

MAINE STATE LEGISLATURE

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*Dept. of Audit: Authority
5 MR 108 242-B*

Dept. of Audit: Access To Reports
STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
Freedom of Access: Audit Reports
AUGUSTA, MAINE 04333

December 23, 1976

The Honorable Richard J. Carey
27 Sterling Street
Waterville, Maine 04901

Dear Representative Carey:

Your letter addressed to the Attorney General in which you inquire as to the authority of the Department of Audit to make recommendations concerning the modus operandi of a state agency, specifically the State Lottery Commission, when an investigatory and evaluation report of said agency is ordered by a Legislative Committee, the derivation of such authority, if it in fact exists, and the authority of the Department of Audit to release its report or fact findings, has been referred to me for an answer.

Answering the questions in their order of presentment, it is my opinion that:

1. The Department of Audit, while conducting an investigation and evaluation of the records, policies and operations of a state agency at the request of a legislative committee, may offer recommendations directly to the agency subject to investigation, absent express legislative direction to the contrary.
2. The derivation of authority for the Department of Audit to make direct recommendations to a state agency whose operations it has been ordered to analyze and evaluate, emanates not only from the terms of a legislative order which formulates the basis for said evaluation, but is also distinctly statutory.
3. The Department of Audit acts in a capacity of "legislative staff" when it prepares an evaluation report at the request of a legislative committee or sub-committee, but if the Department is not expressly prohibited by legislative order, or otherwise, from releasing the contents of such a report prior to its final submission

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to any given committee or sub-committee, the Department is not precluded from releasing the contents of its report to the public.

4. The report of the Department of Audit under review is not the report of the Joint Standing Committee on Performance Audit, until said report is accepted in part or in toto by said Committee, and there is no statutory prohibition which would prevent the Department from releasing the contents of its report to the public, after the report has been submitted to the Sub-Committee or Committee.

The comprehensive report of the State Department of Audit prepared by the Division of Program Review and Evaluation of said Department under date of October 1976, represents not the report of the Joint Standing Committee on Performance Audit, the sole agency entrusted with the duty of conducting a study of the Maine State Lottery Commission, but represents merely the conduit through which information flows to the Committee, which may or may not formulate the basis for the Committee's report. The contents of said Audit report may be accepted or rejected in whole or in part by the Committee.

The legislative order under date of March 9, 1976, which authorized the study of the Maine State Lottery Commission by the Joint Standing Committee on Performance Audit provides only that the Committee shall submit to the Legislative Council "its findings and recommendations." Based solely upon this particular legislative order, neither the Committee nor the State Department of Audit is authorized to act in the status of interim ombudsmen and make recommendations directly to the Lottery Commission. In the absence of restrictive language in any given legislative order prohibiting the Department of Audit from rendering recommendations directly to a state agency, however, there is ample statutory authority for the Department to do so.

Chapter 591 of the Public Laws of 1975 (now 5 M.R.S.A. § 242-B) provides that the State Auditor may create a Program Review and Evaluation Division within the Department of Audit, subsections (2) and (3) of said statute read as follows:

"(2) Purpose. It shall be the purpose of the Program Review and Evaluation Division to examine State Government Programs and their administration to ascertain whether such programs are effective, continue to serve their intended purpose, are conducted in an effective and efficient manner, or require modification or elimination, and generally to assist the Legislature in providing greater control over receipt, disbursement and application of public funds.

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"(3) Assistance to the Legislature. The State Auditor, through the Program Review and Evaluation Division, shall review and analyze the results of government programs and activities carried on under existing law, including the making of cost benefit studies, when ordered by both Houses of the Legislature, or upon his own initiative, or by order of the Legislative Council, or when requested by the Joint Standing Committee on Performance Audit."

The above-quoted statutory language reveals the power of review and analysis which the Legislature has posited in the Department of Audit, and it seems clear that the above-delineated powers of examination and review include the authority to render recommendations directly to state agencies subject to said review.

Lastly, once the Department of Audit submits a report to a legislative committee or sub-committee, the Department ceases to function in the capacity of legislative staff, and the contents of its report are not immune or exempt from dissemination as public information under the terms of our "right-to-know" law.

The terms of 1 M.R.S.A. § 402(3) define public records and certain exceptions thereto, including, but not limited to, the following:

"Records, working papers and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the biennium in which the proposal or report is prepared."

The above-quoted statutory language cannot reasonably be construed to include evaluation reports compiled by the Department of Audit after their submission to a legislative committee or sub-committee.

In order to insure that such reports remain confidential unless released by the legislative committee or sub-committee for whom they are prepared, amendment of the above-cited language would appear to be necessary.

Very truly yours,

PHILLIP M. KILMISTER
Assistant Attorney General

PMK:mfe