

LFC Requester:	Gaussoin
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AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO

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(Analysis must be uploaded as a PDF)

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: Jan. 30, 2024 *Check all that apply:*
Bill Number: HB 139 Original Correction
 Amendment Substitute

Sponsor: Cates **Agency Name and Code** State Ethics Commission (410)
Short Title: IPRA Changes **Number:** _____
Title: _____ **Person Writing** Jeremy Farris
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	(\$10,000)	(\$10,000)	(\$10,000)	(\$30,000)	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: House Bill 139 repeals Sections 14-2-1 through 14-2-1.2 and 14-2-6 through 14-2-12 of the Inspection of Public Records Act (IPRA), leaving Section 14-2-4 (the title) and Section 12-2-5 (the purpose section). In lieu of the repealed material, House Bill 139 then enacts a new public records statute.

Section 1 defines terms. Section 2 sets forth the duty of each agency to designate a records custodian. Sections 3 and 4 set forth the procedures for requesting public records. Section 5 provides instructions for when a request for records is sent to a person who does not have possession or responsibility for the requested records. Section 6 requires a custodian to separate exempt and nonexempt records before providing the nonexempt records for inspection. Section 7 sets for the reasonable fees a records custodian may charge a requester. Section 8 clarifies what a records custodian is not required to do when responding to requests for records. Sections 9 through 23 provides particular instructions and exemptions for particular categories and kinds of records. Section 24 provides a procedure for a public body to request relief from the burdens imposed by a vexatious requester. And section 25 sets forth how the duties that the Inspection of Public Records imposes on public agencies may be enforced.

FISCAL IMPLICATIONS

House Bill 139 would result not only in cost savings to the State Ethics Commission, but it would also save Commission-staff time, making the appropriations to the Commission for its employees (200s) more effective toward the Commission's constitutional purposes. The Commission currently incurs several kinds of explicit and hidden costs associated with IPRA. First, the Commission must look beyond its employee staff to contract support to review broad and burdensome records requests to identify records that are not subject to public inspection under the State Ethics Commission Act, the attorney client privilege, and the attorney work product doctrine, among other bases for nondisclosure. The Commission expends approximately \$500 per month on such contract support for those months during which the Commission assembles a rolling production in response to broad and burdensome requests.

Second, the Commission also incurs costs litigating claims filed against the Commission under IPRA, as the Risk Management Division covers only half of IPRA-related judgments and settlements, shifting the remainder of the costs to the state agencies. Because the Commission files and litigates civil enforcement actions, the Commission experiences a common and obvious tactic by attorneys representing defendants in Campaign Reporting Act, Governmental Conduct Act, and Procurement Act litigation: (i) to submit a broad and burdensome request for records against the State Ethics Commissioners and the Commission's Executive Director, General Counsel and other staff in order to impose a drag on the Commission's capacity; and (ii) to file one or more counterclaims or collateral civil actions, seeking attorney's fees available under IPRA. Moreover, as many public agencies involved in litigation recognize, opposing parties often just look to IPRA in lieu of conducting civil discovery. Because of the availability of attorney's fees for attorneys representing IPRA plaintiffs—and because agencies are tasked to do

far more than respond to records requests and then litigate over productions—agencies have an incentive to settle IPRA claims, instead of litigating the application of an exemption or the procedural failings of a requester. These basic incentives apply to the Commission just the same as any agency. And, so, the costs of IPRA litigation and settlements become a normal (but hidden) part of budgeting for agency expenditures.

Considering that the Commission has only operated for a few years, a fair estimate of the Commission’s operational and litigation costs related to IPRA is \$10,000 per year. HB 139 would reduce the likelihood of IPRA claims against government agencies. If its effect were to eliminate vexatious IPRA requests and civil claims against the agency, HB 139 would result in an explicit cost savings of approximately \$10,000 per year and an implicit cost savings of much more, as agency staff and contractors would be enabled to pursue other agency goals with their time.

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

Section 3(B) requires “[a]ll employees or agents of public bodies shall forward the request to the proper records custodian any requests misdirected to them.” Relatedly, Section 5(A) requires that “the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester.” Because “all employees or agents of public bodies” might not know who is the proper custodian for every records request that they might receive—and yet the statute imposes a duty upon them to act upon such knowledge—a better approach might be for all employees or agents of a public body forward a records request to the custodian at their agency, and that custodian can either process the request or send it to the custodian at the public agency that is likely to have possession or responsibility for the requested records. It would be more efficient for a network of custodians to direct requests, as opposed to extending that duty to “all employees or agents of public bodies”.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

A. Exemptions that relate to the statutes within the State Ethics Commission’s ambit

HB 139, particularly its exemptions, has relationships with a number of laws related to the disclosure of public records. Some of these related laws are within the authority and competence of the State Ethics Commission. For example, Section 17 of HB 139 exempts certain procurement records from disclosure in response to records request:

- Section 17(A) exempts “[r]ecords submitted to a public body a bidder on a public contract that relate to the financial stability of the bidder, including tax returns, financial statements and bank statements, are exempt from inspection” The Procurement Code contains processes for both “invitation for bids” (which references “bidders”) and requests for proposals (which refers to “offerors”). If the purpose of Section 17(A) is to exempt records relating to the financial stability of a person seeking a public contract, and because HB 139 does not include a definition of “bidder,” then Section 17(A) should likely refer to records submitted by a bidder or offeror on a public contract.
- Section 17(B) exempts “materials submitted in response to a sealed bidding or requests for proposals are exempt from inspection” before a contract is awarded. This section largely mirrors the duty of nondisclosure imposed by Section 13-1-116, which provides “[t]he contents of any proposal shall not be disclosed as to be available to competing offerors during the negotiation process.” *See* 2020 Op. Ethics Comm’n No. 2020-04, at 6 (“We read Section 116’s reference to ‘during the negotiation process’ to refer to the period that extends from the submission of proposals until the award of the contract to the selected offeror.”). Section 17(B) extends that exemption for bids submitted in response to an invitation for bids before a contract solicited by competitive sealed bids is awarded.

B. Issues related to Section 24, relating to vexatious requesters

Section 24 grants the state commission of public records a quasi-judicial power to receive petitions for relief submitted by public bodies, conduct hearings, and issue a declaration whether a respondent is a vexatious requester. If the state commission of public records designates a person as a vexatious requester, then a public body has no obligation to respond to requests for inspection from that person for three years following the designation.

This constraint on access to public records does not pose a federal constitutional issue. *See, e.g., Lanphere & Urbaniak v. State of Colo.*, 21 F.3d 1508, 1511 (10th Cir. 1994) (observing “there is no constitutional right, and specifically no First Amendment right, of access to government records”). Moreover, while the New Mexico appellate courts have described the right on access to public records as “fundamental,” *see, e.g., City of Las Cruces v. Public Employee Labor Relations Bd.*, 1996-NMSC-024, ¶ 8; *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, that right is based in statute, not the New Mexico Constitution, *see id.* The vexatious-requester constraint, however, is also easily avoided. A vexatious requester could submit a request through an agent. As currently drafted, HB 139 does not clearly relieve a public agency from the duty to respond to a request from a known or unknown agent of a vexatious requester.

There are two other substantive issues with Section 24. First, the statute does not define vexatious requester and does not provide a standard by which the state commission on public records (or, on appeal, a court) will determine whether a person is or is not a vexatious requester. Second, Section 24(H) refers to “other relief” that the state commission of public records might grant on a petition, but it does not specify the extent of this grant of quasi-judicial power.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS