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ATTORNEY GENERAL

#04022

NO. STATE OF NEBRASKA
OFFICIAL
AUG 14 2004
DEPT. OF JUSTICE

SUBJECT: Authority Of The Legislature's Performance Audit Committee To Review Confidential Records In Connection With A Performance Audit Of A State Agency.

REQUESTED BY: Sen. Chris Beutler
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
Dale A. Comer, Assistant Attorney General

The Nebraska Legislative Performance Audit Act (the "Act") is found at Neb. Rev. Stat. §§ 50-1201 through 50-1215 (Supp. 2003, 2004 Neb. Laws LB 1118, §§ 1,2). That Act generally provides that a special legislative committee known as the Legislative Performance Audit Committee (the "Committee") shall conduct performance audits of state agencies and their programs and activities. Those audits are intended to provide an independent assessment of state agencies and their programs. Those audits consider such things as the effectiveness and results of programs, agency economy and efficiency, internal control by state agencies, and agency compliance with legal and other requirements.

Some question has apparently arisen with respect to the Committee's ability to obtain "confidential information" during the course of its audit work, and you introduced a bill during the last legislative session that clarified the scope of the Committee's authority. You have now posed two questions to us regarding that authority, and we will discuss each of your questions below. However, for purposes of our discussion, we will address your second question first.

**Question No. 2. Whether the Legislative Performance Audit Committee's authority to obtain confidential information and records mirrors the authority of the Auditor of Public Accounts. In other words, is the Auditor's authority to access confidential information broader, narrower, or the same as that of the Legislative Performance Audit Committee?**

Two Nebraska statutes deal with the authority of the Auditor of Public Accounts to access records in the possession of state agencies.[1] First of all, the initial sentence of Neb. Rev. Stat. § 84-304 (3)(2004 Neb. Laws LB 1118, § 3) provides that it shall be the duty of the Auditor:

> To examine or cause to be examined, as such time as he or she shall determine, books, accounts, vouchers, records, and expenditures of all state officers, state bureaus, state boards, state commissioners, the state library, societies and associations supported by the state, state institutions, state colleges, and the University of Nebraska, except when required to be performed by other officers or persons.

In addition, Neb. Rev. Stat. § 84-305 (1999) states that:

> The Auditor of Public Accounts shall have access to all records of any public entity, in whatever form or mode the records may be, unless the auditor's access to the records is specifically prohibited or limited by federal or state law.

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[1] In our Op. Att'y Gen. No. 02030 (December 2, 2002), we indicated that the Auditor of Public Accounts has inherent constitutional authority to conduct financial audits apart from his or her responsibilities under statute. For purposes of this opinion, we will focus on the statutory authority of the Auditor as it compares with that of the Committee, inasmuch as it appears to us that, while the Legislature as a body has inherent investigatory authority in the context of a proper legislative task, the Committee's authority is created primarily by statute and the Rules of the Legislature.

> No provisions of state law shall be construed to change the nonpublic nature of the data obtained as a result of the access. When an audit or investigative finding emanates from nonpublic data which is nonpublic pursuant to federal or state law, all the nonpublic information shall not be made public.

Section 84-305 was added to the statutes by 1995 Neb. Laws LB 509, § 4. The purpose of that provision from LB 509 was to "clarify the Auditor's access to nonpublic information." Committee Records on LB 509, 94th Neb. Leg., 1st Sess. *Introducer's Statement of Intent* (February 15, 1995). It was designed to guarantee the Auditor access to all records. Floor Debate on LB 509, 94th Neb. Leg., 1st Sess. 3566 (March 30, 1995)(Statement of Sen. Hall).

In contrast, § 50-1205 provides that the Committee shall:

> (7) Inspect and examine, or approve the inspection and examination of, the records and documents of any agency as a part of a performance audit or preaudit inquiry;
>
> (8) Administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and cause the depositions of witnesses either residing within or without the state to be taken in the manner prescribed by law for taking depositions in civil actions in the district court.

A comparison of the statutes set out above permits several observations. First, the Committee has the power to subpoena witnesses and compel the production of documents, while the Auditor does not. In that sense, the Committee's general authority to access information is broader than that of the Auditor. However, when the Committee's authority to access documents outside of its subpoena power is compared with that of the Auditor, the circumstances are different. In the latter situation, § 84-305 allows the Auditor to review "all records of any public entity, in whatever form or mode the records may be, unless the auditor's access to the records is specifically prohibited or limited by federal or state law," and that language was apparently intended to allow the auditor to reach "nonpublic information." No similar language is contained in § 50-1205 (7), and that statute essentially tracks § 84-304 (3). For that reason, we believe that the Auditor's authority to review confidential information is broader than the Committee's authority in that regard.

> **Question No. 1. Whether the Legislative Performance Audit Committee has the inherent authority to access any and all of an agency's information and records, confidential or otherwise, in whatever form they may be. I am concerned as to (1) how the term "confidential" is defined, (2) whether an agency could assert any sort of privilege in response to the Committee's request for information, and (3) whether**

executive agency such as the executive privilege or the deliberative process privilege could raise separation of powers issues under art. II, § 1 of the Nebraska Constitution. For example, the Attorney General of Maryland has indicated that a statute which purports to give a legislative auditor authority to examine any record pertinent to an executive agency's performance cannot exceed those powers allocated to the legislative branch under the constitution and separation of powers principles. Op. Md. Att'y Gen. No. 91-014 (March 18, 1991).

We would also note that there may well be federal statutes which could operate to limit the Committee's access to certain information in the possession of executive agencies in Nebraska. However, at this point, we have not attempted to search all existing federal laws in an effort to locate such statutes. If you have specific statutes in mind, or if an agency offers a federal statute as a reason for confidentiality in the process of an audit by the Committee, then we will be happy to provide our views as to the applicability of that statute to the Committee's information request at that time.

Finally, we will briefly discuss the Committee's authority to review records and other information under § 50-1205 (8), the statute which allows the Committee to issue subpoenas and compel the production of papers, books, accounts and documents.

We assume that the Committee's subpoena power would be exercised under Section 20 of Rule 3 of the Rules of the Nebraska Legislature. Rules of the Nebraska Unicameral Legislature, Rule 3, § 20 (January 9, 2004). Subsection (F)(iii) of that section provides that "[a]ny person who appears before a committee pursuant to this section shall have all the rights, privileges, and responsibilities of a witness provided to all other witnesses." That subsection appears to allow witnesses before a legislative committee to assert evidentiary privileges such as the attorney/client privilege, and those privileges would presumably extend to documents produced under a subpoena duces tecum in connection with a performance audit.

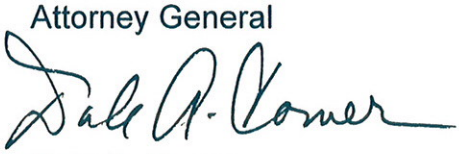
**Summary**

To summarize the discussion above, we believe that the Auditor's general authority to review records in the context of an audit is broader than that of the Committee. That result may allow an argument that the Committee has less authority to review confidential records than does the Auditor. We also do not believe that the confidentiality provisions of the Public Records Statutes limit access by the Committee to agency records. However, agencies may well be able to assert evidentiary privileges in response to records requests from the Committee in connection with an audit, particularly when the records at issue implicate separation of powers issues and privileges. Some of the current uncertainties in the statutes could be remedied by clarifying legislation. In that regard, we would point out that it may be easier to overcome an evidentiary privilege in an audit by the Committee if there is a statutory

provision similar to Neb. Rev. Stat. § 84-311 (1999) which places strictures on the Committee and its staff with respect to the unauthorized release of information obtained in an audit.

Sincerely yours,

JON BRUNING
Attorney General



Dale A. Comer
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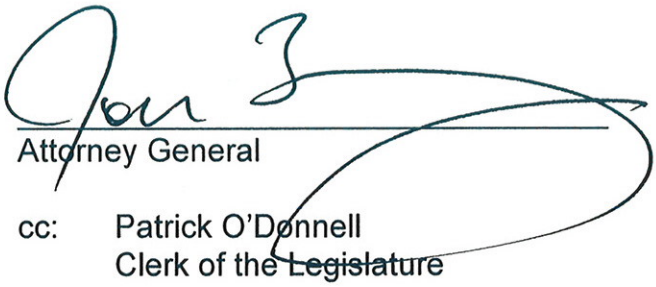

Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

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