

AMENDMENTS TO AUDITOR GENERAL STATUTE

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<http://www.house.mi.gov/hfa>

House Bill 4259 as enrolled

Vetoed by the Governor

Sponsor: Rep. Joseph Graves

House Committee: Oversight

Senate Committee: Government Operations

Complete to 4-8-19

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4259 would amend 2003 PA 1, which specifies in statute the powers and duties of the auditor general. Section 1 of that act says,

... the auditor general may examine, or cause to be examined, the books, accounts, documents, records, performance activities, and financial affairs of each branch, department, office, board, commission, agency, authority, and institution of this state.

The bill would add the term “access” to the current “examine,” and would state that the above duties and powers of the auditor general are *as provided for in section 53 of the State Constitution of 1963*. The bill would also add “electronically stored information” to the kinds of information the auditor general can examine (in addition to books, accounts, documents, records, performance activities, and financial affairs).

The bill would further specify in statute that this applies to access to and the examination of ***confidential information*** of each branch, department, office, board, commission, agency, authority, and institution of the state. ***Confidential information*** would be defined to mean information that is subject to a legal duty to not disclose its contents.

Under a new provision added by the bill, all of the following would apply to confidential information obtained:

- The auditor general is subject to the same duty of confidentiality imposed by law on the entity providing confidential information.
- The auditor general is subject to any civil or criminal penalties imposed by [other] law for willfully and intentionally disclosing confidential information.
- Notwithstanding any other provision of law to the contrary, state officers and employees of all branches, departments, officers, boards, commissions, agencies, authorities, and institutions of the state are not subject to civil or criminal penalties imposed by state law for providing information requested by the auditor general.

The bill would also add to the beginning of subsection (2): “Notwithstanding any other provision of law to the contrary, except as provided in subsection (10) or where the auditor general’s access is expressly limited by law...” Subsection (10) would be newly added by the bill and specifies that the act does not authorize the auditor general to access or examine records or information subject to the attorney-client privilege.

In addition, the entity providing the information to the auditor general would be responsible for paying all costs to produce it, and state officials and employees could not restrict the auditor general's access to information requested regardless of whether the information was sought for the purpose of performing an audit of another state program or agency. Further, all working papers and memoranda of the auditor general would be exempt from public disclosure under the Freedom of Information Act.

The bill would also rewrite, without making a substantive change, several sections of the act dealing with misdemeanor penalties.

MCL 13.101

BACKGROUND:

Article IV, Section 53 of the State Constitution provides for the legislature to appoint an auditor general, who must be a licensed certified public accountant. The auditor general is charged with conducting post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities, and institutions of the state. In addition, the auditor general is required to perform performance post audits of these entities.

FISCAL IMPACT:

The bill does not appear to have a significant direct fiscal impact. The bill would require departments to bear the costs of supplying any additional information. It is likely that any marginal costs incurred by departments or agencies would be covered under current appropriation levels.

BRIEF DISCUSSION:

Supporting arguments

State departments and agencies collect and maintain a great deal of information on a broad array of topics. Though much of the information is accessible even by the general public, access to some is limited by statute due to its sensitive nature. Under Michigan law, the unlawful disclosure of nonpublic information to unauthorized persons may subject an individual to criminal, civil, and/or administrative penalties.

The enabling legislation for the Office of Auditor General (OAG), 2003 PA 1, authorizes access to financial records and performance activities of state entities. Yet, according to testimony presented by representatives of the OAG, the office on occasion has experienced delays in accessing records due to workers' concerns pertaining to the safety of releasing confidential information to it. Without the information, the office cannot provide audit oversight as tasked by 2003 PA 1 and the State Constitution.

The bill addresses the issue by clarifying, affirming, and reinforcing in statute that the OAG's authority to access information includes confidential information and also information that is stored electronically and so revises language to reflect the use of information technology systems. Entities and their employees would be protected from civil or criminal penalties under state law for providing the requested information and

would be prohibited from restricting the auditor general's access to information sought when information was requested of one entity for the purpose of performing an audit on another. The bill also holds the OAG to the same confidentiality standards that apply to the entity providing the information. To further protect the sensitive nature of information accessed and examined by the auditor general, work documents could not be released to the public under FOIA requests. Moreover, placing the clarifying language in the OAG statute saves the legislature from amending the nearly 200 laws restricting disclosure of information.

Opposing arguments

Although stating that he understood and appreciated the auditor general's need for appropriate access to information necessary to perform the duties of the office as set forth in the State Constitution, Governor Snyder nonetheless vetoed House Bill 4259 as being an "unconstitutional encroachment of the separation of our co-equal branches of government." Explaining in his veto message¹ that "[i]nteractions among separate and co-equal branches of government should occur in a controlled environment," the Governor reiterated that the bill "is an unconstitutional overreach that would blur the separation between the legislative and other branches." In addition, he described several weaknesses of the bill, including the following:

- The bill would include access to information that was not relevant to a particular audit request.
- Giving the "legislature's agent unrestricted access into all executive functions," whether or not an audit of those functions was being conducted, would violate the separation of those branches.
- The bill would create a blanket, one-size-fits-all approach to accessing all information, which "could result in inadvertent disclosures of personally identifying, protected health, or other privileged or confidential information."
- Due to the complicated nature of many of the state's data management systems, which requires specialized understanding and experience, giving unrestricted access by the auditor general to all electronic data "could unnecessarily expose private information to data security threats," and such "[u]nfettered and uncontrolled access to confidential data could increase the risk of exposure by a significant margin."

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

¹ https://www.michigan.gov/documents/snyder/House_Bill_4259_veto_letter_641858_7.pdf