

LFC Requester:	Eric Cheiner
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

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

Check all that apply: Date February 7, 2015
Original **Amendment** **Bill No:** HB 363
Correction **Substitute**

Sponsor: Rep. Gail Chasey **Agency Code:** Attorney General's Office
Short Title: No Tort Immunity for Officers and Body Cameras **Person Writing:** Clara Moran, AAG
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

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

BILL SUMMARY

Synopsis:

The proposed legislation would add a second waiver of immunity under the Tort Claims Act's waiver provisions relating to law enforcement officers. As proposed, law enforcement officers who fail to use or operate a body camera as required by their agency's regulations or standard operating procedures, and who caused either a personal injury, a bodily injury, a wrongful death, or property damage, would not be immune from suit or damages.

FISCAL IMPLICATIONS N/A

SIGNIFICANT ISSUES

Generally, the Tort Claims Act provides governmental entities and public employees acting in their official capacities with immunity from tort suits unless the Act sets out a specific waiver of that immunity. *Wachocki v. Bernalillo County Sheriff's Dept.*, 147 N.M. 720, 228 P.3d 504 (NMCA, 2009). The current state of the law, as it concerns law enforcement, is that immunity is waived if a law enforcement officer commits an act of assault, battery, false imprisonment, false arrest, pursues a malicious prosecution, abuse of process, or commits any libel, slander, defamation of character, or violation of property rights or deprivation of any rights, privileges or immunities ("enumerated acts"), and that act in turn causes personal injury, bodily injury, wrongful death or property damage. The Court of Appeals has held that law enforcement officers cannot be liable under this provision of the Tort Claims Act exception to immunity for mere negligence by officers that does not stem from one of the enumerated acts. *Blea v. City of Espanola*, 117 N.M. 217, 870 P.2d 755 (NMCA, 1994).

As drafted, the proposed legislation waives immunity under the Tort Claims Act if a law enforcement officer, acting within the scope of his duty, causes personal injury, bodily injury, wrongful death or property damage to another, and that officer failed to utilize his body camera despite a mandatory-use policy by his agency. Immunity would be waived irrespective of whether that officer committed one of the enumerated acts.

Thus, an officer who is operating his body camera in accordance with his department's regulations, but who commits any one of the enumerated acts which result in those enumerated

injuries, would fall under the purview of the waiver provisions of subsection (A). Similarly, an officer who is not required to use a body camera would remain liable under subsection (A) as well if he committed one of the enumerated acts which in turn caused an enumerated injury. Yet, an officer who fails to operate his body camera and is involved in a situation where *any* act caused an enumerated injury, that officer would be subject to the waiver provisions of subsection (B).

The proposed legislation omits any reference as to the mental state of the law enforcement officer at the time of the failure to utilize the body camera, leaving it to the provisions (if applicable) of that officer's agency and its procedures. In this regard, liability could be established if the officer intentionally turned-off the body camera, if the officer negligently operated the body camera, or if the body camera simply malfunctioned. Such a determination would be wholly dependent upon that officer's agency, its procedures, and its provisions regarding the officer's mental state in failing to use his body camera. As there is no statewide policy on the use of body cameras, there is a real chance that there would be inconsistencies in applying subsection (B).

10th Circuit case law prohibits the admission of standard operating procedures in the context of civil rights cases. The Court held that the violation of police regulations is insufficient to ground a 42 U.S.C. § 1983 action for excessive force. *Marquez v. City of Albuquerque*, 399 F.3d 1216 (10th Cir.2005). One policy reason for excluding police regulations is that "treating administrative standards as evidence of a constitutional violation might deter police departments from adopting progressive standards, as many police departments use administrative measures such as reprimands, salary adjustments, and promotions to encourage a high standard of public service, in excess of the federal constitutional minima." *Tanberg v. Sholtis*, 401 F.3d 1151, 1163 (10th Cir.2005). With this in mind, the proposed legislation may result in police departments electing to not mandate the use of body cameras or promulgating procedures for the use of body cameras.

Finally, the use of body cameras by law enforcement is not uniform throughout the state. For instance, some municipalities, as well as the State Police, rely on dashboard cameras to record their interactions with citizens. Some agencies, like the Bernalillo County Sheriff's Office, rely on the use of belt tapes, which capture only audio interactions. This proposed legislation would only impact those agencies which use body cameras.

Opponents of this legislation will assert the need for law enforcement to implement their own standard operating procedures regarding lapel/body cameras, free from concern about creating tort liability for officers in the process. There are many reasons crucial to officer/detective safety for non-use of cameras, especially when discovery of a camera could cause death or great bodily harm to an undercover detective or his or her family, and compromise high level investigations to the detriment of the public.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS