

## **DESCRIBE THE PROBLEM**

The Secretary of State is charged with the constitutional and statutory responsibility to audit state agencies. However, state agencies often resist requests for information essential to an audit. Sometimes this happens because the audited agency is concerned that sharing information with auditors will breach statutory responsibilities. This leads to complicated legal inquiries from the audited agency to DOJ. These questions take substantial time to answer. The result is repeated and substantial delay in the audit process. This has jeopardized or even destroyed ongoing audits and wasted hundreds of work hours in legal consultation and scrapped audit work.

### **Further description of what promoted the problem and why this is being proposed:**

The problem is longstanding due to multiple factors. One factor is the state's increased reliance on IT systems to conduct its work. Auditors previously accessed hard copy materials that are now only available in electronic format. Another factor is cybersecurity risks as access is more restricted than in the past. Agency staff have defaulted to denying access to electronic records, requiring lengthy delays.

Multiple opinions from DOJ have noted our office has broad discretion in the information we need to audit. Furthermore, the division has strong controls in place to protect data, mitigating the potential cybersecurity risks. We'd like to bring some of the DOJ language into statute to head off lengthy and costly legal delays, as well as reassure agencies that their confidential data will be handled confidentially.

The legislature and the public recognize how important it is to have a neutral auditor who can provide insight into fiscal and performance accountability. Auditors cannot do this without access to necessary records. This is an ongoing and growing problem that requires a solution.

## **PROPOSED SOLUTION**

There are two parts to a solution: providing access to auditors and reassuring agencies about the confidentiality of their data. First, we would like to update current law by adding clarifying language on the Audit Division's ability to access data. Secondly, once we get that information, we want to keep it confidential, according to the same confidentiality rules that the agency must follow. We would like to include a confidentiality section in the second part of the bill, as this would also reassure agencies that their data and information will remain confidential.

We would like to incorporate wording from past DOJ opinions and research. Other states, such as Colorado and Arizona, have already solved the same problem; their solutions are already working well and are consistent with professional audit standards promulgated by US Government Accounting Office (GAO). As such, they are considered best practices in the field and served as models for our proposal. See, e.g., Colorado Revised Statutes 2-2-103; Arizona

Revised Statutes 41-1279.04. This bill is based both on those best practices and on additional problem solving to harmonize those principles with Oregon’s unique public records laws.

- 1. The Attorney General has concluded that the Secretary of State’s Audit Authority under Article VI, section 2 of the Constitution includes broad discretion to access records relating to fiscal accountability and other fiscal affairs. Notably, “fiscal accountability” does not include only traditional financial auditing, but also extends to matters of efficiency that modern auditors consider as part of “performance audits.” Excerpts below:**

From principles stated in our earlier opinions, we conclude that the secretary may audit when she deems it appropriate, provided that the audit relates to determining fiscal accountability and other fiscal affairs.

The Secretary of State has the ultimate constitutional responsibility to determine fiscal accountability. See 39 Op Atty Gen 698, 701 (1979). It is for the secretary, in the first instance, to determine what matters she needs to examine in order to perform that duty. Id. We believe the courts would accord the Secretary of State a large measure of discretion in determining what materials she needs to examine to determine fiscal accountability. Id. at 702. As we stated in 1985:

“Unless the exercise of that discretion is clearly unreasonable, she is entitled to examine books, records, and other materials pertaining to efficiency, and to comment on matters of performance to whatever extent she deems necessary to enable her to determine fiscal accountability. For instance, in evaluating the accounting procedures of public officers charged with receiving or expending of funds, it might be relevant to evaluate the performance of those officers with respect to the economy and efficiency of those operations and their effectiveness in achieving the desired result in compliance with relevant policies, laws or regulations, relating to the collection or disbursement of funds.”

We believe the Secretary of State possesses commensurate discretion concerning when she conducts an audit or other examination of the fiscal records and documents of the state. She may audit or examine such records and documents of any agency or officer in the course of a state-wide audit of selected state agencies or at such other times as she deems appropriate. In the course of performing these duties, she may gather the information that she deems relevant to her duty to report to the legislature.

**The suggested language is the result of extended discussion between SOS and stakeholders.**

SOS first proposed a bill to solve these issues in the 2023 regular session as SB 177. The bill served as a discussion draft for detailed discussion with the Department of Justice and other stakeholders. The language proposed here is the final result of those discussions. It is intended to resolve questions about the handling of confidential material consistently with professional government auditing standards and Oregon's unique public records law.

#### SECTION 1.

(1) Notwithstanding any other provision of Oregon law, and except as otherwise provided in this section, the Secretary of State shall have access at all times to all of the books, accounts, reports, vouchers, or other records or information in any state agency that the Secretary of State deems relevant to an audit that the Secretary of State is conducting, including a performance audit as defined in ORS 297.070.

(2) Officers and employees of state agencies shall make available to the Secretary of State any materials that the Secretary requires to be produced under this section for examination and reproduction.

(3) The records or information that the Secretary of State is authorized to access under this section include but are not limited to records or information the disclosure of which is prohibited or otherwise made confidential or privileged under Oregon law, except that this section does not authorize the Secretary to access records or information that is protected by ORS 40.225 and that subsection (4) does not authorize her to access.

(4) Notwithstanding subsection (3) and ORS 40.225, this section authorizes the Secretary of State to access factual information in records or information in any state agency when

(a) no applicable court order or federal law or regulation prohibits the disclosure of the factual information;

(b) The factual information is compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;

(c) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and

(d) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

(5) When the Secretary requests the factual information described in subsection (4), the state agency may either produce the documents that contain the information or may prepare a condensation of the factual information as described in ORS 192.360(1).

(6) When accessing confidential health records, the Secretary shall determine the necessity of accessing personal identifying health information for the purpose of achieving the audit objectives.

(7) The Secretary of State may send representatives to attend executive sessions of the governing body of any public body in this state, other than an executive session authorized by ORS 192.660(2)(h) or when the purpose of the executive session is to consider an attorney-client privileged document under ORS 192.660(2)(f), for the purpose of gathering information that the Secretary of State deems relevant to an audit that the Secretary of State is conducting, including a performance audit as defined in ORS 297.070.

(8) The Secretary's authority under subsection (1) of this section terminates on the date the final audit report is published.

(9) Any officer or employee of the State of Oregon who willfully and knowingly fails or refuses to permit access or examination for audit by the Secretary of State under subsection (1) or who willfully and knowingly interferes in any way with such access or examination commits a class A misdemeanor.

(10) The Secretary of State has the right to ascertain the amounts on deposit in any bank or other depository belonging to any department, institution, or agency required to be audited and has the right to audit said account on the books of any such bank or depository, if the Secretary deems that information relevant to an audit that the Secretary of State is conducting, including a performance audit as defined in ORS 297.070. No bank or other depository is liable for making available to the Secretary any of the information the Secretary requests under this subsection (10).

(11) Except for a confidential report under subsection (14), nothing in this section shall be construed as authorizing or permitting the publication or disclosure by the Secretary of State, or any person, of information required to be kept confidential pursuant to any other law. No information required to be kept confidential pursuant to any other law shall be released in connection with an audit, except as permitted in subsection 14. Neither shall anything in this section be construed to alter the duties of the Secretary of State under ORS 297.210(5). In addition to the penalty established in subsection (13), any person who unlawfully releases

information required to be kept confidential shall be subject to any criminal or civil penalty under any applicable law for the unlawful release of the information.

(12) Nothing in this section shall be construed to alter ORS 192.345 (37).

(13) Any person working on behalf of the Secretary of State to conduct an audit, including a performance audit as defined in ORS 297.070, who willfully and knowingly discloses the contents of any audit report prepared by or at the direction of the Secretary, before the official release of the final audit report by the Secretary, is guilty of a class A misdemeanor.

(a) This subsection (13) shall not apply to necessary communication of employees or authorized agents of the Secretary of State with those persons necessary to complete the audit report or as necessary to carry out duties required by professional auditing standards.

(b) This subsection (13) shall not apply to disclosure of a draft audit report that is provided to the audited entity by the Secretary of State for the entity's response to the audit findings.

(14) All final audit reports of the Secretary of State shall be open to public inspection after their official release by the Secretary, except that

(a) This subsection (14) shall not apply to reports exempt from public disclosure under ORS 192.345(23). The Secretary of State shall provide such reports to the audited agency directly, and such reports shall not be open to public inspection.

(b) If the Secretary of State cannot make a meaningful audit finding without disclosing information required to be kept confidential under Oregon law or pursuant to any other law, the Secretary of State shall prepare a confidential report containing the confidential information for the review of the audited agency and the Joint Legislative Audit Committee. Such a report shall be exempt from public disclosure, and the agency and Joint Legislative Audit Committee shall not disclose it.

(c) If the Secretary of State cannot make a meaningful audit finding without disclosing information that, in the Secretary's judgment, is justifiably excluded from a public report due to circumstances associated with public safety, privacy, or security, then, in the manner required by professional auditing standards, the Secretary of State may prepare a confidential report containing the excluded information for the review of the audited agency and the Joint Legislative Audit Committee. Such a report shall be exempt from public disclosure, and the agency and Joint Legislative Audit Committee shall not disclose it.

(d) If an audit report described in subsection (14)(b) or (c) contains one or more audit findings that the Secretary of State can make in a meaningful way without disclosing information required to be kept confidential under Oregon law or pursuant to any other law or information that is justifiably excluded due to circumstances associated with public safety, privacy, or

security, then the Secretary of State shall prepare a report containing only those findings that do not require the disclosure of confidential or excluded information and shall release the report for public inspection simultaneously with the release of the report described in subsection (14)(b) or (c). The report released for public inspection shall state, in the manner required by professional auditing standards, that confidential or excluded information has been omitted.

**(15) The Secretary shall make all working papers or other information within the Secretary’s custody related to a published audit report available for public inspection except that**

- (a) the Secretary may exempt records from public disclosure as described in ORS 192.345 (37). and**
- (b) the Secretary shall refer any requests for documents received from an audited entity to the entity, who shall be solely responsible for responding to the request, and**
- (c) if the Secretary receives requests for documents that concern an audit but that did not originate with the audited entity, the Secretary shall consult with the entity concerning exemptions from disclosure that the agency desires the Secretary to assert, and**
- (d) the Secretary shall not disclose**
  - (i) information required to be kept confidential under Oregon law or pursuant to any other law or**
  - (j) information that is justifiably excluded due to circumstances associated with public safety, privacy, or security.**

(16) As used in this section, “State agency” means any state office, department, division, bureau, board and commission, whether in the executive, legislative or judicial branch.

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