



**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion Letter. This is a staff analysis in response to the agency’s committee’s or legislator’s request.

**BILL SUMMARY**

Summary Synopsis:

HB 254, amends the Escrow Company Act to eliminate two exceptions for obtaining a bond, requires the licensee to provide account statements, reports of condition and under certain circumstances, audit reports. HB 254 would create an exclusion of certain records held by the Financial Institutions Division (FID) from being subject to the Inspection of Public Records Act and from subpoena without an administrative, civil or criminal action. However the records may still be disclosed with the consent of the director.

Full audit report-

HB 254, would amend Section 58-22-8 NMSA 1978 so that “A licensee that manages three hundred or more escrow accounts at the time of application for a license renewal shall, at its own expense, submit with its license renewal application a full audit report for the prior calendar year performed and signed by an independent certified public account.”

Elimination of exceptions for bonds-

HB 254 would no longer allow exemptions from the provisions of Section 58-22-10 NMSA for licensee bonding for a) escrow companies that have been licensed for more than three years or b) an escrow company whose application for licensure was submitted on or before December 31, 1990 and that for at least three years immediately prior to licensure actually engaged in servicing at least five hundred accounts in escrow.

Statement of account-

HB 254 would expand the provisions of Section 58-22-18 NMSA 1978 so that within 5 days of a buyer depositing the final payment the licensee would be required to send a notice to the seller containing the final statement of account which shall include

- (1) The names of the buyers and sellers on the account;
- (2) The address of the subject property;
- (3) A statement that the account was paid in full;
- (4) The amount of the final payment;
- (5) The date that the final payment was deposited with the licensee; and
- (6) The date that the final payment was disbursed by the licensee.

The licensee is required to retain copies of the notices and make them available for examination by the director.

#### Reports of Conditions-

HB 254 would create a new section of the Escrow Company Act requiring the licensee to submit quarterly reports of condition as prescribed by the director. A licensee that fails to comply will be fined twenty dollars (\$20.00) for each day's delay.

#### Division records-

HB 254 would amend the Act to contain the language:

“The records of the division generated or received pursuant to the Escrow Company Act, including division examination reports, financial information contained in licensee applications and renewal applications and information on investigations relating to violations of the Escrow Company Act that do not or have not yet culminated in administrative, civil or criminal action:

- A. are not public records subject to the Inspection of Public Records Act;
- B. may be disclosed only with the consent of the director; and
- C. are not subject to subpoena.”

### **FISCAL IMPLICATIONS WITH ENACTING THIS BILL**

N/A

### **SIGNIFICANT LEGAL ISSUES**

Access to public records is one of the fundamental rights afforded to people in a democracy so as to allow members of the public the opportunity to keep a watchful eye on their government. Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the new Mexico Inspection of Public Records Act (IPRA), § 14-2-1 to -12, NMSA 1978 is to ensure, and it is declared to be the public policy of the state, that all person are entitle to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve. The citizen's right to know is the rule and secrecy is the exception.

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Under the New Mexico IRPA every person has a right to inspect public records by making a request pursuant to the procedures set forth in the statute. This right is limited only by the New Mexico Legislature's enumeration of certain categories of records that are excepted from inspection. § 14-2-1(A)(1) to (7) NMSA, 1978:

Every person has a right to inspect public records of this state except:

- (1) records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;
- (2) letters of reference concerning employment, licensing or permits;
- (3) letters or memoranda that are matters of opinion in personnel files or students' cumulative files;
- (4) law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph;
- (5) as provided by the Confidential Materials Act [14-3A-1 NMSA 1978];
- (6) trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;
- (7) tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack;

In addition to the specifically enumerated exceptions, records may be excepted from inspection under the IPRA “as otherwise provided by law.” § 14-2-1(A)(8) NMSA, 1978.

The New Mexico Supreme Court, in *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dep’t*, 2012 NMSC 26; 283 P.3d 853, held that information that is requested under IPRA may only be withheld because of a specific exception contained within IPRA, *or statutory or regulatory exceptions*, or privileges adopted by the New Mexico Supreme Court or grounded in the constitution. (emphasis added)

HB 254 Section 6 “Division Records” would amend the Escrow Company Act so as to create a specific statutory exception to IPRA for “records of the division generated or received pursuant to the Escrow Company Act...”

As a general principal, because of the very sensitive nature of information and records held the Division, the Director of FID and FID officers and employees are under a broad statutory duty to keep secret all information acquired by them in carrying out their duties. “The director and all officers and employees of the division shall, before entering upon the discharge of their duties, in addition to any oath required by the constitution of New Mexico, take and subscribe an oath to keep secret all information acquired by them in the discharge of their duties under the Banking Act 58-1-1 NMSA 1978] except as may be otherwise required by law.”

## **PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL**

N/A

## **ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL**

N/A

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION**

The same amendments to the Escrow Company Act have been introduced this session by Senator Neville in Senate Bill 282

## **TECHNICAL ISSUES OR DRAFTING ERROR**

N/A

## **OTHER SUBSTANTIVE LEGAL ISSUES**

HB 254 Section 6 “Division Records” statutory exception to IPRA for “records of the division generated or received pursuant to the Escrow Company Act...” is broad in that it encompasses all the division records that are either received or created by the division under the Act. Since the citizen’s right to know is the rule and secrecy is the exception this broad exception could capture some information that the public should have access to and which does not compromise the discretion needed by the division to effectuate its work under the Act.

## **ALTERNATIVES TO ENACTING THIS BILL**

N/A

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

## **AMENDMENTS NEEDED TO IMPROVE THIS BILL**

It may be appropriate for the Legislature to consider amending proposed Section 6. Instead of protecting all records of the Division that are received or created under the Act, it might be advisable to limit the exception to those records that are specifically listed, namely, "division examination reports, financial information contained in licensee applications and renewal applications and information on investigations relating to violations of the Escrow Company Act that do not or have not yet culminated in administrative, civil or criminal action." Whether these listed documents meet the need of the agency should, of course, be carefully vetted. Nevertheless, specific exemptions are consistent with the current IPRA scheme.