

Legislative Analysis



AMENDMENTS TO AUDITOR GENERAL STATUTE

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

House Bill 4336 as reported from committee
Sponsor: Rep. Steven Johnson

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

House Bill 4574 as reported from committee
Sponsor: Rep. David LaGrand

1st Committee: Oversight
2nd Committee: Ways and Means
Complete to 6-11-19

BRIEF SUMMARY: House Bill 4336 would clarify the auditor general's authority to access and examine electronically stored information and confidential information held by state entities.

House Bill 4574 would specify that the explicit authority granted to the auditor general to access records held by state entities contained in a statutory provision could not be used to interpret any other statutory provision that does not explicitly allow that access as preventing the auditor general from accessing records.

FISCAL IMPACT: House Bill 4336 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.

House Bill 4574 would have no fiscal impact on state or local government.

THE APPARENT PROBLEM:

The Office of the Auditor General (OAG), an independent office established by the state constitution, provides oversight of state government operations. Among its duties, the OAG conducts financial audits, performance audits, and investigative audits of state entities such as departments, agencies, and offices to identify areas of concern and inefficiencies and to make recommendations. In order to conduct a thorough audit, the OAG must have access to all records of a program for which an audit is being conducted, even those containing confidential information.

Currently, it is reported that over 100 statutes restrict access to sensitive information maintained by governmental offices, allowing disclosure only to listed entities and sometimes only for specific purposes. An unlawful disclosure could subject a person to administrative, civil, and/or criminal penalties. Despite the language of the OAG's enabling legislation, which gives it broad authority to access information pertinent to an audit, the OAG reports instances in which being excluded in such statutes results in being denied access to the requested information.

Although often the issues are worked out, the OAG says this can take time and results in inefficiencies in the auditing process. In some instances, the OAG has had to seek assistance of the courts to obtain necessary records. In addition, because the OAG's statute does not specifically grant it authority to access *electronic* records, some entities have only produced records maintained in other formats or have converted electronically stored materials into paper records.

Rather than amending dozens of different statutes, it has been recommended that the OAG's statute be amended to clarify and affirm the office's audit authority to access data held by state entities and to specifically clarify that such access includes confidential information, as well as data stored electronically.

THE CONTENT OF THE BILLS:

Section 53 of Article IV 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.

House Bill 4336 would amend 2003 PA 1, which specifies in statute the powers and duties of the auditor general. Subsection (2) of section 1 of the act says,

...[T]he 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 powers and duties of the auditor general are "[a]s provided for in section 53 of Article IV 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 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 by the auditor general:

- 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, offices, 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 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 records of the auditor general in connection with audits and examinations would be exempt from public disclosure under the Freedom of Information Act.

The bill would also rewrite, without making a substantive change, provisions of the act concerning misdemeanor penalties.

MCL 13.101

House Bill 4574 would add a new section to Chapter 1 of the Revised Statutes of 1846, entitled “Of the Statutes.” The bill would specify that any statutory provision that explicitly allows the auditor general to access records could not also be used to interpret any other statute that does not have that explicit allowance as preventing the auditor general from accessing records.

The bill is tie-barred to House Bill 4336, meaning that HB 4574 could not take effect unless HB 4336 were also enacted into law.

Proposed MCL 8.6a

BACKGROUND INFORMATION:

House Bill 4336 is a reintroduction of HB 4259 of the 2017-18 legislative session. The bill was passed by both chambers and ordered enrolled, but was vetoed by the governor.¹ In his veto message, Governor Snyder said that he believed HB 4259 to be “well intentioned” but nevertheless “an unconstitutional overreach that would blur the separation between the legislative and other branches.”²

¹ See <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-4259-E3EBCCC6.pdf>

² https://www.michigan.gov/documents/snyder/House_Bill_4259_veto_letter_641858_7.pdf

ARGUMENTS:

For:

Essentially, the Office of Auditor General provides oversight of the offices and agencies of the executive branch to ensure that governmental programs are operating efficiently and as intended. To do so, regular audits must be conducted. Conducting an audit, and developing recommendations to correct any material findings identified by the audit, requires access to data. Recently, it has become apparent that despite the OAG's broad authority under its enabling legislation to access data maintained by state entities, and an attorney general opinion regarding the authority of the OAG to access confidential files of a state agency for the purpose of auditing another state agency,³ statutory clarity is still needed.

The bills would not expand the authority of the auditor general regarding access to records maintained by state entities. Rather, agencies could have confidence that complying with a request for documents (even confidential or electronically stored records) would not violate an agency's own statutory responsibility regarding disclosure, that sufficient measures would be put in place to protect the information contained in the records, and that the OAG would be subject to the same disciplinary actions for unlawful disclosures.

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. (Currently, the OAG's practice is to not further disclose confidential information in its audits and to destroy such records 90 days after the related report is issued.) Because information from one agency can be useful in verifying information in another agency, the 1993 attorney general opinion would be codified, thus prohibiting an agency from restricting the auditor general's access to information when information was requested of one entity for the purpose of performing an audit on another. Requiring the audited entity to cover the costs of providing records protects against an agency's charging exorbitant costs as a means to delay or interfere with the audit process. Further, the bill clearly restricts the OAG's access to records protected by an attorney-client privilege.

Moreover, placing the clarifying language in the OAG statute saves the legislature from amending scores of laws restricting disclosure of information by various state entities. HB 4574 would, as a companion bill, ensure that those laws would not be interpreted to contradict the authority granted to the OAG in its enabling statute and the state constitution.

Against:

Last session House Bill 4259, a bill similar to House Bill 4336, was vetoed by Governor Snyder. If the current bill was not changed significantly, it is reasonable to assume that the same concerns stated in the veto message would still apply.

Response:

The primary argument against the previous version of the bill centered on the belief that the bill was an "unconstitutional encroachment of the separation of our co-equal branches of government." Committee testimony in support of House Bill 4336, however, pointed

³ Opinion No. 6749, February 18, 1993. <https://www.ag.state.mi.us/opinion/datafiles/1990s/op06749.htm>

out that the establishment of the OAG in the constitution, as opposed to only in statute, shows that the intent was not to encroach on the separation of powers but to create an entity to provide oversight of executive branch programs. Further, when read in context, language contained in both versions of the bill pertaining to the OAG's having "unrestricted access" to examine all books, accounts, documents, clearly relates to information requested "to make the audits and examinations provided in this act" and not to information that was not relevant to a particular audit request or "all executive functions," whether or not an audit of those functions was being conducted, as the veto message maintained. Further, House Bill 4336 would adequately address concerns pertaining to "inadvertent disclosures of personally identifying, protected health, or other privileged or confidential information" by holding OAG staff to the same level of confidentiality as staff of the custodial agency of the data.

POSITIONS:

The Auditor General testified in support of the bill. (5-16-19)

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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.