



The Commonwealth of Massachusetts

Senate

State House • Boston • 02133

January 13, 2025

Auditor Diana DiZoglio
State House, Room 230
Boston, MA 02133

Dear Auditor DiZoglio,

Your letter to Karen E. Spilka, Senate President, dated January 3, 2025 and requesting a performance audit of the Legislature (“Auditor Letter”), as well as the subsequent letter from Shaun Alix, Audit Manager for the Office of the State Auditor (“OSA”), to President Spilka, dated January 6, 2025 (“Alix Letter”), have been referred by the Senate to the Subcommittee of the Senate Temporary Committee on Rules, also known as the Subcommittee on Chapter 250 of the Acts of 2024 (“Subcommittee”), for response.¹

The Subcommittee recognizes the role of the OSA in providing the public and government decision-makers with its assessment of the efficiency of various executive agencies, activities, and programs. It shares the OSA’s support for efficiency and transparency in state government, as does the Senate as a whole.² Notably, both the Subcommittee and the wider Senate recognize the significance of the recent election, in which voters approved Question 1.

Thus, the Subcommittee, driven by a sincere regard for the will of the voters and a duty to fulfill its charge by the Senate, now seeks prompt and constructive engagement with the OSA about its proposed audit. We believe that a comprehensive and productive discussion between the Subcommittee and the OSA is necessary to work through important issues related to the OSA’s audit request. We are particularly mindful of significant constitutional concerns that have been raised that may have implications beyond the OSA’s present request, concerns we cannot ignore consistent with our own constitutional responsibilities.

¹ The Auditor Letter was also addressed to Ronald Mariano, Speaker of the Massachusetts House of Representatives.

² As the Senate has communicated to the OSA previously, in its prior letters, the Senate makes a host of materials available for public review. Under its rules, the Senate requires a yearly financial audit conducted by an independent auditing firm, with the audit report made available to the public on the General Court’s website. The Legislature’s financial records and accounts are similarly available on the Commonwealth’s Financial Records Transparency Platform (“CTHRU”), which provides detailed and comprehensive information regarding payroll, expenditures, and other financial information, including amounts paid to state vendors. We understand that the OSA used these materials to draft its October 21, 2024 Audit Report of the General Court (“Audit Report”). Moreover, all legislative sessions and committee hearings are live-streamed and recorded and can be found on the General Court’s website. Access to information about all bills and amendments, including roll call votes and journals and calendars from the House and Senate, are similarly available online.

For these reasons – and in response to your January 3, 2025 invitation to meet – we propose the following dates for members of the OSA auditing team to meet with the Subcommittee: January 29 at 2:00 PM; January 30 at 11:30 AM; or January 30 at 2:30 PM. Please let us know at your convenience which of those dates the OSA is available.

The Subcommittee looks forward to a robust discussion with members of the OSA team. However, it must acknowledge that there are a significant number of legal and procedural issues related to the OSA’s proposed audit, all of which must be addressed. Those issues will not be set forth in their entirety here, but five are worth highlighting: the substantive scope of the audit; the temporal scope of the audit; the standards and method for conducting the audit; potential conflicts surrounding the audit; and process issues related to the audit.

Substantive Scope

There is no historical precedent for the OSA’s proposed audit. Therefore, appropriate scope is very much an open question and one that raises unprecedented constitutional issues.

Specifically, the OSA, pursuant to Question 1, seeks to conduct a performance audit of the Legislature, including its various core legislative functions and other exercises of the Legislature’s independent constitutional authority. *See* Auditor Letter at 1 (stating that proposed performance audit “will cover all of the topics we were unable to fully review in our previous audit” of the Legislature, dated October 21, 2024, which included ensuring “an equitable mode of making laws”). The OSA has never conducted a so-called performance audit of the Legislature. *See* Letter from Andrea Joy Campbell, Attorney General, to Diana DiZoglio, State Auditor, at 13 (Nov. 2, 2023) (distinguishing prior OSA audit reports and finding “no historical precedent at all for the type of audit the [OSA] seeks to conduct now”) (“AGO Letter”).

We are not aware of any other state auditor in the nation who has conducted a similar audit of their state legislature without explicitly being appointed or otherwise authorized to do so by the relevant body. *See* Tufts University, The Center for State Policy Analysis, *Question 1: Should the Auditor Oversee the Legislature* at 2 (September 2024) (“cSPA Report”) (“Looking around the country, we could not find any examples of legislative audits conducted without lawmakers’ consent.”). The information that the OSA seeks also raises significant constitutional and procedural issues, which must be carefully considered and resolved, hopefully through engagement and discussion with the OSA. *See* AGO Letter at 15-16 (“Subjecting the Legislature to compelled discovery into its exercise of core legislative authority very well may impermissibly interfere with or encroach upon powers uniquely granted to the Legislature (and protected from such Executive Branch encroachment or interference by Articles 21 and 30).”)³

³ Although the Auditor Letter states that the OSA plans to begin its proposed performance audit with a truncated list of items, it is clear that the OSA fully intends to reach all the topics outlined in its previous Audit Report. *See* Auditor Letter at 1. Wherever the OSA seeks to begin, the concerns set forth in this letter remain pressing and must be considered and resolved before any proposed audit can commence.

The proposed scope of the OSA’s audit – which is broad and seeks access to records concerning, among other things, the “equitable mode of making laws,” including how bills are considered, whether internal legislative policies and procedures are being “equitably” applied, and how “legislative services” are provided to individual members – raises fundamental constitutional questions of separation of powers, Article 21 immunity, and independent legislative rule-making guarantees. Audit Report at 1. In its October 21, 2024 Audit Report, released during the early voting period and just days before the election, the OSA claimed that its “oversight” role would not infringe on the Legislature’s independent constitutional authority. Audit Report at 15. However, others have taken the opposite view. See AGO Letter at 15-16 (noting constitutional concerns); cSPA Report at 3 (“There is a fundamental constitutional reason the auditor can’t necessarily audit the legislature, namely separation of powers.”); see also Report of the Special Joint Committee on Initiative Petitions on the Initiative Petition of Diana DiZoglio and Others for the Passage of An Act Expressly Authorizing the Auditor to Audit the Legislature (Apr. 30, 2024) (quoting Harvard University’s David King that the Auditor’s proposal “chips away at” the foundational constitutional principle of separation of powers and proposes “an unprecedented transfer of power from the people’s representatives into the Executive Branch”), available at <https://malegislature.gov/Bills/193/H4603>. Such issues must be promptly explored and resolved by this Subcommittee.

Temporal Scope

In addition to the substantive scope, we must consider the audit period, if any. The Auditor Letter of January 3, 2025 says nothing about the time period that the OSA’s proposed performance audit will cover. The reference in that same letter to continuing the unfinished work of the prior Audit Report implies that this audit will be covering the same period, January 1, 2021 through December 31, 2022, yet the Alix Letter of January 6, 2025 requests documents from as far back as July 1, 2020. In either case, the authority purportedly granted to the OSA under Question 1 is presumptively *prospective*. See, e.g., *Matter of Estate of Mason*, 493 Mass. 148, 167 (2023) (“Absent a clear indication of legislative intent, a statute presumptively operates prospectively only.”). Thus, it would appear that any authority to audit or access legislative records under the new law must be limited to the period after its effective date, January 3, 2025.

Auditing Standards

The Government Auditing Standards published by the Comptroller General of the United States, collected in a publication commonly called the “Yellow Book,” control any audit conducted under G. L. c. 11, § 12 (“All such audits shall be conducted in accordance with the standards for audits of governmental organizations, programs, activities, and functions published by the Comptroller General of the United States.”).⁴ The application of the Yellow Book to a legislative performance audit is potentially problematic, despite the explicit reference to it in G.L. c. 11, § 12. The Yellow Book was created by the Comptroller General of the United States, who leads the federal Government Accountability Office (“GAO”). The GAO’s auditing

⁴ The Government Auditing Standards may be found here: <https://www.gao.gov/yellowbook> (including links to the 2018 and 2024 versions of the Yellow Book).

authority is focused on executive agencies, not Congress.⁵ Therefore, the standards espoused in the Yellow Book for objectively auditing the provision of executive services or programs may be entirely inappropriate in evaluating the internal law-making functions of the Legislature.

The OSA's 2024 Audit Report seemed to indicate that the OSA is itself struggling to find an objective and appropriate standard to apply to the Legislature in this unprecedented audit. The 2024 Audit Report does not cite a standard or criteria from the Yellow Book or any other standard auditing resource. Instead, the OSA adopts a phrase from the Preamble to the Massachusetts Constitution, which provides that "[i]t is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws." The Preamble does not create an objective standard for evaluating the Legislature's internal processes and procedures. Without an agreed-upon, recognized standard, it may be impossible to objectively audit the Legislature. That would itself violate the standards of the Yellow Book. *See, e.g.*, Yellow Book at § 8.17 (criteria for performance audit should be "relevant, reliable, objective, and understandable"). The advice of independent auditing experts on this question might be highly beneficial.

Potential Conflicts

The OSA's recent Audit Report covered a period of time during which you were an elected member of the Senate, raising a question of whether you have implicated the "Ethics, Independence, and Professional Judgment" strictures set forth in the Yellow Book. The Yellow Book requires that auditors "be independent from an audited entity." Yellow Book at § 3.18. It also mandates that auditors and their organizations "avoid situations that could lead reasonable and informed third parties to conclude that [they] are not independent and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the engagement and reporting on the work." *Id.* at § 3.19.

Among the many dangers to the independence and objectivity necessary in every audit is recent membership in or employment by the audited entity. *See, e.g., id.* at § 3.40 (warning against biases "associated with political, ideological, or social convictions that result from membership or employment in . . . a level of government that could affect the auditor's objectivity."). In addition to being a recent member of an audited entity, you actively campaigned for authority to audit the Legislature.⁶ This kind of directly relevant political activity may pose a conflict, not

⁵ *See* <https://www.gao.gov/about#:~:text=Our%20Authority,and%20efficiency%20in%20government%20spending> (stating that the GAO "is an independent, non-partisan agency that works for Congress"). *See also* <https://www.gao.gov/blog/congress-takes-office-today-heres-how-gao-can-help-members-make-informed-decisions> (stating that the GAO "audit[s] federal agencies, programs, and policies for Congress.").

⁶ *See, e.g.*, Annie Jonas, Boston.com, *Mass. Auditor Diana DiZoglio Walking 141 miles for Question 1* (Oct. 10, 2024), available at <https://www.boston.com/news/local-news/2024/10/10/mass-auditor-diana-dizoglio-walking-141-miles-for-question-1/>. Your advocacy included your own campaign's donation of over \$100,000 to support passage of Question 1. *See* <https://www.ocpf.us/Filers/Index?q=95510§ion=Reports> (noting that CTE Diana DiZoglio contributed \$105,000 to the Committee for Transparent Democracy).

only for the 2024 Audit Report, but for any proposed audit in the near future. The advice of independent ethics experts could be helpful in carefully considering such a potential conflict.⁷

Process Issues

The Subcommittee has procedural questions concerning the OSA's launch of this most recent audit effort. For example, the January 3, 2025 Auditor Letter, which stated the OSA's intention to conduct a performance audit of the Legislature, requested "some potential dates for an entrance conference to be scheduled." Auditor Letter at 2. Yet on January 6, 2025, less than one business day later, the OSA demanded a list of documents from the Senate "to be provided...within 72 hours, consistent with Section 12 of Chapter 11 of the Massachusetts General Laws." Alix Letter at 1. From the Alix Letter, it appears that the OSA has dispensed with its standard entrance conference without giving the Subcommittee – formed on Monday, January 6, 2025 – time to respond to the request in the January 3, 2025 Auditor Letter. Instead, the OSA has insisted that the Senate provide a host of documents, to be produced within a 72-hour deadline.⁸ This would not allow for any of the fundamental legal and procedural issues to be addressed, or even broached. The Subcommittee had hoped that there would be some time for the parties to have a conversation about these and other threshold issues – as the Subcommittee imagines would occur in a typical entrance conference – before launching immediately into a first-in-the nation audit effort.

Conclusion

In short, there is much work to do to define the proper scope, period, and standards – if any – to be used in a proposed and entirely unprecedented performance audit of the Senate. The Subcommittee's role is to explore these issues – as well as any other relevant considerations – and propose potential solutions. We will conduct this work expeditiously and in partnership with the OSA.

Please let us know at your convenience which proposed meeting time works best for participating members of the OSA.

Sincerely,

Subcommittee of the Temporary Senate Committee on Rules (Subcommittee on Chapter 250 of the Acts of 2024)

Senator Cindy F. Friedman, Chair
Senator William N. Brownsberger
Senator Joanne M. Comerford
Senator Paul R. Feeney

⁷ Certain employees of the OSA may face similar potential conflicts per the Yellow Book standards, including any OSA staff who worked in the Senate during the period that the OSA apparently seeks to audit – January 1, 2021 through December 31, 2022.

⁸ We note that neither G.L. c. 11, § 12, nor the Yellow Book make any mention of a 72-hour deadline for responses from an audited entity. It would be helpful for the Subcommittee to understand the basis for this standard.