

# Legislative Analysis



## AMENDMENTS TO AUDITOR GENERAL STATUTE

Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

**House Bill 4336 as enacted**  
**Public Act 156 of 2019**  
**Sponsor: Rep. Steven Johnson**

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

**House Bill 4574 as enacted**  
**Public Act 155 of 2019**  
**Sponsor: Rep. David LaGrand**

**1st House Committee: Oversight**  
**2nd House Committee: Ways and Means**  
**Senate Committee: Oversight**  
**Complete to 7-9-20**

**BRIEF SUMMARY:** House Bill 4336 clarifies the auditor general's authority to access and examine electronically stored information and confidential information held by state entities. House Bill 4574 specifies that the fact that a statutory provision explicitly grants to the auditor general the authority to access state records held by state entities cannot be used to interpret any other statutory provision that does not explicitly allow that access as preventing the auditor general from accessing records. The bills took effect December 20, 2019.

**FISCAL IMPACT:** House Bill 4336 does not appear to have a significant direct fiscal impact, and 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 departments, agencies, and offices to identify inefficiencies and areas of concern and to make recommendations. 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.

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, 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 its not being included in such statutes has resulted in its being denied access to the requested information.

Although often those issues are worked out, this can take time and result 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 produced only 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 affirm the office's audit authority to access data held by state entities and to specify that such access includes confidential information and data stored electronically.

### ***THE CONTENT OF THE BILLS:***

Section 53 of Article IV of the state constitution requires the legislature to appoint an auditor general. The auditor general, who must be a licensed certified public accountant, 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 and with performing performance post audits of these entities.

**House Bill 4336** amends 2003 PA 1, which prescribes in statute the powers and duties of the auditor general. Previously, section 1(2) of the act provided that

... 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 amends the above provision to add "access" to "examine" and to 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 also adds "electronically stored information" to the kinds of information the auditor general can examine (that is, in addition to books, accounts, documents, records, performance activities, and financial affairs).

The bill further specifies that this provision applies to access to and examination of ***confidential information*** of each branch, department, office, board, commission, agency, authority, and institution of the state.

***Confidential information*** is defined to mean information that is subject to a legal duty to not disclose its contents.

Under the bill, all of the following 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 law for willfully and intentionally disclosing confidential information.
- Notwithstanding any other provision of law, state officers and employees are not subject to civil or criminal penalties for providing information requested by the auditor general.

The bill excepts circumstances in which the auditor general's access is expressly limited by law and provides that the act does not authorize the auditor general to access or examine a record or information that is subject to the attorney-client privilege or executive privilege or that is subject to a court order prohibiting disclosure of its content.

In addition, state officers and employees cannot restrict the auditor general's access to requested information on the basis that the information is sought for the purpose of performing an audit of another state program or agency.

Finally, all working papers and records of the auditor general in connection with audits and examinations are exempt from public disclosure under the Freedom of Information Act (FOIA).

MCL 13.101

**House Bill 4574** adds a new section to 1846 RS 1, entitled "Of the Statutes," to specify that any statutory provision that explicitly allows the auditor general to access records cannot be used to interpret another statute that does not have that explicit allowance as preventing the auditor general from accessing records.

MCL 8.6a

***BACKGROUND:***

House Bill 4336 was a reintroduction of HB 4259 of the 2017-18 legislative session. That bill was passed by both chambers and ordered enrolled, but was vetoed by the governor.<sup>1</sup> 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."<sup>2</sup>

***ARGUMENTS:***

***For:***

Essentially, the OAG provides oversight of the offices and agencies of the executive branch to ensure that government 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<sup>3</sup> regarding the authority of the OAG to access confidential files of a state agency for the purpose of auditing another state agency, statutory clarity is still needed.

The bills do not expand the authority of the auditor general regarding access to records maintained by state entities. Rather, they provide agencies with confidence that complying with a request for documents (even confidential or electronically stored records) does not violate an agency's own statutory responsibility regarding disclosure, that sufficient measures are in place to protect the information contained in the records, and that the OAG is 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 cannot be released to the public under FOIA requests. (The OAG's

---

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

<sup>2</sup> [https://www.michigan.gov/documents/snyder/House\\_Bill\\_4259\\_veto\\_letter\\_641858\\_7.pdf](https://www.michigan.gov/documents/snyder/House_Bill_4259_veto_letter_641858_7.pdf)

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

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 is codified into statute, thus ensuring the auditor general's access to information requested from one entity for the purpose of performing an audit on another. Further, the bill restricts the OAG's access to records protected by an attorney-client or executive privilege or if a court order was issued prohibiting disclosure of the records in question.

Moreover, placing clarifying language in the OAG statute will save having to amend scores of laws restricting disclosure of information by various state entities. House Bill 4574 ensures that those laws will not be interpreted to contradict the authority granted to the OAG in the state constitution and its enabling statute.

***Against:***

House Bill 4259 of the 2017-18 legislative session, a bill similar to House Bill 4336, was vetoed by Governor Snyder in December 2018. To the extent that HB 4336 is the same as that earlier bill, it would be reasonable to assume that the same concerns stated in the veto message still apply. (See **Background**, above.)

***Response:***

The primary argument against HB 4259 was that the bill represented an "unconstitutional encroachment of the separation of our co-equal branches of government." Committee testimony in support of House Bill 4336, however, argued 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. The newer bill also removed language that had been in HB 4259 pertaining to the OAG's having "unrestricted access" to examine all books, accounts, and documents, and simply refers to the OAG's having "access" to the necessary information. Further, HB 4336 addresses 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 data's custodial agency.

Legislative Analyst: Susan Stutzky  
Fiscal Analyst: Ben Gielczyk

---

■ 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.