

SB

50

<TARGET><BILL>SB 50</BILL><SUBJECT>SB
50</SUBJECT><COMM>SSTA27</COMM></TARGET>

ALASKA STATE SENATE



SENATOR FRED DYSON

Date: January 26, 2011

To: Senator Bill Wielechowski
Senate State Affairs Committee

From: Senator Fred Dyson

A handwritten signature in black ink, appearing to read "Fred Dyson", written over the printed name.

Re: Committee Hearing Request for SB 50

I respectfully request a committee hearing be scheduled for SB 50, "An Act relating to the powers and duties of the legislative audit division."

Contact: Chuck Kopp, Staff to Senator Dyson, (907)465-2199



SENATOR FRED DYSON

SPONSOR STATEMENT

SB 50

An Act relating to the powers and duties of the legislative audit division

This bill clarifies that the Division of Legislative Audit, under the direction of the Legislative Budget and Audit Committee, may audit not only state agencies, but also non-state entities who are recipients of grants and funds that are either provided by the state or funneled through the state. The audits are intended to ensure that the appropriate, ethical, and intended expenditures of grants and funds are in accordance with the purposes for which those funds were provided. Without this clarification there is some question about whether Legislative Audit has this authority.

The Legislature has, in the past, requested Legislative Audit to conduct audits as a result of allegations that non-profit organizations were disbursing grant funds inappropriately, such as "steering grants" to family members, or that grantees failed to follow state policy.

As state law is not clear in this area, the Division of Legislative Audit has expressed concerns regarding the authority to conduct such audits, particularly of non-state organizations that receive or utilize state funds or public funds that are administered by state departments.

Legislative Legal Services issued a memorandum opinion on December 18, 2007, and again on January 22, 2010 that if the Division of Legislative Audit is to be able to perform audits of private organizations receiving money from or through the state, the powers and duties of Legislative Audit, as identified in AS 24.20.271, should be amended to clearly state this authority.

Passage of SB 50 will make it clear that the Division of Legislative Audit, at the direction of the Legislative Budget and Audit Committee, has the authority to audit private organizations receiving money from or through the state.

Contact: Chuck Kopp, Staff to Senator Dyson (907)465-6580

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

COPY

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

December 18, 2007

SUBJECT: Authority of the Legislative Audit Division to audit persons, other than state agencies, who receive money from the state (Work Order No. 25-LS1259\A)

TO: Senator Fred Dyson

FROM: Theresa Bannister
Legislative Counsel

This memo accompanies a bill addressing the subject described above.

1. AS 24.20.271, the section that describes the powers and duties of the legislative audit division (LAD), is generally limited to state entities, including boards and commissions, and custodians of public funds and disbursing officers of the state.¹ However, AS 24.20.271(8) authorizes LAD to "complete studies and prepare reports, memoranda, or other materials as directed by the Legislative Budget and Audit Committee" (LB&A).

Under AS 24.20.281, a member of the legislature may "request that LB&A direct a special audit of any state agency or determine the propriety of any expenditure of state funds received by any political subdivision or other entity obtaining state funds." It is possible that "other entity" could be interpreted to cover private entities. Whether determining the propriety of the expenditure of state funds received by the entity would be interpreted to cover audits is not clear. Although "determining the propriety" appears to be an alternative to "special audit" in the sentence, the conclusion of the section appears to identify the legislator's request for either purpose with an "audit."

AS 24.20.201(a)(4) authorizes LB&A to review the expenditure of state funds. AS 24.20.201(a)(7) authorizes LB&A to prepare reports. It is possible that one of these could be broadly interpreted to cover private audits, but it is not a solid basis for the authority.

I recommend that, if you want LAD to be able to perform audits of private organizations receiving money from the state, you amend AS 24.20.271 (or AS 24.20.281) to clearly

¹ I would interpret "custodians" to include private persons who receive money from the state, because the term suggests a holder of money rather than a user (recipient) of money.

Senator Fred Dyson
December 18, 2007
Page 2

state that. Therefore, I have prepared a bill to authorize LAD to perform these additional audits.

2. Coverage of private audits. Your request mentioned "organizations." Do individuals ever receive money that you might want to have audited?

If I may be of further assistance, please advise.

TLB:ljw
07-421.ljw

Enclosure

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 22, 2010

SUBJECT: Authority of the Legislative Audit Division to audit non-governmental entities (CSSB 78(STA), Work Order No. 26-LS0194\P)

TO: Senator Fred Dyson

FROM: Jack Chenoweth
Assistant Revisor

Question Presented

Chuck Kopp of your office staff asked legislative research what authority the Legislative Audit Division has, at the direction of the Budget and Audit Committee, to conduct audits of non-governmental agencies, such as non-profit organizations, that receive state funds. Legislative research asked us to respond. I understand that you specifically would like to know whether Senate Bill 78 needs to pass in order to allow Legislative Audit to perform these types of audits.

Answer

It is more probable than not that an amendment based on or similar to the content of Senate Bill 78 is required before the auditor could investigate nongovernmental agencies. I reach this conclusion principally on the basis of a 1982 Opinion of the Attorney General, 1982 Op. (Inf.) May 20, 1982, the reasoning of which reads, in relevant part:

The Office of Legislative Auditor is established by article IX, section 14, of the Alaska Constitution. Under section 14, the auditor has the power to conduct post-audits as prescribed by law. The Alaska Constitution has been implemented by the legislature by the enactment of AS 24.20.201. Under that section, the legislative budget and audit committee is established by law to supervise the work of the legislative auditor. The powers of that interim committee are specifically enumerated in AS 24.20.201(a)(1) - (12). The purpose of your proposed investigation apparently is to review the contracting practices of the Department of Natural Resources in regard to the sale of state royalty oil. Under AS 24.20.201(a)(6), the legislative budget and audit committee may make recommendations concerning appropriations, their expenditure and the fiscal policies and procedures of state government to the governor when appropriate and to the legislature. Unless it can be determined that the

investigation concerns the "fiscal policies and procedures of state government," then it is our opinion that the legislative budget and audit committee has no power to conduct an investigation of this nature. . . .

The legislative auditor has historically been used to carry out the post-audit function. However, under AS 24.20.271 the legislative audit division, under the direction of the legislative auditor, has the power to carry out the audit function assigned to the legislative auditor. Under AS 24.20.271(8), the audit division "shall complete studies and prepare reports, memoranda or other materials as directed by the legislative budget and audit committee." Under AS 24.20.271(6), the legislative audit division has access at all times to the books, accounts, reports or other records, whether confidential or not, of every state agency. In addition, the legislative audit division has the authority necessary to audit banks to verify a deposit of state money with a bank. [Currently authorized by AS 24.20.271(7).] No other provision of section 271 authorizes the division to obtain the books and papers of an entity which is not a state agency.

. . . .

The opinion concludes that, while the power is clearly one that the legislature may grant, it did not then (and arguably still does not now) exist, and would need to be explicitly authorized before it could be exercised. I assume also that legal counsel for a private entity that would choose to resist an audit could find and would cite the reasoning of the 1982 opinion to avoid examination by state auditors.

While a credible argument could be offered that sufficient authority already exists in the current statutes, notably under existing AS 24.20.281,¹ to conduct these post-audits, given that the constitutional provision directs that audits may be conducted "as provided by

¹ AS 24.20.281 provides:

Special audit. A member of the legislature may, in writing and with at least six days notice, request that the budget and audit committee direct a special audit of any state agency or determine the propriety of any expenditure of state funds received by any political subdivision or other entity obtaining state funds. Should a majority of the committee vote to approve the request, the legislative audit division shall make the audit.

This section did exist at the time of the 1982 opinion but is not cited or relied upon in it.

Senator Fred Dyson
January 22, 2010
Page 3

law," this office, too, has in the past recommended that the legislature amend AS 24.20.271,² to provide a statement of authority to exercise that authority, at least comparable to the authority prescribed to audit banks.

JBC:plm
10-027.plm

Enclosures

² See memo from Theresa Bannister dated December 18, 2007, relating to Work Order 25-LS1259\A, SB 213 from the 25th Legislature, which became the basis of SB 78 and CSSB 78(STA) in the current legislature. Copies of these materials are enclosed, along with a December 2, 2008, memo outlining some of the potential constitutional and legal issues that could arise.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

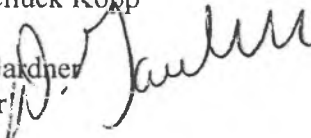
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 25, 2011

SUBJECT: Bill relating to the powers of the Legislative Audit Division
(SB 50 - Work Order No. 27-LS0401\A)

TO: Senator Fred Dyson
Attn: Chuck Kopp

FROM: Doug Gardner
Director 

This memo pertains to the bill described above, sent to you under separate cover.

1. Right to privacy. Please be aware that the new paragraph at AS 24.20.271(11) may raise a federal or state constitutional right to privacy issue if an audit under that paragraph covers information where there is a legitimate expectation of privacy. Alaska's guarantee of privacy is broader than the federal constitution's.¹ This state applies a three-part test to determine whether a person's privacy rights have been violated:²

(1) whether a party seeking protection has a legitimate expectation that materials or information will not be disclosed; (2) whether disclosure is nonetheless required to serve a compelling state interest; and (3) if so, whether disclosure will occur in the least-intrusive manner with respect to the right of privacy.

The record confidentiality provisions of AS 24.20.301 require the agency to keep the information confidential and may be sufficient to cure the privacy issue. However, this may not be sufficient if the records include medical, school, children's, or other sensitive records.

To avoid the privacy issue when the new language is applied, you could limit the audit to financial records connected with the state money and to information that has had the personal indicators removed.

¹ See Myers v. Alaska Psychiatric Institute, 138 P.3d 238, 245 (Alaska 2006), quoting Anchorage Police Dep't. Employees Ass'n. v. Anchorage, 537 P.2d 494, 514 - 15 (Alaska 2001).

² Lawson v. Lawson, 108 P.3d 883, 887 (Alaska 2005), citing Alaska Wildlife Alliance v. Rue, 948 P.2d 976, 980 (Alaska 1997).

Senator Fred Dyson
January 25, 2011
Page 2

2. Other confidentiality considerations. Depending on the activities of the organization involved, there may be state statutory confidentiality provisions that would affect the application of the new language. And, if a private organization is heavily regulated by federal law or receives federal money through the state, federal law may limit or preempt an audit.

If I may be of further assistance, please advise.

DDG:plm
11-032.plm

LEGISLATIVE RESEARCH REPORT

FEBRUARY 22, 2010



REPORT NUMBER 10.178

STATE AUTHORITY TO AUDIT NON-PROFITS THAT RECEIVE STATE FUNDS

PREPARED FOR SENATOR FRED DYSON

BY TIM SPENGLER, LEGISLATIVE ANALYST

You asked whether other states audit non-profit and non-governmental agencies that receive state funds. Specifically, you wanted to know if states define this audit authority in statute.

According to Kinney Poynter, executive director of the National Association of State Auditors, Comptrollers and Treasurers, most, if not all states have the authority to audit non-profits agencies that receive state funds although some do not define this authority in statute.¹ Some states provide auditing authority in their constitutions while many include language in *grant contracts* between state agencies and non-profit or non-governmental entities that specify the state's authority to audit. We identified 16 states that have statutory provisions that outline their ability to audit non-profit and non-governmental agencies that receive state funds.²

In some of the states we identified the language allowing audits is quite broad while in others it is more specific. We include, as Attachment A, the statutes from seven of the states (Georgia, Indiana, Kansas, Kentucky, Minnesota, Montana, and Wisconsin) that specify in statute the state's audit authority of non-profit agencies that receive state funds. Below we highlight the provisions in these states.

- ◆ **Georgia:** Georgia Code 50-20-4(a) states: "The state auditor shall review the nonprofit organization's reporting package or financial statements to ensure compliance with the requirements for audits and financial statement presentation for nonprofit organizations. If the state auditor finds such requirements have not been met, the state auditor within 60 days of receipt of the reporting package or financial statements shall submit a list of

¹ Kinney Poynter, executive director of the National Association of State Auditors, Comptrollers and Treasurers can be reached at (859) 276-1147.

² The 16 states we identified that have statutory provisions defining their ability to audit non-profit entities are California, Colorado, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, New Jersey, New York, Pennsylvania, Texas, and Wisconsin. This should not be considered an exhaustive list of states with statutory provisions regarding auditing non-profits.

deficiencies to be corrected to the nonprofit organization and, if appropriate, to the auditor who performed the audit and to the affected state organizations.”

- ◆ **Indiana:** Indiana Annotated Code 5-11-1-9(a) allows the state examiner to, “. . . examine all accounts and all financial affairs of every public office and officer, state office, state institution, and entity.”
- ◆ **Kansas:** Kansas Statute 46.1114(c) (2) allows an audit of “any person who receives any grant or gift from the state. “Person” is defined in 46-1112 as “. . . an individual, proprietorship, partnership, limited partnership, association, trust, estate, business trust, group, or corporation, **whether or not operated for profit** . . .” (emphasis added)
- ◆ **Kentucky:** Kentucky Statute 43.050(2)(a) allows state auditors the authority to conduct audits and reviews of all state agencies that receives state funds, even indirectly. “State agency” is defined in 6.900(5)(b) “Any entity which receives any part of its funding or resources from state tax dollars, from funds or resources entrusted to the Commonwealth from other sources. . . .”
- ◆ **Minnesota:** Minnesota Statute 3.978(2) states: “...All public officials and their deputies and employees, and all corporations, firms, and individuals having business involving the receipt, disbursement, or custody of public funds shall at all times afford reasonable facilities for examinations by the legislative auditor, make returns and reports required by the legislative auditor, attend and answer under oath the legislative auditor’s lawful inquiries, produce and exhibit all books, accounts, documents, data of any classification, and property that the legislative auditor may need to inspect, and in all things aid the legislative auditor in the performance of duties.”
- ◆ **Montana:** Montana Statute 5-13-304(8), states the auditor shall: “have the authority to audit records of organizations and individuals receiving grants from or on behalf of the state to determine that the grants are administered in accordance with the grant terms and conditions. Whenever a state agency enters into an agreement to grant resources under its control to others, the agency shall obtain the written consent of the grantee to the audit provided for in this subsection.”
- ◆ **Wisconsin:** Wisconsin Statute 13.94(4)(a) allows the legislative auditor to audit “. . . every nonprofit corporation or cooperative or unincorporated cooperative association to which moneys are specifically appropriated by state law;”

Again, we provide these statutes in their entirety in Attachment A.

In Alaska, the state’s ability to audit non-profit entities that receive state money is not codified in statute. Alaska Administrative Code 2 AAC 45.010, however, provides that any entity that receives a cumulative total of \$300,000 or more from the state during a fiscal year **shall** submit an audit. Additionally, Pat Davidson, legislative auditor, points out that language included in the

majority of grant contracts between state agencies and non-profits specifies that the state has a right to perform audits.³

We hope you find this information to be useful. Please let us know if you have questions or need additional information.

³ Pat Davidson, legislative auditor, can be reached at (907) 465-3830.

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSSB 78(STA)
 (S) Publish Date: 3/20/09

Identifier (file name): SB78-LBA-DLA-03-13-09 Dept. Affected: Legislature
 Title: An Act relating to the powers and duties of the RDU: Budget and Audit Committee
Legislative Audit Division Component: Legislative Audit
 Sponsor: Senator Dyson
 Requester: Senate State Affairs Component Number: 773

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2010	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING		0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES

CHANGE IN REVENUES ()

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2009) cost: _____

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: (Attach a separate page if necessary)

This legislation has zero fiscal impact on the Division of Legislative Audit.

Prepared by: Pat Davidson, Legislative Auditor Phone 465-3816
 Division: Division of Legislative Audit Date/Time 3/13/09 9:34 AM
 Approved by: Pat Davidson, Legislative Auditor Date 3/13/2009
Division of Legislative Audit