

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
SUFFOLK COUNTY
NO. SJ-2026-0071

_____)
DIANA DIZOGLIO, State Auditor,)
)
Plaintiff,)
)
v.)
)
RONALD MARIANO, Speaker of the)
House, KAREN E. SPILKA, Senate)
President, and TIMOTHY CARROLL,)
House Clerk, MICHAEL D. HURLEY,)
Senate Clerk,)
)
Defendants.)
_____)

**ATTORNEY GENERAL’S EMERGENCY MOTION TO STRIKE THE COMPLAINT
PURSUANT TO G.L. c. 12, § 3**

State statute and well-established precedent confirm that the Attorney General is the sole representative of the interests of the Commonwealth and its officials in litigation. As set forth in the General Laws, she is the only official authorized to represent state agencies and officials in court; and, accordingly, the only official authorized to initiate actions like this one, either directly or by express delegation of her authority. The Supreme Judicial Court has confirmed that this role allows the Commonwealth to establish uniform and consistent legal positions for the state as a whole, undisturbed by the narrow interests of particular state officials; and the Court has further established that any exceptions to this rule are exceedingly rare, involving circumstances not present here. Violating this settled law, on February 10, 2026, State Auditor Diana DiZoglio filed the instant complaint against the Speaker and Clerk of the Massachusetts House of

Representatives and the President and Clerk of the Massachusetts Senate. The filing was made without authorization from the Attorney General, and by an attorney not designated to act as a Special Assistant Attorney General (SAAG). Consequently, the Attorney General moves to strike the Verified Complaint.

The dispute that is the subject of the complaint is a disagreement between two branches of state government that implicates the separation of powers among all three branches, as well as the scope, if any, of the Auditor’s statutory authority, and touches on issues of concern for other state agencies. On such issues, the Attorney General, as the Commonwealth’s chief law officer, is exclusively empowered to “set a unified and consistent legal policy for the Commonwealth.” *Sec’y of Admin. and Finance v. Att’y Gen.*, 367 Mass. 154, 163 (1975). The Court should therefore strike the Auditor’s Complaint.

FACTUAL BACKGROUND

In March 2023, State Auditor Diana DiZoglio sought to initiate an audit of the Legislature. In August 2023, having not secured voluntary compliance from the Legislature, DiZoglio requested authorization from the Attorney General to file litigation to establish her authority to conduct such an audit. On November 2, 2023, the Attorney General responded, explaining that the Legislature was not one of entities that DiZoglio was statutorily permitted to audit. DiZoglio nonetheless completed and released a performance audit of the Legislature in October 2024. The audit canvassed a variety of issues, ranging from procurement to the Legislature’s website; and from the selection of legislative and committee leadership to the legislative process associated with particular pieces of legislation.¹

In August 2023, the Auditor, acting in her personal capacity with nine other voters, filed

¹ Office of the State Auditor, “Official Audit Report: The Massachusetts General Court” (Oct. 21, 2024), available at <https://www.mass.gov/doc/audit-report-the-massachusetts-general-court-0/download>.

an initiative petition proposing to amend the enabling act of the State Auditor’s Office to expressly include the “general court itself” among the list of entities subject to audit in G.L. c. 11, § 12. That initiative petition became law after voters approved it at the November 2024 biennial state election. *See* St. 2024, c. 250.

Immediately following the November 2024 election, DiZoglio initiated an audit of the Legislature, sending a letter on November 8, 2024 demanding production of several categories of documents. One week later, before the 2024 election had been certified (and therefore before the initiative petition had taken effect), DiZoglio asked the Attorney General to file a lawsuit to compel the Legislature’s production of the sought-after documents.

Thereafter ensued correspondence, numerous meetings, and countless discussions between the Attorney General’s Office (AGO) and the State Auditor’s Office (OSA), in which the AGO sought information from the OSA necessary to evaluate the request.² It is exceptionally rare for one part of state government to sue another, and requests to do so are evaluated carefully by the AGO, which cannot readily fulfill its statutory responsibility to set a consistent legal policy for the Commonwealth if different parts of the Commonwealth are litigating against one another unchecked. In addition, where one part of state government desires to litigate against another, and the AGO determines such litigation is necessary, it must then determine which (if any) party it will represent and whether to appoint a Special Assistant Attorney General (SAAG) for either or both parties. As part of this determination, the AGO looks to understand, as fully as possible, the legal position of each agency or official seeking to litigate. With this understanding, the AGO attempts to work with the disagreeing parts of state government to determine whether litigation can be avoided (and the interests of each part accommodated).

² A compendium of the correspondence between the AGO and OSA is attached as Exhibit A.

In the usual course, the AGO's questions and the OSA's responses (or lack thereof) would be afforded the protection of privilege, between the OSA (as a prospective client) and the AGO (as its prospective counsel). But the OSA has publicly disclaimed and waived that privilege.³ Consequently, the AGO notes here that it has asked the OSA to address the following issues: whether and to what extent the OSA's authority to audit the Legislature is prohibited or constrained by arts. 21 and 30 of the Massachusetts Declaration of Rights and any portion of Pt. II, c. 1 of the Massachusetts Constitution; what cause of action it seeks to bring against the Legislature, given statutory and constitutional limitations on the relief that may be sought against the Legislature; whether and to what extent any steps short of litigation, including negotiation with the Legislature, have been explored; precise identification of the materials sought to be procured by the lawsuit; and precise identification of the parties to be sued. Only the last two inquiries have been addressed meaningfully, although the OSA's written correspondence concerning the scope of the audit have diverged, at times significantly, from public statements about the scope of the audit. The OSA has refused to articulate any position concerning whether the state constitution limits its auditing authority over the legislature; has failed to identify a cause of action (including in the instant complaint); and has not engaged in the type of negotiation with the Legislature that has been encouraged by the AGO. *Cf. United States v. AT&T Co.*, 567 F.3d 121, 130 (D.C. Cir. 1977) (in the analogous context of federal congressional oversight over the executive branch, the "Constitution contemplates ... accommodation" of each branch's interests, and "[n]egotiation between the two branches .. [is] a dynamic process affirmatively furthering the constitutional scheme.") With these issues unresolved, the AGO has

³ See, e.g., Adam Reilly, "State auditor releases correspondence with attorney general amid standoff over new audit law," *WGBH* (Apr. 15, 2025), available at <https://www.wgbh.org/news/politics/2025-04-11/state-auditor-releases-correspondence-with-attorney-general-amid-standoff-over-new-audit-law>.

neither granted or denied the OSA’s requested authorization to file suit.⁴

On January 26, 2026, DiZoglio’s office demanded appointment of a SAAG to represent her in any litigation brought against the Legislature, which raised additional complications in light of the proposed private funding of the representation. The AGO has sought information concerning the propriety of that arrangement; and the OSA has refused to provide it. As with the request for authorization of litigation, the request to appoint a SAAG remains pending. As recently as February 17, 2026, the Auditor has indicated via the news media that she no longer intends to use privately-funded counsel, but now desires a different approach.⁵ She has not so informed the AGO.

On February 10, 2026, without authorization by the Attorney General and represented by counsel who has not been appointed a SAAG for the purposes of this litigation, DiZoglio filed the instant complaint ostensibly seeking to compel the Legislature to produce documents sought in connection with her audit. The Verified Complaint sets forth no legal cause of action. In its prayer for relief, the Verified Complaint asks this Court to “[e]nter judgment for the Auditor, on behalf of the OSA,” order the Legislature to produce the requested documents, and appoint an attorney of the OSA’s choosing to represent the Auditor as a SAAG.

⁴ To illustrate the difficulty posed by the OSA’s failure to articulate a position on these issues, it is worth considering that it is possible that the OSA believes the Auditor is entitled to audit all legislative conduct, including, for example, the law-making process, committee assignments, and conference committee decision-making, as the Auditor publicly claims. Because that position would be difficult to square with the structure of the Massachusetts Constitution, it is unlikely the AGO would adopt it as the Commonwealth’s uniform legal policy, which in turn would affect how the Auditor’s desired case would be litigated and whether separate representation should be considered.

⁵ Samantha Gross, “DiZoglio taps attorney general’s former political rival to represent her in legislative audit fight,” *Boston Globe* (Feb. 17, 2026), available at <https://www.bostonglobe.com/2026/02/17/metro/dizoglio-liss-riordan-audit-lawsuit-campbell/>.

ARGUMENT

THE ATTORNEY GENERAL HAS THE SOLE POWER TO BRING OR DEFEND SUITS ON BEHALF OF THE COMMONWEALTH AND ITS DEPARTMENTS AND OFFICIALS.

A. The Authority to Establish Uniform Legal Policy for the Commonwealth Rests With the Attorney General, and Not With Individual State Officials.

The Attorney General is the chief law officer of the Commonwealth, empowered to make decisions and take positions in litigation, irrespective of the demands of individual state officials or agencies. G.L. c. 12, § 3; *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163-65 (1957); *Feeney v. Commonwealth*, 373 Mass. 359, 364-67 (1977). Her authority encompasses the vetting of legal disputes between parts of state government, to ensure that only those that are ripe and appropriate for adjudication—that is, legal rather than political disputes—are brought to the judicial branch. As a straightforward matter of state law, state officials or state agencies are not permitted to initiate litigation without the authorization of the Attorney General. G.L. c. 12, § 3. The filing of this suit, in contravention of that established law, “enervate[s] the Legislature’s clearly articulated determination to allocate to the Attorney General complete responsibility for all of the Commonwealth’s legal business.” *Feeney*, 373 Mass. at 366. That allocation “empower[s], and perhaps require[s], the Attorney General to set a unified and consistent legal policy for the Commonwealth.” *Secretary of Admin. & Finance*, 367 Mass. at 163.

Under G.L. c. 12, § 3, the Attorney General is directed to “appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the

commonwealth, . . . All such suits and proceedings shall be prosecuted or defended by [her] or under [her] direction.” Thus, the Legislature has “consolidated the responsibility for all legal matters involving the Commonwealth in the office of the Attorney General.” *Feeney*, 373 Mass. at 364. The consolidation is purposeful. As detailed in *Secretary of Admin. & Finance*, the role afforded the Attorney General in the late 1800s by G.L. c. 12, § 3, was in response to gubernatorial and legislative dissatisfaction with piecemeal and divergent legal positions that were being taken by officials and agencies within state government. 367 Mass. at 162. By granting the Attorney General the exclusive power to develop those positions—and assert them in court—uniformity is assured, to the greatest extent possible. *Id.* at 163.

The Attorney General’s authority is such that, as this Court recognized in *Feeney*, she may take a position directly opposed by officials who the Attorney General represents. As the Supreme Judicial Court explained,

The authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concomitant effect of creating a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship. The language of G.L. c. 12, § 3, its legislative history and the history of the office indicate that the Attorney General is empowered, when he appears for State officers, to decide matters of legal policy which would normally be reserved to the client in an ordinary attorney-client relationship.

373 Mass. at 366. The court thus held that the Attorney General could appeal a judgment against a state agency and state officials over their objections. 373 Mass. at 367-68.

In *Secretary of Admin. and Finance*, the Supreme Judicial Court addressed the related issue of whether the Attorney General was required to pursue an appeal when requested to do so by a state official. 367 Mass. at 155. The court held that the Attorney General need not do so

when, in her view, the legal interests of the Commonwealth would not be served by the appeal. It would, the Court reasoned, defeat the purpose of G.L. c. 12, § 3, “to allow an agency head, representing narrow interests and with a limited scope, to dictate a course of conduct to the Attorney General, and in effect to destroy any chance of uniformity and consistency” in the state’s legal position. 367 Mass. at 163.

So too here. The case before this Court is, in the words of the court in *Secretary of Administration and Finance*, an “ordinary case of disagreement between an agency and the Attorney General,” 367 Mass. at 158, in which the Attorney General controls whether the agency may appear as a party. There, the court noted,

The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance. . . . He also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.

367 Mass. at 163 (citations omitted). Here, the OSA has demanded approval to bring a lawsuit, with private counsel of its choosing, while refusing to engage in meaningful discussion of her legal position on baseline issues with the AGO. That is true even though those legal issues, as addressed below, affect numerous other parts of state government, as well as the availability of judicial relief against the Legislature (for the Auditor and anyone else). Instead, the OSA has chosen to make repeated public and political demands—suggesting on multiple occasions that the AGO should “sue” the Auditor to better understand her legal positions,⁶ and now culminating

⁶ *E.g.*, Lance Reynolds, “Massachusetts Auditor DiZoglio to AG Campbell in audit fight: ‘Sue me,’” *Boston Herald* (Oct. 15, 2025), available at <https://www.bostonherald.com/2025/10/15/massachusetts-auditor-dizoglio-to-ag-campbell-in-audit-fight-sue-me/>

in the filing of this action. That course of conduct is foreclosed by G.L. c. 12, § 3, and the OSA’s present attempt “to dictate a course of action to the Attorney General would [impermissibly] prevent the Attorney General from [effectuating her responsibility to] establish[] and sustain[] a uniform and consistent legal policy for the Commonwealth.” *Feeney*, 373 Mass. at 365–66.

B. No Exception to the Plain Language of G.L. c. 12, § 3 Applies.

The text of G.L. c. 12, § 3 provides no exceptions. State officials and agencies may appear in this Court (or any other) only as represented by the Attorney General. In *Secretary of Administration and Finance*, this Court recognized a narrow, atextual exception in circumstances not present here: where the “powers of the Attorney General [were] themselves in question,” i.e., as needed to adjudicate as an issue of first impression whether the Attorney General could refuse to appeal a judgment that her client desired to appeal. 367 Mass. at 158. That issue is now resolved. Regardless, the Court noted, “this narrow exception” does not apply, as here, “in the ordinary case of disagreement between an agency and the Attorney General.” *Id.*

Here, there is no ambiguity as to the Attorney General’s authority under G.L. c. 12, § 3, there is only a state agency that believes, as a policy matter, that it should hold that statutory authority instead. That disagreement is no basis to allow the Auditor to appear in court without authorization. *See Feeney*, 373 Mass. at 368 (“To permit [executive branch officials] who represent a specialized branch of the public interest, to dictate a course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth”); *see also Secretary of Administration and Finance*, 367 Mass. at 158 (usual rule is that Attorney General is sole representative of Commonwealth in litigation).

The Supreme Judicial Court has affirmed this point in *Alliance, AFSCME/SEIU, AFL-*

CIO v. Commonwealth, 425 Mass. 534 (1997). In that action, plaintiffs brought a challenge to a gubernatorial line-item veto against the state officials charged with administering the programs that ostensibly had been vetoed. *Id.* at 545. On the legal issue, the Attorney General agreed with the plaintiffs that the veto was improper and consequently declined to represent the defendants in arguing otherwise; because those officials could appear “in court *only* as represented by the Attorney General,” the matter was conceded and there was no actual controversy to be adjudicated. 425 Mass. at 537 (emphasis added). There, as here, the state officials were “obligated to accept representation from the Attorney General by virtue of G.L. c. 12, § 3”; and it was the Attorney General’s decision, not that of the officials, whether to assert an argument. 425 Mass. at 538 n.7.⁷

The complaint also makes a conclusory assertion that the Attorney General has been arbitrary or capricious in declining to file suit against the Legislature. Comp. ¶ 46. As the AGO has informed the OSA countless times, it may be that the OSA’s dispute with the Legislature will, at the appropriate time, require a judicial resolution. But it is essential that any such litigation is well considered, with a complete distillation of the underlying issues, and filed as a last resort. The OSA has chosen political theater instead. It is the responsibility and obligation of the Attorney General under G.L. c. 12, § 3 to demand a different approach, consistent with the principle that our state courts should be asked only on the rarest of occasions to referee intragovernmental disputes.

C. The Present Circumstances Underscore The Wisdom of the Established Approach.

It is the longstanding policy and practice of the AGO that legal disputes among parts of,

⁷ By statute, and consistent with art. 30, whether and how to present an argument on behalf of the Commonwealth to the judiciary rests with the discretion of the Attorney General.

or officials in, state government very rarely require judicial intervention. Otherwise, weighty issues concerning the structure of government (and the state constitutional provisions that shape that structure) would arrive in court undeveloped; and filing a suit could become more political exercise than serious legal endeavor, wasting judicial and taxpayer resources.

The present circumstances illustrate why. Among the issues underlying the Auditor’s complaint is the scope of legislative privilege. That issue is rarely litigated. Just this year, the Supreme Judicial Court addressed the privilege in detail for the first time in more than two centuries. *See Tran v. Commonwealth*, 496 Mass. 518, 524 (2025). The extent to which legislative privilege protects against civil, rather than criminal incursions, is even more underdeveloped. *See, e.g., Abuzahra v. City of Cambridge*, 101 Mass. App. Ct. 267, 271–72 (2022) (recognizing a legislative privilege against civil discovery, but noting absence of “any Massachusetts appellate decision” on the issue). The issue plainly is quite important to the Legislature, which is the only branch of government whose individual members are expressly granted a privilege by the Massachusetts Constitution. *See Mass. Const. Pt. I, art. 21*. But the scope of legislative privilege also affects the authority of those charged with enforcing state law, including the Attorney General, the Commonwealth’s 11 District Attorneys, the State Ethics Commission, and the Office of Campaign and Political Finance, among many others. It could impact every future Auditor of the Commonwealth; and, if *Abuzahra* is correctly decided, it impacts every municipal legislative entity (e.g., City Councils and Select Boards) as well. By filing this unauthorized action, the current Auditor now asks the Supreme Judicial Court to define for *all* of those parts of the Commonwealth the scope of legislative privilege, even though the OSA has refused to articulate a consistent position itself.

The question of what relief, if any, is available against the Legislature in these

circumstances is also difficult. Under settled precedent, declaratory judgment may not be had against the Legislature. *See* G.L. c. 231A, § 2 (declaratory relief not available against the “legislative and judicial departments”); *Town of Milton v. Commonwealth*, 416 Mass. 471, 475 (1993) (“Declaratory relief is not available against . . . the Legislature”). Nor is mandamus available against the Legislature. *LIMITS v. President of the Senate*, 414 Mass. 31, 35 (1992). Even if some other type of affirmative injunction may be entered against the Legislature in narrow circumstances, no Massachusetts appellate court has yet delineated what those circumstances are. Defining those circumstances is no easy task, as the Supreme Judicial Court is “most hesitant in instructing the General Court [on] when and how to perform its constitutional duties.” *LIMITS*, 414 Mass. at 35; *see Town of Milton*, 416 Mass. at 475 (“Judicial unwillingness to order the Governor or the Legislature to act is founded on separation of powers principles expressed in art. 30 of the Massachusetts Declaration of Rights”). *Cf. Doyle v. Secretary of the Commonwealth*, 448 Mass. 114, 119 (2006) (finding “no viable relief for the asserted violation” by the Legislature of Article 48); *Committee for Health Care for Mass. v. Secretary of the Commonwealth*, 450 Mass. 775, 778 (2008) (same). Before this Court is asked to explore the boundaries of its own authority vis-à-vis the Legislature, it should have a well-developed case before it.

By statute, the Attorney General is a gatekeeper empowered to determine when, if ever, the Commonwealth’s intragovernmental legal disputes require judicial resolution. *See* G.L. c. 12, § 3. There would be no gate at all were mere disagreement with the Attorney General sufficient basis for a dissenting state official to initiate a lawsuit. Were such suits permissible, the Commonwealth, which has heretofore spoken with one voice in litigation, would be rendered a babel of voices with competing interests, many on the docket of this Court. *Secretary of*

Administration and Finance, 367 Mass. at 163; *Feeney*, 373 Mass. at 365-66. That result has been disapproved by this court before and should not be countenanced now, even to the extent it may preclude recourse to the courts by a state official. *Id.* That is especially so where, as the AGO has repeatedly emphasized, constructive engagement with our office may ultimately allow the Auditor a path to authorized litigation.

CONCLUSION

For the reasons set forth above, the Verified Complaint filed by State Auditor Diana DiZoglio should be stricken.

Respectfully submitted,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

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Dated: February 19, 2026

CERTIFICATE OF SERVICE

I, Anne Sterman, hereby certify that, on February 19, 2026, a true and accurate copy of the foregoing was filed through the eFileMA system and will be sent by email to:

Michael Leung-Tat
General Counsel
Office of the State Auditor
One Ashburton Place, #1819
Boston, MA 02108
Michael.Leung-Tat@massauditor.gov

/s/ Anne Sterman
Anne Sterman
Assistant Attorney General

Exhibit

A



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

DIANA DIZOGLIO
AUDITOR

TEL (617) 727-2075
FAX (617) 727-3014

July 26, 2023

VIA E-Mail & U.S. Mail

The Honorable Andrea Joy Campbell
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell:

I. Introduction

In March 2023, I announced that our office was conducting an audit of the Massachusetts Senate and House of Representatives (together, the “Legislature”). The audit includes budgetary, hiring, spending, and procurement information, information regarding active and pending legislation, the process for appointing committees, the adoption and suspension of legislative rules, and the policies and procedures of the Legislature.¹

Ronald Mariano, Speaker of the Massachusetts House of Representatives, and Karen Spilka, President of the Massachusetts Senate, have indicated that both will not comply with the announced audit of the Legislature. Copies of the Letter from Ronald Mariano, Speaker of the House, to the State Auditor dated March 24, 2023 and the Letter from Karen E. Spilka, President of the Senate to the State Auditor dated March 24, 2023 are attached hereto as [Attachment 1](#).

¹ The State Auditor’s enabling statute, M.G.L. c. 11, § 12, does not limit the office merely to performing financial audits. Rather, it grants the State Auditor broad authority to “**audit the accounts, programs, activities and functions** . . . of all departments, offices, commissions, institutions and activities of the commonwealth, including those of districts and authorities created by the general court.” M.G.L. c. 11, § 12. The enabling statute consistently uses such broad language to describe the State Auditor’s authority. For example, it authorizes the State Auditor “**to inspect, review or audit, in conformity with generally accepted government auditing standards, the accounts, books, records and activities** of vendors contracting, having contracted, or agreeing to provide services or materials of any description, or any other thing of value pursuant to any and all contracts or agreements between the commonwealth, its departments, agencies, bureaus, boards, commissions, institutions, or authorities and said vendors” *Id.* Generally accepted government accounting standards define, authorize and set forth guidelines for the conduct of financial as well of performance audits.

Both legislative leaders contend that the audit would exceed the authority granted to the Office of the State Auditor under M.G.L. c. 11, § 12. They also argue that the audit violates the separation of powers principles enunciated in Article XXX of the Declaration of Rights of the Massachusetts Constitution.

However, a review of the applicable authorities demonstrates that the Office of the State Auditor has the authority to audit the Legislature under its enabling statute. M.G.L. c. 11, § 12 grants the Office of the State Auditor broad authority to audit the “departments” of the Commonwealth. The Legislature has been consistently referred to as a “department” of the Commonwealth in the Massachusetts Constitution, statutes, and opinions of the Supreme Judicial Court for at least a century now. Thus, the plain language of M.G.L. c. 11, § 12 provides the Office of the State Auditor with the authority to audit the Legislature.

Additionally, this audit is consistent with past practices of the Office of the State Auditor. Our research has revealed at least 113 past audits of the Legislature, beginning with the Office of the State Auditor’s inception in 1849. A list of audits is attached hereto as [Appendix A: Audits of the Legislative Department conducted by the Office of the State Auditor](#). The Office of the State Auditor also regularly audits the state Judiciary, another recognized “department” of the Commonwealth that, according to the legislative leadership’s interpretation of the Massachusetts Constitution, should give rise to separation of powers concerns.

Further indicating that our office’s audit of the Legislature would not violate separation of powers principles is the reality that the elected State Auditor is not an appointee or a creature of statute; but rather a constitutional officer. As such, the State Auditor is directly elected by, and responsible for representing the will of, the people of the Commonwealth. It is the people to whom the Constitution has granted supreme power over the institutions of government.² The elected Auditor, on behalf of the people, provides an oversight function without corresponding powers to compel auditees to implement any recommendations or to exercise any of their powers.

Public policy considerations also favor an adjudication of this issue and affirmation that the Office of the State Auditor has the authority to audit the Legislature, as has occurred many times in the past and as evidenced by the 113 audits listed in [Appendix A](#). Massachusetts has one of the least transparent legislatures in the United States and there is abundant evidence that Massachusetts voters want more transparency from their elected representatives. Indeed, I was duly elected on a platform of increasing transparency, accountability, and equity that included conducting an audit of the State Legislature. The people of Massachusetts have themselves expressed a strong policy preference toward opening the Legislature up to independent scrutiny. Thus, it is critical to adjudicate the issue of the Office of the State Auditor’s authority to carry out this oversight work – as was supported by the democratic will of the people.

² See Art. V. Magistrates and officers as agents of and accountable to the people, MA CONST Pt. 1, Art. 5 (“All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”).

For all of these reasons, discussed further below, the Office of the State Auditor is authorized by both M.G.L. c. 11, § 12 and the Massachusetts Constitution to audit the Legislature – it is critical that this authority be recognized, by litigation if necessary.

II. The Office of the State Auditor has Statutory Authority to Audit the Legislature Because It is a “Department” of the Commonwealth

The Office of the State Auditor is governed by M.G.L. c. 11, § 12, entitled, “Audits, access to accounts; production of records; response to findings; exceptions.” This statute grants the Office of the State Auditor the authority to “audit the **accounts, programs, activities, and functions ... of all departments, offices, commissions, institutions and activities of the commonwealth...**” The question of the Office of the State Auditor’s authority to audit the legislative department requires an adjudication of the legislative department’s proper consideration as a “department”, its legislative activities as “activities of the commonwealth”, and its functions as “functions” in accordance with this statute.

Assistant Attorney General (now, Appeals Court Judge) Peter Sacks wrote in an opinion letter to State Auditor A. Joseph DeNucci on April 8, 1994, this “question is not free from doubt[,]” as it is fundamentally one of statutory interpretation. Judge Sacks was of the opinion that it “seem[ed] clear enough that the legislature is not an ‘office’ or ‘commission’ and almost as clear that it is not an ‘institution’” but less clear whether it might be considered a “department” or “activity.”³

There is persuasive authority to support the legislative department being considered a “department”, its legislative and budgetary activities being considered “activities”, and its functions as “functions.” Article XXX of the Declaration of Rights of the Massachusetts Constitution — the very constitutional provision that the Legislature’s leadership has relied upon to argue that any audit would violate separation of powers principles — clearly indicates that the Legislature is a “department” of the Commonwealth:

In the government of this Commonwealth, the **legislative department** shall never exercise the executive or judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Elsewhere, the Massachusetts Constitution consistently refers to the Legislature as a “department” of the Commonwealth. For example, Pt. 2, c. 1, § 1, art.1, which is titled “**Legislative department,**” states:

The department of legislation shall be formed by two branches, a Senate and House of Representatives: each of which shall have a negative on the other. The legislative

³ As stated, our office has sought to audit budgetary, procurement, hiring, spending, committee appointment, adoption and suspension of rules, adoption of policies and procedures and other functions that are clearly “activities” of state government and the legislative department itself.

body shall assemble every year ... and shall be stiled, THE GENERAL COURT OF MASSACHUSETTS.

Thus, it is clear that the framers of the Massachusetts Constitution considered the Legislature to be a “department” of the Commonwealth.

For more than a century, the Supreme Judicial Court has referred to the Legislature as a “department” of the Commonwealth. In opinion after opinion regarding “solemn occasions,”⁴ where the Supreme Judicial Court interprets the constitutional and statutory power and authority of the Governor and Legislature, the Court regularly refers to the Legislature as a “department” of the Commonwealth. See, e.g., Answer of the Justices to the Governor, 444 Mass. 1201, 1204–05 (2005) (Article 30 “acts as an inhibition upon the Justices giving opinions as to the duties of either the executive or **legislative department** except under the Constitution.”); see also Opinion of Justices to Senate, 386 Mass. 1201, 1219 (1982); Opinion of the Justices, 365 Mass. 639, 675 (1971). Similarly, the Supreme Judicial Court has a plethora of instances identifying the Legislature as a “department” in their decisions. See, e.g., Fitzgerald v. Selectmen of Braintree, 296 Mass. 362, 367 (1937) (referring to “[t]he **General Court** as “**the legislative department of the government.**”⁵

Such a reading of “department” is also consistent with how the term is used throughout Massachusetts statutes. For example, M.G.L. c. 29, § 7L states that “expenses of the commonwealth shall include expenses of the executive, **legislative** and judicial **departments**[.]” Likewise, M.G.L. c. 234A, § 37, a statute related to the Office of Jury Commissioner, states that “[t]he **legislative, executive, and judicial departments of the commonwealth** and the United States shall not be impeded by the provisions of this chapter from freely exercising their independent powers and duties.”

Additionally, M.G.L. c. 11, § 12 does not, by its plain language, exempt the Senate, House of Representatives, or any other legislative entity from the scope of the Office of the State Auditor’s oversight authority. At least one former Attorney General has recognized that any institution, activity, or department of the Commonwealth that is not expressly exempted from M.G.L. c. 11, § 12 is subject to the Office of the State Auditor’s oversight. Specifically, in a letter to State Auditor Francis X. Hurley dated March 4, 1931, Attorney General Joseph E. Warner wrote: “[t]he plain meaning of section 12 ... is that the Department of the Auditor of the

⁴ The Massachusetts Constitution requires the Justices of the Supreme Judicial Court to give opinions to the Governor, the Legislature, or the Executive Council “upon important questions of law, and upon solemn occasions.” Part II, c. 3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Amendments.

⁵ In discussing this persuasive authority, we recognize that the Supreme Judicial Court held in Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the Gen. Court, 375 Mass. 179 (1978), that the Massachusetts Legislature is not an “agency, executive office, department, board, commission, bureau, division or authority within the meaning of [the Commonwealth’s public records law]”. Id. at 184 (citing M.G.L. c. 4, § 7, cl. 26). However, that holding was narrowly limited to the state’s public records law and is not directly applicable to M.G.L. c. 11, § 12, the language of which differs and is broader. See id. (“Although the General Court has been characterized as one of the ‘three great departments of government’, the term ‘department’ appearing **in this statutory clause** has a much more restricted meaning.”) (internal citations omitted).

Commonwealth shall make a careful audit of all departments, offices, commissions, institutions, and activities of the Commonwealth, **except such as are expressly exempted in the statute.**⁶ The notable absence of an explicit exclusion related to the legislative department from the plain language of M.G.L. c. 11, § 12 is a clear indication that the intent of the Legislature was to include, and not exclude, the legislative department among the entities that the Office of the State Auditor has authority to audit.

III. There is a Historical Practice of the Office of the State Auditor Auditing the Legislature

The Office of the State Auditor’s authority to audit the Legislature is further supported by its practices of auditing both the Legislature and the Judiciary since its inception in 1849. Although statutory interpretation is ultimately the responsibility of the Judiciary, Massachusetts courts have made clear that “reasonable and consistent interpretations of statutes, by agencies charged with their implementation, are entitled to deference.” Board of Education v. School Committee of Quincy, 415 Mass. 240 (1993); see also Boston Neighborhood Taxi Ass’n v. Department of Pub. Utils, 410 Mass. 686, 692 (1991) (“A reviewing court must accord due weight and deference to agency’s reasonable interpretation of a statute within its charge.”). Thus, if there is an established history of the Office of the State Auditor interpreting M.G.L. c. 11, § 12 as empowering them to audit the Legislature, a court must provide appropriate deference to that longstanding reasonable interpretation.

More recently, while some elected State Auditors have chosen not to audit the legislative department, our research has revealed that there is indeed a well-established historical practice of the Office of the State Auditor auditing the legislative department of government. To date, our office has found 113 audits - irrefutable and clear evidence that the Office of the State Auditor not only has the authority to audit the Legislature - but that it has done so repeatedly and regularly throughout its history. See [Appendix A](#). These reports cover audit periods spanning over 150 years with the most recent audit of the Legislature issued in 2006. It is notable that the Office of the State Auditor has audited the Legislature from its inception in 1849. The Office of the State Auditor's first annual report, published in 1850, audited the legislative department's accounts, books, and activities. It is important to note that this audit not only covered the year ending December 31, 1849, but also looked back almost two decades to 1831. This initial audit of the Legislature is a strong indication that the Legislature’s intent was to require an audit of the Legislature by the Office of the State Auditor.

⁶ We recognize that, in his 1994 letter to then State Auditor A. Joseph DeNucci, Assistant Attorney General Peter Sacks expressed some doubt that the term “department” in M.G.L. c. 11, § 12 is used in the same sense as it is used in the separation of powers provisions of the state Constitution. However, AAG Sacks relied on the incorrect presumption that the State Auditor had never audited the Legislature before. As previously noted, this office can cite to at least 113 audits of the Legislature conducted by the Office of the State Auditor. See [Appendix A](#). At any rate, he ultimately determined that M.G.L. c. 11, § 12 “simply does not address the matter clearly.”

IV. Legislative Audits are Contemplated by the Massachusetts Constitution

As noted above, legislative leadership has argued that an audit of the Legislature by the Office of the State Auditor would violate basic separation of powers principles under the Massachusetts Constitution. For example, in the previously referenced letter dated March 24, 2023, to our office, Speaker Mariano argued: “[t]he people of the Commonwealth are the final arbiters of the performance of their duly elected representatives” and “[f]or an executive officer to claim any authority over the General Court is to suggest an authority over the people themselves.”⁷

This assertion is woefully mistaken. An audit of the Legislature reflects the will of the people, not the circumvention thereof. As mentioned previously, the State Auditor is a constitutional officer who is directly elected by, and thus ultimately responsible and accountable to, the people of the Commonwealth.

When the Massachusetts Constitution was adopted in 1780, the position of State Auditor did not exist. Rather, in 1849, the Legislature created the position through statute, under which the Auditor was to be appointed by the Legislature. See St. 1849, c. 56. However, the State Auditor was later elevated to constitutional status, along with the Attorney General, the Secretary of the Commonwealth, and the Treasurer, when the Massachusetts Constitution was amended in 1855.

During the debates of the Constitutional Convention of 1853, the drafters recognized “[t]he office of Auditor of Accounts ... [as] an office of great importance” and that “an officer of this character, vested with the powers with which that officer is vested, could better discharge those duties than they could be discharged by a committee of the legislature, or by any other officer.”⁸ The drafters also acknowledged that, as a constitutional officer, the State Auditor should be directly elected by the people rather than appointed by the Legislature or any “Supreme Executive Magistrate” and that under “the theory of our government ... the supreme power is with the people.”⁹

Following these debates, Massachusetts voters amended the Constitution to declare the State Auditor to be a constitutional officer directly elected by the people, rather than appointed

⁷ The Legislature claims that it currently conducts audits of itself and that the State Auditor’s conduct of an audit would therefore be an exercise of inherent Legislative authority. Auditing oneself is not auditing, as it lacks the independence required of any audit (See Government Auditing Standards, 2018 Revision, Technical Update April 2021) and auditing is not an inherent legislative power. Just as a purchase of goods and services by the Legislature does not make the purchase of goods and services an inherent Legislative power that cannot be conducted by other agencies and offices of the Executive or Judicial departments of government, neither does the Legislature’s exercise of an audit power mean that the Executive cannot wield that power. The Legislature cannot audit itself, and even if it could, doing so does not make auditing the Legislature an inherent Legislative power.

⁸ Official Report of the Debates and Proceedings on the State Convention, 703 (1853) available at <https://archives.lib.state.ma.us/handle/2452/783448>.

⁹ Official Report of the Debates and Proceedings on the State Convention, 704 (1853) available at <https://archives.lib.state.ma.us/handle/2452/783448>.

by the Governor or Legislature. As a result, the State Auditor is accountable directly and independently to the people of the Commonwealth, who hold supreme power. The Supreme Judicial Court has recognized the importance of this change in the State Auditor's position, noting that the 1855 amendment "elevated the office of the Auditor to true constitutional stature." See Massachusetts Bay Transp. Authority v. Auditor of Com., 430 Mass. 783, 787 (2000). This attempt by the House Speaker and Senate President to block or stymie an audit, conducted on behalf of the people of Massachusetts, by their duly elected constitutional officer, is a direct affront to the Constitution which clearly states that they "are at all times accountable" to the people.

The Supreme Judicial Court has "repeatedly confirmed the authority of constitutional officers [such as the State Auditor] to exercise independent judgment." Id. Moreover, it has held that you, as Attorney General and a constitutional officer, may act contrary to the express wishes of the Executive department by, for example, refusing to prosecute an appeal ordered by the Governor. See Secretary of Admin. & Fin. V. Attorney Gen., 367 Mass. 154, 163 (1975). This power to exercise independent judgment is rooted in the Massachusetts Constitution, not the constitutional officer's enabling statute, and is therefore granted by the people. See Alliance, AFSCME/SEIU, AFL-CIO v. Com., 425 Mass. 534, 538 n.6 (1997) ("By virtue of this separate election, the Attorney General does not operate in a wholly subordinate role to the Governor, but may exercise independent judgment ..."). Thus, in auditing the Legislature, I am simply exercising the independent judgment vested in the State Auditor by the Constitution — and by implication the people of the Commonwealth.

Finally, I note that the Supreme Judicial Court has long emphasized the necessity for flexibility in the construction and application of Article XXX's separation of powers doctrine. See, e.g., Gray v. Commissioner of Revenue, 422 Mass. 666, 670-71 (1996) (some overlap of executive, judicial, and legislative functions is inevitable); Chief Administrative Justice of the Trial Court v. Labor Relations Com'n, 404 Mass. 53, 56 (1989) (absolute division of the executive, legislative, and judicial functions is neither possible nor always desirable); Clerk of Superior Court for Middlesex County v. Treasurer and Receiver General, 386 Mass. 517, 525 (1982) (while principle of separation of powers is deeply entrenched, absolute division between three governmental departments is neither possible, nor always desirable); Opinions of the Justices to the Senate, 372 Mass. 883, 892 (1977) ("[W]e recognize that an absolute division of the three general types of functions is neither possible nor always desirable."). Thus, the separation of powers doctrine has never been understood to mean that the three executive, legislative, and judicial departments of government operate entirely independently of each other, or that one department may never exercise oversight authority over another department. Furthermore, it should be noted that the Office of the State Auditor does not seek to exercise "legislative and judicial powers." Rather, our office is exercising its established oversight authority to audit a department under its enabling statute M.G.L. c.11, § 12. Our office's exercise of this function based on our statute — that the Legislature, without legal support, claims to reserve solely to itself — does not violate Article XXX's separation of powers doctrine.

V. Public Policy Considerations Favor an Audit of the Legislature

The Massachusetts Legislature is widely considered to be one of the least transparent state legislatures in the country. Indeed, a recent article gave the Massachusetts Legislature the ignominious ranking as “arguably the least transparent state legislative body in the country.”¹⁰ In 2013, the Sunlight Foundation conducted a nationwide study of the accessibility of each state’s legislative data. It gave Massachusetts a grade of “F.”¹¹ In 2015, the Center for Public Integrity gave Massachusetts a grade of “D+” in its State Integrity Investigation, which measured hundreds of variables to compile transparency and accountability grades for all 50 states.¹² And in 2019, the Pioneer Institute ranked Massachusetts 47th out of 50 states in a study of financial disclosure requirements for elected officials across the nation.¹³

Local and national media also frequently comment on the Legislature’s lack of transparency. For example, in 2021, the Boston Globe discussed the Massachusetts Legislature’s “culture of secrecy” at length, writing:

For years, voters have been left to wonder why some popular, common-sense proposals don’t pass in the Massachusetts House — even when a majority of the chamber’s members sign on publicly in support. That’s because the vast majority of bills never get a formal vote; instead, they die in the obscure committee process, where voters can’t see who killed them.¹⁴

Massachusetts voters agree that this is a problem. In 2020, voters in 16 House districts overwhelmingly supported ballot measures aimed at increasing transparency in the House committee process by requiring the House to make the results of all votes in its legislative committees publicly available on its website.¹⁵ They were joined by roughly 20 activist groups,

¹⁰ Patrick Gleason, “In Massachusetts, Once a Leader in Government Transparency, Key Votes are Hidden from the Public,” Forbes (Jan. 1, 2022) Available At <https://www.Forbes.Com/Sites/Patrickgleason/2022/01/12/In-Massachusetts-Once-A-Model-In-Government-Transparency-Key-Votes-Are-Hidden-From-The-Public/?Sh=445761536683>.

¹¹ “Open States: Transparency Report Card,” Sunlight Foundation (Mar. 11, 2013) available at <https://sunlightfoundation.com/2013/03/11/openstates-report-card/>; see also “Open States’ Legislative Data Report Card,” Ballotpedia, available at https://ballotpedia.org/Open_States%27_Legislative_Data_Report_Card.

¹² “State Integrity Investigation,” The Center for Public Integrity (Nov. 9, 2015) available at <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/how-does-your-state-rank-for-integrity/>.

¹³ “Ranking the States on Financial Transparency,” Pioneer Institute (2019) available at <https://pioneerinstitute.org/state-rankings-financial-disclosure/>.

¹⁴ Emma Platoff, “Massachusetts lawmakers are debating their transparency procedures – behind closed doors,” Boston Globe (Apr. 7, 2021), available at <https://www.bostonglobe.com/2021/04/07/metro/massachusetts-lawmakers-are-debating-their-transparency-procedures-behind-closed-doors/>.

¹⁵ See, e.g., Emma Platoff, “Months later, Beacon Hill has no agreement on contested transparency rules,” Boston Globe (July 4, 2021), available at <https://www.bostonglobe.com/2021/07/04/metro/months-later-beacon-hill-has-no-agreement-contested-transparency-rules/>; see also Danny Jin, “Massachusetts House rejects rules changes backed by transparency advocates,” The Berkshire Eagle (July 7, 2021), available

including Act On Mass, the Sunrise Movement, Mijente Boston, the Boston Indivisible Progressive Action Group, and Our Climate Boston, who organized a campaign pushing for reform of the state’s legislative rules.¹⁶ However, when that initiative came before the House, its members “... overwhelmingly rejected a transparency amendment that would have forced them to post online their votes on bills in committees, publicize the testimony that influences those votes when requested, and required a one-week notice in the scheduling of committee hearings.”¹⁷

If the people are to be the supreme authority in our Commonwealth, then transparency and accountability must be of paramount importance. Without them, the people cannot be informed and have no way to exercise their supreme authority in an informed, responsible manner that truly reflects their will. A lack of transparency to the people renders ineffective their ability to execute their authority under our Constitution and form of government. Knowledge is power – and power belongs to the people.

When asked, Massachusetts voters have voted, via ballot initiative, for more transparency. Transparency, accountability, equity, and oversight are critical to helping voters execute their supreme authority over the Commonwealth and must be the unified position of the Commonwealth as a government. They are clearly in the public interest and, therefore, must be embraced to the fullest extent as the position of the government that serves the public.

VI. Examples of Legislative Oversight of the Executive and Judicial Departments

Legislative leaders have argued that the Office of the State Auditor cannot audit the legislative department because doing so would violate separation of powers principles – yet, the Legislature, itself, has routinely exercised oversight and audit authority over the executive and judicial departments. The Legislature itself appoints “legislative auditors” to actively engage in this oversight. Several committees engage in oversight and have a responsibility that exceeds the typical legislative focus by topic. These practices, described in greater detail below, stand as examples of reasonably acceptable principles of oversight under which the Office of the State Auditor seeks to conduct its audit.

a) Oversight Focused Committees

A number of legislative committees have a history of practicing oversight of executive and judicial departments of the government. In fact, **the House and Senate Committees on Post Audit and Oversight** established under M.G.L. c. 3 § 63 have as their established purpose the duty to “oversee the development and implementation of legislative auditing programs to be conducted by the bureaus with special emphasis on performance auditing.” Such power

at https://www.berkshireagle.com/news/local/massachusetts-house-rejects-rules-changes-backed-by-transparency-advocates/article_34f963ca-df72-11eb-9fd3-9fa0e8319d93.html.

¹⁶ See, e.g., Tori Bedford, “‘It’s All In the Dark:’ Activists Call For Legislative Transparency On Beacon Hill,” *GBH* (June 27, 2021) available at <https://www.wgbh.org/news/local-news/2021/06/27/its-all-in-the-dark-activists-call-for-legislative-transparency-on-beacon-hill>.

¹⁷ Platoff, *supra* n.12.

includes, “the power to summon witnesses, administer oaths, take testimony and compel the production of books, papers, documents and other evidence in connection with any authorized examination and review. If the committees shall deem special studies or investigations to be necessary, they may direct their *legislative auditors* to undertake such studies or investigations.” Likewise, the **Joint Committee on State Administration and Regulatory Oversight** names among its responsibilities the consideration of “all matters concerning competitive bidding on public contracts, public construction, open meeting laws, state regulations, state agencies, lobbyists’ reporting laws and such other matters as may be referred,” thus encompassing all departments of the government.¹⁸

b) Topically Focused Committees

Multiple committees provide direct oversight of executive department entities. The **Joint Committee on Children, Families and Persons with Disabilities** claims “responsibility to *oversee* the Departments of Children and Families, Developmental Services, Transitional Assistance and Youth Services; the Massachusetts Commissions for the Blind, the Deaf and Hard of Hearing, and the Massachusetts Rehabilitation Commission.”¹⁹ Similarly, the **Joint Committee on Environment and Natural Resources** includes among its charges the responsibility to “consider all matters concerning the Division of Conservation and Recreation natural resources and the environment....”²⁰ The **Joint Committee on Mental Health, Substance Use and Recovery** asserts responsibility for the oversight of the Department of Mental Health and the Bureau of Substance Addiction Services.²¹

The **Joint Committee on Public Service’s** duties cover, “all matters concerning the salaries, civil service and retirement of public employees (including the retirement of judges, court personnel and county employees but excluding the salaries of said judges, court personnel and county employees).”²² This Committee’s extensive oversight authority extends not just to the executive department, but also reaches the Judiciary.

In each of these instances, the Legislature exercises significant oversight over the executive department and also has the authority to compel both testimony and data production. This long-standing practice has not yet given rise to a separation of powers objection, even though the legislative department also controls the budgets of the executive and judicial departments. The Office of the State Auditor seeks only to exercise its authority to provide oversight of the legislative department of government, as it has done at least 113 times dating back to its creation, without the ability to compel the legislative department to exercise any

¹⁸ “Joint Committee on State Administration and Regulatory Oversight, 193rd General Court of the Commonwealth of Massachusetts, available at <https://malegislature.gov/Committees/Detail/J25/About>.

¹⁹ “Joint Committee on Children, Families, and Persons with Disabilities,” 193rd General Court of the Commonwealth of Massachusetts, available at <https://malegislature.gov/Committees/Detail/J13/About>.

²⁰ “Joint Committee on Environment and Natural Resources,” 193rd General Court of the Commonwealth of Massachusetts, available at <https://malegislature.gov/Committees/Detail/J21/About>.

²¹ “Joint Committee on Mental Health, Substance Use and Recovery,” 193rd General Court of the Commonwealth of Massachusetts, available at <https://malegislature.gov/Committees/Detail/J18/About>.

²² “Joint Committee on Public Service,” 193rd General Court of the Commonwealth of Massachusetts, available at <https://malegislature.gov/Committees/Detail/J23/About>.

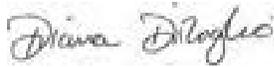
power, and without the budgetary powers that the Legislature exercises over other departments while simultaneously conducting oversight.

VII. Conclusion

Our enabling statute's clear language, historical precedent, and informed analysis of the constitutional separation of powers doctrine, all indicate that the Office of the State Auditor has the authority to audit the Legislature under M.G.L. c. 11, § 12. The Office of the State Auditor urges the Office of the Attorney General to support our effort – an effort backed not only by the Constitution and laws of the Commonwealth, but also the will of Massachusetts voters - to increase transparency, accountability, and equity throughout state government, including the Legislature.

I look forward to further discussions with you and your team.

Best regards,



Diana DiZoglio
Auditor of the Commonwealth

Cc: M. Patrick Moore Jr., First Assistant Attorney General (AGO)
Michael Leung-Tat, Deputy Auditor & General Counsel (OSA)

Appendix A:

Audits of the Legislative Department conducted by the Office of the State Auditor

- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1849; Issued January 10, 1850
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1850; Issued January 14, 1851
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1851; Issued January 15, 1852
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1852; Issued January 15, 1853
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1853; Issued January 14, 1854
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1854; Issued January 15, 1855
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1855; Issued January 16, 1856
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1856; Issued January 13, 1857
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1857; Issued January 12, 1858
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1858; Issued January 26, 1859
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1859; Issued January 31, 1860
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1860; Issued January 15, 1861
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1861; Issued January 15, 1862
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1862; Issued January 15, 1863

- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1863; Issued January 15, 1864
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1864; Issued January 16, 1865
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1865; Issued January 15, 1866
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1866; Issued January 15, 1867
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1867; Issued January 15, 1868
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1868; Issued January 15, 1869
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1869; Issued January 15, 1870
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1870; Issued January 14, 1871
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1871; Issued January 13, 1872
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1872; Issued January 14, 1873
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1873; Issued January 14, 1874
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1874; Issued January 14, 1875
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1875; Issued January 13, 1876
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1876; Issued January 15, 1877
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1877; Issued January 15, 1878
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1878; Issued January 15, 1879

- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1879; Issued January 15, 1880
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1880; Issued January 14, 1881
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1881; Issued January 12, 1882
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1882; Issued January 15, 1883
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1883; Issued January 15, 1884
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1884; Issued January 29, 1885
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1885; Issued January 29, 1886
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending, December 31, 1886; Issued January 28, 1887
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1887; Issued January 30, 1888
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1888; Issued January 30, 1889
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1889; Issued January 30, 1890
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1890; Issued January 19, 1891
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1891; Issued January 19, 1892
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1892; Issued January 30, 1893
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1894; Issued January 30, 1895
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1894; Issued January 30, 1895

- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1895; Issued January 30, 1896
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1896; Issued January 26, 1897
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1897; Issued January 27, 1898
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1898; Issued January 30, 1899
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1899; Issued January 30, 1900
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1900; Issued January 15, 1901
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1901; Issued January 30, 1902
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1902; Issued January 30, 1903
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1903; Issued January 30, 1904
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1904; Issued January 30, 1905
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending December 31, 1905; Issued January 30, 1906
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year (Eleven Months) ending November 30, 1906; Issued January 2, 1907
- Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1907; Issued January 1, 1908
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1908; Issued January 13, 1909
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1909; Issued January 12, 1910
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1910; Issued January 11, 1911

- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1911; Issued January 10, 1912
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1912; Issued January 8, 1913
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1913; Issued January 14, 1914
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1914; Issued January 13, 1915
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1915; Issued January 12, 1916
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1916; Issued January 10, 1917
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1917; Issued January 9, 1918
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1918; Issued January 8, 1919
- Report of the Auditor of the Commonwealth of Massachusetts for the Fiscal Year ending November 30, 1919; Issued January 14, 1920
- The Commonwealth of Massachusetts Report of the Auditor for the Fiscal Year ending November 30, 1920; Issued January 12, 1921
- The Commonwealth of Massachusetts Report of the Auditor for the Fiscal Year ending November 30, 1921; Issued January 11, 1922
- The Commonwealth of Massachusetts Report of the Auditor for the Fiscal Year ending November 30, 1922; Issued January 10, 1923
- Report on the Examination of the Accounts of the Sergeant-at-Arms (December 15, 1937 to April 27, 1939); Issued July 5, 1939
- Report on the Examination of the Accounts of the Sergeant-At-Arms (April 11, 1951 to March 14, 1952); Issued May 27, 1952
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (March 15, 1971 to March 27, 1972); Issued July 24, 1972

- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (April 14, 1971 to April 18, 1972); Issued August 28, 1972
- State Auditor's Report on the Examination of the Accounts of the Legislative Post Audit and Oversight Bureau (From Inception, March 1, 1972 to May 22, 1973); Issued October 11, 1973
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (March 27, 1972 to June 4, 1973); Issued October 26, 1973
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (April 18, 1972 to May 31, 1973); Issued October 26, 1973
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (June 4, 1973 to February 19, 1974); Issued May 16, 1974
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (May 31, 1973 to February 4, 1974); Issued July 2, 1974
- State Auditor's Report on the Examination of the Accounts of the Legislative Post Audit and Oversight Bureau (May 22, 1973-February 15, 1974); Issued July 2, 1974
- State Auditor's Report on the Examination of the Accounts of the Legislative Post Audit and Oversight Bureau (February 11, 1974 to May 27, 1975); Issued September 12, 1975
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (February 4, 1974 to May 21, 1975); Issued October 2, 1975
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (February 19, 1974 to May 12, 1975); Issued November 4, 1975
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (May 21, 1975 to December 22, 1975); Issued June 10, 1976
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (May 12, 1975 to March 8, 1976); Issued July 22, 1976
- State Auditor's Report on the Examination of the Accounts of the Legislative Post Audit and Oversight Bureau (May 27, 1975 to March 8, 1976); Issued, October 21, 1976

- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (December 22, 1975 to October 25, 1976); Issued January 12, 1977
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (March 8, 1976 to January 5, 1977); Issued March 30, 1977
- State Auditor's Report on the Examination of the Accounts of the Legislative Post Audit and Oversight Bureau (March 8, 1976 to March 14, 1977); Issued, May 3, 1977
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (October 25, 1976 to October 28, 1977); Issued May 22, 1978
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (July 1, 1976 to June 30, 1977); Issued May 26, 1978
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (November 16, 1977 to October 17, 1978); Issued April 5, 1979
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (July 1, 1977 to June 30, 1978); Issued June 19, 1979
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (July 1, 1978 to June 30, 1979); Issued September 25, 1980
- Report on the Examination of the Accounts of the Legislative Research Council and Legislative Research Bureau (July 1, 1978 to June 30, 1980); Issued April 17, 1981
- State Auditor's Report on the Examination of the Accounts of the Legislative Post Audit and Oversight Bureau (July 1, 1978 to June 30, 1980); Issued May 7, 1981
- State Auditor's Report on the Examination of the Accounts of the Sergeant-at-Arms (July 1, 1979 to June 30, 1980); Issued August 14, 1981
- State Auditor's Report on the Activities of the Legislative Research Council and Legislative Research Bureau (July 1, 1980 to June 30, 1982); Issued June 9, 1983
- State Auditor's Final Report on the Activities of the Legislative Post Audit and Oversight Bureau (July 1, 1979 to June 30, 1981); Issued August 25, 1983
- State Auditor's Report on the Activities of the Legislative Research Council and Legislative Research Bureau (July 1, 1982 to June 30, 1984); Issued April 25, 1985
- State Auditor's Report on the Activities of the Office of Legislative Post Audit and Oversight Bureau of the House of Representatives (July 1, 1983 to June 30, 1985); Issued May 23, 1986

- State Auditor's Report on the Activities of the Legislative Research Council and Legislative Research Bureau (July 1, 1984 to June 30, 1986); Issued December 31, 1986
- State Auditor's Report on the Activities of the Sergeant-at-Arms (July 1, 1984 to June 30, 1986); Issued June 9, 1987
- State Auditor's Report of the Activities of the Office of Legislative Post Audit and Oversight Bureau of the House of Representatives (July 1, 1986 to June 30, 1987); Issued June 7, 1988
- State Auditor's Report on the Activities of the Legislative Research Council and Legislative Research Bureau (July 1, 1986 to June 30, 1988); Issued September 27, 1989
- State Auditor's Report on the Activities of the Sergeant-at-Arms (July 1, 1988 to June 30, 1989); Issued September 17, 1990
- State Auditor's Report Covering the Overpayments to a Court Officer (January 18, 1984 to May 11, 1989) Issued January 15, 1992
- Review of Selected Information Technology (IT)-related controls at the Office of the Sergeant-at-Arms (December 13, 2001 to December 28, 2001); Issued February 28, 2002
- Office of the State Auditor's Report on Information Technology-Related Controls for Virus Protection at the Legislative Information Services (October 9, 2003 to December 8, 2005); Issued May 11, 2006

ATTACHMENT 1



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HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133-1008

RONALD MARJANO

Speaker

ROOM 356

OFFICE PHONE:

(617) 722-2500

March 24, 2023

The Honorable Diana DiZoglio
Auditor of the Commonwealth
State House, Room 230
Boston, MA 02133

Dear Auditor DiZoglio,

I write to confirm receipt of your letter dated March 7, 2023, claiming an authority to compel a performance audit of the General Court, including the House of Representatives, and the email from your staff dated March 15, 2023, requesting a meeting to begin the audit process. Upon receiving your letter, I asked the Counsel to the House of Representatives to research the legality of your claim. Counsel's conclusion and legal analysis are enclosed. This letter is the House's final response to your request, and is based on a careful reading of our history and laws.

That your office has the legal authority to conduct an audit of the General Court is a claim entirely without legal support or precedent, as it runs contrary to multiple, explicit provisions of the Massachusetts Constitution, and is wholly unnecessary as the public currently has full and ready access to the House's financial information.

All of the House's accounts are available on the Commonwealth's Financial Records Transparency Platform ("CTHRU") webpage, which can be viewed at www.macomptroller.org/cthru. There are **no expenditures** of the House that are not posted on CTHRU and available for public inspection. Additionally, the House adopts rules for each legislative session, including a rule that requires all House accounts to be independently audited on an annual basis *"in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States,"* and that the audit report be filed with the House Clerk for public inspection.

Any performance assessment of the House of Representatives relative to its budgeting, hiring, spending and procurement, active and pending legislation, committee appointments, legislative rules, and its policies and procedures are the sole constitutional purview of the Members elected to the House of Representatives by the people of the Commonwealth. The suggestion that you have such authority violates basic separation of powers principles that the Supreme Judicial Court has called "fundamental... to our form of government," and interferes with what that same Court opined are the "exclusive" and "absolute" constitutional powers of the House of Representatives.

The people of the Commonwealth are the final arbiters of the performance of their duly elected representatives. As those duly elected representatives, we safeguard these constitutional protections not because of institutional jealousies but because the Massachusetts Constitution guarantees "the people of this Commonwealth ... the sole and exclusive right of governing themselves," and that part of the Constitution which establishes the House of Representatives begins by declaring, "There shall be in the Legislature of this Commonwealth a representation of the people." For an executive officer to claim any authority over the General Court is to suggest an authority over the people themselves.

Therefore, given that your attempt to conduct a performance audit of the House of Representatives exceeds your legal authority and is unconstitutional, your request to meet to begin such audit is respectfully denied.

Sincerely,



Ronald J. Mariano
Speaker of the House



The Commonwealth of Massachusetts

OFFICE OF THE COUNSEL TO THE HOUSE OF REPRESENTATIVES
ROOM 139, STATE HOUSE

BOSTON 02133

TEL: (617) 722-2360

FAX: (617) 722-2644

March 23, 2023

The Honorable Ronald J. Mariano
Speaker of the House
State House, Room 356
Boston, MA 02133

Dear Speaker Mariano,

On March 7, 2023, Auditor DiZoglio addressed an engagement letter to you declaring her intent to commence a performance audit of the General Court, including the House of Representatives, and claiming Section 12 of Chapter 11 of the General Laws as the legal basis for her authority. You forwarded me a copy of that letter and requested my opinion as to the Auditor's legal and constitutional authority to conduct such an audit. My conclusion is that the Auditor lacks any legal authority to conduct an audit of the General Court, or either branch thereof. Specifically, as applied to the House of Representatives, any such audit by the Auditor, an officer of the Executive Branch, would violate both Article X of Section 3 of Chapter 1 of Part the Second of the Constitution of the Commonwealth as well as Article XXX of the Declaration of Rights of the Massachusetts Constitution.

Prior to addressing in detail the fundamental constitutional and legal issues raised by the Auditor's claim, I want to first dispel the notion that the most recent audit of the House of Representatives was in 1922, as the Auditor has been publicly stating. As you know, the House is independently audited pursuant to House Rule 85A, and the reports for those annual audits are filed with the House Clerk and available to the public.

I presume that the 1922 document that the Auditor has been referencing is the Report of the Auditor for the Fiscal Year ending November 30, 1922, filed January 10, 1923. This report was not, nor does it reflect, an audit of the House of Representatives. In fact, we have no records of the Office of the State Auditor ever auditing the House of Representatives. A close inspection of the 1922 document itself, and of the historical context in which it was produced, makes it clear that this report is merely an accounting of the Commonwealth's revenue, expenses and debt, including those expenses of the Legislature and other branches and departments of the Commonwealth, including the Auditor's office itself. Clearly, such summaries of the Commonwealth's financial transactions do not amount to a performance audit in today's meaning. As referenced by then-Auditor Alonzo B. Cook in his introduction to the report, the task of summarizing the fiscal transactions of the Commonwealth in an annual report and all other duties "of the state auditor *except such as [they] relate to the auditing of the*

accounts” were transferred to the Commission on Administration and Finance pursuant to Chapter 545 of the Acts of 1922—just as the General Court previously transferred this basic accounting function from the Governor’s Council to the newly created Office of the Auditor of Accounts in 1849.

As for the Auditor’s assertion that Section 12 of Chapter 11 of the General Laws vests the State Auditor’s Office with the statutory authority to audit the General Court, this is incorrect for several reasons. The plain language of the statute omits any reference to the General Court, and Section 12 as a whole, reveals that an audit of the General Court could not have been contemplated. The term “department” as used in Section 12 encompasses only agencies and offices within the executive branch and not the other separate branches of government. The Auditor’s immediate predecessor, Auditor Bump, interpreted Section 12 likewise, previously stating publicly that “the Legislature is not an agency or department but rather another branch of government and, thus, subject to protections under the separation of powers doctrine.” Moreover, in a 1940 *Opinion of the Attorney General to the Auditor*, Attorney General Dever opined that the statute only applies to “units or divisions of the Commonwealth’s own **administrative, or similar, services,**” which is further evidence that Section 12 only applies to accounts within the executive branch or to those accounts necessary to administer the laws enacted by the General Court. (Emphasis added). The Auditor’s opinion of her office’s authority is one her predecessors do not share, as evidenced by the several, unsuccessful, attempts by multiple prior auditors to codify the very authority the Auditor now claims.¹

Even if one were to accept the incorrect notion that Section 12 grants the State Auditor’s Office with an implied statutory authority to audit the House of Representatives, such an argument would still ultimately fail because the exercise of this purported authority, absent the express consent of the House of Representatives, would violate the Massachusetts Constitution.

Article X of Section 3 of Chapter 1 of Part the Second of the Constitution of the Commonwealth vests the House of Representatives with certain unilateral powers that cannot be exercised or restricted by the executive branch, judicial branch, or even by a previous session of the General Court. Specifically, Article X provides the House with the “exclusive” and “absolute” authority to “settle the rules and orders of proceeding” in the House of Representatives. The Supreme Judicial Court has defined this rule-making power as encompassing determinations as to its own rules and other internal matters, as distinct from “laws govern[ing] conduct external to the” House.

Furthermore, the Supreme Judicial Court has explained that where the General Court has enacted “statutes relating to internal proceedings” of the General Court “each House was essentially engaged in its rule-making function” pursuant to Article X. As such, the Supreme Judicial Court has held that such “procedural statutes are not binding upon the Houses” and that each “branch, under its exclusive rule-making constitutional prerogatives, is free to disregard or supersede such statutes by unicameral action.”

Thus, even if Section 12 brought the state legislative bodies within the purview of the State Auditor’s Office, the House of Representatives superseded any such statutory directive, most recently on February 1, 2023, when it adopted Rules for the 193rd General Court, which included, as it has since 1985, House Rule 85A which specifically requires the House Business Manager to procure “outside,

¹ See e.g. [House, No. 6](#) (1999); [House, No. 2](#) (1995); [House, No. 3](#) (1994); [House, No. 19](#) (1985); [House No. 19](#) (1983).

independent audits of House financial accounts.” House Rule 85A is a clear exercise of the House’s exclusive and absolute constitutional authority to determine its own rules of proceeding and overrules any statutory provision regarding audits of the inner workings of the House.

Finally, a “fundamental” and foundational principle “to our form of government” is the separation of powers, which is articulated in Article XXX of the Declaration of Rights of the Massachusetts Constitution. Article XXX provides:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

The Supreme Judicial Court has opined that, in comparison to the federal constitution and the constitutions of most other states, the Massachusetts version of separation of powers contained in Article XXX “is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches.” The Supreme Judicial Court has been clear that Article XXX “scrupulously” protects against the interference by one branch with the internal functioning of another branch.

As an officer of the executive branch, created by the Legislature and later elevated to the Constitution, the Auditor’s attempt to conduct a performance audit of the House including reviewing “*budgetary, hiring, spending and procurement information, as well as information regarding active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules and the policies and procedures of the House*” is indeed the kind of “interference by one department with the power of another department” that the Supreme Judicial Court has held Article XXX “scrupulously” protects against. This is particularly true where, as explained above, Section 12 does not expressly contemplate audits of a co-equal branch of government such as the House of Representatives, and where such audits would intrude upon the House’s own existing rules and its express, exclusive and absolute constitutional authority to determine its own rules in regard to internal matters.

To concur with the Auditor that her office has the authority to conduct an audit of the House of Representatives would require one to concur with the conclusion that a statute may, by implication, permit what the Constitution of the Commonwealth explicitly and repeatedly prohibits. Absent the express consent of the House of Representatives, any audit of the House of Representatives by the Office of the State Auditor would be an unconstitutional ultra vires act by the Office of the State Auditor.

Sincerely,

James C. Kennedy

James C. Kennedy



SENATOR KAREN E. SPILKA
PRESIDENT

Second Middlesex and Norfolk District

The Commonwealth of Massachusetts
MASSACHUSETTS SENATE
OFFICE OF THE PRESIDENT

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March 24, 2023

Diana DiZoglio
Auditor of the Commonwealth
State House, Room 230
Boston, MA 02133

Dear Auditor DiZoglio,

Thank you for your office's request to schedule an engagement conference as part of your communicated intention to conduct a performance audit of the General Court. While the Auditor's office lacks the statutory and constitutional authority to audit the General Court, the Senate shares your goal of ensuring open and transparent government for the people of the Commonwealth. Indeed, we already make information logically associated with an audit publicly available. Accordingly, we respectfully decline your request.

At the outset we note that the Auditor's statutory authority under G.L. c. 11, s. 12, does not extend to the General Court. A plain reading of the statute makes clear that the General Court is not among the entities over which the Auditor has authority.

Moreover, the Massachusetts Constitution guarantees that the Senate and House of Representatives have exclusive authority to manage their own business and determine their own internal rules of proceedings. Your stated desire to audit pending legislation and the General Court's "process for appointing committees, the adoption and suspension of House and Senate rules and the policies and procedures of the House and Senate" would clearly interfere with the Legislature's constitutional prerogative to manage its own proceedings, as well as with the Constitution's separation of powers principles.

Although your requested audit is prohibited by existing statutory and constitutional provisions, the Senate has long agreed with the principle of making government accessible to the public. Pursuant to our constitutional authority and adopted rules, the Senate voluntarily undergoes annual individual and joint financial audits, which are performed by independent

certified public accounting firms experienced in auditing governmental entities. In its most recent audit of the Senate, dated August 30, 2022, the independent auditing firm concluded that the information presented to it was sufficient and appropriate to provide an opinion and that in their opinion the financial statement presents fairly, in all material respects, Senate resources and expenses. Senate audits are available online.

In addition, the financial information you are seeking by audit is already publicly available. Detailed information regarding payroll, expenditures, and other financial information, including vendors and amounts paid to them, for the General Court is available on the Comptroller's website. This information is available at <https://www.macomptroller.org/cthru/>.

Similarly, legislative sessions and committee hearings are livestreamed and recorded on the General Court's website. The website provides ready access to information including: each bill and amendment filed, with sponsors and co-sponsors; roll call votes on bills and amendments and from Senate committees; and journals and calendars for the Senate. The website can be accessed at the following link: <https://malegislature.gov/>.

Thus, while we must decline your invitation, we hope the information we have provided here—and that we regularly make publicly available—demonstrates the Senate's continued commitment to promoting an open and transparent government for the people of the Commonwealth.

Sincerely,

Karen E. Spilka
President of the Senate

Cc: Senator Michael J. Rodrigues, Chairperson, Senate Committee on Ways and Means
Senator Cindy F. Friedman, Vice Chairperson, Senate Committee on Ways and Means
Senator Joan B. Lovely, Chairperson, Senate Committee on Rules
Senator Marc R. Pacheco, Chairperson, Senate Committee on Post Audit and Oversight
Michael D. Hurley, Senate Clerk



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
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November 2, 2023

BY HAND AND VIA E-MAIL

The Honorable Diana DiZoglio, State Auditor
Office of the State Auditor
Massachusetts State House, Room 230
Boston, MA 02133

Dear State Auditor DiZoglio:

I write in response to your letter of July 26, 2023, in which you ask the Attorney General's Office to "**recognize**" that the State Auditor's Office has the statutory authority to audit the Legislature over its objection. The contemplated authority to audit, as the State Auditor's Office ("SAO") has described it, **spans all "accounts, programs, activities and functions" of the Legislature, including "active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules and the policies and procedures of the House and Senate."**¹

We appreciate the important role of the SAO in Massachusetts government, where it provides the public and government decisionmakers **with "independent evaluation[s] of the various agencies, activities and programs operated by the Commonwealth."**² We recognize and value **that the SAO is not "simply a critic[,] but is an agent, an advocate, and a catalyst for improved management and delivery of government services."**³ We also recognize and respect that the Auditor is a constitutional officer, elected directly by the people. See Mass. Const. Amend. art. 82.

The Attorney General's constitutional, statutory, and common law role in state government includes the responsibility to develop considered, uniform, and consistent legal positions for the Commonwealth.⁴ We have evaluated your arguments in that role,

¹ See Letter from Diana DiZoglio, State Auditor, to Andrea Joy Campbell, Attorney General at 3 (July 26, 2023) ("**SAO** letter").

² State Auditor A. Joseph DeNucci, *Office of the State Auditor's Semi-Annual Report for January to June 1996* at 2 (Nov. 19, 1996).

³ *Id.* at 3.

⁴ See e.g., *Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977); *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163-165 (1975).

objectively analyzing the relevant law. We comprehensively reviewed the statute governing the SAO, the history of that statute, records reflecting the **SAO's** historical position on this issue, and the constitutional provisions implicated by your request.

After careful analysis of these materials, and as explained at length below, we conclude that the SAO does not currently have the legal authority to audit the Legislature without the **Legislature's consent**. Our conclusion builds on the advice of the Attorney General's Office to State Auditor DeNucci in 1994, when the office expressed considerable doubt that the SAO had authority to audit the Legislature over its objection.⁵ Prior State Auditors have made the same determination, acknowledging they lacked authority to audit the Legislature and proposing legislation to grant them that authority.⁶ These acknowledgments appear in various contexts, including, notably, documents cited in your recent letter. *See, e.g.*, State Auditor A. Joseph DeNucci, ***State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1984 to June 30, 1986*** at 1 (June 9, 1987) (noting that pursuant to *Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court*, 375 Mass. 179 (1978), **"the records generated by the Legislature could be made available to outsiders [*i.e.*, the Auditor] only at the discretion of the House and Senate leadership"**). Although we recognize (and discuss in detail below) that the SAO has in the past examined certain **entities under the Legislature's control**, we have not identified any prior example of an audit of the type currently proposed, *i.e.*, of how the **Legislature handles "active and pending legislation, the process for appointing commissions, [or] the adoption and suspension of the House and Senate rules."**⁷

The results of our research are sufficiently clear that litigation on this question is not necessary or appropriate. It is the role of the **Attorney General's Office** "to set a unified and consistent legal position for the Commonwealth." *Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977) (quoting *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163 (1975)). This role preserves credibility in the eyes of the public, who reasonably expect that their state government can agree on the meaning of state law, given that we, as state government, collectively ask the public to follow the law. A single state legal position also preserves **the Commonwealth's** credibility in the courts, which need not referee intra-governmental disputes absent exceptional circumstances that are not present here. *See Secretary of Admin. & Finance*, 367 Mass. at 163-164. In addition, as a steward of taxpayer resources, the Attorney General's **Office** believes that the cost of such legal sparring among entities within the same state government would be better spent on the sound and efficient delivery of government services.

We are mindful, of course, that the question of whether the SAO currently *can* audit the Legislature over its objection is different from the question of whether the SAO *should*

⁵ See Letter from Peter Sacks, Assistant Attorney General and Opinion Coordinator, to A. Joseph DeNucci, State Auditor (April 9, 1994) ("**AAG Sacks Letter**").

⁶ *See, e.g.*, House No. 6 (1999); House No. 7 (1995); House No. 10 (1994); House No. 19 (1985); House No. 19 (1983).

⁷ SAO letter, *supra* n.1, at 1.

be able to do so. The latter is, at least in part, a question of policy rather than a question of law. We do not reach that policy question here, and nothing in this letter should be understood as a policy statement.

As you know, the Attorney General has certified an initiative petition as eligible for the November 2024 ballot to which you, in your individual capacity, are a signatory.⁸ The initiative proposes an amendment to G.L. c. 11, § 12 (“**Section 12**”) that would explicitly authorize the SAO to audit the Legislature. Should the initiative become law, we may need to consider whether, and the extent to which, constitutional limitations affect how the law would apply. For now, we have confined our analysis to the issue raised by the SAO concerning the scope of your authority under current law.

Legal Analysis

We begin our analysis with the text of Section 12, well-established rules used to interpret the meaning of statutes, and **judicial decisions interpreting the term “departments”** in similar contexts. Then, we will address the history of the adoption and amendment of Section 12 over the years. As we will explain in detail, each of these methods of ascertaining statutory meaning indicates that the **word “departments” in Section 12** is limited to Executive Branch entities.

Next, we will examine prior reports and audits, and other materials, relating to the **SAO’s past examinations** of legislative activity. We conclude that, like the statute itself, these materials do not support the assertion that the SAO presently has authority to **undertake a comprehensive audit of the Legislature over the Legislature’s objection**. In fact, these materials provide support for the conclusion that the SAO does not have that authority, as the SAO has acknowledged over the years in its own reports.

Finally, we note that separation of powers principles in the Constitution of the Commonwealth may limit an **Executive Branch entity’s** ability to audit certain operations of another branch of government **over the latter’s objection**, that the Legislature would have been aware of these limitations when drafting Section 12, and that it is unlikely that the Legislature would have ignored those limitations by granting the Auditor broad authority to audit its operations.

1. Standard Methods of Interpreting Statutory Language, and Judicial Decisions Interpreting Similar Provisions, Show That the Term **“Department” in the SAO’s** Enabling Statute Does Not Include the Legislature.

Chapter 11 of the General Laws addresses the authorities and responsibilities of the State Auditor, along with the processes that the SAO must follow. Most pertinent to this analysis is Section 12 of Chapter 11, which delineates the **SAO’s** authority and responsibility to conduct audits.

⁸ See Initiative Petition 23-34 (proposing to authorize the Auditor to audit the Legislature).

Section 12 directs the State Auditor to audit the “accounts, programs, activities and functions directly related to the aforementioned accounts of all *departments, offices, commissions, institutions and activities* of the commonwealth, including those of districts and authorities created by the general court and including those of the income tax division of the department of revenue.” G.L. c. 11, § 12 (emphasis added). Each state entity that the Auditor can audit must be audited **“at least once every 3 years.”** *Id.*⁹

The key question **is whether the Legislature is a “department” as that term is used in Section 12.**¹⁰ Applying well-established rules for interpreting statutes, we conclude that it is not. We find further support for this conclusion from several decisions of the **Supreme Judicial Court that considered the word “department” in similar contexts.**

First, it is “a basic tenet of statutory construction that a statute must be construed ‘so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” *Bankers Life and Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140 (1998) (*quoting* 2A B. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992)). **Here, interpreting “department” to include the legislative, executive, and judicial branches of government would render the remaining words in the provision surplusage. Specifically, there would be no reason for the statute also to list “offices, commissions, institutions and activities of the commonwealth, including those of districts and authorities created by the general court and including those of the income tax division of the department of revenue,” since many of those entities would already be encompassed by the term “department.”**

The Supreme Judicial Court addressed a virtually identical issue arising out of the **phrase “departments, boards, commissions or institutions”** as appearing in Article 48 of the Articles of Amendment to the Massachusetts Constitution. *See Yont v. Secretary of the Commonwealth*, 275 Mass. 365, 367-368 (1931). In *Yont*, the Court considered and rejected a suggestion that the term **“department”** encompassed **“the three grand departments of government”** described in Article 30. *Id.* **It was “manifest[,]” the court explained, that “department” was used “in a much more restricted sense” in Article 48,**

⁹ To effectuate these audits, the State Auditor’s Office “shall have access to such accounts at reasonable times and . . . may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit conducted under this section . . . **except tax returns.**” G.L. c. 11, § 12. Should enforcement of requests for materials required for an audit prove necessary, Section 12 confers authority upon the Superior Court to order production. *Id.* **Where an audit results in “adverse or critical” results, the SAO “may require a response, in writing, to such audit results.”** *Id.* **The response “shall be filed with the appropriate secretariat, the secretary of administration and finance, the cognizant executive board in the case of an authority, and the house and senate committees on ways and means.”** *Id.*

¹⁰ **The SAO letter focuses mostly on the term “departments,”** and our analysis therefore does the same. The SAO also briefly argues that **the Legislature’s legislative and budgetary activities are “activities” and the Legislature’s functions are “functions” as those terms appear in Section 12.** SAO letter, *supra* n.1, at 3 & n.3. But as a previous AGO opinion **noted,** “common sense suggests that the Legislature itself is not an ‘activity’ of the Commonwealth. If it were, then so would be every part of the executive and judicial branches, and the more specific mention in G.L. c. 11, § 12 of ‘departments, offices, commissions, [and] institutions’ would . . . be rendered impermissibly superfluous.” AAG Sacks Letter at 2-3. This same reasoning applies to the term “functions.”

and “[t]o attribute the same meaning to the word in both articles would also render superfluous and of no signification the remaining descriptive words in the relevant clause of **article 48 of the Amendments, namely: ‘boards, commissions or institutions.’**” *Id.* at 368. Similarly, the Court in *Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court*, 375 Mass. 179, 184 (1978), considered whether the word **“department”** as appearing in the statutory phrase **“agency, executive office, department, board, commission, bureau, division or authority”** included the Legislature in the public records law, G.L. c. 4, § 7, Twenty-sixth. The Court readily concluded that **“the term ‘department’ appearing in this statutory clause has a much more restricted meaning.”** *Id.* (citing *Yont*, 275 Mass. at 367-68).¹¹

Second, it is a fundamental rule of statutory construction that **“the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”** *Dermody v. Executive Office of Health & Human Servs.*, 491 Mass. 223, 230 (2023) (citation omitted). The canon of *noscitur a sociis*—“ordinarily the coupling of words denotes an intention that they should be understood in the same general sense,” *Commonwealth v. Hamilton*, 459 Mass. 422, 432 (2011) (quoting 2A N.J. Singer, Sutherland Statutory Construction § 47:16 at 352-353 (7th ed. 2007))—is one means by which the Supreme Judicial Court takes statutory context into account.¹² That canon applies with particular force here. In the first sentence of Section 12, the word **“departments”** is coupled with **the words “offices, commissions, [and] institutions.”** Similarly, **later in the section, “departments” is coupled with “agencies, bureaus, boards, commissions, institutions, [and] authorities.”** Thus, all of the words with which **“departments”** is coupled in Section 12 refer to subsidiary governmental entities. It follows that **“departments” “should be understood in the same general sense,”**¹³ to refer to **a subsidiary governmental entity (such as the “department of revenue” specifically referenced later in the first sentence)**, rather than as one of the **“three grand departments of government.”** See *Yont*, 275 Mass. at 367.

Third, contrary to the maxim that **“a statute should be read as a whole to produce an internal consistency,”** *Telesetsky v. Wright*, 395 Mass. 868, 873 (1985) (citing 2A C. Sands, Sutherland Statutory Construction § 46.05 (4th ed. 1984)), **the SAO’s proposed interpretation of “department”** conflicts with how Chapter 11 otherwise refers to the Legislature. Specifically, throughout Chapter 11, the Legislature is called **“the general court.”** For example, G.L. c. 11, § 6 provides that the salaries of the officers and employees in the Auditor’s Office may not **“exceed the sum annually appropriated therefor by the general court.”** G.L. c. 11, §§ 6B and 17 require that reports be made to

¹¹ We do not agree that the reasoning of the *Westinghouse* decision **“was narrowly limited to the state’s public records law and is not directly applicable to [Section 12], the language of which differs and is broader.”** See SAO letter, *supra* n.1, at 4 n.5. Rather, we concur with prior State Auditors, who have expressly recognized the importance of *Westinghouse* and have noted that the decision precludes under existing law any ability of the SAO to obtain records from the Legislature over its objection. See *infra* at 12.

¹² See *Richardson v. UPS Store, Inc.*, 486 Mass. 126, 130-131 (2020) (**“The canon of noscitur a sociis counsels that terms must be read within the context, of the statute in which they appear.”**).

¹³ *Hamilton*, 459 Mass. at 432.

“the general court.” Indeed, Section 12 itself **refers to “districts and authorities created by the general court.”** The Legislature would not use the term **“department”** to subject itself to the Auditor’s mandatory audit requirement where it used a different, more specific term (**“general court”**) to refer to itself in the very same sentence and elsewhere in the chapter. **“Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings.”** *Commonwealth v. Williamson*, 462 Mass. 676, 682 (2012) (quoting *Ginther v. Commission of Ins.*, 427 Mass. 319, 324 (1998)); *accord Commonwealth v. Wynton W.*, 459 Mass. 745, 751-752 (2011) (Court presumes that Legislature intended different meanings when it used distinct terms in two statutes enacted at the same time).

It is, of course, true that certain provisions of the Massachusetts Constitution and some statutes refer to the **“legislative department”** or the **“department of legislation.”** For example, Article 30 of the Declaration of Rights, which establishes the principle of **separation of powers, states in part that “the legislative department shall never exercise the executive or judicial powers.”**¹⁴ The Supreme Judicial Court has also occasionally referred to the **“legislative department.”**¹⁵ However, as explained above, multiple Supreme Judicial Court decisions have found that use of the term **“department”** in a statute, when read in context, refers to Executive Branch departments, not to entire branches of government. *See, e.g., Westinghouse*, 375 Mass. at 184; *Yont*, 275 Mass. at 367-368; *Massachusetts Probation Ass’n v. Commissioner of Admin.*, 370 Mass. 651, 661 (1976) (noting **“the similar phraseology”** between statutes limited by their terms to executive branch departments and labor statute defining public **employee as “any employee of the commonwealth assigned to work in any department, board, commission or other agency thereof,”** and concluding that labor statute was limited to executive branch employees).

As one of my predecessors, Attorney General Francis X. Bellotti, observed, these **decisions have all “considered the meaning of the word ‘department’ as it appears in statutory or constitutional provisions listing several types of governmental entities (e.g.,**

¹⁴ *See also* Mass. Const. pt. 2, c. 1, § 1, art. 1 (specifying that “[t]he department of legislation shall be formed by two branches, a Senate and House of Representatives”); Mass. Const. Amend. art. 87 (referring to **“the executive department of the government of the commonwealth”**); G.L. c. 231A, § 2 (providing that **declaratory judgment procedures “shall not apply to the governor and council or the legislative and judicial departments”**); G.L. c. 29, § 7L (providing that **“expenses of the commonwealth shall include expenses of the executive, legislative and judicial departments”**); G.L. c. 234A, § 37 (stating that **“the legislative, executive, and judicial departments of the commonwealth and of the United States shall not be impeded by the provisions of this chapter from freely exercising their independent powers and duties”**). It is also worth noting that the Massachusetts Constitution has no consistent reference term for the Legislature. As one legal commentator has observed, **“[a]lthough no language in the Massachusetts Constitution should be considered *superfluous*, the use of one word over another is not necessarily significant.** The state constitution runs rampant with synonyms and uses them for no discernable reason.” Kenneth Bresler, *Synonyms in the Massachusetts Constitution*, 98 Mass. L. Rev. 7, 7 (Oct. 2016) (emphasis in original).

¹⁵ *See, e.g., Answer of the Justices to the Governor*, 444 Mass. 1201, 1204-1205 (2005) (**Article 30 “acts as an inhibition upon the Justices giving opinions as to the duties of either the executive or legislative department except under the Constitution.”**).

‘board,’ ‘commission,’ ‘office,’ ‘authority’), in a manner and order very similar to” the statute he was considering, which in turn is very similar to Section 12. 1977-78 *Op. Att’y Gen’l* No. 28, P.D. No. 12 at 141 (June 2, 1978) (interpreting small business purchasing provisions of St. 1976, c. 434) (citations omitted). Attorney General Bellotti further observed **that** “[i]n each case the court concluded that ‘department’ referred only to departments within the executive branch of government, and did not include either the legislative or judicial branches.” *Id.* Noting the “**similarity between the language**” in the statute he was considering “and the statutes under review in the cited cases,” Attorney General Bellotti **concluded that the proper course was to** “follow the court’s decisions and conclude that ‘department’ in [the statute at issue] does not encompass the legislative or judicial branch.” *Id.* Likewise, a 1921 opinion of Attorney General J. Weston Allen determined that “**it is plain that the words ‘every state officer, department, or head thereof’ are confined to the executive branch of government.**” 1921-1922 *Op. Att’y Gen’l*, P.D. No. 12 at 348-349 (Dec. 20, 1921). I adopt the views of my predecessors that **the word “department” in statutes such as these** should in general encompass only executive branch departments.¹⁶

In summary, settled principles of statutory construction and judicial decisions cited above, together with prior opinions of this Office, all dictate our conclusion that “**department,**” as it appears in Section 12, does not include the Legislature.

2. The Historical Context of **Section 12’s** Adoption Indicates that the **Term “Departments” References the Executive Branch.**

The historical context of the addition of the term “departments” to Section 12 provides further support for our conclusion that the Legislature is not within the ambit of that term as it is used in Section 12.

The Legislature created the **State Auditor’s Office, originally known as the “Office of Auditor of Accounts,”** by statute in 1849. *See* St. 1849, c. 56. In 1907, the Legislature amended the Auditor’s enabling statute to direct the Auditor to “**at least once in each year, and oftener in his discretion, audit the accounts of all state officials, boards and institutions receiving moneys to be turned into the treasury of the Commonwealth.**” St. 1907, c. 139, § 1. This is the origin of the provision currently at issue: Section 12. **Notably absent from this provision was the term “department.”**

¹⁶ The SAO letter argues that the absence of an explicit exclusion of the Legislature from Section 12 is an indication that the Legislature intended to include itself. SAO letter, *supra* n.1, at 4-5. In support of this proposition, the SAO letter cites to a 1931 opinion written by Attorney General Warner that states, “[t]he plain meaning of section 12 . . . is that the [SAO] shall make a careful audit of all departments, offices, commissions, institutions, and activities of the Commonwealth, except such as are expressly exempted in the statute.” *Id.* (citing 1930-31 *Op. Att’y Gen’l*, P.D. No. 12 at 58 (March 4, 1931)). However, because we conclude the term “department” in Section 12 does not include the Legislature, the question of whether the Legislature expressly exempted itself from a list in which it was not included does not arise. Therefore, there is no conflict between Attorney General Warner’s opinion and the opinions by Attorneys General Allen and Bellotti discussed in the text.

The term “department” did not appear in this section until 1920, when the General Laws were enacted. See G.L. c. 11, § 12 (1921). The margin notes in the General Laws beside the 1920 version of this section cite to a 1919 act that reorganized the executive branch into “departments.” See *id.* (citing St. 1919, c. 350, § 54).¹⁷ This 1919 act implemented Article 66, an amendment to the Massachusetts Constitution adopted in 1918 that required the executive and administrative work of the Commonwealth to be organized into not more than twenty “departments.”¹⁸ Proponents of this amendment argued that this change was necessary given the large and disorganized state of the Executive Branch, with one noting that there were “over 100 boards, commissioners, and officers, all independent” with “no grouping, no correlation, no co[o]rdination, no integration.”¹⁹

The Article 66 restructuring prompted “sweeping changes” to the Commonwealth’s laws to reflect the new department system.²⁰ This included the addition of the word “department” to clauses that had previously only referred to boards or commissions. See, e.g., G.L. c. 5, § 11 (1921),²¹ G.L. c. 111, § 160 (1921),²² G.L. c. 121, § 19 (1921).²³ One such clause was contained in the Auditor’s enabling statute, which had previously stated that the Auditor shall “audit the accounts of all state officials, boards and institutions.”

¹⁷ Pursuant to that act, “[a]ll executive and administrative offices, boards, commissions and other governmental organizations and agencies, except those now or by virtue of this act serving directly under the governor or the governor and council” were placed into “departments.” See St. 1919, c. 350, § 1. All rights, powers, duties, and obligations of the existing offices, boards, and commissions were transferred to the new departments. See *generally* St. 1919, c. 350.

¹⁸ “Article 66 was superseded in 1966 by art. 87, which provides for a scheme of greater flexibility.” *Ward v. Coletti*, 383 Mass. 99, 107 n. 11 (1981).

¹⁹ Debates in the Massachusetts Constitutional Convention 1917-1918 Vol. III, c. LIII at 1024.

²⁰ See Senate Doc. No. 27 at 4-5 (1920) (“The amendment requiring no more than twenty state departments has resulted in the passage of chapter 350 of the General Acts of 1919 . . . [This law] has made necessary sweeping changes in 50 other chapters . . . and lesser changes in 35 chapters, making in all 102 chapters which have had to be drafted, redrafted, or changed since July 23, 1919, the date of passage of said chapter 350.”); see also Introduction to the General Laws Vol. I at iii (1921) (noting that much of the collection “was changed by . . . [Article 66], providing for consolidation of all State boards and offices, except those under the Governor and Council, into not more than twenty departments”).

²¹ This provision directed clerks to “annually prepare a manual of the general court” and the state secretary to distribute copies of the manual to each of the “officers of the several state departments, boards and commissions.” G.L. c. 5, § 11 (1921). The preceding version of this section directed secretary distribute the manuals to “each of the officers of the several state boards and commissions.” R.L. c. 9, § 10 (1902).

²² This provision authorized the Department of Public Health to “delegate the granting and withholding of any permit required by such rules or regulations to state departments, boards and commissions.” G.L. c. 111, § 160 (1921). The preceding version authorized the Department of Public Health (then “the State Board of Health”) to “delegate the granting and withholding of any permit required by such rules or regulations to state boards and commissions.” R.L. c. 75, § 113 (as amended by St. 1907, c. 467, § 1).

²³ This provision required the Department of Public Welfare to “give notice . . . to the institutions, departments, boards, officers, or persons . . .” G.L. c. 121, § 19 (1921). The preceding version required the Department of Public Welfare (then “The State Board of Charity”) to “give notice . . . to the institutions, boards, officers, or persons . . .” R.L. c. 86, § 53 (1902).

R.L. c. 6, § 21 (as amended by St. 1907, c. 139, § 1). After the changes necessitated by Article 66, that statute **now read: “[the Auditor] shall . . . audit the accounts of all state departments, officers, commissions and institutions receiving money to be paid to the commonwealth.”** G.L. c. 11, § 12 (1921) (emphasis added). The insertion of the term **“department”** is thus best understood in context of a larger restructuring of the Executive Branch **into “departments.”** This history thus indicates that the Legislature added the term **“department”** to Section 12 not to expand its scope to include the Legislature, but rather to update its terms to match the recently-enacted restructuring of the executive **branch of the Commonwealth’s** government—exactly as it did with numerous other statutes.

The Supreme Judicial Court discussed this historical context in *Yont*, 275 Mass. at 367. There, as noted above, the Court **addressed the meaning of the term “department” as it appeared in Article 48 of the amendments to the Massachusetts Constitution.** *Id.* The Court looked to the history of Article 48 and noted that it was enacted at the same time as Article 66. *Id.* Considering these two amendments together, the Court concluded **that “departments” in Articles 48 and 66 had the same meaning: Executive Branch departments.** *Id.*

3. **The SAO’s Past** Statements, Reports, and Audits Do Not Indicate that Current Law Authorizes **a Legislative Audit Over the Legislature’s** Objection.

The SAO letter cites to 113 reports referencing the Legislature as precedent for the type of audit now proposed. We have reviewed each of those reports—as well as two additional reports identified by our office and four additional reports identified recently by the SAO—and we do not agree. We conclude, instead, that the reports do not provide support for the authority the SAO now seeks, for two principal reasons.

- First, 74 of these reports predate 1923, at which time the Auditor’s **enabling** statute was amended to transfer the bulk of its financial reporting responsibilities to the newly created Office of the Comptroller. *See* St. 1922, c. 545, § 5. These reports are not **“audits” as that term is currently understood, but instead were summaries of the Commonwealth’s finances.** As such, they have no bearing on whether the Auditor’s **enabling statute currently gives the Auditor the authority to audit the Legislature.**
- Second, while the SAO indeed audited specific entities under the control of the Legislature after 1923, these audits were irregular, limited in scope, and did not examine core legislative functions.

We turn first to the pre-1923 reports. When the SAO was established in 1849, the Auditor’s **role was similar to what** would later become the Comptroller’s **role: examining** the financial records of the Commonwealth to ensure accuracy and reliability. *See* St. 1849, c. 56, § 4. Specifically, the Auditor’s **enabling statute required the Auditor, every January, to “carefully examine all the books and accounts of the treasurer,” and submit an annual report to the Legislature detailing “a complete statement of the public**

property of the Commonwealth,” including its debts, obligations, revenue, expenses, and balance left in the treasury. *Id.* These reports were not limited to the “departments, offices, commissions, institutions and activities of the commonwealth” (like the Auditor’s current authority). Instead, the reports covered all public property and financial accounts “of the Commonwealth,” including property held and accounts spent by the Legislature. *See id.* In 1922, however, the Office of the Comptroller was established,²⁴ and the Auditor’s annual financial reporting duties were transferred to the Comptroller.²⁵ *See* St. 1922, c. 545, § 5 (specifying that the Comptroller has the authority “to perform all the accounting duties hereinbefore transferred from the [SAO]”).

As noted above, we have reviewed each of the pre-1923 reports. From that review, it is clear that those reports were made pursuant to the Auditor’s annual financial accounting authority that ended in 1922. We therefore see no connection between these reports and the question of whether the Auditor currently has the authority to conduct a performance audit of the Legislature over the Legislature’s objection. First, many of the reports themselves explicitly state that they are annual financial reports made pursuant to the Auditor’s statutory authority under St. 1849, c. 56, § 4 and its subsequent iterations.²⁶ The inaugural report, for instance, published less than one year after the creation of the SAO, explains that the report is intended to fulfill the Auditor’s yearly financial reporting duty as it is outlined by St. 1849, c. 56, § 4.²⁷ Many of the subsequent reports also cite to or quote the statute governing the Auditor’s financial reporting authority. These reports contain a broad overview of all of the financial accounts, expenditures, and debts of state entities, which included the Legislature. Second, the reports are limited to financial information, and only occasionally included asides to the Legislature about how the Commonwealth could reduce its expenditures. They do not contain the kind of in-depth review of legislative functions that the SAO currently

²⁴ St. 1922, c. 545 established the Commission on Administration and Finance, which included the “comptroller’s bureau.” *See* St. 1922, c. 545, §§ 3 (organizing the commission into three bureaus, including the “comptroller’s bureau”), 5 (specifying the Comptroller’s responsibilities). For consistency, we will refer to the “comptroller’s bureau” as the “Comptroller” or “Office of the Comptroller.”

²⁵ Specifically, the Comptroller was required to prepare and file annual statements of state accounts. *See* St. 1922, c. 545, § 5 (requiring the Comptroller to “prepare and file annually . . . statements of state accounts setting forth . . . estimates of all claims and other expenditures authorized by law, including interest, sinking fund and serial bond requirements, the appropriations for the preceding fiscal year and expenditures for all state purposes for the preceding three fiscal years”). The Auditor’s authority to audit enumerated state entities was left in place. *See* St. 1922, c. 545, § 1 (“[a]ll the rights, powers, duties, and obligations . . . of the state Auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits . . . are hereby transferred to . . . the commission on administration and finance established by this act”).

²⁶ The SAO’s enabling statute and its mandate to issue annual financial reports were set forth in different locations over time. *See e.g.*, St. 1849, c. 56, §§ 4 (specifying Auditor’s financial reporting responsibilities); St. 1867, c. 178, §§ 6-12 (same); Public Statutes, c. 16, §§ 9-13 (1882); Revised Laws, c. 6, §§ 22-25 (1902) (same); General Laws, c. 11, §§12-15 (1921).

²⁷ *See* State Auditor David Wilder, Jr., *Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending December 31, 1849* at 3 (Jan. 10, 1850).

proposes. Third, the reports were made on a regular, annual basis only until the Auditor’s **financial reporting authority was transferred to the Comptroller in 1922**. This change is acknowledged in the Auditor’s **final pre-1923 report, which states**, “[t]his will be the last report of the Auditor to contain the financial transactions of the Commonwealth, as under the provisions of [St. 1922, c. 545] my report will, in the **future, relate only to audits.**”²⁸ Because the pre-1923 reports were made pursuant to the Auditor’s annual financial reporting authority—a responsibility the Auditor has not had for more than 100 years—they do not bear on the question now before us.

The post-1923 audits cited in the SAO letter likewise do not support **the SAO’s** claim of authority to conduct a broad audit of the Legislature. These audits fall roughly into three groups.

First, from the nearly fifty-year period between 1923 and 1971, we know of only seven relevant audits, namely: five audits of the Sergeant-at-Arms, one audit of the Special Commission on the Structure of State Government, and one audit of the Legislative Research Council and Bureau.²⁹ The audits from this period that were made available for our review were not of the Legislature as a whole, but instead focused narrowly on an entities under the purview of the Legislature and were primarily focused on the finances or contracting practices of those entities.³⁰

Second, between 1972 and 1990, the SAO conducted regular audits of three specific entities within the legislative branch: the Sergeant-at-Arms, the Legislative Research Council and Legislative Research Bureau, and the Legislative Post Audit and Oversight Bureau (and one of its successors, the Office of the Legislative Post Audit and Oversight Bureau of the House of Representatives). To our knowledge, the SAO also conducted one audit of the Joint Commission on Federal Base Conversion and one audit of the Revolutionary War Bicentennial Commission.³¹ Again, the audits from this period that were made available for our review, many of which were **entitled “Report on the Examination of the Accounts of [the subject entity],”** were of entities under the

²⁸ See State Auditor Alonzo B. Cook, *Report of the Auditor for the Fiscal Year Ending November 20, 1922 at 2 (Jan. 10, 1923)*. Auditor Cook’s statement that his reports would **“in the future, relate only to audits,”** suggests that Auditor Cook may not have considered the yearly financial reports “audits” at all.

²⁹ See State Auditor Russell A. Wood, *Report on the Examination of the Accounts of the Sergeant-at-Arms from December 15, 1937 to April 27, 1939* (July 5, 1939); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1946* at 135 (Mar. 19, 1947); State Auditor Thomas J. Buckley, *Report on the Examination of the Accounts of the Sergeant-at-Arms from April 11, 1951 to March 14, 1952* (May 27, 1952); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1953* at 4 (Dec. 14, 1953); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1956* at 80, 85 (Oct. 8, 1956).

³⁰ These audits included occasional suggestions about how the subject entities could reduce their expenditures. The audits also noted the statutory authority for the entities and how the offices were organized.

³¹ State Auditor Thaddeus Buczko, *Commonwealth of Massachusetts Department of the State Auditor Annual Report Fiscal Year Ended June 30, 1977* at 19 (issue date unknown).

Legislature’s purview—not the whole of the Legislature itself—and primarily examined financial accounts of the entities (e.g., expenditures, appropriations, miscellaneous income).³² Furthermore, as we understand from the SAO and the Legislature, it is not clear whether the Legislature consented to these audits.

Of particular relevance to the question now before us, we do know that after the **Supreme Judicial Court’s** *Westinghouse* decision in 1978, the Senate stopped cooperating with some of the audits. In an audit of the Sergeant-at-Arms from 1987, for example, Auditor A. Joseph DeNucci explained that his office **was “not permitted to examine time or attendance records for Senate Court Officers, Senate Pages and Legislative Document Room employees.”**³³ Auditor DeNucci further noted that, pursuant to *Westinghouse*, **“the records generated by the Legislature could be made available to outsiders only at the discretion of the House and Senate leadership.”**³⁴ A virtually identical statement was included in an audit of the Sergeant-at-Arms from 1990.³⁵ Statements that expressly recognized legislative discretion to comply (or not) with SAO requests also appear in audits of the Sergeant-at-Arms from 1982 and 1985—neither of which are cited in the SAO letter.³⁶ For example, the 1982 report states that “[w]e were not permitted to examine time or attendance records for the senate court officers, senate pages and employees working in the Legislative Document Room because of the constitutional separation of the legislative and executive branch[e]s of government in the Commonwealth of Massachusetts.”³⁷ **Further reflecting the Senate’s position**, when the Legislative Post Audit and Oversight Bureau was abolished in 1981 and replaced with bureaus in the House and Senate, the Auditor only audited the Office

³² Like the previous reports, these audits also included occasional suggestions about how the entities could reduce their expenditures. The audits also noted the statutory authority for the entities and how the entities were organized.

³³ State Auditor A. Joseph DeNucci, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1984 to June 30, 1986* at 1 (June 9, 1987).

³⁴ *Id.* (emphasis added).

³⁵ State Auditor A. Joseph DeNucci, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1988 to June 30, 1989* at 2 (Sep. 17, 1990).

³⁶ See State Auditor John J. Finnegan, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1980 to June 30, 1981* at 1 (June 8, 1982) (“**1982 report**”); State Auditor John J. Finnegan, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1982 to June 30, 1984* at 1 (June 3, 1985) (“**The Massachusetts Supreme Court has ruled that the records generated by the legislature could be made available to outsiders only at the discretion of the House and Senate Leadership. The leadership granted us permission to examine time or attendance records for House Court officers and House pages for the audit period. However, we were not permitted to examine time or attendance records for Senate Court officers, Senate pages, and Legislative Document Room employees.**”).

³⁷ 1982 report, *supra* n.36, at 1.

of the Legislative Post Audit and Oversight Bureau of the House of Representatives. After 1990, the State Auditor's Office stopped auditing these entities completely.³⁸

The third group of legislative audits consists of those that have taken place in the 33 years from 1990 to the present. There are only three such audits: a 1992 report covering overpayments to a court officer,³⁹ a 2002 report covering information technology (IT)-related controls at the Sergeant-at-Arms,⁴⁰ and a 2006 report covering IT-related controls at the Legislative Information Services.⁴¹ These limited audits are not comparable to the broad audit of the Legislature, over its objection, that the SAO now proposes. The 1992 report addressing overpayments to a court officer states that it was made at the request of the Attorney General and with the express cooperation of the House of Representatives.⁴² It focused solely on overpayments made to a single court officer. While neither the 2002 nor the 2006 IT report explains how it came to occur, both are narrowly focused on the IT-related controls of specific Legislative entities, and do not address core legislative powers, the exercise of which the SAO now seeks to audit.

In sum, despite the existence of numerous SAO reports on certain discrete activities or entities within the legislative branch, we have found no historical precedent at all for the type of audit the SAO seeks to conduct now: a sweeping audit of the Legislature over its objection, which would include review of many of its core legislative functions, namely, active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules, and the policies and procedures of the legislative bodies.

To the contrary, historical precedent indicates that the type of audit now proposed has not previously been performed, and prior State Auditors did not believe the SAO to have the power now claimed.⁴³ Where a power asserted by part of one branch of the

³⁸ It is notable that several of these audits were completed during the tenure of Auditor DeNucci, the same **Auditor who in 1994, requested an opinion from the Attorney General's Office as to whether the State Auditor's Office could audit the Legislature without its consent.**

³⁹ See State Auditor A. Joseph DeNucci, *State Auditor's Report Covering Overpayments to a Court Officer for the Period January 18, 1984 to May 11, 1989* (January 15, 1992) ("**1992 report**").

⁴⁰ See State Auditor A. Joseph DeNucci, *Review of Selected Information Technology (IT)-related controls at the Office of the Sergeant-at-Arms* (February 28, 2002).

⁴¹ See State Auditor A. Joseph DeNucci, *Office of the State Auditor's Report on Information Technology-Related Controls for Virus Protection at the Legislative Information Services October 9, 2003 to December 8, 2005* (May 11, 2006).

⁴² See 1992 report, *supra* n.39, at 1, 2 (**noting that this review was conducted "[a]t the request of the Office of the Attorney General" and "express[ing] [the Auditor's] appreciation to [the House of Representatives] and the Sergeant-at-Arms for [their] cooperation and assistance"**).

⁴³ **As a 1994 letter of the Attorney General's Office emphasized, where a part of government is listed in Section 12, the SAO's authority to audit is also a mandate that it must regularly audit that part of government (i.e., every three years), such that the absence of regular audits of the Legislature (rather than a small entity within its control) is particularly instructive.** See AAG Sacks Letter at 3.

government against another branch has not been exercised or even acknowledged before, **that “longstanding ‘practice of the government’ can inform [our] determination of ‘what the law is.’”** *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (citations and quotations omitted); accord *Simon v. State Examiners of Electricians*, 395 Mass. 238, 246 (1985) (“Authority actually granted by [the Legislature] of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in **determining whether such power was actually conferred.**”) (quoting *Federal Trade Comm’n v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)). On this point, we note that the previous State Auditor disclaimed the authority to audit the Legislature over its objection⁴⁴; and prior State Auditors have filed legislation that would have granted them that authority (thereby at least suggesting that Section 12 did not already do so).⁴⁵ In addition, the power the SAO now claims also would allow it to compel the Legislature to produce records by judicial enforcement. See G.L. c. 11, § 12. But we are not aware of any such lawsuit ever having been filed.

Consequently, the historical record is consistent with the legal precedent set forth above in showing that Section 12 does not confer upon the SAO the authority to audit the Legislature without its consent.

4. Because of the Constitutional Issues Implicated by Auditing Another Branch of Government, the Legislature Is Unlikely to Have Granted Unconditional Authority to the Auditor to Conduct Legislative Audits Without Explicitly Saying So.

As former Auditors Bump and DeNucci both observed, the possibility of auditing the Legislature over its objection raises significant separation of powers concerns.⁴⁶ Those concerns stem in part from the fact that, to accomplish such an audit, the SAO would require the authority to demand that the Legislature, over its objection, produce all

⁴⁴ In 2022, former State Auditor Suzanne Bump issued a statement on behalf of the SAO explaining that the SAO **“does not have the authority, express or implied, to audit the Legislature.”** See Bruce Mohl, *Bump Says Auditor Cannot Audit Legislature*, Commonwealth Magazine (April 7, 2022), <https://commonwealthmagazine.org/politics/bump-says-auditor-cannot-audit-legislature/>. Auditor **Bump went on to state that “the Legislature** is not an agency or department but rather another branch of government and, thus, subject to protections under the separation of powers doctrine.” *Id.*

⁴⁵ See, e.g., House No. 6 (1999); House No. 7 (1995); House No. 10 (1994); House No. 19 (1985); House No. 19 (1983). While the Supreme Judicial Court has expressed caution in drawing conclusions from proposed legislation that was not adopted, it has found repeatedly **“proposed but unadopted legislation”** to be **“illustrative of the meaning of” existing language.** *Furtado v. Town of Plymouth*, 451 Mass. 529, 537-38 & nn. 14-15 (2008); *Simon v. State Examiners of Electricians*, 395 Mass. 238, 246-47 (1985) (similar).

⁴⁶ See Mohl, *supra* n.44 (quoting former Auditor Bump’s recognition that the Legislature is **“subject to protections under the separation of powers doctrine”**); 1982 report, *supra* n.36, at 1 (noting the Auditor’s **inability to access certain legislative documents due to the “constitutional separation of the legislative and executive branch[e]s of government”**).

“books, documents, vouchers and other records relating to any matter within the scope of an audit,” against the backdrop of potential Superior Court litigation to enforce those demands. G.L. c. 11, § 12. The SAO claims this auditing power extends equally to the Judiciary, which also would have to subject all of **its “accounts, programs, activities and functions” to regular audit, with requisite and enforceable document demands, because** the Judiciary, too, is a **“department.”**⁴⁷ The enforceability of a document production order from the Superior Court against the Legislature, or against the Judiciary as a whole, would itself present a serious constitutional question. *See e.g., Abuzahra v. City of Cambridge*, 101 Mass. App. Ct. 267, **270 (2022)** (“If the documents at issue here were communications among members of the Legislature about proposed legislation, the order to disclose them would raise a significant question under the separation of powers **provisions of art. 30 of the Massachusetts Declaration of Rights.**”) (citing *K.J. v. Superintendent of Bridgewater State Hosp.*, 488 Mass. 362, 368 (2021)).

For reasons we explain, in light of these constitutional concerns, the authority now asserted by the SAO is not authority the Legislature would have afforded to the SAO lightly **or by implication**. “As the United States Supreme Court has observed regarding Congress, the Legislature ‘does not, one might say, hide elephants in mouseholes.’” *Patel v. 7-Eleven*, 489 Mass. 356, 364 (2022) (quoting *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

We do not seek in this letter to define precisely the extent to which the state constitution may limit the ability of the Auditor to conduct even statutorily-authorized audits into core legislative (or judicial) functions, although that issue may arise if the voters approve the ballot initiative proposed for the November 2024 ballot. Nevertheless, we think it clear that an assertion of authority to audit all **“programs, activities and functions” of the Legislature** (including the authority to demand and require the production of information), absent **the Legislature’s** consent, raises separation of powers issues.⁴⁸ When the separation of powers is at issue, **the “essence of what cannot be tolerated” is interference by one branch with the core functions of another.** *Chief Admin. Justice of the Trial Court v. Labor Relations Comm’n*, 404 Mass. 53, 56 (1989) (citation omitted). The Constitution recognizes the authority of the House of Representatives and the Senate to determine their own rules of proceeding, *see* Mass. Const. p. 2, c. 1, § 2, arts. 7 (Senate), 10 (House); and Article 21 protects **the “freedom of deliberation, speech and debate”** in the Legislature, such that it may not be **“the foundation of any accusation or prosecution, action or complaint, in any court or place whatsoever.”**⁴⁹ Mass. Const. p. 2, c. 1, § 2, art. 21. Subjecting the Legislature to

⁴⁷ We note that, although the Judiciary has complied with SAO audit requests, it has done so voluntarily, and entities within the Judiciary previously have raised constitutional concerns regarding **the SAO’s assertions of authority to audit all “accounts, programs, activities and functions” of the Judiciary.**

⁴⁸ **“If the coordinated activity of branches of government is voluntary and the activity of one branch does not intrude into the internal function of another, the strictures of art. 30 are not violated.”** *Commonwealth v. Tate*, 34 Mass. App. Ct. 446, 448 (1993).

⁴⁹ The latter provision is intended **“to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.”** *Coffin v. Coffin*, 4

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).

As we consider the meaning of Section 12, we must presume that the Legislature took into consideration existing constitutional principles. *See, e.g., School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 80 (1982). That presumption is particularly forceful **where the constitutional principles bear on the Legislature's** own operations and authority. Here, it is implausible that the Legislature intended, merely **by including the term "departments"** within a list of other subsidiary governmental entities, to make itself and all of its programs, activities, and functions subject to the **Auditor's mandatory audit** authority without any provision limiting the scope of such audits or shielding its core legislative activity from potentially unconstitutional interference. That the Legislature did not include any such provisions or protections further supports the statutory analysis above, *i.e.*, that the term **"department" in** Section 12 was not intended to encompass the Legislature.⁵⁰ At the very least, given all of these considerations, if the Legislature had intended to include itself and the Judiciary within the **term "departments," it would have done so explicitly**—as it has done in a variety of other statutes. *See, e.g.,* G.L. c. 7, § 3 (referring to **"the executive department of the government of the commonwealth"**); G.L. c. 29, § 7L (referring to **"the executive, legislative and judicial departments"**); G.L. c. 29, § 23 (referring to agencies **"within the executive or legislative department"**); G.L. c. 234A, § 37 (referring to **"[t]he legislative, executive, and judicial departments of the commonwealth"**).

In sum, our analysis does not rely on constitutional separation of powers principles, but cognizance of those principles does provide context that aids our interpretation of Section 12. An unqualified auditing power sufficient to audit the Legislature over its objection would be difficult to reconcile with the powers vested exclusively in the Legislature by various parts of Chapter 1 of Part II of the Massachusetts Constitution, and protected from encroachment by Articles 21 and 30 of the Massachusetts Declaration of Rights.⁵¹ We do not believe that the Legislature would have chosen to

Mass. 1, 27 (1808). The protections of Article 21 against civil inquiry into the legislative process generally reflect the common law at the time the Massachusetts constitution was adopted. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48-50 (1998).

⁵⁰ Similarly, it is most unlikely that the Legislature would have attempted to subject the Judiciary to audits of all of its **"programs, activities and functions" without addressing the** host of constitutional issues posed in that context, as well. *See, e.g., In re Enforcement of Subpoena*, 463 Mass. 162, 170 (2012) (**"The judiciary's independence from the other branches of government and from outside influences and extraneous concerns has been one of the cornerstones of our constitutional democracy, intended to ensure that judges will be free to decide cases on the law and the facts as their best judgment dictates, without fear or favor."**).

⁵¹ We understand the consideration of separation of powers principles may be vexing, frustrating, or **insufficiently responsive to the politics of the moment. But "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted constraints spelled out in the constitution."**

ignore these separation of powers issues entirely. Instead, the Legislature simply did not include itself among the entities subject to the **SAO's auditing authority**.

Conclusion

The SAO is a creation of the Legislature and is vested with the authority granted to it by the Legislature. For the reasons set forth in this letter, that authority does not include the power to audit the Legislature itself over **the Legislature's** objection. This conclusion is supported by the statutory text, its legislative history, judicial interpretation of similar statutes, and the historical record. We provide this conclusion in carrying out the role of **the Attorney General's Office** to establish a uniform and consistent legal position for the Commonwealth. See *Secretary of Admin. & Fin.*, 367 Mass. at 163. Please let us know if you or members of the SAO would like to discuss.

Very truly yours,

A handwritten signature in black ink, appearing to read 'AJC', with a long horizontal stroke extending to the right.

Andrea Joy Campbell
Attorney General

cc: Michael Leung-Tat, Deputy Auditor & General Counsel
Pat Moore, First Assistant Attorney General
James C. Kennedy, Chief Legal Counsel to the Massachusetts House of Representatives
James E. DiTulio, Counsel to the Massachusetts Senate

K.J. v. Superintendent of Bridgewater State Hosp., 488 Mass. 362, 367 n.10 (2021) (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983)).



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

TEL (617) 727-2075
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November 15, 2024

VIA ELECTRONIC AND US MAIL

The Honorable Andrea Joy Campbell
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell:

As you are undoubtedly aware, Massachusetts residents voted overwhelmingly last week to give the Office of the State Auditor (OSA) the explicit power to audit the Legislature via the passage of Question 1 in the November 5, 2024 election. With this mandate from the people in mind, I request that you revisit the November 2, 2023 determination of the Office of Attorney General (AGO) that concluded the OSA “does not currently have the legal authority to audit the Legislature without the Legislature’s consent.”¹ Although the OSA has consistently maintained that no such consent was required and our authority to audit the Legislature existed before the passage of Question 1, the issue of consent is now moot. Sadly, House Speaker Ron Mariano and Senate President Karen Spilka have indicated that they are interested in alterations to the voter law. In fact, the House of Representatives, just yesterday, voted for their own preference to continue to be audited by a private auditing firm instead of by the OSA in direct conflict with the will of the people, as was just expressed on November 5, 2023. Accordingly, I invite you to join our office’s efforts to disrupt the shameful status quo and shed a bit of sunlight on the woefully opaque Massachusetts Legislature. Specifically, I request your support to start the process of litigating this matter as the Legislature has already failed to even acknowledge, much less comply with, our current audit engagement letter.² (See attached letter). To the extent there are any constitutional limitations or concerns regarding our authority to audit the Legislature under G.L. c. 11, s. 12, the Judicial department not Legislative department (the Legislature) or the

¹ Letter from Attorney General Andrea Joy Campbell to State Auditor Diana DiZoglio, dated November 2, 2023, at p. 2 (“AGO Letter”).

² Audit Engagement Letter from the Office of the State Auditor to Speaker Mariano and President Spilka, dated November 8, 2024, attached hereto as Attachment 1.

Executive department (the AGO) is the appropriate department of government to interpret the statute and adjudicate this matter.

In our Commonwealth, it is always necessary and always appropriate for us – as residents and as their elected representatives – to pursue justice and transparency on behalf of the people. Our offices are called to this work – the pursuit of justice for the people we are sworn to represent. Indeed, the Massachusetts Constitution in its Preamble recognizes this “duty...to provide for an equitable mode of making laws, as well as for an **impartial interpretation**, and a faithful interpretation of them.” Furthermore, Article XXIX of the Massachusetts Constitution very clearly states — “It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, **that there be an impartial interpretation of the laws, and administration of justice**. It is the **right of every citizen to be tried by judges** as free, impartial and independent as the lot of humanity will admit.” Thus, as an office representing the people, a denial of our right to a court hearing is ultimately a denial of the people’s right for a court hearing on this matter. It is a denial of the people’s right to pursue the transparency they deserve and which is their fundamental right.

We know that Massachusetts state government is frequently ranked among the least transparent in the entire nation.³ Our state legislature is not subject to the public records law, not subject to the open meeting law, not subject even to recording committee votes. If it so chooses, it is able to pass bills into law with no public debate, in the middle of the night with no recorded votes.

Our budget is essentially decided behind closed doors, among a few powerful legislators and has been late for at least the last 13 years.⁴ Our tax dollars are able to be used to fund non-disclosure agreements that hide harassment, discrimination, or even outright corruption. Procurement procedures and state contracting in the hundreds of thousands of taxpayer dollars are executed with no accountability.

Our Commonwealth is awash in crises – housing, mental health, addiction, and transportation to name a few. The list goes on and on. These crises reflect the broken, anti-democratic style of governance conducted behind closed doors, which intentionally excludes the very people we are sworn to serve.

The AGO’s previous position usurped the powers and duties of the bench on a matter of great importance to the people of the Commonwealth. Those powers and duties cannot and should not be foreclosed by the opinion of a single elected official in the executive department. While the

³ Patrick Gleason, “In Massachusetts, Once a Leader in Government Transparency, Key Votes are Hidden from the Public,” *Forbes* (Jan. 1, 2022) Available At <https://www.Forbes.Com/Sites/Patrickgleason/2022/01/12/In-Massachusetts-Once-A-Model-In-Government-Transparency-Key-Votes-Are-Hidden-From-The-Public/?Sh=445761536683>; “Open States: Transparency Report Card,” Sunlight Foundation (Mar. 11, 2013) available at <https://sunlightfoundation.com/2013/03/11/openstates-report-card/>; see also “Open States’ Legislative Data Report Card,” *Ballotpedia*, available at https://ballotpedia.org/Open_States%27_Legislative_Data_Report_Card; “State Integrity Investigation,” The Center for Public Integrity (Nov. 9, 2015) available at <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/how-does-your-state-rank-for-integrity/>; “Ranking the States on Financial Transparency,” Pioneer Institute (2019) available at <https://pioneerinstitute.org/state-rankings-financial-disclosure/>.

⁴ Katie Lannan, “Massachusetts blows past its budget deadline — again,” *WGBH Talking Politics* (Aug. 28, 2023), available at <https://www.wgbh.org/news/politics/2023-06-30/massachusetts-blows-past-its-budget-deadline-again>.

AGO opined that the question of whether the OSA has the authority to audit the Legislature – a question of statutory interpretation – did not warrant consideration, never mind adjudication, in court, I assert that such a decision is most appropriately made by the Judiciary itself. The AGO previously obstructed the only appropriate legal remedy – litigation to compel compliance with our authority to audit under G.L. c. 11, s. 12. I strongly urge the AGO to reverse course, support the position of the people, and support our office’s right to access the judicial system following the passage of Question 1.

When my office previously sought your support of our position in court, where this important matter should be appropriately heard and resolved, we did not ask the AGO to act as the court in rendering a final verdict on the law because you are not judges or members of the Judiciary. As requested by your staff, the OSA provided your office with a sound legal basis, bolstered by substantive precedent and persuasive public policy considerations, to proceed with resolving this matter through the courts. In response, your office delivered an executive decree, unilaterally deciding the matter in place of the courts, while obstructing our access to the justice system.

While we respect the AGO’s right to an opinion on matters of law, the courts are the enforcement mechanism to ensure compliance with our statutory authority pursuant to G.L. c.11, s.12. See also Suzanne Bump, State Auditor v. Shahrzad Haghayegh-Askarian and Hancock Dental Co., Mass. Super. Ct., No. 11-4539A (Suffolk County May 10, 2012)(affirming “the Auditor's remedy is to seek an order from this Court.”). Denying the OSA our day in court to defend our legal position, on behalf of the people we serve, supported the continued disenfranchisement of our working neighbors, who deserve access to the government that taxes them and justifiably believe does little to represent them or their needs.

The AGO’s November 2023 opinion went beyond the question of our authority to audit the Legislature under G.L. c. 11, s. 12 by also foreshadowing a potential constitutional challenge to a ballot question⁵ on this matter – a matter that the AGO, itself, saw fit to clear, approve, and officially certify for the November 2024 ballot over constitutional objections raised by the Senate.⁶ In determining that the petition was filed in “proper form” and was not required to have been submitted as a constitutional amendment, your office rejected the assertion of the Senate President and Senate Counsel that the proposed law “[would] limit the Senate’s constitutional authority to make its own rules and manage its own proceedings. . . .[and] triggers serious concerns related to Article 30 of the Massachusetts Declaration of Rights and the separation of powers doctrine.”⁷ Any separation of powers concerns raised by the AGO or the Legislature should be adjudicated by the judicial department pursuant to Article XXX of the Massachusetts Constitution, and not decided by the Legislature or your office.

I remain troubled by the AGO’s previous opinion which inserted itself into the OSA’s decision-making process regarding the scope of our audits – a right exclusively reserved for the OSA in accordance with G.L. c.11, s.12 which mandates our compliance with Generally Accepted

⁵ 23-34 Initiative Petition for a Law Expressly Authorizing the Auditor to Audit Legislature, available at [Ballot Initiatives filed for the 2024 Biennial Statewide Election \(proposed laws\) and 2026 Biennial Statewide Election \(proposed constitutional amendments\) | Mass.gov.](#)

⁶ AGO Letter at p. 3 and 15.

⁷ Letter from Counsel to the Senate James E. DiTullio to Attorney General Andrea Joy Campbell, dated August 11, 2023, attached hereto as Attachment 2.

Government Auditing Standards (GAGAS). The AGO's sweeping opinion exceeded its authority and usurped the power of the Judiciary, infringing upon the rights and authorities of the OSA.

The OSA strongly encourages the AGO to reconsider its previous positions for the following reasons:

First, the AGO's letter cited case law in support of its narrow interpretation of "department" to include only the executive department. Conversely, the OSA provided myriad examples from the Massachusetts Constitution, its general laws, relevant case law, previous audits conducted by the OSA of the Legislature, and the past opinions of the AGO that indicated a more expansive definition of "departments" to include the Legislature. The passage of Question 1 has settled this matter by explicitly including the Legislature in the list of entities subject to the OSA's audit authority under G.L. c.11, s.12.

Second, the AGO's November 2023 determination contended that the cost of addressing this matter in court would not be justified – instead using the very valid and pressing need for stewardship of taxpayer dollars to buoy a lengthy defense of legislative leaders' continued closed-door operations that allow for potential mismanagement, abuse, and fraud. I counter that any question of cost must be viewed in the context of benefit, and whether the cost of litigation is greater than the potential mismanagement, waste, fraud or abuse of taxpayer dollars that the OSA, as the state's chief accountability office, may uncover or prevent. Furthermore, the AGO's previous opinion failed to mention – and appeared not to have even considered – the benefits of increased transparency, accountability, and accessibility to the taxpayers. The significant financial, public policy, and other benefits related to additional transparency and accountability far outweigh any potential, nominal costs associated with litigation in this instance.

Third, as you are aware, the OSA has not hired outside counsel in this matter but has instead relied on our in-house General Counsel. Although you previously have sided with the legislative leadership's position, I ask you to reconsider your position in this regard following the passage of Question 1. Any associated litigation costs would be nominal – perhaps, limited to filing fees. Comparatively, any expenses associated with the pursuit of justice on behalf of taxpayers are minimal relative to the losses that would inevitably follow by allowing the Legislature to continue operating under a cloak of darkness. I ask the AGO to consider these points as it considers our request for support in this present instance.

Fourth, the AGO is the "People's Law Firm,"⁸ charged with protecting and defending the interests of the people. It is in the people's interest to have access to information, via a regular audit by our office, regarding the use of their tax dollars by our legislative leaders. On November 5, 2024, the people emphatically voiced their interests – overwhelmingly passing Question 1 granting the OSA the express authority to audit the Legislature. We urge the AGO to recognize the sense of urgency surrounding the people's wishes on this matter and support our office's efforts to begin the process of executing the will of people immediately – ensuring the Legislature does not slow-walk the implementation and/or adherence to the law.

⁸ In addition, the AGO website states, [the AGO] is an advocate and resource for the people of Massachusetts in many ways, including protecting consumers combating fraud and corruption, investigating and prosecuting crime, and protecting the environment, workers, and civil rights." [Office of the Attorney General | Mass.gov](https://www.mass.gov/info-details/office-of-the-attorney-general).

Fifth, just as your November 2023 letter raised separation of powers concerns, the OSA must register our own separation of powers concerns, specific to your office’s exercise of the powers of Judiciary. Massachusetts General Laws, c. 11, s. 12, provides the sole and exclusive remedy in this matter to be a decision of the Superior Court. Your opinion, which sought to bar this matter from consideration by the courts, effectively decided this matter in place of the courts. The substitution of your opinion for that of the judicial department would appear to be a blatant violation of the separation of powers doctrine. Your opinion circumvented the sole remedy available to the OSA, and in doing so, stood you in the place of the judicial branch of government. The AGO’s attempt to exercise the Judiciary’s power seems to have violated Article XXX of our Constitution, which states “[T]he executive [department] shall never exercise the legislative and judicial powers.” Article XXX forbids the legislative and executive branches from exercising powers that are entrusted to the judicial department, especially if that exercise restricts the court’s inherent powers. Chief among those inherent powers of the court is the power to interpret laws and decide cases where there is uncertainty with regard to statutory interpretation – as currently exists between the OSA and Legislature.

Sixth, the AGO previously cited an aversion to “refereeing intra-governmental disputes absent exceptional circumstances.”⁹ The present situation, especially now with the passage of Question 1, represents such an exceptional circumstance.

Finally, in your previous opinion, the AGO strayed from the fundamental question as to whether the OSA has authority to audit the Legislature and inappropriately introduced the question of audit scope. In its next response to the OSA, we urge the AGO to analyze G.L. c. 11, s. 12 and respect that the OSA maintains sole discretion related to the scope of its audits, limited only by the U.S. Comptroller’s Generally Accepted Government Auditing Standards, under which all OSA audits are conducted. Indeed, the AGO’s previous attempt to classify audits as either too narrow or too broad was beyond scope of the AGO’s authority and expertise. All audits are audits, under professional standards and law, regardless of scope. Any disagreement on these matters is an issue for the courts to resolve.

Indeed, Justice Fabricant, in the recent Bump v Haghayegh opinion, recognized and honored that independence, stating, “It is not up to the Court to decide what entity the Auditor should audit, and when; G. L. c. 11, s. 12 confers that authority on the Auditor.” If the courts lack the authority to make this determination, the AGO certainly lacks the legal authority to make such determinations. If the OSA has the legal authority to audit the Legislature under G. L. c. 11, s. 12, then the OSA has the authority to audit the Legislature consistent with G. L. c. 11, s. 12.

Conclusion

I ask the AGO to exert its full authority to ensure that the law is upheld. Your office rightly cleared the path for the ballot question, which more expressly provides our office with the authority to audit the Legislature, to proceed as a statutory question rather than as a constitutional one. Your office recently recognized that the people have spoken, overwhelming passing

⁹ AGO Letter at p.2.

Question 1. Our office hopes that recognition is supported with a strong legal defense of the people's position which mandates our office to conduct audits of the Legislature.

Sunlight is the best disinfectant...

As always, I look forward to working with you, and continuing to work alongside you, to help make government work better.

Yours in Service,

A handwritten signature in cursive script that reads "Diana DiZoglio".

Diana DiZoglio
Auditor of the Commonwealth

Cc: Governor Maura Healey
Michael Leung-Tat (OSA General Counsel)

ATTACHMENT 1



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

DIANA DIZOGLIO
AUDITOR

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FAX (617) 727-3014

November 8, 2024

Representative Ronald Mariano, Speaker of the House
24 Beacon Street, Room 356
Boston, MA 02133

Senator Karen E. Spilka, Senate President
24 Beacon Street, Room 332
Boston, MA 02133

Dear Speaker Mariano and President Spilka:

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, we will be conducting a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees).

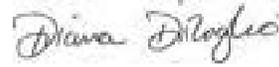
The Generally Accepted Government Auditing Standards, commonly referred to as the "Yellow Book," are issued by the United States Government Accountability Office. The standards apply to both financial and performance audits of government agencies. Our audit will be conducted in accordance with these standards and will cover all of the topics we were unable to fully review in our previous audit, due to your refusal to participate in the audit process. Our work will start with a review of high-risk areas, such as state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of your balance forward line item - including a review of all relevant financial receipts and information.

Section 12 of Chapter 11 of the General Laws requires organizations being audited to provide our audit team with books, documents, and other records pertaining to the audit areas. We may also make inquiries regarding audit issues with the members of your staff responsible for the functions involved in this audit and request, from management, written confirmation of statements your staff made to us during the audit. We ask that all requested records and information be made available to us within 72 hours of the date of request.

At the completion of our audit, we will provide you with a draft copy of our audit report for your review and comments. Your comments should be forwarded to us within 15 days of notification. Also, if you would like a formal exit meeting, please request the meeting at this time.

My office will be in touch to make arrangements for an entrance conference to be scheduled during November 2024.

Sincerely,

A handwritten signature in cursive script that reads "Diana DiZoglio".

Diana DiZoglio
Auditor of the Commonwealth

Cc: Representative Aaron Michlewitz, Chairperson, House Committee on Ways and Means
Representative Ann-Margaret Ferrante, Vice Chairperson, House Committee on Ways and Means
Representative William C. Galvin, Chairperson, House Committee on Rules
Representative John J. Mahoney, Chairperson, House Committee on Post Audit and Oversight
Steven T. James, House Clerk
Senator Michael J. Rodrigues, Chairperson, Senate Committee on Ways and Means
Senator Cindy F. Friedman, Vice Chairperson, Senate Committee on Ways and Means
Senator Joan B. Lovely, Chairperson, Senate Committee on Rules
Senator Marc R. Pacheco, Chairperson, Senate Committee on Post Audit and Oversight
Michael D. Hurley, Senate Clerk

ATTACHMENT 2



The Commonwealth of Massachusetts
OFFICE OF THE
COUNSEL TO THE SENATE

JAMES E. DiTULLIO
Counsel to the Senate

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August 11, 2023

By Electronic Mail and Hand Delivery

The Honorable Andrea Joy Campbell
Assistant Attorney General Erin Fowler
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell and Assistant Attorney General Fowler:

On behalf of Senate President Karen E. Spilka and the Massachusetts Senate, I submit this letter concerning Initiative Petition 23-34 (the "Petition"), which proposes to amend G.L. c. 11, § 12 to expressly provide the Auditor power to audit the General Court.¹ The Petition attempts to limit the Senate's constitutional authority to make its own rules and manage its own proceedings. It also triggers serious concerns related to Article 30 of the Massachusetts Declaration of Rights and the separation of powers doctrine. The Petition should have been submitted as a constitutional amendment. As proposed, the Petition is not in the "proper form," therefore I ask that the Attorney General decline to certify it.

Article 48 of the Massachusetts Constitution requires that an initiative petition be in "proper form for submission to the people." Art. 48, The Initiative, II, § 3. The Petition attempts to fundamentally recast two constitutional principles, and thus should be in the form of a constitutional amendment, not an initiative petition proposing a statutory change. *See League of Women Voters of Mass. v. Secretary of the Commonwealth*, 425 Mass. 424, 430 (1997) (finding that constitutional provisions "may be changed only by constitutional amendment," not the statutory initiative process); *Paisner v. Attorney Gen.*, 390 Mass. 593, 600-01 (1983) (stating that the power to "vacate the constitutional authority of the Senate and House to order their own internal procedures...cannot be brought about by an initiative petition unless that petition...seeks and accomplishes a constitutional amendment to that end"). The Petition does not propose enactment of a law and therefore should not be certified under Article 48.

¹ In the coming days, the Senate will be sending a separate submission to the Attorney General's Office related to the broader question of whether the Auditor, in her official capacity, has authority under existing law to audit the General Court.

The General Court's broad authority to determine its own rules and manage its own proceedings

The Massachusetts Constitution ensures wide latitude for the Senate and House of Representatives to determine their own rules and manage their own proceedings. Specifically, the Senate is authorized to “choose its own president, appoint its own officers, and determine its own rules of proceedings.” Part II, c. 1, § 2, art. 7. The House has similar authority. *See* Part II, c. 1, § 3, art. 10 (speaking to the House’s authority to “settle the rules and orders of proceeding in their own house”).²

When analyzing the rule-making authority of each legislative chamber, the Supreme Judicial Court has observed that “laws govern conduct external to the legislative body, while rules govern internal procedures.” *Paisner*, 390 Mass. at 600 (citing *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983)). The Court has stated: “Legislative rule-making authority is a continuous power absolute and beyond the challenge of any other tribunal.” *Id.* (citing *United States v. Ballin*, 144 U.S. 1 (1892)). When the General Court has enacted “statutes relating to internal proceedings” of the General Court, “each House was essentially engaged in its rule-making function” pursuant to the Constitution. *Id.* at 601. In the Court’s words, “Such procedural statutes are not binding upon the Houses” and that each branch “under its exclusive rule-making constitutional prerogatives, is free to disregard or supersede such statutes by unicameral action.” *Id.* at 601-02.

The Massachusetts Senate strongly supports the principle of making government open and accessible to the public while ensuring the financial and operational integrity of its functions. For nearly 40 years, the Senate has adopted and maintained a rule for the Senate and a parallel rule for Senate-House joint accounts that require independent audits of all financial accounts. *See* Senate Rule 13C (“The Senate Committee on Rules shall provide for an annual fiscal year audit of all Senate financial accounts to be conducted by a certified public accountant experienced in auditing governmental entities.”); Joint Rule 34. The Senate makes completed audits available to the public on the General Court’s website.³ Adoption of these rules is a clear and unambiguous demonstration that the function of auditing legislative accounts falls within the Senate’s exclusive and absolute constitutional authority to determine its own rules of proceedings. Consistent with the Supreme Judicial Court’s opinion in *Paisner*, any **statutory** provision to the contrary would be superseded by the Senate’s adoption of those rules.

Moreover, the current Auditor has already stated an intention to use any new statutory authority to audit the General Court’s core functions, including: active and pending legislation; the process for appointing committees; the adoption and suspension of House and Senate rules; and the policies and procedures of the House and Senate. There can be no question that these

² In contrast, there is not one word in the Massachusetts Constitution related to the Auditor’s power and authority. The Auditor’s authority and power comes from legislatively-enacted statutes.

³ The Senate also makes publicly available payroll, expenditures, and other financial information, including vendors and amounts paid to them, on the Comptroller’s website (<https://www.macomptroller.org/cthr>). With respect to its functions, the Senate makes available on the General Court’s website (<https://malegislature.gov>) extensive information about the Senate and the legislative process, including information on members, bills and amendments, roll call votes from Senate sessions and Senate committees, archived video of Senate sessions and committee hearings, and journals and calendars for the Senate.

“internal proceedings” are controlled exclusively by the General Court’s rule-making function. If proponents wish to limit that rule-making function, they must seek a change to the Constitution. They cannot proceed by initiative petition. *Paisner*, 390 Mass. at 600-01.

Separation of powers

Article 30 of the Massachusetts Constitution is more explicit than the Federal Constitution in calling for the separation of powers of the three branches of government, and the Supreme Judicial Court insists on scrupulous observance of its limitations. *Opinion of the Justices to the House of Representatives*, 365 Mass. 639, 640-41 (1974). At the doctrine’s core is a mandate to prohibit interference by one branch of government with the functions of another. *Id.* at 645.

Any audit of the General Court conducted by the Auditor would constitute a prohibited interference by an executive officer into the Legislature’s constitutionally protected prerogatives. That interference would be particularly acute were the Auditor to use her new-found statutory power to audit areas within the General Court’s core functions, including: active and pending legislation; the process for appointing committees; the adoption and suspension of House and Senate rules; and the policies and procedures of the House and Senate. Article 30 strictly prohibits such interference.

Conclusion

If the proponents of the Petition seek to give the Auditor express authority to audit the General Court, they should have made their proposal in the form of a constitutional amendment. Their failure to do so has left them with an initiative petition that is not in “proper form for submission to the people.” As such, it should not be certified under Article 48.

Sincerely,



James E. DiTullio
Counsel to the Senate

Cc: Karen E. Spilka, President of the Massachusetts Senate



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

November 27, 2024

VIA E-MAIL

The Honorable Diana DiZoglio
Auditor of the Commonwealth
State House Room TK
Boston, MA 02133

Dear Auditor DiZoglio:

I write in response to your letter of November 15, 2024, primarily concerning the authority granted to the Office of the State Auditor by G.L. c. 11, § 12, and the amendment to that law approved by the voters on the November statewide ballot (where it appeared as Question 1).

By its text, the law proposed by Question 1 includes “the [G]eneral [C]ourt” among the entities subject to an audit by your office. The title of that question—given to it by my office, working together with the Secretary of the Commonwealth—**was “A Law Expressly Authorizing the Auditor to Audit the Legislature.”**¹ The voters approved the law when it was proposed to them.

I understand from your letter and associated public comments that you are eager to undertake an audit of the Legislature—and, if necessary, litigate about its scope. But no such litigation is ripe.

First, the new law is not yet in effect. See Mass. Const. Art. Amend. 48, The Initiative, **Pt. V (an initiative “shall take effect in 30 days after such state election”)**. As a result, the Office of the State Auditor does not yet have the authority to seek information from the Legislature under the new law.

Second, when your office does seek any such information, the Legislature may respond with the requested information, may decline or fail to respond, or may make certain objections or claims of privilege. The nature of that response will necessarily affect whether litigation is appropriate and, if so, the scope of any prospective litigation.

¹ See G.L. c. 54, § 53.

To the extent the Legislature does make objections or claims of privilege, the Office of the State Auditor will then need to consider whether and how to resolve them, which may include seeking authority to bring litigation. My office will then evaluate whether any requested litigation is warranted, including by considering both your position and **the Legislature's position on the dispute**. As you know, our offices have cooperated on litigation matters in the past. In the usual course, **the Attorney General's Office recently** approved a request from the Office of the State Auditor to initiate litigation against the subject of an audit that has refused to provide information to which your office is entitled.

If and when a timely request to initiate litigation is made, **as the Commonwealth's chief** law officer, I will consider the appropriate next steps. In so doing, I will consider all pertinent principles of law and every fact available to me, including the law approved by the voters through Question 1.

I know our offices look forward to working constructively on these issues.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'AJC', with a long horizontal stroke extending to the right.

Andrea Joy Campbell

Cc: Michael Leung-Tat



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

TEL (617) 727-2075
FAX (617) 727-3014

MEMORANDUM

TO: Anne Sterman, Chief, Government Bureau (AGO)
Abigail Taylor, Acting First Assistant Attorney General (AGO)

CC: Steve Lisauskas, Executive Deputy Auditor (OSA)

FROM: Michael Leung-Tat, General Counsel and Deputy Auditor (OSA)

RE: Request for Assistance to Audit the General Court

DATE: December 17, 2024

Facts

The Office of the State Auditor (OSA) conducts audits to promote accountability and transparency, improve performance, and make government work better. G.L. c. 11 § 12 mandates the OSA to audit each department, office, commission, institution and activity of the Commonwealth, including those of districts and authorities created by the General Court and the General court itself, as the OSA deems necessary and at least once every 3 years. Entities may be audited separately or as part of an audit covering multiple entities.

On November 5, 2024, voters approved Question 1 on the statewide ballot, granting the OSA the express authority to audit the General Court under G.L. c. 11, § 12.¹ The new law went into effect on December 5, 2024. *See* Mass. Const. Art. Amend. 48, The Initiative, Pt. V (an initiative “shall take effect in 30 days after such state election”). On December 5, 2024, our office sent an audit engagement letter to Speaker Ronald Mariano and Senate President Karen Spilka, notifying them that our office would be conducting a performance audit of the General Court. (Attachment 1). Specifically, the audit will cover all of the topics we were unable to fully review in our previous audit of the General Court, starting with a review of high-risk areas, such

¹ Our office maintains that it had the authority to audit the General Court prior to passage of Question 1.

as state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of its balance forward line item - including a review of all relevant financial receipts and information. In response, Senate Counsel James E. DiTullio directed our office to the November 26, 2024 letter sent to our office from him and House Counsel James Kennedy. (Attachment 2). That letter was sent in response to our office's November 8, 2024 audit engagement letter and raised several objections to our efforts to audit, most notably, that our engagement was not timely as the amendment to G.L. c. 11, § 12 was not yet law.

Based on the Massachusetts Constitution, we believe that our office has the authority to audit the General Court as of December 5, 2024 or 30 days after the November 5, 2024 state election. It is notable that our office's position regarding the date when the ballot initiative petition became law was shared by Attorney General Campbell in her November 27, 2024 letter to Auditor DiZoglio. (Attachment 3). In addition, the Secretary of the Commonwealth's published guide to State Ballot Question Petitions indicates that the "[l]aw takes effect. . . [t]hirty days after election. . . on December 5, 2024." (p. 5-6 of Attachment 4).

Assistance Requested

For the reasons stated above, the OSA respectfully requests the assistance of the Attorney General's Office to initiate affirmative litigation against the General Court to compel compliance with our audit under G.L. c. 11 § 12.

Attachment 1



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

DIANA DIZOGLIO
AUDITOR

TEL (617) 727-2075
FAX (617) 727-3014

December 5, 2024

Representative Ronald Mariano, Speaker of the House
24 Beacon Street, Room 356
Boston, MA 02133

Senator Karen E. Spilka, Senate President
24 Beacon Street, Room 332
Boston, MA 02133

Dear Speaker Mariano and President Spilka:

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, we will be conducting a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees).

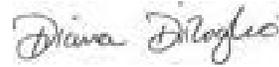
The Generally Accepted Government Auditing Standards, commonly referred to as the “Yellow Book,” are issued by the United States Government Accountability Office. The standards apply to both financial and performance audits of government agencies. Our audit will be conducted in accordance with these standards and will cover all of the topics we were unable to fully review in our previous audit, due to your refusal to participate in the audit process. Our work will start with a review of high-risk areas, such as state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of your balance forward line item - including a review of all relevant financial receipts and information.

Section 12 of Chapter 11 of the General Laws requires organizations being audited to provide our audit team with books, documents, and other records pertaining to the audit areas. We may also make inquiries regarding audit issues with the members of your staff responsible for the functions involved in this audit and request, from management, written confirmation of statements your staff made to us during the audit. We ask that all requested records and information be made available to us within 72 hours of the date of request.

At the completion of our audit, we will provide you with a draft copy of our audit report for your review and comments. Your comments should be forwarded to us within 15 days of notification. Also, if you would like a formal exit meeting, please request the meeting at this time.

Please respond with some potential dates for an entrance conference to be scheduled.

Sincerely,

A handwritten signature in cursive script that reads "Diana DiZoglio".

Diana DiZoglio
Auditor of the Commonwealth

Cc: Representative Aaron Michlewitz, Chairperson, House Committee on Ways and Means
Representative Ann-Margaret Ferrante, Vice Chairperson, House Committee on Ways and Means
Representative William C. Galvin, Chairperson, House Committee on Rules
Representative John J. Mahoney, Chairperson, House Committee on Post Audit and Oversight
Steven T. James, House Clerk
Senator Michael J. Rodrigues, Chairperson, Senate Committee on Ways and Means
Senator Cindy F. Friedman, Vice Chairperson, Senate Committee on Ways and Means
Senator Joan B. Lovely, Chairperson, Senate Committee on Rules
Senator Marc R. Pacheco, Chairperson, Senate Committee on Post Audit and Oversight
Michael D. Hurley, Senate Clerk

Attachment 2



THE GENERAL COURT OF MASSACHUSETTS
STATE HOUSE, BOSTON 02133-1053

November 26, 2024

The Honorable Diana DiZoglio
Auditor of the Commonwealth
State House, Room 230
Boston, MA 02133

Dear Auditor DiZoglio,

Your letter sent to the Speaker of the House of Representatives and the President of the Senate, received on November 8, 2024, informing them that you would be conducting “a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees)”, has been referred to us for response.

As you are undoubtedly aware, pursuant to Article 48 of the Amendments to the Constitution of the Commonwealth, an initiative petition for a change in law is effective thirty days after the state election in which the petition is approved, unless otherwise provided in the text of the petition.¹ Question 1 contained no such provision. Furthermore, this 30-day period does not commence until the election has been duly certified by the Governor and the Governor’s Council.² Thus, G.L. c. 11, § 12 does not yet contain any reference to the General Court, and your request is untimely.

The General Court respects the electoral process prescribed by the Constitution of the Commonwealth and the General Laws and will allow the Governor and the Governor’s Council to discharge their duties, as delineated under law, to certify the recent election results. When that process has concluded and thirty days have passed after certification of the election results, the General Court will respond to any audit engagement letter that we receive at that time.

In the meantime, we would refer you to the letters that you received from the Senate and the House of Representatives, dated March 24, 2023, as well as Attorney General Andrea Campbell’s letter to you dated November 2, 2023, all of which outline the serious constitutional questions presented by your proposed performance audit of the General Court.

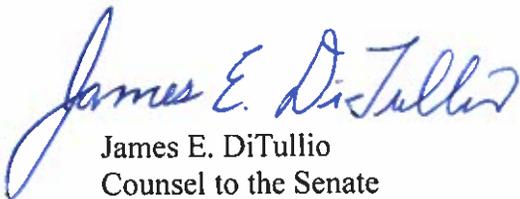
¹ See art. 48, The Initiative, V, § 1, of the Amendments to the Massachusetts Constitution, as amended by art. 81 of the Amendments (initiative petition approved by a majority of voters “shall become law, and shall take effect in thirty days after such state election or at such time after such election as may be provided in such law”).

² See *Opinion of the Justices*, 362 Mass. 907 (1972) (recognizing that an election is not deemed complete until the votes are tabulated by the Governor and Governor’s Council pursuant to G.L. c. 54, § 115).

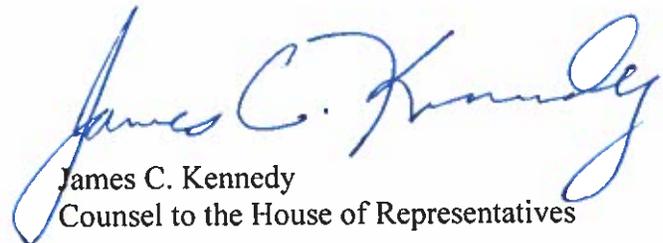
We would be remiss in failing to note that, pursuant to their internal Rules, both the Senate and the House of Representatives undergo regular professional financial audits by independent auditing firms, and those audits are publicly available online. In addition, the Comptroller's public website (<https://www.macomptroller.org/cthr>) contains detailed information regarding the General Court's payroll, expenditures, and other financial information, including its vendors and amounts paid to them.

In closing, as of your letter dated November 8, 2024, your office lacks the legal authority to conduct "a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees)."

Sincerely,



James E. DiTullio
Counsel to the Senate



James C. Kennedy
Counsel to the House of Representatives

CC: Michael Leung-Tat - Deputy Auditor & General Counsel

Attachment 3



THE GENERAL COURT OF MASSACHUSETTS
STATE HOUSE, BOSTON 02133-1053

November 26, 2024

The Honorable Diana DiZoglio
Auditor of the Commonwealth
State House, Room 230
Boston, MA 02133

Dear Auditor DiZoglio,

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The General Court respects the electoral process prescribed by the Constitution of the Commonwealth and the General Laws and will allow the Governor and the Governor’s Council to discharge their duties, as delineated under law, to certify the recent election results. When that process has concluded and thirty days have passed after certification of the election results, the General Court will respond to any audit engagement letter that we receive at that time.

In the meantime, we would refer you to the letters that you received from the Senate and the House of Representatives, dated March 24, 2023, as well as Attorney General Andrea Campbell’s letter to you dated November 2, 2023, all of which outline the serious constitutional questions presented by your proposed performance audit of the General Court.

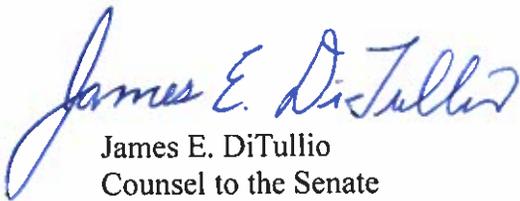
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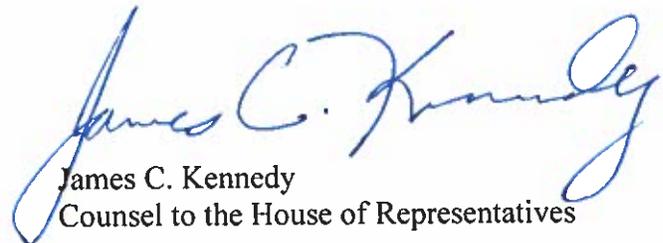
We would be remiss in failing to note that, pursuant to their internal Rules, both the Senate and the House of Representatives undergo regular professional financial audits by independent auditing firms, and those audits are publicly available online. In addition, the Comptroller's public website (<https://www.macomptroller.org/cthr>) contains detailed information regarding the General Court's payroll, expenditures, and other financial information, including its vendors and amounts paid to them.

In closing, as of your letter dated November 8, 2024, your office lacks the legal authority to conduct "a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees)."

Sincerely,



James E. DiTullio
Counsel to the Senate



James C. Kennedy
Counsel to the House of Representatives

CC: Michael Leung-Tat - Deputy Auditor & General Counsel

Attachment 4

State Ballot Question Petitions



Contents:

•

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• Checklist for Gathering Signatures	20

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Revised January 2023



A GUIDE FOR CIRCULATING PETITIONS

The Massachusetts Constitution provides that people have the right to affect the state laws by which they are governed. One way for persons to affect the laws is through the use of a petition for a ballot question. In Massachusetts, there are four types of petitions which may be used to place questions on the ballot at the biennial state election: an Initiative Petition for a Law, an Initiative Petition for a Constitutional Amendment, a Referendum Petition, and a Public Policy Petition.

File an INITIATIVE PETITION FOR A LAW to submit a proposed law to the voters for their approval or rejection or to repeal or amend a particular section of an existing law.

File an INITIATIVE PETITION FOR A CONSTITUTIONAL AMENDMENT to submit a proposed constitutional amendment to the voters for approval or rejection.

File a REFERENDUM PETITION to have a law recently enacted by the General Court repealed by the voters.

File a PUBLIC POLICY PETITION to submit instructions to the senator or representative from a district on a non-binding question of public policy.

Before collecting any signatures, read all of the instructions carefully. In addition, it may be helpful to seek assistance when writing the text of the measure to be placed on the petitions.

INITIATIVE PETITION FOR A LAW

2023-2024 Petition

An initiative petition for a law should be filed if the individual intends to submit a proposed law to the voters for their approval or rejection. An initiative petition for a law may also be used to propose a law seeking to repeal or amend a *particular section* of an existing law.

HOW TO ORIGINATE AN INITIATIVE PETITION FOR A LAW

To originate an initiative petition for a law, at least ten qualified voters of the Commonwealth may draw up and sign an original petition on which they put forward the full text of the law they wish to have enacted.

Each of the original signers must obtain a certificate of voter registration from the board of registrars or election commission in the city or town in which they are a registered voter. Each certificate of voter registration must be signed by at least three members of the board of registrars or election commission. These voter registration certificates and the original petition then must be submitted to the Office of the Attorney General by the first Wednesday in August.

SOME RECOMMENDATIONS

- Although not required, it is strongly recommended that each of the original signers initial each page of the text of the law before submitting it to the Attorney General. It is also advisable to have more than ten original signers (the ten names to be printed on the petition form can be specified).
- It is not recommended to file separate signature papers which are attached to the full text of the law. Instead, the final page of the full text should contain the signature of each of the original petitioners. Above the name of each signer you may wish to add a statement similar to **the following**: **"I have personally reviewed the final text of this Initiative Petition, fully subscribe to its contents, and agree to be one of the original signers of the petition."**
- The voter registration certificate of each signer may be attached separately to the petition.

EXCLUDED SUBJECTS AND SUMMARY

The Constitution excludes from the Initiative subjects that relate to religion, judges, the courts, particular localities of the Commonwealth, specific appropriations, and certain provisions of the **state constitution's Declaration of Rights. Additionally, substantially the same petition cannot** have appeared on the ballot at either of the two immediately preceding biennial state elections.

The Attorney General bears the responsibility of determining whether the petition is an acceptable subject of the Initiative, and if so, he or she prepares a fair and concise summary and returns this summary and the proposed law to the petitioners. If the Attorney General determines the petition relates to an excluded matter, the petition is disallowed.

PRINTING OF PETITIONS

After the petition is returned from the Attorney General with the summary, the petitioners file both the summary and the proposed law with the Secretary of the Commonwealth. The Secretary prepares initiative petition form blanks with the summary printed thereon for gathering signatures of registered voters.

Pursuant to 950 C.M.R. § 48.04(6), the petitioners may request in writing that certain information be printed on the petition forms. Specifically, upon request of the petition **sponsors, this office will print the petition sponsors' address and telephone number on the** petition form and/or a box at the bottom right on the petition sheet specifically for circulators to number petitions.

The petition forms are available within fourteen days after the petitioners file the papers with the Secretary of the Commonwealth. Petitions may be printed off-site. In order to receive the printed blanks as soon as possible, the petitioners may pick up the petitions at the printing plant if they so desire. Before picking up the blank petition forms from the printing plant, the petitioners must get an authorization slip from the Secretary of the Commonwealth. The Secretary provides enough blank petition forms to gather more than the required number of signatures. However, the petitioners may make exact copies of the blank forms for gathering additional signatures.

HOW MANY SIGNATURES ARE REQUIRED

In order to be placed before the General Court, the petition must contain certified signatures at least equal to 3% of the total vote cast for all candidates for Governor (excluding blanks) at the last state election. This means that until the results of the 2026 state **election are certified by the Governor's Council, the initiative** petition must be signed by a minimum of 74,574 certified voters. No more than one-quarter of the certified signatures may come from any one county (until the results of the 2026 state election are certified by the **Governor's Council, this figure is** 18,643).

THE PETITION IS LAID BEFORE THE LEGISLATURE

After the necessary number of signatures have been certified and subsequently filed with the Secretary of the Commonwealth, the Secretary transmits the initiative petition to the House Clerk for legislative action on the first legislative day of the year.

The initiative petition must be heard by the committee to which it is referred and a report issued. Any legislative action on the petition must be taken by each branch of the General Court before the first Wednesday in May. The initiative petition may not be amended by the General Court. If the General Court approves the initiative and the Governor signs it or it passes over his veto by a two-thirds vote of both houses, it becomes a law. In a rarely used procedure, after rejecting the proposed initiative, the General Court may formulate a legislative proposal of its own, to be grouped on the ballot with the initiative measure as an alternate choice.

HOW TO GET THE PETITION ON THE BALLOT

If the petition is rejected by the General Court or if the General Court fails to act by the first Wednesday in May, the proposed ballot measure, in an infrequently used process, may be amended by a majority of the ten original signers. Any amendment proposed pursuant to this infrequently used process must be approved by the Attorney General as perfecting in nature; that is, the amendment does not materially change the substance of the measure.

The petitioners may force the original or amended petition on the ballot at the next regular state election by submitting a written request to the Secretary by the appropriate deadline for additional petition forms and then collecting the required number of additional certified signatures on these forms. This request should indicate that a majority of the first ten signers wish to obtain additional petition forms. The request need not contain the signatures of all ten signers, and an agent may sign on behalf of a majority of the first ten signers.

ADDITIONAL SIGNATURES

The signatures of an additional 1/2 of 1% of the vote cast for Governor (excluding blanks) at the last state election must be filed with the Secretary of the Commonwealth. Accordingly, the additional signature requirement is 12,429 certified signatures. The same provision applies that no more than 1/4 of these signatures may come from one county. Accordingly, no more than 3,107 signatures can come from one county.

HOW IT PASSES

For an initiative petition for a law to be passed by the electorate, the Constitution requires that at least 30% of the voters who cast ballots in the election must vote in the affirmative on the question, and a majority of the ballots cast on that question must also be affirmative.

WHEN EFFECTIVE

The Constitution states that a law proposed by an initiative petition takes effect thirty days after the state election, or at such time after the election as may be provided in such law. The courts have not definitively decided whether this means thirty days after the election, or thirty **days after the certification of the election results by the Governor's Council, which usually** occurs in late November or early December.

If the petitioners want to ensure that the initiative measure takes effect at the earliest possible date, it is suggested that the petitioners state in the measure itself that it is to become effective immediately upon becoming law. That will mean it becomes effective immediately upon certification of the election results.

Legal References:

- Articles XLVIII, LXXIV, and LXXXI of the Amendments of the *Massachusetts Constitution*.
- Massachusetts General Laws Chapter 53, section 22A (2020 ed.).
- 950 C.M.R. § 48.00.
- Capezuto v. State Ballot Law Commission, 407 Mass. 949, 556 N.E.2d 366 (1990).
- Hurst v. State Ballot Law Commission, 427 Mass. 825 (1998).

CALENDAR FOR AN INITIATIVE PETITION FOR A LAW
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<u>Calendar of Events</u>	<u>Legal Deadlines</u>	<u>Dates</u>
Submission of petition to Attorney General by 10 original signers	By the 1st Wednesday of August	August 2, 2023
Filing of petition with Secretary of the Commonwealth by original Petitioners	Not before the 1st Wednesday of September	September 6, 2023
Secretary has petition forms prepared for collection of required number of signatures	No later than 14 days after filing with the Secretary	September 20, 2023*
Filing of petitions with local registrars for certification	By 14 days before the 1st Wednesday of December	November 22, 2023
Filing certified petitions with the Secretary	By the 1st Wednesday of December	December 6, 2023
Transmittal of petitions to House Clerk by the Secretary	First legislative day of the year	January 3, 2024
Legislative action	<i>Before</i> the 1st Wednesday of May	April 30, 2024
Filing with Secretary of request for additional petition forms	Not before the 1st Wednesday of May	May 1, 2024
Filing with Secretary of amended petition, with certificate from the Attorney General that the amendment does not materially change the substance of the measure	<i>Before</i> the 1st Wednesday of June	June 4, 2024
Collection and filing of additional signatures with local registrars for certification	After the 1st Wednesday of May and by 14 days before the 1st Wednesday of July	June 18, 2024**
Filing with Secretary of additional signatures to put petition on ballot if General Court fails to enact Measure	Not before the 1st Wednesday of June and by the 1st Wednesday of July	June 5, 2024 - July 3, 2024
STATE ELECTION DAY	1st Tuesday after the 1st Monday in November	November 5, 2024
Law takes effect	Thirty days after election or upon such time as may be provided in such law	December 5, 2024

* For those who file on September 6, 2023.

**Deadline falls on Tuesday, due to Juneteenth Independence Day.

INITIATIVE PETITION FOR A CONSTITUTIONAL AMENDMENT

2023-2024 Petition

An initiative petition for a constitutional amendment should be filed if an individual intends to submit a proposed constitutional amendment to the voters for approval or rejection.

HOW TO ORIGINATE A CONSTITUTIONAL AMENDMENT PETITION

To originate an initiative petition for a constitutional amendment, at least ten qualified voters of the Commonwealth may draw up and sign an original petition on which they put forward the full text of the constitutional amendment they wish to have enacted.

Each of the ten original signers must obtain a certificate of voter registration from the board of registrars or election commission in the city or town in which they are a registered voter. Each certificate of voter registration must be signed by at least three members of the board of registrars or election commission. These voter registration certificates and the original petition then must be submitted to the Office of the Attorney General by the first Wednesday in August.

SOME RECOMMENDATIONS

- Although not required, it is strongly recommended that each of the original signers initial each page of the text of the amendment before submitting it to the Attorney General. It is also advisable to have more than ten original signers (the ten names to be printed on the petition form can be specified).
- It is not recommended to file separate signature pages which are attached to the full text of the amendment. Instead, the final page of the full text should contain the signature of each signer. Above the name of each signer you may wish to add a statement similar to the following: **"I have personally reviewed the final text of this Constitutional Amendment, fully subscribe to its contents, and agree to be one of its original signers."**
- The voter registration certificate of each signer may be attached separately to the petition.

EXCLUDED SUBJECTS AND SUMMARY

The Constitution excludes from the Initiative subjects that relate to religion, judges, the courts, particular localities of the Commonwealth, specific appropriations, and certain provisions of the **state constitution's Declaration of Rights. Additionally, substantially the same petition cannot** have appeared on the ballot at either of the two immediately preceding biennial state elections.

The Attorney General bears the responsibility of determining whether the petition is an acceptable subject of an initiative, and if so, prepares a fair and concise summary and returns this summary and the proposed amendment to the petitioners. If the Attorney General determines that the petition relates to an excluded matter, the petition is disallowed.

PRINTING OF PETITIONS

After the petition is returned from the Attorney General with the summary, the petitioners file both the summary and the amendment with the Secretary of the Commonwealth. The Secretary prepares initiative petition form blanks with the summary printed thereon for gathering signatures of registered voters. These petition forms are available within fourteen days after the petitioners file the papers with the Secretary of the Commonwealth.

Pursuant to 950 C.M.R. § 48.04(6), the petitioners may request in writing that certain information be printed on the petition forms. Specifically, upon request of the petition **sponsors, this office will print the petition sponsors' address and telephone number on the** petition form and/or a box at the bottom right on the petition sheet specifically for circulators to number petitions.

In order to receive the printed blanks as soon as possible, the petitioners may pick up the petitions at the printing plant. Before picking up the blank petition forms from the printing plant, the petitioners must get an authorization slip from the Secretary of the Commonwealth. The Secretary provides enough blank petition forms to gather more than the required number of signatures. However, the petitioners may make exact copies of the blank forms if they wish for gathering additional signatures.

HOW MANY SIGNATURES ARE REQUIRED

In order to be placed before the General Court, the petition must contain certified signatures at least equal to 3% of the total vote cast for all candidates for Governor (excluding blanks) at the last state election. Therefore, until the results of the 2026 state election **are certified by the Governor's Council, the amendment petitions must be signed by a** minimum of 74,574 certified voters. No more than one-quarter of the certified signatures (18,643) may come from any one county.

THE PETITION IS LAID BEFORE THE LEGISLATURE

After signatures have been certified and petitions filed, the Secretary transmits the amendment petition to the House Clerk for legislative action on the first legislative day of the year.

Initiative amendments are acted upon by joint sessions of the House and Senate sitting **together. The amendment must be "laid before" the joint session by the second Wednesday** of May. The petition may be amended by a three-fourths affirmative majority vote by the House and Senate. By a majority vote, the Legislature may formulate a proposal of its own, to be grouped on the ballot with the initiative amendment as an alternative choice.

HOW TO GET THE AMENDMENT ON THE BALLOT

The initiative amendment must be placed on the ballot if, in joint sessions held by two successively elected Legislatures, the petition wins the support of at least 25% (50) of the 200 legislators (40 senators and 160 representatives). An initiative amendment to the constitution will not appear on the ballot if, when it comes to a vote in *either* joint session, less than 25% of the legislators vote in favor of it or no vote is taken before the legislative term ends.

HOW IT PASSES

For an initiative petition for a constitutional amendment to be passed by the electorate, at least 30% of the voters who cast ballots in the election must vote in the affirmative on the question, and a majority of the ballots cast on that question must also be affirmative.

WHEN EFFECTIVE

The Constitution states that a constitutional amendment proposed by initiative petition takes effect upon certification of the election results by the **Governor's** Council, which usually occurs in late November or early December, or date provided, if later.

Legal References:

- Articles XLVIII, LXXIV, and LXXXI of the Amendments to the *Massachusetts Constitution*.
- Massachusetts General Laws Chapter 53, section 22A (2020 ed.).
- 950 C.M.R. § 48.00.
- Capezzuto v. State Ballot Law Commission, 407 Mass. 949, 556 N.E.2d 366 (1990).
- Limits v. President of the Senate, 414 Mass. 31 (1992).

**CALENDAR FOR AN INITIATIVE PETITION FOR A
CONSTITUTIONAL AMENDMENT**

<u>Calendar of Events</u>	<u>Legal Deadlines</u>	<u>Dates</u>
Submission of petition to Attorney General by 10 original signers	By the 1st Wednesday of August	August 2, 2023
Filing of petition with Secretary of the Commonwealth by original Petitioners	Not before the 1st Wednesday of September	September 6, 2023
Secretary has petition forms prepared for collection of required number of signatures	No later than 14 days after filing with the Secretary	September 20, 2023*
Filing of petitions with local registrars for certification	By 14 days before the 1st Wednesday of December	November 22, 2023
Filing certified petitions with the Secretary	By the 1st Wednesday of December	December 6, 2023
Transmittal of petitions to House Clerk by the Secretary	First legislative day of the year	January 3, 2024
Legislative action - Joint Session	Must be "laid before" joint session not later than the 2nd Wednesday in May. If approved by at least 25% (50 votes) of legislature, it is held for the next elected legislature. If not, it is dead.	May 8, 2024
Legislative action - next elected Legislature in joint session		2025 or 2026
STATE ELECTION DAY (if amendment passes 2 sessions)	1st Tuesday after the 1st Monday in November	November 3, 2026
Amendment takes effect	Date of certification of election results or upon date provided if later	November or December 2026

* For those who file on September 6, 2023.

SUGGESTIONS FOR PETITION FILERS

1. Although the courts have not yet ruled on whether an initiative petition must have a title, it is recommended to include a title. The title should indicate whether the petition is an initiative petition for a law or for a constitutional amendment and should make some mention of the subject matter of the proposed measure.
2. It is preferable to have each signer of the petition put their initials on each page of the petition to avoid any later question about whether the person signing actually saw the final version of the petition.
3. It is highly recommended to get more than ten original signers with voter registration certificates, signed by a majority of the registrars of voters, to be submitted to the Attorney General at the time the petition is filed. The courts have not yet ruled on whether such certificates must be filed with the Attorney General. However, it is recommended to file the certificates with the Attorney General with the original petition itself.
4. The Attorney **General's** office welcomes the chance to review draft petitions on an informal, non-binding basis and will make suggestions for changes to avoid certification problems if the draft petitions are submitted prior to the first Wednesday in August. The earlier the draft is submitted, the better. Do not wait until the petition has been signed. For more information please contact:

Anne Sterman, Deputy Chief Government Bureau
Office of the Attorney General
One Ashburton Place, 20th Floor
Boston, Massachusetts 02108
(617) 963-2524
ballotquestions@state.ma.us
5. You need not wait until the first Wednesday in August to file the final version of your petition with the Attorney General. Petitions will be accepted any time, and early filings are encouraged.
6. The Office of the Attorney General requests that petitioners submit an electronic copy (either via e-mail or disc) when filing the original petition. For more information regarding electronic submission of the text of the petition, please contact the Attorney General's office at the telephone number above.

REFERENDUM PETITION

A referendum petition should be filed if an individual intends to have a law enacted by the General Court repealed by the voters. A referendum petition can only be used to repeal an entire law; it cannot be used to repeal a section of a law.

HOW TO ORIGINATE A REFERENDUM PETITION

To originate a referendum petition, at least ten qualified voters of the Commonwealth may draw up and sign an original petition on which they correctly identify the law they wish to have repealed.

Each of the ten original signers must obtain a certificate of voter registration from the board of registrars or election commission in the city or town in which they are a registered voter. Each certificate of voter registration must be signed by at least three members of the board of registrars or election commission. These voter registration certificates and the original petition are then submitted to the Secretary of the Commonwealth no later than 30 days after the act is signed into law by the Governor or passed over his veto.

SOME RECOMMENDATIONS

- It is strongly recommended that each of the signers have physical custody of the law they are seeking to repeal before signing the petition. It is also advisable to have more than ten original signers (the ten names to be printed on the petition form can be specified).
- It is not recommended to file separate signature papers which are attached to the law they are seeking to repeal. Instead, each of the ten signers should sign the page containing the petition language. Above the name of each signer you may wish to add a statement similar **to the following: "I have personally reviewed the law sought to be repealed by this** Referendum Petition and agree to be one of the original signers of the **petition."**
- The voter registration certificate of each signer may be separately attached to the petition.

EXCLUDED SUBJECTS AND SUMMARY

The Constitution excludes from the Referendum subjects that relate to religion, judges, the courts, particular localities of the Commonwealth, state appropriations and certain provisions of the state **constitution's** Declaration of Rights. The Attorney General prepares a summary of the act to be repealed. Within 14 days after receiving the summary from the Attorney General, the Secretary of the Commonwealth prepares referendum petition form blanks with the summary printed thereon for gathering signatures of registered voters.

HOW MANY SIGNATURES ARE REQUIRED

The number of certified signatures required depends on three factors:

- whether the law in question has an emergency declaration (and therefore is constitutionally barred from being suspended);
- whether the petitioners request the law be suspended upon filing the petition; and
- the number of votes cast for Governor at the last biennial state election, excluding blanks.

If the repeal is sought on an emergency law or on a law whose suspension is not requested by the petitioners, the number of certified signatures required is 1.5% of the total vote cast for Governor (excluding blanks) at the last state election. This figure is 37,287 until the results of the 2026 state election are certified by the **Governor's** Council; no more than one-fourth of these certified signatures may come from any one county, which is 9,321.

If the original petition filed by ten registered voters requests suspension in writing, the law will be suspended from taking effect when the referendum petition is filed. (Again, this does not apply to emergency laws.) The number of signatures required to suspend the law upon filing of the petition is 2% of the total vote cast for Governor (excluding blanks) at the last state election. This figure is 49,716 until the results of the 2026 state **election are certified by the Governor's Council; no more than one-fourth** of these certified signatures may come from any one county, which is 12,429.

HOW IS THE REFERENDUM PASSED

The ballot question that results from a referendum petition must read as follows:

"Do you approve of a law summarized below, which was approved by the House of Representatives by a vote of _____ on _____ (date) and approved by the Senate by a vote of _____ on _____ (date)?"

In order for the referendum to be successful, a majority of voters must vote against approval of the existing law. Further, at least 30% of voters who cast ballots in the election must vote to repeal the question (vote no).

Legal References:

- Articles XLVIII, LXVII, LXXIV, and LXXXI of the Amendments to the *Massachusetts Constitution*.
- Massachusetts General Laws Chapter 53, section 22A (2020 ed.).
- 950 C.M.R. § 48.00.
- Capezzuto v. State Ballot Law Commission, 407 Mass. 949, 556 N.E.2d 366 (1990).

CALENDAR OF EVENTS FOR REFERENDUM PETITIONCalendar of EventsLegal Deadlines*

Submission of petition to Secretary of the Commonwealth by ten original signers

No later than 30 days after act is signed by Governor (or passed over his veto)

Secretary prepares petition forms for collection of required number of signatures

Within 14 days after summary is prepared by Attorney General

Filing of petitions with local registrars for certification

By 14 days before filing deadline with the Secretary

Petitions with certified signatures filed with the Secretary

Within 90 days after the act is signed by the Governor (or passed over his veto)

Petitions submitted to the voters; Suspended law immediately null and void if law disapproved

First state election 60 or more days after filing certified petitions with the Secretary

If voters approve, suspended law becomes effective. If they do not approve, non-suspended law is repealed

30 days after election

* If a deadline falls on a Saturday, Sunday, or legal holiday, the deadline may be on the previous or next weekday. Check with the Elections Division for exact dates.

PETITION FOR A PUBLIC POLICY QUESTION

2024 Petition

A public policy petition should be filed if an individual intends to submit instructions to the state senator or state representative from a district on a non-binding question of public policy.

HOW TO ORIGINATE A PUBLIC POLICY QUESTION

To put a public policy question on the ballot in a particular district at the next regular state election, at least twelve hundred (1,200) voters in a state senatorial district and two hundred (200) voters in a state representative district must sign the petition. Generally, public policy questions involve a determination of what governmental action is desirable or necessary for the public interest.

The question must be fit for legislative action. It must provide a legislator with an instruction or direction regarding governmental action.

It is recommended that a petitioner submit a public policy question in the following form: **"Shall the (senator or representative) from this district be instructed to vote in favor of legislation (describe the legislation you wish to be enacted)?"**

For more information, please contact the Elections Division before circulating a petition.

WHERE TO GET FORMS

Petitioners may obtain forms for public policy questions from:

Secretary of the Commonwealth
Elections Division
One Ashburton Place, Room 1705
Boston, Massachusetts 02108

The petitions include a space designated for the text of the public policy question. Petitioners are strongly encouraged to consult the Office of the Attorney General and/or the Elections Division about the wording of their question before circulating their petition.

EXCLUDED QUESTIONS AND SUMMARY

The Attorney General determines whether or not the question is one of public policy. The **Attorney General's decision, in the absence of bad faith, is final and not reviewable in court.** In order to qualify for placement on the state election ballot, the question (or one that was **substantially the same**) **cannot have been disapproved by the district's voters in the previous state election.** Finally, no more than three public policy questions may appear in each district in any year.

FINAL FORM OF THE QUESTION

The Secretary of the Commonwealth and the Attorney General draft the final form in which the question will appear on the ballot.

HOW IS THE PUBLIC POLICY QUESTION PASSED

The public policy question must receive a majority of all votes cast in the district at the election to constitute an instruction to the legislator.

WHAT FORCE DOES A PUBLIC POLICY QUESTION HAVE

A question of public policy is not binding upon the vote of the legislator on that issue. Former **Attorney General Paul A. Dever wrote that a public policy question “. . . was to afford an opportunity to the voters to apprise their senators and representatives of their sentiments upon important public questions.”**

Legal References:

- *Massachusetts Constitution*, Part 1, Article XIX.
- Massachusetts General Laws Chapter 53, sections 19-22 (2020 ed.).

CALENDAR OF EVENTS FOR A PUBLIC POLICY PETITION

<u>Calendar of Events</u>	<u>Legal Deadlines</u>	<u>Dates</u>
Secretary of the Commonwealth has petition forms ready for the public	By the 15th Tuesday before the filing deadline with the Secretary	April 30, 2024
Petitions must be submitted to local registrars for certification	By the 28th day before the filing deadline with the Secretary	July 10, 2024
Petitions must be filed with the Secretary by the requisite number of voters according to the district	By the 1st Wednesday of August before the election at which the question is to be submitted	August 7, 2024
Question appears on the ballots in the district. The question is not binding and the results are advisory to the senator or representative.	State Election Day	November 5, 2024

CIRCULATING AND GATHERING SIGNATURES ON
BALLOT QUESTION PETITIONS

Two Massachusetts Supreme Judicial Court cases have set a strong precedent regarding the circulation and gathering of signatures on ballot question petitions. Walsh v. Secretary of the Commonwealth, 430 Mass. 103 (1999); Hurst v. State Ballot Law Commission, 427 Mass. 825 (1998). Specifically, both courts held that any extraneous markings on a petition sheet will invalidate all of the signatures **contained thereon**. “[N]o alterations--additions or deletions--of any sort may be made to the forms provided by **the Secretary....**” Walsh at 105; Hurst at 830. Prior to those decisions, the Secretary of the Commonwealth had been presented with and accepted petitions with various markings. *As a result of those court decisions, the Secretary will disallow all signatures contained on any petition that deviates from the blank form provided by the Secretary.*

In response to the court decisions, the Secretary of the Commonwealth promulgated regulations that govern the format of ballot question petitions. 950 C.M.R. § 48.00. The regulations were designed to enable petitioners to use the form most efficiently to gather signatures and to allow election officials to complete their tasks in as simple and efficient a manner as possible. Below please find recommendations for circulators.

DO NOT place any extraneous markings on the petitions.

DO NOT place a return address—handwritten, stamped or printed—on the petitions.

- * Upon request of the petition sponsors, this office will print the petition **sponsors’** address and telephone number on the petition form.

DO NOT underline, highlight, or mark any words, information or area on the petition, especially the summary.

DO NOT number the petitions.

- * Upon request of the petition sponsors, this office will print a box at the bottom right on the petition sheet specifically for circulators to number **petitions**. **The circulator’s initials** *may not* be part of a numbering system; instead, the system should use only numbers and the use of a connector—for example: 1 of 20, or 1/20, or just consecutive numbers.

DO NOT put the name, initials, or telephone number of the signature gatherer on the petition.

DO NOT make any marks to count or delineate the number of signatures gathered.

DO have scratch paper available when gathering signatures to test pens.

Please be aware that any extraneous markings on a petition sheet will result in invalidation of all signatures contained on it.

CIRCULATING PETITIONS

The regulations, 950 CMR § 48.07, require the Secretary to review all initiative petition forms to ensure that they contain the signatures of at least three registrars of voters and for extraneous markings and compliance with exact copy requirements. If a petition is not signed by at least three registrars of voters, the signatures contained on such sheet will not be counted towards the total number of required signatures and instead will be designated as **"uncertified."** Signatures contained on petition forms that have extraneous markings and/or signatures contained on petition forms that are not exact copies will not be counted towards the total number of required signatures and instead will be designated as **"disqualified."**

Examples of extraneous markings include, but are not limited to, the following:

1. highlighting;
2. underlining;
3. scribbles;
4. doodles;
5. instructional language (*i.e.* **"over"** or **"see other side"**);
6. the name or initials of the circulator; or
7. the telephone number of the circulator.

Examples of petition forms which are not exact copies include, but are not limited to, the following:

1. the paper size or color is different than that prepared by the Secretary;
2. the original text is missing or altered;
3. the petition form is one which was sent by facsimile;
4. the petition form contains printing on only one side;
5. the petition form contains two front sides, and therefore there is no box for the Registrars of Voters to certify the number of certified signatures contained thereon; or
6. the petition form contains a different number of signature lines than the number on the original petition form as prepared by the Secretary.

Accordingly, petitioners should ensure that any petitions circulated conform to the above standards. Signatures contained on petitions that contain extraneous markings and/or that are not exact copies will not be accepted as valid signatures towards the total number of required signatures.

ELECTRONIC VERSION OF PETITION

Upon written request, this Office will provide petitioners with a disk containing a .pdf file of the petition. This electronic version will be available on the same day as the blank initiative petition forms. Please note that by providing an electronic version of

the petition, it does not signify that this Office condones the electronic distribution of the form or the placement of the form on a website for downloading. Petitioners are cautioned to provide any person either circulating or signing an initiative petition with careful instructions to avoid disqualification, including making sure the petitions are printed double-sided and that they remain exact copies of the originals.

CERTIFIED SIGNATURES

Regardless of which type of petition is circulated, all signatures gathered must be those of registered voters in Massachusetts in the city or town in which the signatures are collected. All signatures must be certified by a majority (at least three) of the local registrars or election commissioners in the city or town in which the signatures are collected.

The final date for filing public policy petitions with local registrars or election commissioners is four weeks prior to the final filing date with the Secretary of the Commonwealth. For additional information, please see the calendars on pages 6, 10, 14, and 16.

FILE AS EARLY AS POSSIBLE

Petitioners *should not wait* until the final date for filing with local registrars. It is the **petitioners' responsibility to deliver the signed petitions to local registrars or election commissioners** by the appropriate deadline and to subsequently pick up the certified forms from the appropriate local election officials. The petitioners also bear responsibility for filing the certified petitions with the Secretary of the Commonwealth by the required filing date. Please be aware that all deadlines are at 5:00 p.m. on the date specified.

SIGNATURES ON ALL PETITIONS

In order for a signature to be certified, the signature must be legible and signed in person, substantially as registered. Next to the signature must be written the complete address where the voter is registered. A signature will be certified if it can reasonably be identified as that of a registered voter.

Further, each petition should contain signatures of registered voters from only one city or town. Registrars cannot certify names from communities other than their own. For **more information, please see "Checklist for Gathering Signatures" on page 20.**

CHECKLIST FOR GATHERING SIGNATURES

- Collect only signatures from one city or town on nomination papers designated for that city or town. Signatures from another city or town will be disallowed.
- All signatures must be legible and signed substantially as registered.
 - If the registrars can determine the identity of the voter from the form of the signature then the name shall be considered signed substantially as registered according to the law.
 - The law allows the voter to insert or omit a middle name or initial and still have the signature deemed valid.
 - Voters should sign both their first and last names.
For example: Helen Jones should not sign as “Mrs. John Jones.”
 - It is wise to have a list of registered voters or a street listing with you to verify the exact form of registration.
- Ballot question petitions require the **voter’s** address where they are currently registered.
- If a voter signs incorrectly or makes an error, do not erase or make changes. Leave the incorrect line intact and ask the voter to sign their name and address again on the next line. An altered or illegible signature may be disallowed or challenged.
- Persons who are prevented from signing by physical disability may authorize another individual to sign for them in the **voter’s** presence.
 - No person may sign for another unless the voter is physically disabled. One spouse may not sign for another.
- Collect and submit more signatures than the law requires. Many may be disallowed or challenged.



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
www.mass.gov/ago

January 2, 2025

VIA E-MAIL

The Honorable Diana DiZoglio
Auditor of the Commonwealth
State House Room 230
Boston, MA 02133

Dear Auditor DiZoglio:

I write in response to your recent request, via brief memorandum dated December 17, 2024, to initiate litigation against the Legislature to compel compliance with a performance audit that you sought to initiate in early December.

As you know, to ensure a consistent legal policy for the Commonwealth, my staff evaluate the legal basis for every request by a state agency to initiate affirmative litigation. That evaluation includes analyzing whether the underlying dispute is ripe (or moot), whether a claim presents a new or settled question of law, whether the agency has standing and entitlement to pursue the claim, and the nature of the relief sought. This process is familiar to you and your staff, as your office has made multiple requests to initiate affirmative litigation against audited entities since you took office. Indeed, I recently approved one such request in late November, after your staff provided detailed information regarding the factual and legal basis of the proposed claim, including relevant case law as well as the relief sought.

Unlike that request, your recent request does not identify the specific nature of the cooperation (or the materials) sought from the Legislature, nor does it cite a refusal by the Legislature to respond to specific requests for cooperation or materials after the effective date of the law approved by the voters in Question 1.¹ This information is necessary not only to evaluate the justiciability and merits of a potential claim, but also for a practical reason: a court complaint would need to detail what the Court is being asked to order, with specificity. For example, to the extent you seek the production of documents by the Legislature, the Complaint would need to

¹ The correspondence you supplied makes plain that you and the Legislature disagree about whether Question 1's changes to G.L. c. 11, § 12 take effect on December 5, 2024 (30 days from the state election) or January 4, 2025 (30 days from the certification of the results of the state election). The Legislature's letter states that it "will respond to any audit engagement letter that [it] receive[s]" after January 4, 2025 (when, in the Legislature's view, the law takes effect). Thus, whether, and to what extent, the Legislature is willing to cooperate with your audit is not yet clear.

identify the classes of documents you seek and set the stage to respond to any objection(s) to their production.

My office routinely requests, and receives, this type of information from other agencies when they request approval to initiate affirmative litigation. Without these specifics, we cannot responsibly approve such requests. That is particularly true where, as here, the legal issues involved are complex, including the extent of judicial relief available against the Legislature.

To be clear, the amendment to G.L. c. 11, § 12, passed by the voters as Question 1, will be given effect. Your public statements that the Attorney General's Office is somehow hindering "enforcement" of the amendment are inaccurate, as we remain ready to consider and approve a proper, substantiated, and ripe request to initiate affirmative litigation.

My review of your request is not colored by my analysis of the question of statutory interpretation you submitted to my office in 2023. Though you disagree, that issue—whether, prior to the amendment effectuated by Question 1, G.L. c. 11, § 12 included the Legislature within the enumerated entities subject to audit—was not a close question and did not require judicial review. By contrast, the extent to which the Legislature is amenable to a performance audit under the now amended G.L. c. 11, § 12 involves potentially nuanced issues, including serious constitutional questions, that may, in certain circumstances, warrant judicial resolution. But as you know from your prior requests, any request to initiate litigation must follow the standard process we have described to you in our previous communications and in this letter.

Should you have any further questions about this process, my staff is available to discuss them. Please accept my best wishes for a happy and healthy New Year.

Very truly yours,

A handwritten signature in black ink, appearing to read "AJC", with a stylized flourish extending to the right.

Andrea Joy Campbell

cc: Michael Leung-Tat, Esq.



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

TEL (617) 727-2075
FAX (617) 727-2383

January 3, 2025

VIA E-Mail

The Honorable Andrea Joy Campbell
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell:

I am disappointed with your recent letter, dated January 2, 2025, to me and your failure to take any action on my office's efforts to audit the Legislature. When I first engaged your office in July 2023 on this matter prior to the passage of Question 1, you frustrated our efforts to seek judicial review by unilaterally, in place of the Judiciary, deciding in favor of the Legislature. Now with the passage of Question 1, you appear unwilling to exercise the will of the people and uphold the law to support our office's audit of the Legislature. Quite simply, Madam Attorney General, do you fully support my office's right to audit the Legislature – or do you not?

Throughout my office's dispute with the Legislature, you have forcefully defended legislative leaders' unwillingness to cooperate with an audit conducted by my office (See Attachment). Yet, since the passage of Question 1, your office has remained on the sidelines. So, it's not that your office cannot take a public position in support of one side or the other, now that Question 1 has passed and the people have spoken, it simply appears that you have decided not to do so. I would love to see the same level of dedication and passion that was extended by your office for legislative leaders' prior refusals to be audited, in support of the new audit law that nearly 72% of voters approved. Yet it appears, instead of taking a similarly passionate position now, in support of the full implementation of the new audit law, you have instead continued to preview potential, hypothetical, future, maybe constitutional issues regarding my office's authority to audit the Legislature – which continues to instead sow seeds of doubt regarding whether or not you support legislative leaders' full adherence to the new audit law. I certainly hope, Madam Attorney General, this is not being done purposefully. After all, as you are most certainly aware, your office was responsible for vetting these types of constitutional concerns for all ballot questions. It was your office, not ours, that approved Question 1 for appearance on the ballot. In

doing so, your office overruled the objections clearly raised to you by the Senate, which cited the same constitutional concerns that they continue to raise now. If the Attorney General's Office shared these concerns, especially after they were clearly and formally raised by the Senate, it was your office's responsibility to require that this issue be filed as a constitutional amendment – rather than as a statutory question – before over 100,000 signatures were collected and countless volunteer hours were spent, to pass this amendment to the statute via ballot initiative into law. Since the Attorney General approved this ballot initiative over the constitutional objections of the Senate, it now has a duty to defend it against those same constitutional objections. I am concerned that the Attorney General's Office appears to instead be instigating constitutional objections to a law passed through a ballot initiative that it, itself, approved – continually referencing a potential, hypothetical, future, maybe constitutional issue with the audit law, rather than coming out and vocally supporting lawmakers' adherence to it.

Madam Attorney General, why are your constitutional concerns directed solely at my office and not the Legislature, which has indeed audited the executive branch myriad times and holds subpoena authority over executive branch agencies? Also, do your recent actions, denying my office's ability to bring this issue to court and choosing instead to decide what the law says on behalf of the court (a blatant exercise of the power of the judiciary by an executive branch elected official), not register with your office as a violation of the separation of powers doctrine, raising the same constitutional concerns for which your office has repeatedly alleged that my office could someday, somehow, potentially, and maybe violate? I encourage the Attorney General's Office to reflect upon the fact it appears to itself have violated the separation of powers doctrine and, therefore, the Constitution by previously adjudicating this matter on behalf of the bench. The Office of the State Auditor, however, remains committed to following the Constitution.

As we enter a new year, I am hopeful that you will change course and use the power of your office to forcefully and passionately defend the will of the people instead of continuing to demonstrate deference to the supposed constitutional issues raised by legislative leaders. Our Constitution should not continue to be weaponized against the will of the people by Beacon Hill insiders. We, the people, need our Attorney General's Office to stand up and lead the fight for justice to ensure that the audit, that the people voted for, occurs – and occurs timely.

Thank you and, as always, please feel free to contact me directly to discuss these important issues.

Respectfully,



Diana DiZoglio



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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November 2, 2023

BY HAND AND VIA E-MAIL

The Honorable Diana DiZoglio, State Auditor
Office of the State Auditor
Massachusetts State House, Room 230
Boston, MA 02133

Dear State Auditor DiZoglio:

I write in response to your letter of July 26, 2023, in which you ask the Attorney General's Office to "**recognize**" that the State Auditor's Office has the statutory authority to audit the Legislature over its objection. The contemplated authority to audit, as the State Auditor's Office ("SAO") has described it, **spans all "accounts, programs, activities and functions" of the Legislature, including "active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules and the policies and procedures of the House and Senate."**¹

We appreciate the important role of the SAO in Massachusetts government, where it provides the public and government decisionmakers **with "independent evaluation[s] of the various agencies, activities and programs operated by the Commonwealth."**² We recognize and value **that the SAO is not "simply a critic[,] but is an agent, an advocate, and a catalyst for improved management and delivery of government services."**³ We also recognize and respect that the Auditor is a constitutional officer, elected directly by the people. See Mass. Const. Amend. art. 82.

The Attorney General's constitutional, statutory, and common law role in state government includes the responsibility to develop considered, uniform, and consistent legal positions for the Commonwealth.⁴ We have evaluated your arguments in that role,

¹ See Letter from Diana DiZoglio, State Auditor, to Andrea Joy Campbell, Attorney General at 3 (July 26, 2023) ("**SAO letter**").

² State Auditor A. Joseph DeNucci, *Office of the State Auditor's Semi-Annual Report for January to June 1996* at 2 (Nov. 19, 1996).

³ *Id.* at 3.

⁴ See e.g., *Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977); *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163-165 (1975).

objectively analyzing the relevant law. We comprehensively reviewed the statute governing the SAO, the history of that statute, records reflecting the **SAO's** historical position on this issue, and the constitutional provisions implicated by your request.

After careful analysis of these materials, and as explained at length below, we conclude that the SAO does not currently have the legal authority to audit the Legislature without the **Legislature's consent**. Our conclusion builds on the advice of the Attorney General's Office to State Auditor DeNucci in 1994, when the office expressed considerable doubt that the SAO had authority to audit the Legislature over its objection.⁵ Prior State Auditors have made the same determination, acknowledging they lacked authority to audit the Legislature and proposing legislation to grant them that authority.⁶ These acknowledgments appear in various contexts, including, notably, documents cited in your recent letter. *See, e.g.*, State Auditor A. Joseph DeNucci, ***State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1984 to June 30, 1986*** at 1 (June 9, 1987) (noting that pursuant to *Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court*, 375 Mass. 179 (1978), **"the records generated by the Legislature could be made available to outsiders [*i.e.*, the Auditor] only at the discretion of the House and Senate leadership"**). Although we recognize (and discuss in detail below) that the SAO has in the past examined certain **entities under the Legislature's control**, we have not identified any prior example of an audit of the type currently proposed, *i.e.*, of how the **Legislature handles "active and pending legislation, the process for appointing commissions, [or] the adoption and suspension of the House and Senate rules."**⁷

The results of our research are sufficiently clear that litigation on this question is not necessary or appropriate. It is the role of the **Attorney General's Office** "to set a unified and consistent legal position for the Commonwealth." *Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977) (quoting *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163 (1975)). This role preserves credibility in the eyes of the public, who reasonably expect that their state government can agree on the meaning of state law, given that we, as state government, collectively ask the public to follow the law. A single state legal position also preserves **the Commonwealth's** credibility in the courts, which need not referee intra-governmental disputes absent exceptional circumstances that are not present here. *See Secretary of Admin. & Finance*, 367 Mass. at 163-164. In addition, as a steward of taxpayer resources, the Attorney General's **Office** believes that the cost of such legal sparring among entities within the same state government would be better spent on the sound and efficient delivery of government services.

We are mindful, of course, that the question of whether the SAO currently *can* audit the Legislature over its objection is different from the question of whether the SAO *should*

⁵ *See* Letter from Peter Sacks, Assistant Attorney General and Opinion Coordinator, to A. Joseph DeNucci, State Auditor (April 9, 1994) ("**AAG Sacks Letter**").

⁶ *See, e.g.*, House No. 6 (1999); House No. 7 (1995); House No. 10 (1994); House No. 19 (1985); House No. 19 (1983).

⁷ SAO letter, *supra* n.1, at 1.

be able to do so. The latter is, at least in part, a question of policy rather than a question of law. We do not reach that policy question here, and nothing in this letter should be understood as a policy statement.

As you know, the Attorney General has certified an initiative petition as eligible for the November 2024 ballot to which you, in your individual capacity, are a signatory.⁸ The initiative proposes an amendment to G.L. c. 11, § 12 (“**Section 12**”) that would explicitly authorize the SAO to audit the Legislature. Should the initiative become law, we may need to consider whether, and the extent to which, constitutional limitations affect how the law would apply. For now, we have confined our analysis to the issue raised by the SAO concerning the scope of your authority under current law.

Legal Analysis

We begin our analysis with the text of Section 12, well-established rules used to interpret the meaning of statutes, and **judicial decisions interpreting the term “departments”** in similar contexts. Then, we will address the history of the adoption and amendment of Section 12 over the years. As we will explain in detail, each of these methods of ascertaining statutory meaning indicates that the **word “departments” in Section 12** is limited to Executive Branch entities.

Next, we will examine prior reports and audits, and other materials, relating to the **SAO’s past examinations** of legislative activity. We conclude that, like the statute itself, these materials do not support the assertion that the SAO presently has authority to **undertake a comprehensive audit of the Legislature over the Legislature’s objection**. In fact, these materials provide support for the conclusion that the SAO does not have that authority, as the SAO has acknowledged over the years in its own reports.

Finally, we note that separation of powers principles in the Constitution of the Commonwealth may limit an **Executive Branch entity’s** ability to audit certain operations of another branch of government **over the latter’s objection**, that the Legislature would have been aware of these limitations when drafting Section 12, and that it is unlikely that the Legislature would have ignored those limitations by granting the Auditor broad authority to audit its operations.

1. Standard Methods of Interpreting Statutory Language, and Judicial Decisions Interpreting Similar Provisions, Show That the Term **“Department” in the SAO’s** Enabling Statute Does Not Include the Legislature.

Chapter 11 of the General Laws addresses the authorities and responsibilities of the State Auditor, along with the processes that the SAO must follow. Most pertinent to this analysis is Section 12 of Chapter 11, which delineates the **SAO’s** authority and responsibility to conduct audits.

⁸ See Initiative Petition 23-34 (proposing to authorize the Auditor to audit the Legislature).

Section 12 directs the State Auditor to audit the “accounts, programs, activities and functions directly related to the aforementioned accounts of all *departments, offices, commissions, institutions and activities* of the commonwealth, including those of districts and authorities created by the general court and including those of the income tax division of the department of revenue.” G.L. c. 11, § 12 (emphasis added). Each state entity that the Auditor can audit must be audited **“at least once every 3 years.”** *Id.*⁹

The key question **is whether the Legislature is a “department” as that term is used in Section 12.**¹⁰ Applying well-established rules for interpreting statutes, we conclude that it is not. We find further support for this conclusion from several decisions of the **Supreme Judicial Court that considered the word “department” in similar contexts.**

First, it is “a basic tenet of statutory construction that a statute must be construed ‘so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” *Bankers Life and Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140 (1998) (*quoting* 2A B. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992)). **Here, interpreting “department” to include the legislative, executive, and judicial branches of government would render the remaining words in the provision surplusage. Specifically, there would be no reason for the statute also to list “offices, commissions, institutions and activities of the commonwealth, including those of districts and authorities created by the general court and including those of the income tax division of the department of revenue,” since many of those entities would already be encompassed by the term “department.”**

The Supreme Judicial Court addressed a virtually identical issue arising out of the **phrase “departments, boards, commissions or institutions”** as appearing in Article 48 of the Articles of Amendment to the Massachusetts Constitution. *See Yont v. Secretary of the Commonwealth*, 275 Mass. 365, 367-368 (1931). In *Yont*, the Court considered and rejected a suggestion that the term **“department”** encompassed **“the three grand departments of government”** described in Article 30. *Id.* **It was “manifest[,]” the court explained, that “department” was used “in a much more restricted sense” in Article 48,**

⁹ To effectuate these audits, the State Auditor’s Office “shall have access to such accounts at reasonable times and . . . may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit conducted under this section . . . **except tax returns.**” G.L. c. 11, § 12. Should enforcement of requests for materials required for an audit prove necessary, Section 12 confers authority upon the Superior Court to order production. *Id.* **Where an audit results in “adverse or critical” results, the SAO “may require a response, in writing, to such audit results.”** *Id.* **The response “shall be filed with the appropriate secretariat, the secretary of administration and finance, the cognizant executive board in the case of an authority, and the house and senate committees on ways and means.”** *Id.*

¹⁰ **The SAO letter focuses mostly on the term “departments,”** and our analysis therefore does the same. The SAO also briefly argues that **the Legislature’s legislative and budgetary activities are “activities” and the Legislature’s functions are “functions” as those terms appear in Section 12.** SAO letter, *supra* n.1, at 3 & n.3. But as a previous AGO opinion **noted,** “common sense suggests that the Legislature itself is not an ‘activity’ of the Commonwealth. If it were, then so would be every part of the executive and judicial branches, and the more specific mention in G.L. c. 11, § 12 of ‘departments, offices, commissions, [and] institutions’ would . . . be rendered impermissibly superfluous.” AAG Sacks Letter at 2-3. This same reasoning applies to the term “functions.”

and “[t]o attribute the same meaning to the word in both articles would also render superfluous and of no signification the remaining descriptive words in the relevant clause of **article 48 of the Amendments, namely: ‘boards, commissions or institutions.’**” *Id.* at 368. Similarly, the Court in *Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court*, 375 Mass. 179, 184 (1978), considered whether the word **“department”** as appearing in the statutory phrase **“agency, executive office, department, board, commission, bureau, division or authority”** included the Legislature in the public records law, G.L. c. 4, § 7, Twenty-sixth. The Court readily concluded that **“the term ‘department’ appearing in this statutory clause has a much more restricted meaning.”** *Id.* (citing *Yont*, 275 Mass. at 367-68).¹¹

Second, it is a fundamental rule of statutory construction that **“the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”** *Dermody v. Executive Office of Health & Human Servs.*, 491 Mass. 223, 230 (2023) (citation omitted). The canon of *noscitur a sociis*—“ordinarily the coupling of words denotes an intention that they should be understood in the same general sense,” *Commonwealth v. Hamilton*, 459 Mass. 422, 432 (2011) (quoting 2A N.J. Singer, Sutherland Statutory Construction § 47:16 at 352-353 (7th ed. 2007))—is one means by which the Supreme Judicial Court takes statutory context into account.¹² That canon applies with particular force here. In the first sentence of Section 12, the word **“departments”** is coupled with **the words “offices, commissions, [and] institutions.”** Similarly, **later in the section, “departments” is coupled with “agencies, bureaus, boards, commissions, institutions, [and] authorities.”** Thus, all of the words with which **“departments”** is coupled in Section 12 refer to subsidiary governmental entities. It follows that **“departments” “should be understood in the same general sense,”**¹³ to refer to **a subsidiary governmental entity (such as the “department of revenue” specifically referenced later in the first sentence)**, rather than as one of the **“three grand departments of government.”** *See Yont*, 275 Mass. at 367.

Third, contrary to the maxim that **“a statute should be read as a whole to produce an internal consistency,”** *Telesetsky v. Wright*, 395 Mass. 868, 873 (1985) (citing 2A C. Sands, Sutherland Statutory Construction § 46.05 (4th ed. 1984)), **the SAO’s proposed interpretation of “department”** conflicts with how Chapter 11 otherwise refers to the Legislature. Specifically, throughout Chapter 11, the Legislature is called **“the general court.”** For example, G.L. c. 11, § 6 provides that the salaries of the officers and employees in the Auditor’s Office may not **“exceed the sum annually appropriated therefor by the general court.”** G.L. c. 11, §§ 6B and 17 require that reports be made to

¹¹ We do not agree that the reasoning of the *Westinghouse* decision **“was narrowly limited to the state’s public records law and is not directly applicable to [Section 12], the language of which differs and is broader.”** *See* SAO letter, *supra* n.1, at 4 n.5. Rather, we concur with prior State Auditors, who have expressly recognized the importance of *Westinghouse* and have noted that the decision precludes under existing law any ability of the SAO to obtain records from the Legislature over its objection. *See infra* at 12.

¹² *See Richardson v. UPS Store, Inc.*, 486 Mass. 126, 130-131 (2020) (**“The canon of noscitur a sociis counsels that terms must be read within the context, of the statute in which they appear.”**).

¹³ *Hamilton*, 459 Mass. at 432.

“the general court.” Indeed, Section 12 itself **refers to “districts and authorities created by the general court.”** The Legislature would not use the term **“department”** to subject itself to the Auditor’s mandatory audit requirement where it used a different, more specific term (**“general court”**) to refer to itself in the very same sentence and elsewhere in the chapter. **“Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings.”** *Commonwealth v. Williamson*, 462 Mass. 676, 682 (2012) (quoting *Ginther v. Commission of Ins.*, 427 Mass. 319, 324 (1998)); accord *Commonwealth v. Wynton W.*, 459 Mass. 745, 751-752 (2011) (Court presumes that Legislature intended different meanings when it used distinct terms in two statutes enacted at the same time).

It is, of course, true that certain provisions of the Massachusetts Constitution and some statutes refer to the **“legislative department”** or the **“department of legislation.”** For example, Article 30 of the Declaration of Rights, which establishes the principle of **separation of powers, states in part that “the legislative department shall never exercise the executive or judicial powers.”**¹⁴ The Supreme Judicial Court has also occasionally referred to the **“legislative department.”**¹⁵ However, as explained above, multiple Supreme Judicial Court decisions have found that use of the term **“department”** in a statute, when read in context, refers to Executive Branch departments, not to entire branches of government. See, e.g., *Westinghouse*, 375 Mass. at 184; *Yont*, 275 Mass. at 367-368; *Massachusetts Probation Ass’n v. Commissioner of Admin.*, 370 Mass. 651, 661 (1976) (noting **“the similar phraseology”** between statutes limited by their terms to executive branch departments and labor statute defining public **employee as “any employee of the commonwealth assigned to work in any department, board, commission or other agency thereof,”** and concluding that labor statute was limited to executive branch employees).

As one of my predecessors, Attorney General Francis X. Bellotti, observed, these **decisions have all “considered the meaning of the word ‘department’ as it appears in statutory or constitutional provisions listing several types of governmental entities (e.g.,**

¹⁴ See also Mass. Const. pt. 2, c. 1, § 1, art. 1 (specifying that “[t]he department of legislation shall be formed by two branches, a Senate and House of Representatives”); Mass. Const. Amend. art. 87 (referring to **“the executive department of the government of the commonwealth”**); G.L. c. 231A, § 2 (providing that **declaratory judgment procedures “shall not apply to the governor and council or the legislative and judicial departments”**); G.L. c. 29, § 7L (providing that **“expenses of the commonwealth shall include expenses of the executive, legislative and judicial departments”**); G.L. c. 234A, § 37 (stating that **“the legislative, executive, and judicial departments of the commonwealth and of the United States shall not be impeded by the provisions of this chapter from freely exercising their independent powers and duties”**). It is also worth noting that the Massachusetts Constitution has no consistent reference term for the Legislature. As one legal commentator has observed, **“[a]lthough no language in the Massachusetts Constitution should be considered *superfluous*, the use of one word over another is not necessarily significant.** The state constitution runs rampant with synonyms and uses them for no discernable reason.” Kenneth Bresler, *Synonyms in the Massachusetts Constitution*, 98 Mass. L. Rev. 7, 7 (Oct. 2016) (emphasis in original).

¹⁵ See, e.g., *Answer of the Justices to the Governor*, 444 Mass. 1201, 1204-1205 (2005) (**Article 30 “acts as an inhibition upon the Justices giving opinions as to the duties of either the executive or legislative department except under the Constitution.”**).

‘board,’ ‘commission,’ ‘office,’ ‘authority’), in a manner and order very similar to” the statute he was considering, which in turn is very similar to Section 12. 1977-78 *Op. Att’y Gen’l* No. 28, P.D. No. 12 at 141 (June 2, 1978) (interpreting small business purchasing provisions of St. 1976, c. 434) (citations omitted). Attorney General Bellotti further observed **that** “[i]n each case the court concluded that ‘department’ referred only to departments within the executive branch of government, and did not include either the legislative or judicial branches.” *Id.* Noting the “**similarity between the language**” in the statute he was considering “and the statutes under review in the cited cases,” Attorney General Bellotti **concluded that the proper course was to** “follow the court’s decisions and conclude that ‘department’ in [the statute at issue] does not encompass the legislative or judicial branch.” *Id.* Likewise, a 1921 opinion of Attorney General J. Weston Allen determined that “**it is plain that the words ‘every state officer, department, or head thereof’ are confined to the executive branch of government.**” 1921-1922 *Op. Att’y Gen’l*, P.D. No. 12 at 348-349 (Dec. 20, 1921). I adopt the views of my predecessors that **the word “department” in statutes such as these** should in general encompass only executive branch departments.¹⁶

In summary, settled principles of statutory construction and judicial decisions cited above, together with prior opinions of this Office, all dictate our conclusion that “**department,**” as it appears in Section 12, does not include the Legislature.

2. The Historical Context of **Section 12’s** Adoption Indicates that the **Term “Departments” References the Executive Branch.**

The historical context of the addition of the term “departments” to Section 12 provides further support for our conclusion that the Legislature is not within the ambit of that term as it is used in Section 12.

The Legislature created the **State Auditor’s Office, originally known as the “Office of Auditor of Accounts,”** by statute in 1849. *See* St. 1849, c. 56. In 1907, the Legislature **amended the Auditor’s enabling statute to direct the Auditor to “at least once in each year, and oftener in his discretion, audit the accounts of all state officials, boards and institutions receiving moneys to be turned into the treasury of the Commonwealth.”** St. 1907, c. 139, § 1. This is the origin of the provision currently at issue: Section 12. **Notably absent from this provision was the term “department.”**

¹⁶ The SAO letter argues that the absence of an explicit exclusion of the Legislature from Section 12 is an indication that the Legislature intended to include itself. SAO letter, *supra* n.1, at 4-5. In support of this proposition, the SAO letter cites to a 1931 opinion written by Attorney General Warner that states, “[t]he plain meaning of section 12 . . . is that the [SAO] shall make a careful audit of all departments, offices, commissions, institutions, and activities of the Commonwealth, except such as are expressly exempted in the statute.” *Id.* (citing 1930-31 *Op. Att’y Gen’l*, P.D. No. 12 at 58 (March 4, 1931)). However, because we **conclude the term “department”** in Section 12 does not include the Legislature, the question of whether the Legislature expressly exempted itself from a list in which it was not included does not arise. Therefore, there is no conflict between **Attorney General Warner’s opinion and the opinions by Attorneys General Allen and Bellotti** discussed in the text.

The term “department” did not appear in this section until 1920, when the General Laws were enacted. See G.L. c. 11, § 12 (1921). The margin notes in the General Laws beside the 1920 version of this section cite to a 1919 act that reorganized the executive branch into “departments.” See *id.* (citing St. 1919, c. 350, § 54).¹⁷ This 1919 act implemented Article 66, an amendment to the Massachusetts Constitution adopted in 1918 that required the executive and administrative work of the Commonwealth to be organized into not more than twenty “departments.”¹⁸ Proponents of this amendment argued that this change was necessary given the large and disorganized state of the Executive Branch, with one noting that there were “over 100 boards, commissioners, and officers, all independent” with “no grouping, no correlation, no co[o]rdination, no integration.”¹⁹

The Article 66 restructuring prompted “sweeping changes” to the Commonwealth’s laws to reflect the new department system.²⁰ This included the addition of the word “department” to clauses that had previously only referred to boards or commissions. See, e.g., G.L. c. 5, § 11 (1921),²¹ G.L. c. 111, § 160 (1921),²² G.L. c. 121, § 19 (1921).²³ One such clause was contained in the Auditor’s enabling statute, which had previously stated that the Auditor shall “audit the accounts of all state officials, boards and institutions.”

¹⁷ Pursuant to that act, “[a]ll executive and administrative offices, boards, commissions and other governmental organizations and agencies, except those now or by virtue of this act serving directly under the governor or the governor and council” were placed into “departments.” See St. 1919, c. 350, § 1. All rights, powers, duties, and obligations of the existing offices, boards, and commissions were transferred to the new departments. See *generally* St. 1919, c. 350.

¹⁸ “Article 66 was superseded in 1966 by art. 87, which provides for a scheme of greater flexibility.” *Ward v. Coletti*, 383 Mass. 99, 107 n. 11 (1981).

¹⁹ Debates in the Massachusetts Constitutional Convention 1917-1918 Vol. III, c. LIII at 1024.

²⁰ See Senate Doc. No. 27 at 4-5 (1920) (“The amendment requiring no more than twenty state departments has resulted in the passage of chapter 350 of the General Acts of 1919 . . . [This law] has made necessary sweeping changes in 50 other chapters . . . and lesser changes in 35 chapters, making in all 102 chapters which have had to be drafted, redrafted, or changed since July 23, 1919, the date of passage of said chapter 350.”); see also Introduction to the General Laws Vol. I at iii (1921) (noting that much of the collection “was changed by . . . [Article 66], providing for consolidation of all State boards and offices, except those under the Governor and Council, into not more than twenty departments”).

²¹ This provision directed clerks to “annually prepare a manual of the general court” and the state secretary to distribute copies of the manual to each of the “officers of the several state departments, boards and commissions.” G.L. c. 5, § 11 (1921). The preceding version of this section directed secretary distribute the manuals to “each of the officers of the several state boards and commissions.” R.L. c. 9, § 10 (1902).

²² This provision authorized the Department of Public Health to “delegate the granting and withholding of any permit required by such rules or regulations to state departments, boards and commissions.” G.L. c. 111, § 160 (1921). The preceding version authorized the Department of Public Health (then “the State Board of Health”) to “delegate the granting and withholding of any permit required by such rules or regulations to state boards and commissions.” R.L. c. 75, § 113 (as amended by St. 1907, c. 467, § 1).

²³ This provision required the Department of Public Welfare to “give notice . . . to the institutions, departments, boards, officers, or persons . . .” G.L. c. 121, § 19 (1921). The preceding version required the Department of Public Welfare (then “The State Board of Charity”) to “give notice . . . to the institutions, boards, officers, or persons . . .” R.L. c. 86, § 53 (1902).

R.L. c. 6, § 21 (as amended by St. 1907, c. 139, § 1). After the changes necessitated by Article 66, that statute **now read: “[the Auditor] shall . . . audit the accounts of all state departments, officers, commissions and institutions receiving money to be paid to the commonwealth.”** G.L. c. 11, § 12 (1921) (emphasis added). The insertion of the term **“department”** is thus best understood in context of a larger restructuring of the Executive Branch **into “departments.”** This history thus indicates that the Legislature added the term **“department”** to Section 12 not to expand its scope to include the Legislature, but rather to update its terms to match the recently-enacted restructuring of the executive **branch of the Commonwealth’s** government—exactly as it did with numerous other statutes.

The Supreme Judicial Court discussed this historical context in *Yont*, 275 Mass. at 367. There, as noted above, the Court **addressed the meaning of the term “department” as it appeared in Article 48 of the amendments to the Massachusetts Constitution.** *Id.* The Court looked to the history of Article 48 and noted that it was enacted at the same time as Article 66. *Id.* Considering these two amendments together, the Court concluded **that “departments” in Articles 48 and 66 had the same meaning: Executive Branch departments.** *Id.*

3. **The SAO’s Past** Statements, Reports, and Audits Do Not Indicate that Current Law Authorizes **a Legislative Audit Over the Legislature’s** Objection.

The SAO letter cites to 113 reports referencing the Legislature as precedent for the type of audit now proposed. We have reviewed each of those reports—as well as two additional reports identified by our office and four additional reports identified recently by the SAO—and we do not agree. We conclude, instead, that the reports do not provide support for the authority the SAO now seeks, for two principal reasons.

- First, 74 of these reports predate 1923, at which time the Auditor’s **enabling** statute was amended to transfer the bulk of its financial reporting responsibilities to the newly created Office of the Comptroller. *See* St. 1922, c. 545, § 5. These reports are not **“audits” as that term is currently understood, but instead were summaries of the Commonwealth’s finances.** As such, they have no bearing on whether the Auditor’s **enabling statute currently gives the Auditor the authority to audit the Legislature.**
- Second, while the SAO indeed audited specific entities under the control of the Legislature after 1923, these audits were irregular, limited in scope, and did not examine core legislative functions.

We turn first to the pre-1923 reports. When the SAO was established in 1849, the Auditor’s **role was similar to what** would later become the Comptroller’s **role: examining** the financial records of the Commonwealth to ensure accuracy and reliability. *See* St. 1849, c. 56, § 4. Specifically, the Auditor’s **enabling statute required the Auditor, every January, to “carefully examine all the books and accounts of the treasurer,” and submit an annual report to the Legislature detailing “a complete statement of the public**

property of the Commonwealth,” including its debts, obligations, revenue, expenses, and balance left in the treasury. *Id.* These reports were not limited to the “departments, offices, commissions, institutions and activities of the commonwealth” (like the Auditor’s current authority). Instead, the reports covered all public property and financial accounts “of the Commonwealth,” including property held and accounts spent by the Legislature. *See id.* In 1922, however, the Office of the Comptroller was established,²⁴ and the Auditor’s annual financial reporting duties were transferred to the Comptroller.²⁵ *See* St. 1922, c. 545, § 5 (specifying that the Comptroller has the authority “to perform all the accounting duties hereinbefore transferred from the [SAO]”).

As noted above, we have reviewed each of the pre-1923 reports. From that review, it is clear that those reports were made pursuant to the Auditor’s annual financial accounting authority that ended in 1922. We therefore see no connection between these reports and the question of whether the Auditor currently has the authority to conduct a performance audit of the Legislature over the Legislature’s objection. First, many of the reports themselves explicitly state that they are annual financial reports made pursuant to the Auditor’s statutory authority under St. 1849, c. 56, § 4 and its subsequent iterations.²⁶ The inaugural report, for instance, published less than one year after the creation of the SAO, explains that the report is intended to fulfill the Auditor’s yearly financial reporting duty as it is outlined by St. 1849, c. 56, § 4.²⁷ Many of the subsequent reports also cite to or quote the statute governing the Auditor’s financial reporting authority. These reports contain a broad overview of all of the financial accounts, expenditures, and debts of state entities, which included the Legislature. Second, the reports are limited to financial information, and only occasionally included asides to the Legislature about how the Commonwealth could reduce its expenditures. They do not contain the kind of in-depth review of legislative functions that the SAO currently

²⁴ St. 1922, c. 545 established the Commission on Administration and Finance, which included the “comptroller’s bureau.” *See* St. 1922, c. 545, §§ 3 (organizing the commission into three bureaus, including the “comptroller’s bureau”), 5 (specifying the Comptroller’s responsibilities). For consistency, we will refer to the “comptroller’s bureau” as the “Comptroller” or “Office of the Comptroller.”

²⁵ Specifically, the Comptroller was required to prepare and file annual statements of state accounts. *See* St. 1922, c. 545, § 5 (requiring the Comptroller to “prepare and file annually . . . statements of state accounts setting forth . . . estimates of all claims and other expenditures authorized by law, including interest, sinking fund and serial bond requirements, the appropriations for the preceding fiscal year and expenditures for all state purposes for the preceding three fiscal years”). The Auditor’s authority to audit enumerated state entities was left in place. *See* St. 1922, c. 545, § 1 (“[a]ll the rights, powers, duties, and obligations . . . of the state Auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits . . . are hereby transferred to . . . the commission on administration and finance established by this act”).

²⁶ The SAO’s enabling statute and its mandate to issue annual financial reports were set forth in different locations over time. *See e.g.*, St. 1849, c. 56, §§ 4 (specifying Auditor’s financial reporting responsibilities); St. 1867, c. 178, §§ 6-12 (same); Public Statutes, c. 16, §§ 9-13 (1882); Revised Laws, c. 6, §§ 22-25 (1902) (same); General Laws, c. 11, §§12-15 (1921).

²⁷ *See* State Auditor David Wilder, Jr., *Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending December 31, 1849* at 3 (Jan. 10, 1850).

proposes. Third, the reports were made on a regular, annual basis only until the Auditor’s **financial reporting authority was transferred to the Comptroller in 1922**. This change is acknowledged in the Auditor’s **final pre-1923 report, which states**, “[t]his will be the last report of the Auditor to contain the financial transactions of the Commonwealth, as under the provisions of [St. 1922, c. 545] my report will, in the **future, relate only to audits.**”²⁸ Because the pre-1923 reports were made pursuant to the Auditor’s annual financial reporting authority—a responsibility the Auditor has not had for more than 100 years—they do not bear on the question now before us.

The post-1923 audits cited in the SAO letter likewise do not support **the SAO’s** claim of authority to conduct a broad audit of the Legislature. These audits fall roughly into three groups.

First, from the nearly fifty-year period between 1923 and 1971, we know of only seven relevant audits, namely: five audits of the Sergeant-at-Arms, one audit of the Special Commission on the Structure of State Government, and one audit of the Legislative Research Council and Bureau.²⁹ The audits from this period that were made available for our review were not of the Legislature as a whole, but instead focused narrowly on an entities under the purview of the Legislature and were primarily focused on the finances or contracting practices of those entities.³⁰

Second, between 1972 and 1990, the SAO conducted regular audits of three specific entities within the legislative branch: the Sergeant-at-Arms, the Legislative Research Council and Legislative Research Bureau, and the Legislative Post Audit and Oversight Bureau (and one of its successors, the Office of the Legislative Post Audit and Oversight Bureau of the House of Representatives). To our knowledge, the SAO also conducted one audit of the Joint Commission on Federal Base Conversion and one audit of the Revolutionary War Bicentennial Commission.³¹ Again, the audits from this period that were made available for our review, many of which were **entitled “Report on the Examination of the Accounts of [the subject entity],”** were of entities under the

²⁸ See State Auditor Alonzo B. Cook, *Report of the Auditor for the Fiscal Year Ending November 20, 1922 at 2 (Jan. 10, 1923)*. Auditor Cook’s statement that his reports would **“in the future, relate only to audits,”** suggests that Auditor Cook may not have considered the yearly financial reports “audits” at all.

²⁹ See State Auditor Russell A. Wood, *Report on the Examination of the Accounts of the Sergeant-at-Arms from December 15, 1937 to April 27, 1939* (July 5, 1939); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1946* at 135 (Mar. 19, 1947); State Auditor Thomas J. Buckley, *Report on the Examination of the Accounts of the Sergeant-at-Arms from April 11, 1951 to March 14, 1952* (May 27, 1952); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1953* at 4 (Dec. 14, 1953); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1956* at 80, 85 (Oct. 8, 1956).

³⁰ These audits included occasional suggestions about how the subject entities could reduce their expenditures. The audits also noted the statutory authority for the entities and how the offices were organized.

³¹ State Auditor Thaddeus Buczko, *Commonwealth of Massachusetts Department of the State Auditor Annual Report Fiscal Year Ended June 30, 1977* at 19 (issue date unknown).

Legislature’s purview—not the whole of the Legislature itself—and primarily examined financial accounts of the entities (e.g., expenditures, appropriations, miscellaneous income).³² Furthermore, as we understand from the SAO and the Legislature, it is not clear whether the Legislature consented to these audits.

Of particular relevance to the question now before us, we do know that after the **Supreme Judicial Court’s** *Westinghouse* decision in 1978, the Senate stopped cooperating with some of the audits. In an audit of the Sergeant-at-Arms from 1987, for example, Auditor A. Joseph DeNucci explained that his office **was “not permitted to examine time or attendance records for Senate Court Officers, Senate Pages and Legislative Document Room employees.”**³³ Auditor DeNucci further noted that, pursuant to *Westinghouse*, **“the records generated by the Legislature could be made available to outsiders only at the discretion of the House and Senate leadership.”**³⁴ A virtually identical statement was included in an audit of the Sergeant-at-Arms from 1990.³⁵ Statements that expressly recognized legislative discretion to comply (or not) with SAO requests also appear in audits of the Sergeant-at-Arms from 1982 and 1985—neither of which are cited in the SAO letter.³⁶ For example, the 1982 report states that “[w]e were not permitted to examine time or attendance records for the senate court officers, senate pages and employees working in the Legislative Document Room because of the constitutional separation of the legislative and executive branch[e]s of government in the Commonwealth of Massachusetts.”³⁷ **Further reflecting the Senate’s position**, when the Legislative Post Audit and Oversight Bureau was abolished in 1981 and replaced with bureaus in the House and Senate, the Auditor only audited the Office

³² Like the previous reports, these audits also included occasional suggestions about how the entities could reduce their expenditures. The audits also noted the statutory authority for the entities and how the entities were organized.

³³ State Auditor A. Joseph DeNucci, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1984 to June 30, 1986* at 1 (June 9, 1987).

³⁴ *Id.* (emphasis added).

³⁵ State Auditor A. Joseph DeNucci, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1988 to June 30, 1989* at 2 (Sep. 17, 1990).

³⁶ See State Auditor John J. Finnegan, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1980 to June 30, 1981* at 1 (June 8, 1982) (“**1982 report**”); State Auditor John J. Finnegan, *State Auditor’s Report on the Activities of the Sergeant-at-Arms July 1, 1982 to June 30, 1984* at 1 (June 3, 1985) (“**The Massachusetts Supreme Court has ruled that the records generated by the legislature could be made available to outsiders only at the discretion of the House and Senate Leadership. The leadership granted us permission to examine time or attendance records for House Court officers and House pages for the audit period. However, we were not permitted to examine time or attendance records for Senate Court officers, Senate pages, and Legislative Document Room employees.**”).

³⁷ 1982 report, *supra* n.36, at 1.

of the Legislative Post Audit and Oversight Bureau of the House of Representatives. After 1990, the State Auditor's Office stopped auditing these entities completely.³⁸

The third group of legislative audits consists of those that have taken place in the 33 years from 1990 to the present. There are only three such audits: a 1992 report covering overpayments to a court officer,³⁹ a 2002 report covering information technology (IT)-related controls at the Sergeant-at-Arms,⁴⁰ and a 2006 report covering IT-related controls at the Legislative Information Services.⁴¹ These limited audits are not comparable to the broad audit of the Legislature, over its objection, that the SAO now proposes. The 1992 report addressing overpayments to a court officer states that it was made at the request of the Attorney General and with the express cooperation of the House of Representatives.⁴² It focused solely on overpayments made to a single court officer. While neither the 2002 nor the 2006 IT report explains how it came to occur, both are narrowly focused on the IT-related controls of specific Legislative entities, and do not address core legislative powers, the exercise of which the SAO now seeks to audit.

In sum, despite the existence of numerous SAO reports on certain discrete activities or entities within the legislative branch, we have found no historical precedent at all for the type of audit the SAO seeks to conduct now: a sweeping audit of the Legislature over its objection, which would include review of many of its core legislative functions, namely, active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules, and the policies and procedures of the legislative bodies.

To the contrary, historical precedent indicates that the type of audit now proposed has not previously been performed, and prior State Auditors did not believe the SAO to have the power now claimed.⁴³ Where a power asserted by part of one branch of the

³⁸ It is notable that several of these audits were completed during the tenure of Auditor DeNucci, the same **Auditor who in 1994, requested an opinion from the Attorney General's Office as to whether the State Auditor's Office could audit the Legislature without its consent.**

³⁹ See State Auditor A. Joseph DeNucci, *State Auditor's Report Covering Overpayments to a Court Officer for the Period January 18, 1984 to May 11, 1989* (January 15, 1992) ("**1992 report**").

⁴⁰ See State Auditor A. Joseph DeNucci, *Review of Selected Information Technology (IT)-related controls at the Office of the Sergeant-at-Arms* (February 28, 2002).

⁴¹ See State Auditor A. Joseph DeNucci, *Office of the State Auditor's Report on Information Technology-Related Controls for Virus Protection at the Legislative Information Services October 9, 2003 to December 8, 2005* (May 11, 2006).

⁴² See 1992 report, *supra* n.39, at 1, 2 (**noting that this review was conducted "[a]t the request of the Office of the Attorney General" and "express[ing] [the Auditor's] appreciation to [the House of Representatives] and the Sergeant-at-Arms for [their] cooperation and assistance"**).

⁴³ **As a 1994 letter of the Attorney General's Office emphasized, where a part of government is listed in Section 12, the SAO's authority to audit is also a mandate that it must regularly audit that part of government (i.e., every three years), such that the absence of regular audits of the Legislature (rather than a small entity within its control) is particularly instructive.** See AAG Sacks Letter at 3.

government against another branch has not been exercised or even acknowledged before, **that “longstanding ‘practice of the government’ can inform [our] determination of ‘what the law is.’”** *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (citations and quotations omitted); accord *Simon v. State Examiners of Electricians*, 395 Mass. 238, 246 (1985) (“Authority actually granted by [the Legislature] of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in **determining whether such power was actually conferred.**”) (quoting *Federal Trade Comm’n v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)). On this point, we note that the previous State Auditor disclaimed the authority to audit the Legislature over its objection⁴⁴; and prior State Auditors have filed legislation that would have granted them that authority (thereby at least suggesting that Section 12 did not already do so).⁴⁵ In addition, the power the SAO now claims also would allow it to compel the Legislature to produce records by judicial enforcement. See G.L. c. 11, § 12. But we are not aware of any such lawsuit ever having been filed.

Consequently, the historical record is consistent with the legal precedent set forth above in showing that Section 12 does not confer upon the SAO the authority to audit the Legislature without its consent.

4. Because of the Constitutional Issues Implicated by Auditing Another Branch of Government, the Legislature Is Unlikely to Have Granted Unconditional Authority to the Auditor to Conduct Legislative Audits Without Explicitly Saying So.

As former Auditors Bump and DeNucci both observed, the possibility of auditing the Legislature over its objection raises significant separation of powers concerns.⁴⁶ Those concerns stem in part from the fact that, to accomplish such an audit, the SAO would require the authority to demand that the Legislature, over its objection, produce all

⁴⁴ In 2022, former State Auditor Suzanne Bump issued a statement on behalf of the SAO explaining that the SAO **“does not have the authority, express or implied, to audit the Legislature.”** See Bruce Mohl, *Bump Says Auditor Cannot Audit Legislature*, Commonwealth Magazine (April 7, 2022), <https://commonwealthmagazine.org/politics/bump-says-auditor-cannot-audit-legislature/>. Auditor **Bump went on to state that “the Legislature is not an agency or department but rather another branch of government and, thus, subject to protections under the separation of powers doctrine.”** *Id.*

⁴⁵ See, e.g., House No. 6 (1999); House No. 7 (1995); House No. 10 (1994); House No. 19 (1985); House No. 19 (1983). While the Supreme Judicial Court has expressed caution in drawing conclusions from proposed legislation that was not adopted, it has found repeatedly **“proposed but unadopted legislation”** to be **“illustrative of the meaning of” existing language.** *Furtado v. Town of Plymouth*, 451 Mass. 529, 537-38 & nn. 14-15 (2008); *Simon v. State Examiners of Electricians*, 395 Mass. 238, 246-47 (1985) (similar).

⁴⁶ See Mohl, *supra* n.44 (quoting former Auditor Bump’s recognition that the Legislature is **“subject to protections under the separation of powers doctrine”**); 1982 report, *supra* n.36, at 1 (noting the Auditor’s **inability to access certain legislative documents due to the “constitutional separation of the legislative and executive branch[e]s of government”**).

“books, documents, vouchers and other records relating to any matter within the scope of an audit,” against the backdrop of potential Superior Court litigation to enforce those demands. G.L. c. 11, § 12. The SAO claims this auditing power extends equally to the Judiciary, which also would have to subject all of **its “accounts, programs, activities and functions” to regular audit, with requisite and enforceable document demands, because** the Judiciary, too, is a **“department.”**⁴⁷ The enforceability of a document production order from the Superior Court against the Legislature, or against the Judiciary as a whole, would itself present a serious constitutional question. *See e.g., Abuzahra v. City of Cambridge*, 101 Mass. App. Ct. 267, **270 (2022)** (“If the documents at issue here were communications among members of the Legislature about proposed legislation, the order to disclose them would raise a significant question under the separation of powers **provisions of art. 30 of the Massachusetts Declaration of Rights.**”) (citing *K.J. v. Superintendent of Bridgewater State Hosp.*, 488 Mass. 362, 368 (2021)).

For reasons we explain, in light of these constitutional concerns, the authority now asserted by the SAO is not authority the Legislature would have afforded to the SAO lightly **or by implication**. “As the United States Supreme Court has observed regarding Congress, the Legislature ‘does not, one might say, hide elephants in mouseholes.’” *Patel v. 7-Eleven*, 489 Mass. 356, 364 (2022) (quoting *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

We do not seek in this letter to define precisely the extent to which the state constitution may limit the ability of the Auditor to conduct even statutorily-authorized audits into core legislative (or judicial) functions, although that issue may arise if the voters approve the ballot initiative proposed for the November 2024 ballot. Nevertheless, we think it clear that an assertion of authority to audit all **“programs, activities and functions” of the Legislature** (including the authority to demand and require the production of information), absent **the Legislature’s** consent, raises separation of powers issues.⁴⁸ When the separation of powers is at issue, **the “essence of what cannot be tolerated” is interference by one branch with the core functions of another.** *Chief Admin. Justice of the Trial Court v. Labor Relations Comm’n*, 404 Mass. 53, 56 (1989) (citation omitted). The Constitution recognizes the authority of the House of Representatives and the Senate to determine their own rules of proceeding, *see* Mass. Const. p. 2, c. 1, § 2, arts. 7 (Senate), 10 (House); and Article 21 protects **the “freedom of deliberation, speech and debate”** in the Legislature, such that it may not be **“the foundation of any accusation or prosecution, action or complaint, in any court or place whatsoever.”**⁴⁹ Mass. Const. p. 2, c. 1, § 2, art. 21. Subjecting the Legislature to

⁴⁷ We note that, although the Judiciary has complied with SAO audit requests, it has done so voluntarily, and entities within the Judiciary previously have raised constitutional concerns regarding **the SAO’s assertions of authority to audit all “accounts, programs, activities and functions” of the Judiciary.**

⁴⁸ **“If the coordinated activity of branches of government is voluntary and the activity of one branch does not intrude into the internal function of another, the strictures of art. 30 are not violated.”** *Commonwealth v. Tate*, 34 Mass. App. Ct. 446, 448 (1993).

⁴⁹ The latter provision is intended **“to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.”** *Coffin v. Coffin*, 4

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).

As we consider the meaning of Section 12, we must presume that the Legislature took into consideration existing constitutional principles. *See, e.g., School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 80 (1982). That presumption is particularly forceful **where the constitutional principles bear on the Legislature's** own operations and authority. Here, it is implausible that the Legislature intended, merely **by including the term "departments"** within a list of other subsidiary governmental entities, to make itself and all of its programs, activities, and functions subject to the **Auditor's mandatory audit** authority without any provision limiting the scope of such audits or shielding its core legislative activity from potentially unconstitutional interference. That the Legislature did not include any such provisions or protections further supports the statutory analysis above, *i.e.*, that the term **"department" in** Section 12 was not intended to encompass the Legislature.⁵⁰ At the very least, given all of these considerations, if the Legislature had intended to include itself and the Judiciary within the **term "departments," it would have done so explicitly**—as it has done in a variety of other statutes. *See, e.g.,* G.L. c. 7, § 3 (referring to **"the executive department of the government of the commonwealth"**); G.L. c. 29, § 7L (referring to **"the executive, legislative and judicial departments"**); G.L. c. 29, § 23 (referring to agencies **"within the executive or legislative department"**); G.L. c. 234A, § 37 (referring to **"[t]he legislative, executive, and judicial departments of the commonwealth"**).

In sum, our analysis does not rely on constitutional separation of powers principles, but cognizance of those principles does provide context that aids our interpretation of Section 12. An unqualified auditing power sufficient to audit the Legislature over its objection would be difficult to reconcile with the powers vested exclusively in the Legislature by various parts of Chapter 1 of Part II of the Massachusetts Constitution, and protected from encroachment by Articles 21 and 30 of the Massachusetts Declaration of Rights.⁵¹ We do not believe that the Legislature would have chosen to

Mass. 1, 27 (1808). The protections of Article 21 against civil inquiry into the legislative process generally reflect the common law at the time the Massachusetts constitution was adopted. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48-50 (1998).

⁵⁰ Similarly, it is most unlikely that the Legislature would have attempted to subject the Judiciary to audits of all of its **"programs, activities and functions" without addressing the** host of constitutional issues posed in that context, as well. *See, e.g., In re Enforcement of Subpoena*, 463 Mass. 162, 170 (2012) (**"The judiciary's independence from the other branches of government and from outside influences and extraneous concerns has been one of the cornerstones of our constitutional democracy, intended to ensure that judges will be free to decide cases on the law and the facts as their best judgment dictates, without fear or favor."**).

⁵¹ We understand the consideration of separation of powers principles may be vexing, frustrating, or **insufficiently responsive to the politics of the moment. But "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted constraints spelled out in the constitution."**

ignore these separation of powers issues entirely. Instead, the Legislature simply did not include itself among the entities subject to the **SAO's auditing authority**.

Conclusion

The SAO is a creation of the Legislature and is vested with the authority granted to it by the Legislature. For the reasons set forth in this letter, that authority does not include the power to audit the Legislature itself over **the Legislature's** objection. This conclusion is supported by the statutory text, its legislative history, judicial interpretation of similar statutes, and the historical record. We provide this conclusion in carrying out the role of **the Attorney General's Office** to establish a uniform and consistent legal position for the Commonwealth. See *Secretary of Admin. & Fin.*, 367 Mass. at 163. Please let us know if you or members of the SAO would like to discuss.

Very truly yours,

A handwritten signature in black ink, appearing to read 'AJC', with a long horizontal stroke extending to the right.

Andrea Joy Campbell
Attorney General

cc: Michael Leung-Tat, Deputy Auditor & General Counsel
Pat Moore, First Assistant Attorney General
James C. Kennedy, Chief Legal Counsel to the Massachusetts House of Representatives
James E. DiTulio, Counsel to the Massachusetts Senate

K.J. v. Superintendent of Bridgewater State Hosp., 488 Mass. 362, 367 n.10 (2021) (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983)).



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

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MEMORANDUM

TO: M. Patrick Moore Jr., First Assistant Attorney General (AGO)
Anne Sterman, Chief, Government Bureau (AGO)

CC: Meredith Barrieau, First Assistant Auditor (OSA)
Steve Lisauskas, Executive Deputy Auditor (OSA)

FROM: Michael Leung-Tat, General Counsel and Deputy Auditor (OSA)

RE: Request for Assistance to Audit the General Court

DATE: January 9, 2025

Facts

The Office of the State Auditor (“OSA”) conducts audits to promote accountability and transparency, improve performance, and make government work better. G.L. c. 11 § 12 mandates the OSA to audit each department, office, commission, institution and activity of the Commonwealth, including those of districts and authorities created by the General Court and the General Court itself, as the OSA deems necessary and at least once every 3 years. Entities may be audited separately or as part of an audit covering multiple entities.

On November 5, 2024, voters approved Question 1 on the statewide ballot, granting the OSA the express authority to audit the General Court under G.L. c. 11, § 12.¹ As you are aware, this office has held that the amended law took effect on December 5, 2024, while the Legislature’s view was that the law took effect after January 4, 2025. That issue is now moot as we are now beyond January 4, 2025 and both the OSA and Legislature recognize that this new law is in full effect.

¹ The OSA maintains that it had the authority to audit the General Court prior to passage of Question 1.

On January 3, 2025, our office sent a letter to Speaker Ronald Mariano and Senate President Karen Spilka, notifying them that our office would be conducting a performance audit of the General Court (see Attachment 1). Specifically, the audit is starting with a review of high-risk areas, such as state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of its balance forward line item - including a review of all relevant financial receipts and information.

On January 6, 2025 at 3:13PM, our office sent requests for documents to both the House and Senate in connection with the audit of the Legislature pursuant to our authority under G.L. c. 11, § 12 (see Attachment 2). The requests included a 72 hour deadline by which the House and Senate are to provide the requested documents to our office on or before January 9, 2025.

To date, we have not received any records responsive to our requests from either the House or Senate. Nor have we received any indication from the House or Senate that they are willing to meet with us to discuss the audit that we are conducting under G.L. c. 11, § 12.

Legal Discussion

G.L. c. 11, § 12 provides that the OSA “shall have access to such accounts at reasonable times and the department may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit.” Within the statute, there is also an enforcement mechanism to compel the production of records that states, “The superior court shall have jurisdiction to enforce the production of records that the department requires to be produced pursuant to this section, and the court shall order the production of all such records within the scope of any such audit.”

The requests to the House and Senate are for copies of their official budgets and audits, a listing of all transactions related to their balance forward line item, and a listing of all monetary settlement agreements in connection with any of their current, former employees, or members. The requests cover Fiscal Years 2021, 2022, 2023 and 2024.

The information requested should be readily available. I note the audit information is required by the House and Senate rules to be made available to the public upon request and that the Senate is required to send a copy of the audit reports to the Office of the State Auditor each year. Similarly, these budget records should be readily available as they have been filed. Finally, the transactions related to the balance forward line item, which we are asking for in advance of back-up documentation such as receipts, should be readily available to the auditees and settlement listings can be created by the Human Resources, Payroll, or Legal Departments. Our requests do not impose any administrative burden on the Legislature, therefore, our directive that the Legislature provide the OSA the requested documents on or before January 9, 2025 is reasonable under our authority to access records pursuant to G.L. c. 11, § 12. Certainly, there is no burden at all to, at the very least, signal cooperation with our audit.

Assistance Requested

For the reasons stated above, the OSA respectfully requests the assistance of the Attorney

General's Office (AGO) to initiate affirmative litigation against the General Court to compel the productions of records and their compliance with our audit under G.L. c. 11 § 12.

As you are undoubtedly aware, the Attorney General has broad powers to enforce the laws of the Commonwealth. See Commonwealth v. Mass. CRINC, 392 Mass. 79, 88 (1984). G. L. c. 12, § 10 provides the Attorney General with the general statutory duty to "take cognizance of all violations of law or of orders of courts, tribunals or commissions affecting the general welfare of the people . . . and shall institute . . . such criminal or civil proceedings . . . as [s]he may deem to be for the public interest, and shall investigate all matters in which [s]he has reason to believe that there have been such violations."

In the recent past, the AGO has emphatically expressed and exercised that authority to enforce the laws of Commonwealth with regard to G. L. c. 40A, § 3A, the Massachusetts Bay Transportation Authority Communities Act ("MBTA Communities Act"). In this matter, the AGO has taken a very public position, advising that all MBTA Communities must comply with the MBTA Communities Act. As part of your office's advisory, Attorney General Campbell noted, "Compliance with the MBTA Communities Zoning Law is not only mandatory, it is an essential tool for the Commonwealth to address its housing crisis along with our climate and transportation goals."² In fact, your office, recognizing the public's interest in enforcement of the law, sued the Town of Milton to enforce its compliance with the MBTA Communities Act. The Supreme Judicial Court's recent decision in that case affirmed the Attorney General's power under G. L. c. 12, § 10 to enforce the law and her "unique and well-established role as a protector of public rights."³

We ask that your office exercise that power to bring much needed transparency and accountability to the Legislature, to enforce our authority to audit the Legislature under G. L. c. 11, § 12, and to protect the public who overwhelming supported the passage of Question 1.

² [AG Campbell Issues Advisory on Requirements of MBTA Communities Zoning Law | Mass.gov](https://www.mass.gov/doc/attorney-general-issues-advisory-on-requirements-of-mbta-communities-zoning-law-13580/download)

³ <https://www.mass.gov/doc/attorney-general-v-town-of-milton-executive-office-of-housing-and-livable-communities-sjc-13580/download>

Attachment 1



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

DIANA DIZOGLIO
AUDITOR

TEL (617) 727-2075
FAX (617) 727-3014

January 3, 2025

Representative Ronald Mariano, Speaker of the House
24 Beacon Street, Room 356
Boston, MA 02133

Senator Karen E. Spilka, Senate President
24 Beacon Street, Room 332
Boston, MA 02133

Dear Speaker Mariano and President Spilka:

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, we will be conducting a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees).

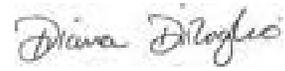
The Generally Accepted Government Auditing Standards, commonly referred to as the “Yellow Book,” are issued by the United States Government Accountability Office. The standards apply to both financial and performance audits of government agencies. Our audit will be conducted in accordance with these standards and will cover all of the topics we were unable to fully review in our previous audit, due to your refusal to participate in the audit process. Our work will start with a review of high-risk areas, such as state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of your balance forward line item - including a review of all relevant financial receipts and information.

Section 12 of Chapter 11 of the General Laws requires organizations being audited to provide our audit team with books, documents, and other records pertaining to the audit areas. We may also make inquiries regarding audit issues with the members of your staff responsible for the functions involved in this audit and request, from management, written confirmation of statements your staff made to us during the audit. We ask that all requested records and information be made available to us within 72 hours of the date of request.

At the completion of our audit, we will provide you with a draft copy of our audit report for your review and comments. Your comments should be forwarded to us within 15 days of notification. Also, if you would like a formal exit meeting, please request the meeting at this time.

Please respond with some potential dates for an entrance conference to be scheduled.

Sincerely,

A handwritten signature in cursive script that reads "Diana DiZoglio".

Diana DiZoglio
Auditor of the Commonwealth

Cc:

Timothy Carroll, House Clerk
Michael D. Hurley, Senate Clerk

Attachment 2

January 6, 2025

Senator Karen E. Spilka, Senate President
24 Beacon Street, Room 332
Boston, MA 02133

Dear President Spilka:

Pursuant to our audit, which we notified you of on January 3, 2025 (please see attached), we request the following documents be provided to us within 72 hours, consistent with Section 12 of Chapter 11 of the Massachusetts General Laws:

1. The official budgets for the Senate for Fiscal Years 2021, 2022, 2023 and 2024.
2. Copies of official audits of the Senate for Fiscal Years 2021, 2022, 2023 and 2024.
3. A listing of all transactions related to the Senate's balance forward line item for Fiscal Years 2021, 2022, 2023 and 2024.
4. A listing of all monetary settlement agreements¹ entered into by the Senate with any current or former employees or members of the Senate during Fiscal Years 2021, 2022, 2023 and 2024.

We anticipate requesting other documents in the coming days related to this audit and will provide you those requests in writing.

Please provide these documents to me at Shaun.Alix@massauditor.gov. Should you have any questions, please do not hesitate to contact me for further clarification.

Sincerely,

Shaun Alix
Audit Manager

¹ Monetary settlement agreements are as defined by the Office of the Comptroller at <https://public.powerdms.com/MAComptroller/documents/1779893>

January 6, 2025

Representative Ronald Mariano, Speaker of the House
24 Beacon Street, Room 356
Boston, MA 02133

Dear Speaker Mariano:

Pursuant to our audit, which we notified you of on January 3, 2025 (please see attached), we request the following documents be provided to us within 72 hours, consistent with Section 12 of Chapter 11 of the Massachusetts General Laws:

1. The official budgets for the House of Representatives for Fiscal Years 2021, 2022, 2023 and 2024.
2. Copies of official audits of the House of Representatives for Fiscal Years 2021, 2022, 2023 and 2024.
3. A listing of all transactions related to the House of Representatives' balance forward line item for Fiscal Years 2021, 2022, 2023 and 2024.
4. A listing of all monetary settlement agreements² entered into by the House of Representatives with any current or former employees or members of the House of Representatives during Fiscal Years 2021, 2022, 2023 and 2024.

We anticipate requesting other documents in the coming days related to this audit and will provide you those requests in writing.

Please provide these documents to me at Shaun.Alix@massauditor.gov. Should you have any questions, please do not hesitate to contact me for further clarification.

Sincerely,

Shaun Alix
Audit Manager

² Monetary settlement agreements are as defined by the Office of the Comptroller at <https://public.powerdms.com/MAComptroller/documents/1779893>



ANDREA JOY CAMPBELL
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
www.mass.gov/ago

January 23, 2025

VIA E-MAIL

Michael K. Leung-Tat
Deputy Auditor & General Counsel
Office of the Auditor of the Commonwealth
State House Room 230
Boston, MA 02133

Dear Michael:

We have received the request of the Office of the State Auditor (OSA) to initiate affirmative litigation against the Legislature. We appreciate the time you and other OSA senior staff members took last week to discuss that request with us. As we expressed in our meeting last week, for the Attorney General's Office (AGO) to assess the request, the OSA must provide answers to certain core questions about the office's position and what you hope to accomplish through litigation.

Although we discussed these questions last week, we are sharing them in writing to ensure clarity and assist you in responding, particularly in light of your email to our office of earlier today, January 23, 2025. These are the same types of questions that are asked of and answered by any state government entity seeking to initiate litigation against any party, whether private or public. As we have emphasized previously, the consideration of your request is not affected by the AGO's analysis of the question you submitted to our office in 2023. Any request to initiate litigation must follow the standard process, which your office successfully navigated on another matter just two months ago.

It is exceedingly rare for one part of state government to sue another. To date, it has happened no more than once or twice a decade. The public does not expect a government that it elects—and a government that demands that the public follow its law—will waste time and resources suing itself over what the law means. Nor do Massachusetts courts expect to referee intragovernmental political disputes.

Still, if an agency has well developed views on the key issues presented by prospective litigation and can demonstrate that the best way to achieve its interests is through a lawsuit, the AGO will approve the proposed litigation. By contrast, if an agency cannot

describe precisely its goals in litigation and how it intends to achieve them, the litigation will not resolve the underlying dispute, because the judiciary will be unable to provide meaningful relief.

In this context, the core questions are:

1. What is the scope of the audit that the OSA intends to perform?

OSA issued an audit report of the Legislature last year, with eight articulated objectives. See OSA, “Official Audit Report: The Massachusetts General Court” (Oct. 21, 2024). In certain correspondence since the voters adopted Question 1—now codified at St. 2024, c. 250—OSA has indicated that it will return to these objectives. In other correspondence, OSA has stated that at least its initial focus is certain “high-risk areas.”

Please share with us with as much specificity as possible the scope of the intended audit. Any court in which litigation is filed will require that baseline information. A court will not—indeed, cannot—answer the theoretical question of the Auditor’s authority; it must examine the question in the context of particular information sought. We understand from our discussion that an exhaustive description of your scope may not be possible at this stage (as the scope depends, in part, on what the OSA finds when the audit is under way), but we need—and a court will demand—far more specificity than what you have shared to date.

2. What legal claim do you propose to bring against the Legislature and what relief do you propose to ask of the court?

To assess any proposed litigation, we must understand the claim that OSA hopes to bring. This is not a theoretical question: as a practical matter, if we approve the proposed litigation, we cannot draft a complaint or other court filings without this information. This question is particularly important in the present circumstances, where existing law poses significant obstacles to the type of relief it appears you intend to seek.

In our conversation, you indicated that the OSA would like a general declaratory judgment concerning the OSA’s authority—that is, a declaration from a Massachusetts court that the Legislature is subject to the OSA’s audit authority. We understand why the OSA would like such a declaration. But as we explained, declaratory judgments are not available against the Legislature. *Town of Milton v. Commonwealth*, 416 Mass. 471, 475 (1993).¹ Consequently, we look to you for either an explanation for how you propose to overcome that legal barrier, or a different type of proposed relief that is permitted by law.

Similarly, if the OSA proposes to seek an injunction—that is, an order—compelling the Legislature’s cooperation, current law poses a significant hurdle, as the Supreme Judicial Court repeatedly has concluded that such orders may not be available against the

¹ “Declaratory relief is not available against the Governor, the Legislature, or legislative leadership” because of “separation of powers principles expressed in art. 30 of the Massachusetts Declaration of Rights.” *Town of Milton*, 416 Mass. at 475, citing *LIMITS v. President of the Senate*, 414 Mass. 31, 35 (1992); see *Pawlick v. Birmingham*, 438 Mass. 1010 (2002).

Legislature. *LIMITS v. President of the Senate*, 414 Mass. 31, 35 (1992).² It may be that there is some other type of affirmative injunction that could be entered against the Legislature, but there is scant (if any) precedent for such an injunction. As the Commonwealth's in court advocate, we are not at liberty to wish away judicial precedent. If the OSA believes G.L. c. 11, § 12, provides a statutory basis for such an injunction and a way to navigate around these cases, we welcome your detailed legal thinking on that point.

At minimum, because we cannot approve litigation without understanding what the proposed complaint would ask the court to do, we must understand the OSA's position on this fundamental issue to properly consider your request.

3. Does the OSA believe all functions of the Legislature are subject to audit or, instead, are certain core functions constitutionally protected?

The Massachusetts constitution provides certain express protections for the legislative process. Mass. Const. Pt. I, arts. 21 and 30; Mass. Const. Pt. II, c. 1, s. 1, art. 4; Mass. Const. Pt. II, c. 1, s. 2, art. 7; Mass. Const. Pt. II, c. 1, s. 3, art. 10. In assessing the OSA's request, we must understand—because a court will similarly need to understand—whether the OSA believes that its authority to audit the Legislature is limited in any way by these constitutional provisions. In other words, are there certain core legislative functions that may not be subject to a performance audit; or does the OSA believe that its auditing authority is unqualified by the state constitution?

A central part of the AGO's role is to make sure that any case brought by the Commonwealth is sufficiently developed to make efficient and appropriate use of our courts' time and resources; and, further, that the litigation will actually and materially resolve the dispute at issue. We do that by considering the end result that the Commonwealth seeks to achieve and working backwards from there. In this process, foundational and elementary questions about litigation must be addressed before it is brought. That is required in every case, and it has not yet occurred here.

We take seriously the lasting effect of a judicial decision, the impact of which reaches beyond those currently in office. That is especially true here where the issues involve the

² The type of affirmative injunction most commonly used against public officials for their failure to comply with a legal obligation, known as mandamus, is “not available against the Legislature” due to “separation of powers principles expressed in art. 30 of the Declaration of Rights of the Massachusetts Constitution . . . which call for the judiciary to refrain from intruding into power and function of another branch of government[.]” *LIMITS v. President of the Senate*, 414 Mass. at 35, citing *Lamson v. Secretary of the Commonwealth*, 341 Mass. 254, 274 (1960). The Supreme Judicial Court has gone so far as to suggest that there is “there is no presently articulated judicial remedy for the Legislature's indifference to, or defiance of” even constitutional requirements. *Committee for Health Care for Mass. v. Secretary of the Commonwealth*, 450 Mass. 775, 777 (2008), quoting *Doyle v. Secretary of the Commonwealth*, 448 Mass. 114, 116 (2006).

While we are very open to considering ways to navigate this precedent, we cannot authorize a suit until OSA has developed, at minimum, a plausible theory of how it intends to do so.

balance of power between the executive and legislative branches; and, if suit is filed, likely will involve the balance of power among all three branches.³

For all of these reasons, we look forward to the OSA's answers to our questions in order to appropriately consider a request for affirmative litigation. No litigation will be authorized until they are answered, substantively and seriously. We have welcomed and continue to welcome your engagement on these issues.

Very truly yours,

/s/ M. Patrick Moore Jr.

M. Patrick Moore Jr.
First Assistant Attorney General

³ With that in mind, it would be helpful for us to understand the full extent of communications between OSA and the Legislature. It is our present understanding that OSA and the Senate have been in communication about scheduling a meeting to discuss the intended audit.



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

TEL (617) 727-2075
FAX (617) 727-3014

MEMORANDUM

TO: M. Patrick Moore Jr., First Assistant Attorney General (AGO)
Anne Sterman, Chief, Government Bureau (AGO)

CC: Ann Marie Irwin, Senior Deputy Auditor (OSA)
Steve Lisauskas, Executive Deputy Auditor (OSA)

FROM: Michael Leung-Tat, General Counsel and Deputy Auditor (OSA)

RE: Addendum to Request for Assistance to Audit the General Court

DATE: February 5, 2025

Your letter dated January 23, 2025 stated that that the OSA “must provide answers to certain core questions about the office’s position and what [we] hope to accomplish through litigation.”

You have observed that it is rare for one part of the state government to sue another. We accept your contention but observe that our dispute with the Legislature regarding the OSA’s authority to audit the Legislature under G.L. c. 11, § 12 itself is rarer still – it is unprecedented – and represents an extraordinary circumstance that will likely require litigation given the legislative leadership’s adversarial public posture and responses to the OSA’s current audit.

While we appreciate the AGO’s stated desire to better understand our perspective regarding the limits of our authority to audit the Legislature, declaring self-imposed limits on our authority where none exist in statute, does not serve the interests of the OSA or the citizens of the Commonwealth. First, such a request is inconsistent with our recent experience when your office approved our request to litigate an unrelated matter late last year. Second, your request is problematic in light of the current uncertainty regarding whether your office is our attorney and our office is your client in connection with our dispute with the Legislature. There is a reasonable concern that this information, requested by and shared with your office, may be used against the OSA as the AGO has not yet agreed to represent the OSA against the General Court and is in fact engaged in discussions with the General Court regarding this instant dispute. To

the extent necessary, the OSA explicitly asserts that this communication, our prior communications and the information contained therein are subject to attorney-client privilege and must be treated as protected and confidential. Even with such assurances, however, there is a concern that staff at the AGO cannot “unlearn” things from our responses to these hypothetical questions and that our responses may lead to untenable conflict of interest risks to the OSA.

Nevertheless, as the OSA is eager to work with your office to enforce our statute in connection with our present audit of the General Court, below are responses to the “core questions” posed in your January 23, 2025 letter:

A. What is the scope of the audit that the OSA intends to perform?

Under the Generally Accepted Governmental Standards (GAGAS), which the OSA is required by statute (G.L. c. 11, § 12) to follow in conducting its audits, auditors assess significance and risk to establish the scope and methodology for addressing the audit objectives. See GAGAS 8.05. Planning is a continuous process throughout an audit. *Id.* GAGAS both anticipates and permits that the OSA may adjust (expand or narrow) the scope of an ongoing audit after an audit is engaged. See GAGAS 8.09. This is a routine occurrence in audits after the audit team gains a greater understanding of the auditee and the topics of the audit.

In this instant audit of the Legislature, the OSA is reviewing “high risk areas” referenced in the OSA’s audit engagement/notification letter dated January 3, 2025 to the General Court. Specifically, the scope of our audit is focused on the General Court’s contracting and procurement procedures, use of taxpayer-funded nondisclosure agreements, and a review of the General Court’s forward line item – including a review of all relevant financial documentation. Based on these audit topics, the OSA sent a letter dated January 6, 2025, requesting the following records of both the House of Representatives and the Senate for Fiscal Years 2021 through 2024: (a) official budgets; (b) copies of official audits; (c) a listing of all transactions related to the forward line item; and (d) a listing of all monetary settlement agreements¹ entered into with any current or former employees or members of the Senate and House of Representatives. To date, the House has not responded to or even acknowledged our request and the Senate by its letter dated January 13, 2025 has indicated that it will not comply with the request. The OSA reserves the right to and will likely request further historical documentation from the General Court if and when the General Court produces documents in response to its January 6, 2025 request.

In its letter, the AGO correctly asserts that “[a] court will not—indeed, cannot—answer the theoretical question of the Auditor’s authority; it must examine the question in the context of particular information sought.” Similarly, the OSA cannot answer a theoretical question that asks us to provide exhaustive detailed description of the potential scope of this and future audits.

In contrast to those abstract questions, there is a very real controversy currently between the OSA and the Legislature that requires resolution from the courts. We are asking a court to resolve the specific question regarding our authority to audit the General Court in the context of

¹ Defined by the Office of the Comptroller at <https://public.powerdms.com/MAComptroller/documents/1779893>.

our specific request for records – budgets, financial audits, transactions related to the balance forward line items and a listing of settlement agreement for any current or former employees for fiscal year 2021, 2022, 2023, and 2024 – in connection with the specific scope of this audit. We are not seeking to “get under the hood” of policy decisions of the Legislature or to engage in any legislative functions but rather are seeking historical records of things that have occurred in the past. Our audit cannot be the exercise of any power, especially not a core Legislative power, if for no other reason than audits look back and can in no way change what has already occurred.

Finally, to the extent that there are findings in our audit, the OSA has no authority to take any action against or demand any action from any auditee, including the Legislature. Based on the audit findings, the OSA may issue recommendations, but they are just that – recommendations; the OSA does possess any authority to compel an auditee to take any action relative to our audit findings or as a result of our audit. If actions were taken, they would be taken by the Legislature at their discretion.

B. What legal claim do you propose to bring against the Legislature and what relief do you propose to ask of the court?

During our January 16, 2025 meeting and, in its January 23, 2025, letter, the AGO outlined the significant legal obstacles if the OSA were to seek either declaratory (declaration from a court that the Legislature is subject to the OSA’s audit authority) or injunctive (a court order compelling the Legislature to comply with our audit) relief.

A mandamus under G.L. c. 249, § 5 provides a roadmap to overcome those legal barriers. While the SJC in *LIMITS v. President of the Senate*, 414 Mass. 31, 35 (1992) held that “[m]andamus does not lie against the Legislature,” that statement is limited by both the underlying facts as well as the preceding sentence in that opinion: “[t]he courts should be most hesitant in instructing the General Court when and how to perform *constitutional duties*.” Here, the OSA’s request for documents involves the ascertainment of facts and does not infringe upon the Legislature’s constitutional duties. See *Attorney General v. Brissiden*, 271 Mass. 172, 180 (1930) (“The ascertainment of facts in its essence is not a legislative function.”).

Notably, the SJC confronted a completely different factual and legal issue in *LIMITS* than are involved in this case. There, a Massachusetts ballot question committee, registered voters, and signers of a term-limits ballot initiative brought a mandamus, seeking a declaration that a joint session of the General Court was required to take final action on the proposed term limit initiative amendment. *Id.* at 32. The *LIMITS* mandamus sought to compel the Legislature to take legislative action. Our proposed mandamus is distinguishable in that it does not seek to compel the Legislature to take any legislative action but rather to comply with our audit and provide our office with the historical data requested in connection with our audit.

While the narrow issue confronted in *LIMITS* – whether Massachusetts courts have the power to compel compliance with Article 48 – is not wholly applicable here because the requirements of Article 48 have been satisfied, it is notable that the *LIMITS* holding contemplated that “[w]hen the purpose of art. 48 has been frustrated, the only remedy may come from the influence of public opinion, expressed ultimately at the ballot box.” *Id.* at 35 (emphasis added)(internal

citations omitted). In this instance, the remedy has “come from the influence of public opinion, expressed ultimately at the ballot box” on November 5, 2024 when nearly 72% of the Massachusetts electorate voted overwhelming to amend G.L. c. 11, § 12, granting the OSA the authority to audit the Legislature and providing the judiciary with the authority “to enforce the production of records that the [Auditor] requires to be produced...and the court...[to] order the production of all such records within the scope of any such audit.” This ballot question was simple and straightforward, and the public’s intent in voting for it was unambiguous. There can be no question that the public wants the Legislature to be subject to audit.

As amended by the passage of Ballot Question #1, G.L. c. 11, § 12 expressly provides that “[t]he department of *the state auditor shall* audit the accounts, programs, activities and functions directly related to the aforementioned accounts of all departments, offices, commissions, institutions and activities of the commonwealth, *including those of districts and authorities created by the general court and the general court itself*, and including those of the income tax division of the department of revenue, and for such purposes, the authorized officers and employees of the department of the state auditor shall have access to such accounts at reasonable times and the department may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit conducted under this section or section 13, except tax returns.” (emphasis added). The OSA is, therefore, mandated by statute and has a duty to the public to conduct an audit of the General Court and to do so no less than once every three years. Unlike in the *LIMITS* case, where the issue was whether the Legislature could be compelled to pass a law, here a public official, the Auditor, is seeking to enforce a law passed by the voters of Massachusetts, already in force and effect, and fulfill her obligations as State Auditor. Moreover, the relief sought – an order compelling the General Court to take administrative action by producing the specific records (historical data) requested by OSA in connection with its audit of the General Court – does not implicate the lawmaking function of the Legislature or otherwise infringe upon or usurp its core legislative functions in violation of the separation of powers doctrine.

It is also notable that, in similar circumstances to those in this case, the SJC ruled that a mandamus action was appropriate. *See Lawson v. Secretary of Com.*, 341 Mass. 264, 267 (1960). While *Lawson* did not involve a direct action against the Legislature, the underlying and central issue was whether the General Court enacted redistricting measures in accordance with the Massachusetts Constitution. *Id.* (petitioners “contention is that the Legislature was without power to make any new division. If the statute was unconstitutionally enacted, its enforcement will impair the right of each citizen.”). The case also noted that the mandamus petition at issue was “for the enforcement of a public duty. . . .” *Id.* Lastly, in ruling that mandamus was appropriate, the SJC noted that the issue – whether a law enacted by the Legislature was in accordance with the Massachusetts Constitution – was “of first impression here, and there is little direct aid in our decisions or in legislative history.” *Id.* at 268. All of the foregoing rationales justifying allowing a mandamus petition to proceed are present in this case.

Moreover, to the extent that the SJC, based upon separation of powers principles, has been hesitant to allow mandamus actions involving the Legislature, we believe the AGO should consider two main points:

First, as expressed by United States Supreme Court Justice Louis Brandies, the underlying rationale and ultimate purpose of the doctrine of separation of powers was “not to promote

efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.” *Myers v. U.S.*, 272 U.S. 52, 293 (1926).

Second, the SJC has long emphasized the necessity for flexibility in the construction and application of Article 30’s separation of powers doctrine. See *Gray v. Commissioner of Revenue*, 422 Mass. 666, 670-671 (1996) (some overlap of executive, judicial, and legislative functions is inevitable); *Chief Administrative Justice of the Trial Court v. Labor Relations Com’n*, 404 Mass. 53, 56 (1989) (absolute division of the executive, legislative, and judicial functions is neither possible nor always desirable); *Clerk of Superior Court for Middlesex County v. Treasurer and Receiver General*, 386 Mass. 517, 525 (1982) (while principle of separation of powers is deeply entrenched, absolute division between three governmental departments is neither possible, nor always desirable); *Opinions of the Justices to the Senate*, 372 Mass. 883, 892 (1977) (while Article 30 demands separation, it does not prevent one branch from assuming those functions that would aid in its internal operations without unduly restricting endeavors of another coordinate branch).

Indeed, in *Attorney General v. Brissiden*, the SJC determined that the Legislature’s passage of an Act and assignment of a legislative investigation to an executive officer did not violate the separation of powers doctrine where such assignment did not delegate “its law-making power or any power explicitly repost in it.” 271 Mass. 172, 180 (1930). In so ruling, the Court stated, “The ascertainment of facts in its essence is not a legislative function.” *Id.* at 181. Conducting our audit under G.L. c. 11, § 12, which requires the Legislature to provide us access to records relating to any matter within the scope of an audit, is not a legislative function.

In this instant matter, the voters of Massachusetts have tasked the OSA with conducting an audit of the Legislature, including a review of historical data and ascertainment of facts. The voters, through the passage of Ballot Question #1, assigned a non-legislative fact-finding function to the OSA in the form of an audit of the Legislature. See *Bates v. Dir. of Office of Campaign and Political Finance*, 436 Mass. 144, 166 (2002) (where voters passed ballot initiative under Article 48, it was “the voters of the Commonwealth who enacted [the] law. They are the legislators whose intent we must discern.”). In furtherance of this non-legislative fact-finding charge from the voters and as part of its audit, the OSA has requested historical data in connection with the scope of its audit. The separation of powers doctrine is not implicated here and the OSA may properly maintain a mandamus action under G.L. c. 249, § 5.

While the OSA appreciates that the AGO “[is] very open to considering ways to navigate [the] precedent” set forth in the *LIMITS* decision and looks forward to your input, we are confident that the above reflects a well-developed “plausible theory” of how to do so successfully.

C. Does the OSA believe all functions of the Legislature are subject to audit or, instead, are certain core functions constitutionally protected?

The OSA, like all departments, offices, agencies, etc. of the Commonwealth, is subject to constitutional limitations. We conduct audits, including this instant audit of the Legislature, in

accordance with Massachusetts Constitution and applicable laws. Additionally, G.L. c. 11, § 12 requires the OSA to conduct its audits in accordance with GAGAS.

Again, the OSA struggles to resolve these speculative and theoretical questions regarding its authority to audit the Legislature. As your potential client, we ask whether your office has requested that any other office or agency of the Commonwealth provide such a broad opinion on a constitutional issue prior to engaging litigation and prior to your office deciding whether your office will represent or oppose a party in litigation.

Absent a request from a court or from either the Governor or the Legislature seeking an advisory opinion from the SJC in connection with our authority to audit the Legislature under G.L. c. 11, § 12, such a request seems unreasonable.

To the extent that there are certain core functions of the Legislature that are constitutionally protected – a determination most appropriately made by the courts – the OSA maintains that these protected areas are not encroached upon by our current audit and that the Legislature is subject to the present audit reviewing contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and the General Court’s forward line item – including a review of all relevant financial documents. Neither the scope of the audit nor the associated requests touch upon any constitutionally protected core functions of the Legislature.

CONCLUSION

“Article 48 was debated, framed, and adopted during the heyday of a national movement to give citizens more control over lawmaking by amending State Constitutions to add initiative and referendum provisions.” *Bates, supra* at 156. Similarly, the people of Massachusetts adopted Ballot Question #1 to promote more transparency from the General Court. The longer the General Court is allowed to continue to ignore and stymie the OSA’s efforts to conduct an audit, public confidence in its government and the People’s confidence in government’s ability to represent their interests, especially after they have clearly expressed their desire, will continue to erode.

Accordingly, the OSA requests that the AGO represent our office to enforce G.L. c. 11, § 12 or authorize the appointment of a SAAG to proceed with litigation. Action is necessary to honor the votes of nearly 72% of Massachusetts voters who passed the measure who, for all intents and purposes, knew they were instructing their representatives and agents – the elected and appointed officials who exercise the inherent power of the People, for the benefit of the People alone – to ensure this audit is conducted.

I note that the OSA is scheduled to meet with the Senate Subcommittee on Chapter 250 of the Acts of 2024 on Tuesday, February 11, 2025 to discuss our audit. Understanding this is a tight timeline, we respectfully request a determination from the AGO regarding our request to pursue litigation prior to that meeting.

From: DiZoglio, Diana (SAO) [Diana.DiZoglio@massauditor.gov]
Sent: Thursday, February 13, 2025 1:01 PM
To: Campbell, Andrea J (AGO)[andrea.j.campbell@mass.gov]
Subject: Massachusetts General Court audit

Dear Attorney General Campbell,

I am writing to inquire if you will be assisting the Office of the State Auditor in the litigation process as it pertains our efforts to audit the Massachusetts General Court.

It is imperative that your office recognizes the legal authority of our office to conduct audits, including our current audit of the Massachusetts General Court, under Chapter 11, Section 12 of the Massachusetts General Laws. To not take action would not only be a dereliction of your duty to enforce the law but would be a missed opportunity for your office to support the people of the Commonwealth, 72% of whom voted to support the new law — but if you're not up to representing us in this matter, it's your office's responsibility to let us know that we need to seek alternative representation.

Our audit team is ready to get to work but needs to know if you are interested in defending the will of the people by defending our right to do our jobs, consistent with the law.

Sincerely,

Diana

Diana DiZoglio
State Auditor
Office of the State Auditor
(617) 727-2075

From: DiZoglio, Diana (SAO) [Diana.DiZoglio@massauditor.gov]
Sent: Friday, February 14, 2025 10:36 AM
To: Campbell, Andrea J (AGO)[andrea.j.campbell@mass.gov]
Subject: Massachusetts General Court audit

Dear Attorney General Campbell,

I am writing to inquire if you will be assisting the Office of the State Auditor in the litigation process as it pertains our efforts to audit the Massachusetts General Court.

It is imperative that your office recognizes the legal authority of our office to conduct audits, including our current audit of the Massachusetts General Court, under Chapter 11, Section 12 of the Massachusetts General Laws. To not take action would not only be a dereliction of your duty to enforce the law but would be a missed opportunity for your office to support the people of the Commonwealth, 72% of whom voted to support the new law — but if you're not up to representing us in this matter, it's your office's responsibility to let us know that we need to seek alternative representation.

Our audit team is ready to get to work but needs to know if you are interested in defending the will of the people by defending our right to do our jobs, consistent with the law.

Sincerely,

Diana

Diana DiZoglio
State Auditor
Office of the State Auditor
(617) 727-2075

From: DiZoglio, Diana (SAO) [Diana.DiZoglio@massauditor.gov]
Sent: Monday, February 17, 2025 11:44 AM
To: Campbell, Andrea J (AGO)[andrea.j.campbell@mass.gov]
Subject: Massachusetts General Court audit

Dear Attorney General Campbell,

I am writing to inquire if you will be assisting the Office of the State Auditor in the litigation process as it pertains our efforts to audit the Massachusetts General Court.

It is imperative that your office recognizes the legal authority of our office to conduct audits, including our current audit of the Massachusetts General Court, under Chapter 11, Section 12 of the Massachusetts General Laws. To not take action would not only be a dereliction of your duty to enforce the law but would be a missed opportunity for your office to support the people of the Commonwealth, 72% of whom voted to support the new law — but if you're not up to representing us in this matter, it's your office's responsibility to let us know that we need to seek alternative representation.

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Sincerely,

Diana

Diana DiZoglio
State Auditor
Office of the State Auditor
(617) 727-2075

From: DiZoglio, Diana (SAO) [Diana.DiZoglio@massauditor.gov]
Sent: Tuesday, February 18, 2025 9:16 AM
To: Campbell, Andrea J (AGO)[andrea.j.campbell@mass.gov]
Subject: Massachusetts General Court audit

Dear Attorney General Campbell,

I am writing to inquire if you will be assisting the Office of the State Auditor in the litigation process as it pertains our efforts to audit the Massachusetts General Court.

It is imperative that your office recognizes the legal authority of our office to conduct audits, including our current audit of the Massachusetts General Court, under Chapter 11, Section 12 of the Massachusetts General Laws. To not take action would not only be a dereliction of your duty to enforce the law but would be a missed opportunity for your office to support the people of the Commonwealth, 72% of whom voted to support the new law — but if you're not up to representing us in this matter, it's your office's responsibility to let us know that we need to seek alternative representation.

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Sincerely,

Diana

Diana DiZoglio
State Auditor
Office of the State Auditor
(617) 727-2075

From: DiZoglio, Diana (SAO) [Diana.DiZoglio@massauditor.gov]
Sent: Wednesday, February 19, 2025 5:24 PM
To: Campbell, Andrea J (AGO)[andrea.j.campbell@mass.gov]
CC: Moore, Pat (AGO)[Pat.Moore@mass.gov]
Subject: RE: Massachusetts General Court audit

AG,

I am greatly disappointed in the stall tactics you continue to engage in. Your questions seem to be drafted with the intention of building a case for the General Court — like you have done in the past. I respectfully call on you to tell me whether you're representing the people or not.

How our office conducts our audit work is not under your purview and you are overstepping. Your role is to enforce the law, not to plan out and execute the audits I conduct.

Please know I also remain gravely concerned about your collusive conversations with the Governor's Office (regarding our audit of settlement agreements) that were intended to prevent my office from accessing records — in violation of statute and in benefit to yourself. I call on you to provide me with a SAAG to represent my office due to your conflicting yourself out regarding that legal dispute. And, I call on you to do that now — not on your own timetable.

Regarding this immediate instance, you will be receiving these letters from me until you fulfill your duties on these matters.

Do you agree the Legislature should give us the documents we requested? Answer the question.

Thank you.

Diana DiZoglio
State Auditor
Office of the State Auditor
(617) 727-2075

From: Campbell, Andrea J (AGO) <Andrea.J.Campbell@mass.gov>
Sent: Wednesday, February 19, 2025 4:04 PM
To: DiZoglio, Diana (SAO) <Diana.DiZoglio@massauditor.gov>
Cc: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Subject: Re: Massachusetts General Court audit

Afternoon Auditor DiZoglio,

I continue to receive your emails and want to make sure you are aware that on Tuesday our office responded via letter to your office's most recent correspondence. Our respective staffs remain in touch. There are certain baseline issues that, as a matter of course and what we seek from all agencies who seek our representation, we have repeatedly asked to be settled before litigation is initiated. This remains true regardless of how our office decides to proceed with litigation either

through our office or a SAAG. We continue to try to discern OSA's position on several issues. We cannot move forward if we do not have clear responses to our questions including the identification of legal support for your positions, which would better advance your goals than form emails.

We look forward to hearing more details and specifics in response to our most recent correspondence.

Best, Andrea

On Feb 19, 2025, at 9:51 'a0AM, DiZoglio, Diana (SAO)
<Diana.DiZoglio@massauditor.gov> wrote:

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Dear Attorney General Campbell,

I am writing to inquire if you will be assisting the Office of the State Auditor in the litigation process as it pertains our efforts to audit the Massachusetts General Court.

It is imperative that your office recognizes the legal authority of our office to conduct audits, including our current audit of the Massachusetts General Court, under Chapter 11, Section 12 of the Massachusetts General Laws. To not take action would not only be a dereliction of your duty to enforce the law but would be a missed opportunity for your office to support the people of the Commonwealth, 72% of whom voted to support the new law — but if you're not up to representing us in this matter, it's your office's responsibility to let us know that we need to seek alternative representation.

Our audit team is ready to get to work but needs to know if you are interested in defending the will of the people by defending our right to do our jobs, consistent with the law.

Sincerely,

Diana

Diana DiZoglio
State Auditor
Office of the State Auditor
(617) 727-2075



ANDREA JOY CAMPBELL
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
www.mass.gov/ago

February 18, 2025

VIA E-MAIL

Michael K. Leung-Tat
Deputy Auditor & General Counsel
Office of the Auditor of the Commonwealth
State House Room 230
Boston, MA 02133

Dear Michael:

Thank you for your memorandum of February 5, 2025 in response to our January 23, 2025 letter regarding the Office of the State Auditor's (OSA) request to initiate litigation to compel the General Court's compliance with its audit. We appreciate your initial response to our questions. As explained below, we have certain additional requests for information; and we wanted to address your questions about the extent to which these communications are protected by the attorney-client privilege.

Beginning with the latter: as we have previously explained, the Attorney General's Office (AGO) views your memorandum to be within the ambit of privilege triggered by your request, as a prospective client, for authorization to file suit. Similarly, the AGO treats as privileged its communications with the respective chambers of the General Court regarding your proposed lawsuit. In this respect, the Attorney General's role differs from the attorney-client relationship between a private lawyer and private client. This unique role is expressly recognized by the Massachusetts Rules of Professional Conduct, which acknowledge that the Attorney General "may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so"; and which carve out from the Rules the "substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth."

Because it is the role of the AGO, as the Commonwealth's chief legal officer, to attempt to resolve disputes among parts of state government without the need for litigation, we may relay our general sense of the OSA's position to the General Court, and vice versa, in service of our effort to seek a resolution short of litigation, and failing that, to focus the parties' legal dispute for the courts. That does not involve sharing your written

correspondence; nor, for example, detail about our productive meeting several weeks ago.

In addition, as we have explained previously and emphasize again: the Office of the State Auditor may not publicly characterize, or mischaracterize, the substance of the back and forth between the AGO and the OSA, and then rely on assertions of privilege to silence the AGO. Should that occur, the AGO will not hesitate to explain our views ourselves, as any putative privilege would be waived. Several comments to date very well may have crossed that line. But, reflecting the respect we afford as a matter of course to a fellow constitutional office, we have declined from publicly sharing or characterizing our views. That will not continue if the OSA waives the privilege on its end.

We also write to seek additional information about the substantive responses provided in your February 5 memorandum. For clarity, we structure this letter using the same three questions posed in our January 23 correspondence.

1. What is the scope of the audit that the OSA intends to perform?

In your memorandum, you express some reluctance to firmly define the scope of your audit of the General Court, but you describe that audit as being “focused on the General Court’s contracting and procurement procedures, use of taxpayer-funded nondisclosure agreements, and a review of the General Court’s forward line item – including a review of all relevant financial documentation.” Please confirm whether that is, in fact, the intended scope of your audit as it would be described to a court in prospective litigation; and whether you have communicated that scope (or any other) to the General Court and, if so, when and how you did so.

2. What legal claim do you propose to bring against the Legislature and what relief do you propose to ask of the court?

Your memorandum asserts that existing judicial precedent permits a mandamus claim against the General Court so long as that mandamus claim does not seek instruct the General Court regarding its constitutional duties. Please confirm that, should this office authorize you to bring suit, the complaint you propose to bring would assert a mandamus claim, and specify against whom you propose to bring that claim (i.e., the precise defendants that would be named). If you propose to assert any other type of claim, please identify what claim or claims you propose to assert, against which defendants.

In addition, please identify the precise scope of the relief you propose to seek. Understanding that you propose to seek some form of declaratory or injunctive relief, what would your proposed complaint ask the Court to order? Please identify any precedent supporting your proposed claim.

3. Does the OSA believe all functions of the Legislature are subject to audit or, instead, are certain core functions constitutionally protected?

Your memorandum appears to acknowledge that there may be certain limits on the OSA’s ability to audit the General Court. For example, you observe that the SJC has previously

held that a mandamus claim cannot compel the General Court to take legislative action. What does OSA consider to be “legislative action”? To what extent, if any, does the OSA believe “legislative action” is subject to audit?

Your letter inquires whether these questions would be asked of other state litigants asking to bring suit. The answer is yes. In the usual course, this office routinely asks would-be litigants to develop and state their position on issues that will be the subject of judicial inquiry *before* a case is filed. We do so to further our objective of developing a consistent legal policy for the Commonwealth and ensuring that any litigation involving a state agency is an appropriate use of the court system.

Please confirm whether you agree that the OSA’s ability to audit the General Court is limited.

As before, we are glad to discuss these issues at your convenience.

Very truly yours,

/s/ M. Patrick Moore, Jr.

M. Patrick Moore Jr.
First Assistant Attorney General

From: [Moore, Pat \(AGO\)](#)
To: [Leung-Tat, Michael K. \(SAO\)](#)
Cc: [Stermann, Anne \(AGO\)](#); [Fowler, Erin \(AGO\)](#)
Subject: Filing Expected?
Date: Wednesday, February 26, 2025 1:15:54 PM

Michael:

I'm informed that the Auditor is making public statements suggesting we may imminently expect some sort of mandamus petition, naming the Attorney General as a defendant. Please promptly let us know what you can share about such a filing.

Regards,
Pat

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DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

TEL (617) 727-2075
FAX (617) 727-3014

MEMORANDUM

TO: M. Patrick Moore Jr., First Assistant Attorney General (AGO)
Anne Sterman, Chief, Government Bureau (AGO)

CC: Ann Marie Irwin, Senior Deputy Auditor (OSA)
Steve Lisauskas, Executive Deputy Auditor (OSA)

FROM: Michael Leung-Tat, General Counsel and Deputy Auditor (OSA)

RE: OSA Response to AGO's February 18, 2025 Letter

DATE: February 27, 2025

Your letter dated February 18, 2025 sought "additional information about the substantive responses provided in [the OSA's] February 5 memorandum." Below are the OSA's responses:

A. What is the scope of the audit that the OSA intends to perform?

The scope of the OSA's current audit of the General Court is state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of the balance forward line item - including a review of all relevant financial information related to this line item. The OSA has communicated this scope to the General Court via the January 3, 2025 Notification Letter to Speaker Mariano and President Spilka (Attachment 1) and the written Agenda for the February 11, 2025 audit entrance conference (Attachment 2). In addition, during the February 11, 2025 audit entrance conference, the OSA repeatedly stated to members of the Subcommittee of the Temporary Senate Committee on Rules (Subcommittee on Chapter 250 of the Acts of 2024) and Senate staff, including counsel for the Senate, that the scope of the OSA's current audit of the General Court would cover the above-referenced areas.

This is the scope of the OSA's current audit as it would be described to a court in prospective litigation. As previously discussed, because a court cannot answer a theoretical question of the Auditor's authority, we are not seeking to litigate the hypotheticals regarding the potential scope of this instant audit or future audits. Pursuant to G.L. c. 11, § 12, we are seeking "to enforce the production of records" within the scope (as described above) of our current audit of the General Court.

B. What legal claim do you propose to bring against the Legislature and what relief do you propose to ask of the court?

Based on our previous discussions, we propose bringing a mandamus claim under G.L. c. 249, § 5 against the General Court to compel the production of records necessary for the completion of our audit pursuant to G.L. c. 11 section 12 . Relief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform. *See Lutheran Serv. Assn of New England, Inc. v. Metro. Dist. Com'n*, 397 Mass. 341, 344 (1986). In this instance, we would be seeking mandamus relief to compel public officials to produce to the OSA the records requested by the OSA in connection with its current audit of the General Court. The proposed defendants are as follows:

1. House Clerk, as some or all of the records requested are in the possession and control of the House Clerk.
2. Senate Clerk, as some or all of the records requested are in the possession and control of the Senate Clerk.
3. Representative/House Speaker Ronald J. Mariano as he has obstructed the OSA's efforts to audit the House of Representatives by, among other things, instructing the House Clerk to refuse to cooperate with the audit.
4. Senator/Senate President Karen E. Spilka as she has obstructed the OSA's efforts to audit the Massachusetts Senate by, among other things, instructing the Senate Clerk to refuse to cooperate with the audit.

Additionally, a potential defendant may be the Secretary of the Commonwealth in his capacity as the keeper of records for the Commonwealth under Part Second, Chapter II, Section IV, Article II of the Massachusetts Constitution.

As stated in our February 5, 2025 memorandum, the relief sought would compel the defendants to take administrative action, i.e. producing the specific records (historical data) requested by OSA in connection with its audit of the General Court, not legislative action, which the holding in *LIMITS* may preclude. We note that the courts routinely direct Executive Branch agencies and officials to take specific action. Our request is analogous, though it would involve the courts directing officials of the Legislature to undertake actions as defined above.

C. Does the OSA believe all functions of the Legislature are subject to audit or, instead, are certain core functions constitutionally protected?

The OSA conducts audits, including this instant audit of the General Court, in accordance with the Massachusetts Constitution and all applicable laws. Additionally, G.L. c. 11, § 12 requires the OSA to conduct its audits in accordance with Generally Accepted Government Auditing Standards (GAGAS). The limits, which exist to the scope and topics for all state entities subject to audit by OSA, also apply to audits of the General Court.

The OSA holds sacred the separation of powers doctrine and does not seek to usurp, infringe, exercise or otherwise obstruct the core functions of the Legislature. Certainly, not all functions of the Legislature are subject to audit, particularly those core legislative functions that are constitutionally protected. We acknowledge that there may be uncertainty regarding the definition of core legislative functions, however, there is no uncertainty with regard to our audit and we would welcome a court's consideration and determination in that regard.

Relevant to this prospective litigation in connection with this instant audit, the OSA maintains the scope of the audit and the associated requests do not violate the separation of powers doctrine or touch upon any constitutionally protected core functions of the Legislature.

CONCLUSION

The OSA is requesting the AGO's assistance to compel the production of records requested by the OSA in connection with its current audit of the General Court. In making the request, it was and remains the OSA's expectation that the AGO would in fact assist our office. While we appreciate the AGO's rigorous inquest regarding our request, we look forward to your assistance in not only identifying, but using your legal expertise and resources, working with the OSA to overcome any potential legal obstacles related to our proposed litigation against the General Court.

Accordingly, the OSA requests that the AGO represent our office to enforce G.L. c. 11, § 12 or, in the alternative, authorize the appointment of a SAAG to proceed with litigation to compel the production of all records requested by the OSA in connection with our current audit of the General Court. We respectfully request this matter be expedited so our office can continue its work and produce a timely audit of the General Court.

Attachment 1



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

DIANA DIZOGLIO
AUDITOR

TEL (617) 727-2075
FAX (617) 727-3014

January 3, 2025

Representative Ronald Mariano, Speaker of the House
24 Beacon Street, Room 356
Boston, MA 02133

Senator Karen E. Spilka, Senate President
24 Beacon Street, Room 332
Boston, MA 02133

Dear Speaker Mariano and President Spilka:

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, we will be conducting a performance audit of the Massachusetts General Court (House, Senate, and Joint Legislative Committees).

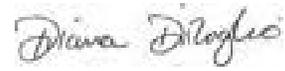
The Generally Accepted Government Auditing Standards, commonly referred to as the “Yellow Book,” are issued by the United States Government Accountability Office. The standards apply to both financial and performance audits of government agencies. Our audit will be conducted in accordance with these standards and will cover all of the topics we were unable to fully review in our previous audit, due to your refusal to participate in the audit process. Our work will start with a review of high-risk areas, such as state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of your balance forward line item - including a review of all relevant financial receipts and information.

Section 12 of Chapter 11 of the General Laws requires organizations being audited to provide our audit team with books, documents, and other records pertaining to the audit areas. We may also make inquiries regarding audit issues with the members of your staff responsible for the functions involved in this audit and request, from management, written confirmation of statements your staff made to us during the audit. We ask that all requested records and information be made available to us within 72 hours of the date of request.

At the completion of our audit, we will provide you with a draft copy of our audit report for your review and comments. Your comments should be forwarded to us within 15 days of notification. Also, if you would like a formal exit meeting, please request the meeting at this time.

Please respond with some potential dates for an entrance conference to be scheduled.

Sincerely,

A handwritten signature in cursive script that reads "Diana DiZoglio".

Diana DiZoglio
Auditor of the Commonwealth

Cc:

Timothy Carroll, House Clerk
Michael D. Hurley, Senate Clerk

Attachment 2



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

TEL (617) 727-2075
FAX (617) 727-3014

OSA Audit of the General Court Entrance Conference - February 11, 2025 Agenda

I. Statutory Authority & Standards

- a. G.L. c. 11, § 12
- b. GAGAS

II. Audit Scope/Topics

- a. State contracting and procurement procedures
- b. Use of taxpayer-funded nondisclosure agreements
- c. Review of the Senate's balance forward line item
 - i. Review of all relevant financial receipts and information

III. Audit Process

- a. Planning Phase
 - i. Gain an understanding of the programs under audit, including staff interviews and walkthroughs of processes, functions, and applicable controls
 - ii. We will perform standard fraud inquiries of key staff and management
 - iii. Obtain relevant data and assess its reliability
 - iv. Plan substantive testing
- b. Fieldwork Phase
 - i. Perform testing
 - ii. Inform auditee of results of testing
- c. Reporting Phase
 - i. Write the report
 - ii. Quality Assurance review
 - iii. Auditee Comment period
 - iv. Conclude the audit process

IV. Communication

- a. OSA will ask Senate to designate a liaison or point of contact for each audit topic/objective
- b. Meetings will be held throughout the audit with the liaisons, and any issues identified will be discussed before the end of the audit

V. Requests for Documents

- a. Process
 - i. Document requests will be made as needed
 - ii. Please process document requests within 72 hours
- b. January 6, 2025 Request (Outstanding)
 - i. The official budgets for the Senate for Fiscal Years 2021, 2022, 2023 and 2024
 - ii. Copies of official audits of the Senate for Fiscal Years 2021, 2022, 2023 and 2024
 - iii. A listing of all transactions related to the Senate's balance forward line item for Fiscal Years 2021, 2022, 2023 and 2024
 - iv. A listing of all monetary settlement agreements entered into by the Senate with any current or former employees or members of the Senate during Fiscal Years 2021, 2022, 2023 and 2024

VI. Conclusion and Reporting

- a. Informal Exit Conference: An informal exit conference will be held at the conclusion of our fieldwork phase to discuss the results of the audit.
- b. Report Process: A draft report will be provided to the auditee and the auditee will have 15 days to respond to any findings in the draft report. The Auditee will have the option to request a formal exit conference to discuss any issues in the report. Auditee responses to identified issues will be incorporated into the final report. The OSA will have the opportunity to respond to these comments (if any) in the final report.
- c. Formal Exit Conference: the Auditee may request a formal exit conference after receiving and responding to the draft report
- d. Report Release: The OSA may issue a press release at the time the audit is made public.

VII. Questions

From: [Moore, Pat \(AGO\)](#)
To: [Leung-Tat, Michael K. \(SAO\)](#)
Cc: [Lisauskas, Stephen P. \(SAO\)](#); [Irwin, Ann Marie \(SAO\)](#); [Serman, Anne \(AGO\)](#)
Subject: RE: OSA Request for Assistance - Audit of the Legislature
Date: Tuesday, March 4, 2025 4:00:24 PM

Michael:

Thank you for the memo, which we continue to review. In the meantime, I write with some clarifying questions.

First, we appreciated your description of “[t]he scope of the OSA’s current audit of the General Court,” and your clarification that the scope, as you described it, would be so described to any court addressing this dispute. We also inquired about how that scope had been described to the respective legislative chambers, particularly in writing, as they have described the potential scope somewhat differently referencing letters from the OSA, including certain letters sent recently. Can you provide to us those letters? They doubtlessly would be introduced in any court proceeding.

Second, we were interested to see that you listed the Secretary of the Commonwealth as a potential defendant in the litigation. As a part of its audit of the Legislature, has OSA requested records from the Secretary? We noted, as well, your reference to Mass. Const. Pt. II, c. 2, s. 4, art. 2, specifically the provision that “records of the Commonwealth shall be kept in the office of the Secretary.” Is it your position that the sought-after documents are “records of the Commonwealth” as that phrase is used in the state constitution? If so, do you have support for that proposition? It certainly would address some of the redressability concerns that arise when there are legislative defendants.

Third, we noted the Clerks of the House and the Senate, respectively, were first on the list of prospective defendants. Is it OSA’s view that limits on the availability of relief against the legislature do not extend to the respective clerks. In other words, if we disagree with you that mandamus is available against the Legislature as a body (or its leadership), is there a basis to seek relief against the clerks?

Please let us know your thoughts.

As always, we are glad to discuss.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Thursday, February 27, 2025 12:05 PM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Pat:

Attached are the OSA's responses to questions posed in your February 18th letter.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Tuesday, February 18, 2025 6:59 AM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Michael:

I hope you had a nice long weekend. A letter responding to your memo, and asking several clarifying questions, is attached.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Wednesday, February 5, 2025 1:06 PM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Pat – Attached please find OSA’s responses to your January 23, 2025 correspondence. Please let me know if you need any additional information or wish to discuss.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Thursday, January 23, 2025 3:30 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Michael –

Thanks for your email, the receipt of which I am acknowledging. When we left last week’s meeting, we had a number of outstanding questions, which are not addressed by the below. Please see the attached which describes the most central of those questions. We look forward to your response.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Thursday, January 23, 2025 12:03 PM
To: Sterman, Anne (AGO) <anne.sterman@mass.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Anne and Pat - Thank you for the substantive meeting with your office on Thursday, January 16, 2025. After internal discussion, our office believes that we have a current bona fide legal dispute with the Legislature regarding our authority to audit the Legislature under G.L. c. 11, § 12, as amended by the passage of Ballot Question 1. To date, our January 6, 2025 requests for specific records related to our audit remain outstanding. The House has not responded to or even acknowledged our request. The Senate by its January 13, 2025 letter has indicated that it will not comply with the request and has instead directed us to various websites. This response is problematic. It is the obligation of the auditee, not the OSA, to produce the requested records, especially because an auditee's records could differ from the official records posted on the Commonwealth's computer systems. Contrary to the assertions of the Senate, it is notable that the information requested, which they directed us to find online, is not even available on those websites. Moreover, the Senate has signaled it will not cooperate with our audit, citing a "significant constitutional concern" in addition to a "significant number of legal and procedural issues."

Based on the above, we not only have a legal dispute but also have a sufficient factual record to support litigation against the Legislature. While we seek relief from the Judiciary to enforce the production of all records requested, we anticipate a court (Superior or Supreme Judicial Court) would opine on the larger issues surrounding our authority to audit the Legislature such as those constitutional issues alleged by the Legislature.

We appreciate the feedback provided at the meeting but do not see any legitimate constitutional issues, including those related to the separation of powers doctrine, with our current audit and the associated requests. If the Legislature has those concerns and wishes to raise them in opposition to our audit and requests, we welcome a court's adjudication to resolve this dispute.

Accordingly, we request your assistance to proceed with litigation.

Thanks,
Michael

From: Leung-Tat, Michael K. (SAO)
Sent: Wednesday, January 15, 2025 3:04 PM
To: Serman, Anne (AGO) <anne.sterman@mass.gov>; Moore, Pat (AGO)
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Thanks for the call, Anne. Ann Marie Irwin, Senior Deputy Auditor, will also be joining for the

OSA. I forwarded the meeting invite to her.

From: Stermann, Anne (AGO) <anne.sterman@mass.gov>
Sent: Tuesday, January 14, 2025 5:36 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Thanks, Michael. Let's do this Thursday 1/16 at noon. Please let me know who else should be included from your office and then I'll send an invite.

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Tuesday, January 14, 2025 3:33 PM
To: Stermann, Anne (AGO) <anne.sterman@mass.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Thanks, Anne. We have availability as follows:

- 1/15 (9am-12pm)
- 1/16 (12-2pm, 3-4pm)
- 1/17 (9:30am-11am, 12-1:30pm, 2:30-4:30pm)

Please let me know if you need any additional dates/times.

Thanks,
Michael

From: Stermann, Anne (AGO) <anne.sterman@mass.gov>
Sent: Tuesday, January 14, 2025 9:27 AM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Barrieau, Meredith K (SAO)

<Meredith.Barrieau@massauditor.gov>

Subject: RE: OSA Request for Assistance - Audit of the Legislature

Hi Michael,

We'd like to set up a time to discuss this request. Could you give us a few dates/times that work on your end?

Thanks,

--Anne

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>

Sent: Thursday, January 9, 2025 5:25 PM

To: Moore, Pat (AGO) <Pat.Moore@mass.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>

Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Barrieau, Meredith K (SAO) <Meredith.Barrieau@massauditor.gov>

Subject: OSA Request for Assistance - Audit of the Legislature

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Dear Pat and Anne:

Attached please find a memorandum from the Office of the State Auditor seeking the Office of the Attorney General's assistance regarding our audit of the Legislature.

Please do not hesitate to contact me with any questions or if you need any additional information.

Thanks,

Michael Leung-Tat

General Counsel | Deputy Auditor

Office of the State Auditor

One Ashburton Place, Room 1819

Boston, MA 02108

Michael.Leung-Tat@MassAuditor.gov

(m) 857-331-5394

***Please note that my email address has changed. My new address is now Michael.Leung-Tat@MassAuditor.gov. Please update your records accordingly and direct all future emails to my new address. ***



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

March 13, 2025

VIA E-MAIL

Michael Leung-Tat
General Counsel and Deputy Auditor
Office of the State Auditor (OSA)
Michael.Leung-Tat@massauditor.gov

Dear Michael:

I write in response to your email dated March 6, 2025, and to address remaining gaps in our requests for information and legal support arising from the Office of the State Auditor's (OSA) request to initiate litigation against the Legislature. I understand that several of these issues were also discussed via teleconference with members of the Attorney General's Office (AGO) yesterday afternoon.

There are substantive reasons why the OSA must provide the information we seek. Among them: it is important to establish whether litigation is the only pathway forward, particularly where the dispute is among government entities; to understand a would-be litigant's position to determine whether that position can or should be represented by the Attorney General; and, regardless, to think through positions that inevitably must be taken before that litigation is initiated. This office does not grant its consent to initiate litigation without first giving full consideration to these questions. Any suggestion that we short-circuit this process—or that the process is uniquely burdensome because of the prospective defendants—is neither welcome nor consistent with our exchanges to date. It is the role of the AGO to ensure that when the Commonwealth takes legal positions in court, those positions are well developed, supported by precedent, and consistent with the facts as we know them. As far as this matter is concerned, we have not yet found that to be the case.

We note that the OSA has publicly and in yesterday's meeting claimed that you have provided all of the information the AGO has requested. That is not so. The following issues remain, organized in order of importance; and a new one is necessitated by assertions made for the first time by the OSA yesterday. If and when these issues are addressed, we remain open to authorizing litigation—and we could do so promptly, if the OSA's answers reflect the type of serious engagement with these issues that a court will demand.

First, as you are aware, our office has asked the OSA several times to state clearly the scope of the OSA's proposed audit of the Legislature, so that the AGO may evaluate the strength of the OSA's proposed claims and whether the OSA's request to bring litigation ought to be permitted. However, the OSA has provided shifting descriptions of that scope.

Specifically, in the OSA's February 27, 2025, letter to our office, the OSA described "the scope of the OSA's current audit as it would be described to a court in prospective litigation" as the following:

The scope of the OSA's current audit of the General Court is state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of the balance forward line item - including a review of all relevant financial information related to this line item.

But the OSA described the scope differently elsewhere, including to the Senate, one of the two legislative chambers from which you are requesting documents. In the OSA's February 28, 2025, letter to the Subcommittee of the Temporary Senate Committee on Rules, the OSA described the scope of the audit as "all of the topics [OSA was] unable to fully review in [OSA's] previous audit," including the subject areas referenced above. The previous audit directly addressed the lawmaking process, listing as objectives: "how and to what extent the Massachusetts General Court is ensuring an equitable mode of making laws in accordance with the Preamble of the Massachusetts Constitution"; and "how and to what extent member majority bills are being considered by the Massachusetts General Court."

Please clarify which of these descriptions of the scope of the proposed audit accurately represents the OSA's ongoing audit. To be clear, the constitutional concerns implicated by an audit that would include "all of the topics [the OSA] was unable to fully review in [the OSA's] previous audit" are significant. Those concerns may not be implicated (or, at least, may not be implicated to the same extent) by the far narrower audit the OSA described in your February 27, 2025, letter to our office. Your response to the above inquiry will therefore guide the AGO's decision on the OSA's request to initiate litigation against the Legislature.

Second, we understand your request for authorization to initiate litigation has now expanded to include unspecified claims against the Secretary of the Commonwealth. Has that office been asked to produce any documents in connection with the ongoing audit? If not, do you intend to make such a request pursuant to G.L. c. 11, § 12, or any other provision of law? As a general matter, we do not authorize litigation between parts of state government where a defendant in such litigation has not first been asked to take the desired action. We have not raised the issue with the Secretary, but we expect that office will have clear and strong views about whether the sought after records are in fact in their possession, custody or control. We cannot authorize litigation against the Secretary—let alone determine whether the Secretary would be entitled to representation by our office in such litigation—without these issues being addressed.

Third, we remain skeptical about the availability of the mandamus relief the OSA would seek against the Legislature. To be clear, this concern need not prevent authorization of litigation, but we nonetheless need to understand the OSA's position. In recent correspondence, you emphasized that *LIMITS v. President of the Senate*, 414 Mass. 31 (1992), is distinguishable because there the plaintiffs sought relief that would order the Legislature to take a legislative action required by the constitution. Is it the OSA's position that such relief is available where the requirement arises from statute, rather than the constitution? Or that the constitutional concern animating "[j]udicial unwillingness to order the Governor or the Legislature to act [arising from] separation of powers principles expressed in art. 30," see *Town of Milton v. Commonwealth*, 416 Mass. 471, 475 (1993), recedes where the act is administrative (e.g., the production of documents) and about administrative activities (e.g., procurement)? Can you identify any caselaw that would support this distinction? Likewise, you have asserted that naming the respective clerks of the House and Senate could mitigate any concerns about the availability of relief. If that assertion is based on supporting precedent, please provide it to us.

Fourth, we had understood that the OSA's planned cause of action sounded in mandamus, rather than declaratory relief. Yesterday, though, the OSA indicated that it is now once again considering declaratory judgment "that the ballot initiative is constitutional." But as we have noted in previous correspondence, the Declaratory Judgment Act, by its very terms, does not apply to the Legislature. G.L. c. 231, § 2; see *Foster v. Comm'r of Correction*, 484 Mass. 1059, 1060-61 (2020) (collecting cases). How does the OSA propose to circumvent this settled law?

Fifth, I now understand the OSA takes the position that no authorization of litigation by the Attorney General is needed, because the OSA will seek authority from the Court under G.L. c. 12, § 26. This is a novel position that has not been taken by any state entity, including independent constitutional officers, seeking affirmative litigation in recent times. Nor have we located caselaw indicating that § 26 applies in these circumstances. We would be pleased to consider any legal support you can identify for this position.

As always, we are glad to discuss as needed.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Patrick Moore Jr.", written in a cursive style.

M. Patrick Moore Jr.
First Assistant Attorney General



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

TEL (617) 727-2075
FAX (617) 727-3014

MEMORANDUM

TO: M. Patrick Moore Jr., First Assistant Attorney General (AGO)
Anne Sterman, Chief, Government Bureau (AGO)

CC: Ann Marie Irwin, Senior Deputy Auditor (OSA)
Steve Lisauskas, Executive Deputy Auditor (OSA)

FROM: Michael Leung-Tat, General Counsel and Deputy Auditor (OSA)

RE: OSA Response to AGO's March 13, 2025 Letter

DATE: March 28, 2025

Your letter dated March 13, 2025 sought “to address remaining gaps in our requests for information and legal support arising from the Office of the State Auditor’s (OSA) request to initiate litigation against the Legislature.” Our office is growing increasingly frustrated with repeatedly answering the same questions to obtain your support to enforce our statutory authority to access basic financial historical records in connection with our current audit of the Legislature. There is reasonable concern that after we respond to your requests the Office of the Attorney General (AGO) is simply moving the goal posts with more requests (often asking previously asked and answered questions). There is rising suspicion that our engagement with the AGO and the information we provide are again being used by your office to thwart our efforts to audit the Legislature rather than assist us in litigating this matter against the Legislature. Our suspicion is borne out of our past experience when we first sought your assistance to audit the Legislature and your office solicited our legal strategy only to later weaponize it against our office in defense of the Legislature. For that reason, we ask again that your office state whether it will be representing our office and the People, or the Legislature, in this current matter. To continue to demand that our office provide the AGO with our legal strategy and information without your office’s commitment to enforce the law – G.L c. 11§ 12, as amended by 72% of voters to provide our office with the express authority to audit the Legislature – raises questions regarding the

attorney-client privilege that should exist between our offices. Any notion or suggestion that our answers do not “reflect the type of serious engagement with these issues that a court will demand” is a gross mischaracterization of our efforts and illustrative of the AGO’s continued adversarial posture to enforce G.L. c. 11, § 12, dating back to July 2023, when we first reached out to your office for assistance but were instead met with your opposition.

Accordingly, we ask the AGO to make clear that it intends to enforce G.L. c. 11, § 12 and support our litigation against the Legislature.

Below are the OSA’s responses to the questions raised in your March 13th letter:

A. Scope of the Audit of the General Court

The basis of the OSA’s proposed litigation against the Legislature is the Legislature’s refusal to comply with the OSA’s January 6, 2025 request for records in connection with its audit of the Legislature pursuant to G.L. c. 11, § 12. Most recently, the OSA restated our request for these records via Auditor DiZoglio’s February 28, 2025 letter to the Senate Subcommittee. Copies of which have been provided previously to your office.

As stated in our correspondence to the AGO, dated January 9, 2025, February 5, 2025, and February 27, 2025, the current scope of the OSA’s audit of the General Court covers state contracting and procurement procedures, settlement agreements and the use of non-disclosure agreements, along with a review of the balance forward line item - including a review of all relevant financial information related to this line item.

However, we remind the AGO that we are not seeking its permission regarding the scope of our audit, nor are we seeking to litigate the scope of our audit. For the purposes of this litigation, which arises from the Legislature’s refusal to comply with our request for records in connection with our audit, the only relevant scope is the scope associated with our requests, i.e. state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of the balance forward line item - including a review of all relevant financial information related to this line item.¹ The legal dispute, which is the basis of the proposed litigation, is the Legislature’s refusal to produce the financial and contracting documents requested in connection with this audit. Under G.L. c. 11, § 12, the Legislature has a legal obligation to produce the requested documents to the OSA. Accordingly, we seek the AGO’s assistance to initiate litigation to enforce the law and to compel the Legislature’s production of these specific records.²

To answer your questions regarding scope, the OSA reiterates that the only relevant scope for your consideration pertains to the financial and contracting documents that we have requested and that are being withheld in violation of G.L. c. 11, § 12. We are not seeking to litigate

¹ Under G.L. c. 11, § 12, “the department may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit.”

² G.L. c. 11, § 12 states, “The superior court shall have jurisdiction to enforce the production of records that the department requires to be produced pursuant to this section, and the court shall order the production of all such records within the scope of any such audit.”

hypothetical questions that may present themselves in the future. We are only seeking to litigate what is currently before us as a clear violation of G.L. c. 11, § 12 – the Legislature’s refusal to produce financial and contracting documents to our office.

To clarify, for the purpose of this prospective litigation which arises out of our current dispute with the Legislature's refusal to produce requested records, regarding our instant audit, the current scope of the audit is what is referenced above and in our February 25th letter - state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of the balance forward line item - including a review of all relevant financial information related to this line item. Accordingly, we seek to litigate due to the Legislature’s refusal to cooperate with the specific requests for these specific documents.

B. Secretary of the Commonwealth

Even a cursory reading of our February 27th and March 6th correspondence to your office cannot justify the AGO’s assertion that our “request for authorization to initiate litigation has now expanded to include unspecified claims against the Secretary of the Commonwealth.” In our February 27th response to your February 18th request to “specify against whom you propose to bring that [mandamus] claim (i.e., the precise defendants that would be named),” our office provided your office with the following four defendants to be named in our proposed litigation: House Clerk, Senate Clerk, House Speaker, and Senate President. Our response also noted that “a potential defendant may be the Secretary of the Commonwealth in his capacity as the keeper of records for the Commonwealth.” Similarly, our March 6th email to your office also noted that we were “still exploring naming the Secretary of the Commonwealth as a potential defendant.” We have never committed to naming the Secretary of the Commonwealth as a defendant; any assertion to the contrary is untrue and misleading. All we have ever represented is that we are considering this option to overcome some of obstacles asserted by the AGO in connection with enforcement of our statutory authority to audit the General Court under G.L. c. 11, § 12. Any notion that the proposed litigation or your determination regarding this proposed litigation hinges upon this matter strains credulity. Since it is the AGO's official duty to assist in developing a legal strategy that constructively addresses the potential challenges presented by this novel case – we would appreciate it doing so – rather than using these challenges as a means to seemingly subvert our efforts to litigate this matter. If there are issues that your office identifies as being potentially problematic, we call on you to make clear, that your questions regarding such potential challenges are solely for the purpose of ensuring the Legislature complies with the law and that our responses will not be used against the OSA in defense of the Legislature’s position.

C. Mandamus

Although the AGO has questioned the availability of the mandamus relief for the OSA against the Legislature in light of *LIMITS v. President of the Senate*, 414 Mass. 31(1992), we asserted in our February 5th, February 27th, and March 6th correspondence to your office and continue to assert that *LIMITS* is distinguishable because the plaintiffs sought relief that would order the

Legislature to take legislative action required by the constitution. The Judiciary's well-founded reluctance to violate the separation of powers doctrine in *Town of Milton v. Commonwealth*, 416 Mass. 471, 475 (1993) does not apply to administrative actions such as the production records related to procurement, budget, audits, and employee settlements requested by the OSA in connection with its instant audit. A court ordering the Legislature or administrative staff of the Legislature to produce these requested historical records does not and cannot infringe upon the Legislature's inherent Article 30 powers. Does the AGO acknowledge the OSA's request for these financial and contractual documents under G.L. c. 11, § 12 does not violate the separation of powers doctrine? Or does the AGO support the Legislature's position that it has the right to withhold these financial and contractual documents from our office despite our explicit authority to audit the Legislature?

As the AGO itself has acknowledged, case law in this area is limited. However, that should not serve as an immovable barrier to prevent litigation in this unprecedented novel dispute that requires resolution and judicial adjudication. G.L. c. 11, § 12, as amended by the passage of Question 1 by 72% of voters expressly granting the OSA authority to audit the General Court, is the law. Despite our willingness to cooperate and work together in the face of AGO's apparent reservations to enforce the law, we remind the AGO that it is in fact the AGO's, not the OSA's, to enforce the law and to develop the legal strategy to effectuate enforcement of the law. The OSA remains available to assist your office with the expectation that we are working together to enforce G.L. c. 11, § 12 not to undermine it. Accordingly, the OSA need to know the AGO's position on this issue and ask that your office provide our office with its stated position – whether supportive or opposed. We cannot continue to engage with you in good faith unless you tell us if you are going to represent us or the Legislature.

D. Declaratory Relief

During the March 12, 2025 meeting with AGO staff to discuss conflict of interest waivers and SAAG appointments, OSA's prospective outside counsel, on his own, raised the issue of declaratory relief. This statement, which was exploratory in nature regarding declaratory relief, was made by OSA's prospective counsel, who did not represent the OSA, does not represent the OSA, and was not speaking on behalf of the OSA. Moreover, it is apparent his statements been taken out of context in a discussion about conflict of interest waivers and potential SAAG designations. To be clear, our request for the AGO's assistance to initiate litigation against the Legislature, as developed throughout the course of the OSA's engagement with the AGO and as articulated to AGO in correspondence dated February 5th, February 27th and March 6th, is for mandamus relief against the Legislature.

E. G.L. c. 12, § 26

Again, the AGO has mischaracterized the OSA's position. Our office's position is and has remained consistent. Since July 2023, we have sought to engage the AGO to represent the OSA to enforce our authority to audit the General Court under G.L. c. 11, § 12. Regrettably, the AGO has presented only obstacles without lending its expertise, advice, or resources to assist our office enforce the law as is the AGO's statutory duty. Although the OSA has repeatedly

answered your questions, your office's March 13th letter and public comments contend that we have not provided your office with the information that you seek. That is categorically false as evidenced by our responses to your office dated January 9th, January 23rd, February 5th, February 27th, and March 6th and the various meetings with AGO staff. Given our office's experience throughout this engagement and the recent public comments made by your office, a reasonable conclusion is that AGO, in this matter, is rendering itself to be unavailable or absent as contemplated by G.L. c. 12, § 26. See *Sec. of Admin. and Finance v. Attorney Gen., et al.*, 367 Mass. 154, 168 n.3 (1975).

CONCLUSION

Accordingly, the OSA calls on the AGO to commit to the enforcement of G.L. c. 11, § 12 via litigation brought by either the AGO or a SAAG of the OSA's choosing. We respectfully request this matter be expedited with the requisite urgency so the public's trust in state government is not further damaged by the G.L. c. 11, § 12 continuing to go unenforced.

From: [Moore, Pat \(AGO\)](#)
To: [Leung-Tat, Michael K. \(SAO\)](#)
Cc: [Lisaukas, Stephen P. \(SAO\)](#); [Irwin, Ann Marie \(SAO\)](#); [Stermann, Anne \(AGO\)](#)
Subject: Re: OSA Request for Assistance - Audit of the Legislature
Date: Friday, March 28, 2025 11:16:13 PM

Michael:

Acknowledging receipt. I would say that I look forward to reviewing, but I confess some considerable dismay about some of the inaccurate characterizations set forth even in the introduction. Regardless, we will be in touch.

Regards,
Pat

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From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Friday, March 28, 2025 11:04:39 PM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisaukas, Stephen P. (SAO) <Stephen.Lisaukas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Stermann, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Pat:

Attached is the OSA's memorandum in response to your March 13th letter.

Sincerely,

Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Thursday, March 13, 2025 8:48 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: Lisaukas, Stephen P. (SAO) <Stephen.Lisaukas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Stermann, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Michael:

Follow up correspondence is attached.

Best regards,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Thursday, March 6, 2025 11:56 AM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Serman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Pat – Thank you for your email. In response to your first request, please find the two letters sent by the OSA to the Senate Subcommittee this past Friday, February 28, 2025.

In response to your second question, the OSA is still exploring naming the Secretary of the Commonwealth as a potential defendant, which would be based on language in the Constitution that “records of the Commonwealth shall be kept in the office of the Secretary.” While we are attempting to ascertain the universe of those records, preliminary research reveals that some records of the General Court are transferred to the State Archive.

In response to your third question, although the OSA believes that mandamus is available against the Legislature as a body and against individual members of the Legislature, i.e. the Senate President and House Speaker, the challenges raised in the Limits decision do not apply to administrative staff such as the clerks of the House and Senate, who do not perform constitutional duties. We are also exploring naming other administrative staff such as the House Business Manager and Senate Chief Financial Officer, who may possess records, specifically those records related to procurements, based on each chamber’s respective rules. The production of records (historical data) from these administrative staff is not a “legislative function” as contemplated in Limits or in violation of the separation of powers doctrine.

Finally, I remain respectful of the AGO’s process regarding affirmative litigation. There are questions, however, as to why there has been no decision as to whether the AGO will assist this office in litigation. Accordingly, we would appreciate a decision or, at a minimum, a timeline for making such a decision.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Tuesday, March 4, 2025 4:00 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Michael:

Thank you for the memo, which we continue to review. In the meantime, I write with some clarifying questions.

First, we appreciated your description of “[t]he scope of the OSA’s current audit of the General Court,” and your clarification that the scope, as you described it, would be so described to any court addressing this dispute. We also inquired about how that scope had been described to the respective legislative chambers, particularly in writing, as they have described the potential scope somewhat differently referencing letters from the OSA, including certain letters sent recently. Can you provide to us those letters? They doubtlessly would be introduced in any court proceeding.

Second, we were interested to see that you listed the Secretary of the Commonwealth as a potential defendant in the litigation. As a part of its audit of the Legislature, has OSA requested records from the Secretary? We noted, as well, your reference to Mass. Const. Pt. II, c. 2, s. 4, art. 2, specifically the provision that “records of the Commonwealth shall be kept in the office of the Secretary.” Is it your position that the sought-after documents are “records of the Commonwealth” as that phrase is used in the state constitution? If so, do you have support for that proposition? It certainly would address some of the redressability concerns that arise when there are legislative defendants.

Third, we noted the Clerks of the House and the Senate, respectively, were first on the list of prospective defendants. Is it OSA’s view that limits on the availability of relief against the legislature do not extend to the respective clerks. In other words, if we disagree with you that mandamus is available against the Legislature as a body (or its leadership), is there a basis to seek relief against the clerks?

Please let us know your thoughts.

As always, we are glad to discuss.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Thursday, February 27, 2025 12:05 PM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Serman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Pat:

Attached are the OSA's responses to questions posed in your February 18th letter.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Tuesday, February 18, 2025 6:59 AM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Serman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Michael:

I hope you had a nice long weekend. A letter responding to your memo, and asking several clarifying questions, is attached.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Wednesday, February 5, 2025 1:06 PM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Serman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Pat – Attached please find OSA’s responses to your January 23, 2025 correspondence. Please let me know if you need any additional information or wish to discuss.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Thursday, January 23, 2025 3:30 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Michael –

Thanks for your email, the receipt of which I am acknowledging. When we left last week’s meeting, we had a number of outstanding questions, which are not addressed by the below. Please see the attached which describes the most central of those questions. We look forward to your response.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Thursday, January 23, 2025 12:03 PM
To: Sterman, Anne (AGO) <anne.sterman@mass.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Irwin, Ann Marie (SAO) <AnnMarie.Irwin@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Anne and Pat - Thank you for the substantive meeting with your office on Thursday, January 16, 2025. After internal discussion, our office believes that we have a current bona fide legal dispute with the Legislature regarding our authority to audit the Legislature under G.L. c. 11, § 12, as amended by the passage of Ballot Question 1. To date, our January 6, 2025 requests for specific records related to our audit remain outstanding. The House has not responded to or even acknowledged our request. The Senate by its January 13, 2025 letter has indicated that it will not comply with the request and has instead directed us to various websites. This response is problematic. It is the obligation of the auditee, not the OSA, to produce the requested records, especially because an auditee's records could differ from the official records posted on the Commonwealth's computer systems. Contrary to the assertions of the Senate, it is notable that the information requested, which they directed us to find online, is not even available on those websites. Moreover, the Senate has signaled it will not cooperate with our audit, citing a "significant constitutional concern" in addition to a "significant number of legal and procedural issues."

Based on the above, we not only have a legal dispute but also have a sufficient factual record to support litigation against the Legislature. While we seek relief from the Judiciary to enforce the production of all records requested, we anticipate a court (Superior or Supreme Judicial Court) would opine on the larger issues surrounding our authority to audit the Legislature such as those constitutional issues alleged by the Legislature.

We appreciate the feedback provided at the meeting but do not see any legitimate constitutional issues, including those related to the separation of powers doctrine, with our current audit and the associated requests. If the Legislature has those concerns and wishes to raise them in opposition to our audit and requests, we welcome a court's adjudication to resolve this dispute.

Accordingly, we request your assistance to proceed with litigation.

Thanks,
Michael

From: Leung-Tat, Michael K. (SAO)
Sent: Wednesday, January 15, 2025 3:04 PM
To: Serman, Anne (AGO) <anne.sterman@mass.gov>; Moore, Pat (AGO)
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Thanks for the call, Anne. Ann Marie Irwin, Senior Deputy Auditor, will also be joining for the

OSA. I forwarded the meeting invite to her.

From: Stermann, Anne (AGO) <anne.sterman@mass.gov>
Sent: Tuesday, January 14, 2025 5:36 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

Thanks, Michael. Let's do this Thursday 1/16 at noon. Please let me know who else should be included from your office and then I'll send an invite.

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Tuesday, January 14, 2025 3:33 PM
To: Stermann, Anne (AGO) <anne.sterman@mass.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>
Subject: RE: OSA Request for Assistance - Audit of the Legislature

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Thanks, Anne. We have availability as follows:

- 1/15 (9am-12pm)
- 1/16 (12-2pm, 3-4pm)
- 1/17 (9:30am-11am, 12-1:30pm, 2:30-4:30pm)

Please let me know if you need any additional dates/times.

Thanks,
Michael

From: Stermann, Anne (AGO) <anne.sterman@mass.gov>
Sent: Tuesday, January 14, 2025 9:27 AM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>; Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Barrieau, Meredith K (SAO) <Meredith.Barrieau@massauditor.gov>

Subject: RE: OSA Request for Assistance - Audit of the Legislature

Hi Michael,

We'd like to set up a time to discuss this request. Could you give us a few dates/times that work on your end?

Thanks,

--Anne

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>

Sent: Thursday, January 9, 2025 5:25 PM

To: Moore, Pat (AGO) <Pat.Moore@mass.gov>; Sterman, Anne (AGO) <anne.sterman@mass.gov>

Cc: Lisauskas, Stephen P. (SAO) <Stephen.Lisauskas@massauditor.gov>; Barrieau, Meredith K (SAO) <Meredith.Barrieau@massauditor.gov>

Subject: OSA Request for Assistance - Audit of the Legislature

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Dear Pat and Anne:

Attached please find a memorandum from the Office of the State Auditor seeking the Office of the Attorney General's assistance regarding our audit of the Legislature.

Please do not hesitate to contact me with any questions or if you need any additional information.

Thanks,

Michael Leung-Tat
General Counsel | Deputy Auditor
Office of the State Auditor
One Ashburton Place, Room 1819
Boston, MA 02108
Michael.Leung-Tat@MassAuditor.gov
(m) 857-331-5394

***Please note that my email address has changed. My new address is now Michael.Leung-Tat@MassAuditor.gov. Please update your records accordingly and direct all future emails to my new address. ***



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

August 4, 2025

VIA E-MAIL

Michael Leung-Tat
General Counsel and Deputy Auditor
Office of the State Auditor (OSA)
Michael.Leung-Tat@massauditor.gov

Dear Michael:

I write to follow-up on our previous communications regarding the Office of the State Auditor's (OSA) request to initiate litigation against the House, the Senate, elected or appointed officials within each chamber, and, possibly, the Secretary of the Commonwealth.

Since our last written communication, OSA publicly released correspondence between our respective offices related to that request. As a result of that disclosure, subsequent correspondence, including this letter, may not be protected by attorney-client privilege. So as not to prejudice the OSA's legal position moving forward, we set forth the following issues only in broad strokes.

It will not surprise you that the Attorney General's Office (AGO) has concerns with representing OSA in the proposed litigation, including that any such representation has been unduly complicated because of OSA's inconsistent positions on the prospective litigation and the associated issues. At times, we have been told one thing in a meeting, only to read quite another in a public statement. For instance, the Massachusetts Constitution recognizes legislative privilege, which affects the scope of the OSA's authority with respect to the House and Senate. At times, the OSA has conceded that point only to later and publicly claim otherwise. We cannot initiate litigation or undertake representation of the OSA when the OSA's position on this central issue is in flux. In addition, we have noted on numerous occasions that, to our knowledge, no Massachusetts court has ever ordered mandamus or entered an affirmative injunction against the Legislature; but that nonetheless appears to be what the OSA would be seeking in its proposed litigation. We still do not have any information regarding how the OSA intends to navigate that threshold issue.

These concerns do not necessarily preclude the appointment of a Special Assistant Attorney General (SAAG) to pursue your proposed litigation. But as we have emphasized, part of the role of the AGO is to limit intergovernmental disputes presented to the courts for resolution; and, particularly, to avoid the use of litigation as a political tool by one part of state government against another. Given our experience with the OSA on this issue, we believe the OSA may prefer to publicly claim the right to an all-encompassing legislative audit despite the serious legal complications attendant to such an audit, rather than commit itself in court to a legal position that may allow non-legislative functions to be audited but would preclude an audit of the lawmaking process, committee assignments, or other legislative actions. If that is so, litigation is neither necessary nor appropriate. Similarly stated, where parts of state government are at odds, litigation must be the last option and not the first; and the legal issue must be one that actually warrants judicial attention. By way of example, the accommodations process—through which, at the federal level, the legislature and the executive address committee requests for information and assertions of executive privilege—requires extensive engagement between the elected branches before courts are willing to intercede. Minimal such engagement has occurred here.

Moreover, were a SAAG to be appointed to pursue litigation on your behalf, any such appointment would be expressly limited to a particular cause of action against specifically identified defendants.

To assist our evaluation of whether a SAAG appointment is appropriate—and the scope of any such authorized representation—please provide us with:

- A precise description of the full scope of the proposed audit of the Legislature;
- The documents sought as part of that audit, including an explanation of why those documents are necessary to complete the audit and whether the documents are available from any other source;
- The OSA's position on whether core legislative functions (including lawmaking, the evaluation of potential legislation, and committee assignments) are subject to audit or, instead, are the exclusive province of the Legislature under the state Constitution;
- The cause of action(s) the OSA desires to bring against specifically named defendants; and
- A commitment that the OSA and its counsel will abide by the scope of SAAG authority authorized by the AGO (including assent to the AGO's intervention in any such action to enforce the scope of that authority).

Should it be useful to do so, we are glad to discuss these issues with you.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Patrick Moore Jr.", written in a cursive style.

M. Patrick Moore Jr.

First Assistant Attorney General



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

TEL (617) 727-2075
FAX (617) 727-3014

August 22, 2025

VIA EMAIL

M. Patrick Moore, Jr.
First Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Pat:

I write in response to your August 4, 2025 letter regarding the Office of the State Auditor's ("OSA") audit of the Massachusetts General Court ("General Court"). As we are both aware, the OSA is authorized by law to audit the General Court. As stated in our correspondence to the Office of the Attorney General, dated January 9, 2025, February 5, 2025, February 27, 2025, and March 28, 2025, the scope of the OSA's audit of the General Court is state contracting and procurement procedures, settlement agreements and the use of non-disclosure agreements, along with a review of the balance forward line item— including a review of all relevant financial information related to this line item. On January 6, 2025, the OSA served the General Court with requests for documents concerning the General Court's accounts, programs, activities, and function related to the above-referenced scope of our audit. Specifically, the OSA requested: (1) official budgets for the General Court for Fiscal Years 2021, 2022, 2023 and 2024; (2) copies of official audits of the General Court for Fiscal Years 2021, 2022, 2023 and 2024; (3) a listing of all transactions related to the General Court's balance forward line item for Fiscal Years 2021, 2022, 2023 and 2024; and (4) a listing of all monetary settlement agreements entered into by the General Court with any current or former employees, or members of the General Court, during Fiscal Years 2021, 2022, 2023 and 2024.

To date, the General Court has refused to comply with those document requests. As a result of the General Court's failure to comply with our audit, the OSA requested that the Attorney General's Office initiate legal action against the General Court to enforce our document requests. Thus far, the Attorney General's Office has refused. In light of that refusal, the OSA publicly stated it intended to engage private counsel (at no expense to the taxpayer) to bring legal

action against the General Court. The Attorney General's Office responded with its August 4th letter, requesting clarification from the OSA and asking the OSA to limit its legal authority to audit the General Court. Although the OSA has clearly laid its authority to audit the General Court and has articulated the scope of its audit and specific requests in connection with its audit numerous times in previous correspondence to your office, I hope this letter provides any clarification needed. However, as explained below, the OSA cannot commit to any proposals that seek to limit its legal authority under Mass. Gen. Laws ch. 11, § 12 to audit the General Court.

Mass. Gen. Laws ch. 11, § 12 does not require the OSA to provide the "precise description of the full scope of the proposed audit" that you request. Nor does the statute require the OSA to explain "its position on whether core legislative functions . . . are subject to [the] audit." In any event, the scope of the audit of the General Court has been clear since the start. And it remains clear. The OSA seeks to enforce the document requests sent to Speaker of the House Ronald Mariano and Senate President Karen E. Spilka on January 6, 2025. Those requests for financial budget-related records and records related to employee settlement agreements are narrow, straight forward, and already provide a "precise description of the full scope of the proposed audit." Moreover, neither the scope of the audit nor the associated requests for records impinge upon the core legislative functions of the General Court.

On November 5, 2024, voters approved Question 1 on the statewide ballot, granting the OSA the authority under Mass. Gen. Laws ch. 11, § 12 to audit the "accounts, programs, activities and functions" of the "[G]eneral [C]ourt itself." Despite the public's overwhelming support for the audit of the General Court, the Senate has refused to respond to the document requests sent by the OSA. The House has ignored the requests entirely.

For eight months, the OSA has requested that the Attorney General's Office enforce the document requests by initiating litigation against the General Court. The Attorney General's Office has consistently refused to do so, despite its statutory obligation to represent the OSA in matters such as this. *See* Mass. Gen. Laws ch. 12, § 3 ("The attorney general *shall* appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called into question . . ." [emphasis added]). In fact, the Attorney General's Office's refusal to do so runs contrary to its previous representation of the OSA, in which the Attorney General's Office represented the OSA in seeking to enforce document requests sent pursuant to Mass. Gen. Laws ch. 11, § 12. *Suzanne Bump, State Auditor v. Shahrzad Haghayegh-Askarian and Hancock Dental Co.*, Suffolk County Civil Action No. 11-4539A, (Mass. Super. Ct. May 10, 2012).

In your August 4th letter, you referenced the possibility of the appointment of a Special Assistant Attorney General ("SAAG") to pursue litigation against the General Court on behalf of the OSA. But you qualified that the OSA must commit to the "scope of SAAG authority [as] authorized by the [Attorney General's Office]." The OSA will not make such blind commitment. Nor will the OSA "assent to the [Attorney General's Office's] intervention" in any action by the OSA under Mass. Gen. Laws ch. 11, § 12.

The OSA has a clear statutory right under Mass. Gen. Laws ch. 11, § 12 to audit the General Court. The OSA intends to exercise that right and fulfill its duties to the public. If the Attorney General's Office refuses to enforce the OSA's statutory rights, then the OSA will be left with no choice but to file suit on its own with the assistance of private counsel. *See Clerk of the Superior Court of Middlesex v. Treasurer and Receiver General*, 386 Mass. 517, 526 (1981) (state officials permitted to hire outside counsel after Attorney General declined to pursue litigation).

The Attorney General's Office cannot deny the OSA access to the courts by refusing to take action by either representing the OSA or allowing the OSA to choose its own SAAG. While the Supreme Judicial Court has found that “. . . a technical reading of [Mass. Gen. Laws ch.] 12, § 3, and its legislative history indicate that only the Attorney General is authorized to appear for State agencies and officers,” this rule assumes that the Attorney General's Office is carrying out its duties under the law. *See Secretary of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 158 & 164 (1975). It is wholly inapplicable in situations such as this, where the Attorney General has (1) failed to carry out its duties, and (2) acted “in a capricious, arbitrary or illegal manner in refusing to represent a governmental body,” thus precluding the OSA from obtaining recourse in the courts. *See id.* at 159 n.4 & 165.

The Attorney General's Office's refusal to take action over the past eight months is clear demonstrative evidence that your office has willfully abdicated its responsibilities under Mass. Gen. Laws ch. 12, § 3, and has acted arbitrarily and capriciously following the OSA's request for representation. Should the Attorney General's Office continue to fail to faithfully discharge its statutory duty to enforce the OSA's authority to audit the General Court, the OSA will initiate legal action.

If the Attorney General's Office refuses to initiate litigation against the General Court to enforce the January 6, 2025 document requests by September 19, 2025, the OSA will initiate litigation through private counsel.

Thank you for your attention to this matter. I look forward to hearing from you promptly.

Regards,

/s/ Michael Leung-Tat

Michael Leung-Tat
Deputy Auditor & General Counsel

cc: George W. Vien (Donnelly, Conroy, and Gelhaar LLP)

From: [Moore, Pat \(AGO\)](#)
To: [Leung-Tat, Michael K. \(SAO\)](#)
Cc: [George W. Vien](#); [Stermann, Anne \(AGO\)](#); [Fowler, Erin \(AGO\)](#)
Subject: RE: Correspondence from the Office of the State Auditor
Date: Friday, August 22, 2025 1:12:08 PM

Michael:

Thank you. We will have response to the various assertions in your letter in due course.

I noted the reference in your letter to a SAAG being engaged “at no expense to the taxpayer.” I understand from public reporting that a private citizen is funding the engagement. Matt Stout, “Seeking to bring her fight to audit the Legislature to court, DiZoglio hires outside law firm – funded by a GOP donor,” *Boston Globe* (Aug. 6, 2025). And that reporting indicates that the SAO consulted with the Ethics Commission about this engagement. *See id.* (“DiZoglio said her office consulted with the state Ethics Commission before entering into the agreement with the law firm. Leung-Tat said that based on the commission’s guidance, ‘there are no concerns related to state ethics laws, conflict of interest, or required financial disclosures’ with this type of third-party arrangement”).

A request by an agency or public official to initiate privately funded litigation on behalf of the Commonwealth is not one we commonly field. To assist our consideration of that proposed arrangement, please provide all available detail as to the funding of the legal representation, specifically including, but not limited to (i) any correspondence the SAO has had with the Ethics Commission on this or any related issue; (ii) any correspondence with the funder (or funders) of the SAAG engagement; and (iii) any involvement the funder (or funders) of this litigation has had in the SAO’s decision-making to date and with respect to any prospective litigation.

Kind regards,
Pat

Pat Moore
First Assistant Attorney General
Office of Massachusetts Attorney General Andrea Joy Campbell
Pat.Moore@Mass.gov
(617) 963-2495

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Friday, August 22, 2025 9:57 AM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>

Cc: George W. Vien <gww@dcglaw.com>

Subject: Correspondence from the Office of the State Auditor

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Pat – Attached is the Office of the State Auditor’s response to your letter dated August 4, 2025.

Sincerely,

Michael Leung-Tat
General Counsel | Deputy Auditor
Office of the State Auditor
One Ashburton Place, Room 1819
Boston, MA 02108
Michael.Leung-Tat@MassAuditor.gov
(m) 857-331-5394

From: [Leung-Tat, Michael K. \(SAO\)](#)
To: [Moore, Pat \(AGO\)](#)
Cc: [George W. Vien](#); [Stermann, Anne \(AGO\)](#); [Fowler, Erin \(AGO\)](#)
Subject: RE: Correspondence from the Office of the State Auditor
Date: Monday, September 8, 2025 2:10:57 PM

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Pat – I appreciate your patience as I was out of the office. It is unclear to me whether we are operating under an attorney-client relationship. Accordingly, I am not producing our office’s engagement letter with Donnelly, Conroy & Gelhaar, LLP in connection with our Audit of the General Court in whole. Below are excerpted portions of the engagement letter that are responsive to your inquiry:

Michael R. Minogue has agreed to pay the Firm’s fees in connection with this engagement. Under the Massachusetts Rules of Professional Conduct, a lawyer may accept fees paid by a third-party so long as: (1) the client consents after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the attorney-client relationship; and (3) confidential information relating to the representation of the client is protected as required by the relevant rules.

In this instance, the Office has consented to the payment of fees by Mr. Minogue. We see no reason to believe that Mr. Minogue’s payment of those fees would impair our independence or our attorney-client relationship with the Office; and we will maintain client confidential information as required by the relevant lawyer ethics rules. As we have discussed, although the Firm is amenable to receiving payment directly from Mr. Minogue, we will always exercise our independent professional judgment concerning what is in *the Office’s* best interests.

Finally, as you are undoubtedly aware, requests and responses for legal advice from the State Ethics Commission (SEC) are confidential, however, my statement, as referenced in your email below, regarding our consultation with the SEC and its guidance is accurate.

We await your substantive responses to our August 22nd correspondence.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Friday, September 5, 2025 3:36 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>
Subject: RE: Correspondence from the Office of the State Auditor

Michael:

I write to follow up on the inquiry below.

Thanks and my best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Saturday, August 23, 2025 11:40 AM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>
Subject: RE: Correspondence from the Office of the State Auditor

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Pat – Confirming receipt of your email. I am out of the office through September 2nd but will review your most recent requests and respond as appropriate.

Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Friday, August 22, 2025 1:12 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>
Subject: RE: Correspondence from the Office of the State Auditor

Michael:

Thank you. We will have response to the various assertions in your letter in due course.

I noted the reference in your letter to a SAAG being engaged “at no expense to the taxpayer.” I understand from public reporting that a private citizen is funding the engagement. Matt Stout, “Seeking to bring her fight to audit the Legislature to court, DiZoglio hires outside law firm – funded by a GOP donor,” *Boston Globe* (Aug. 6, 2025). And that reporting indicates that the SAO consulted with the Ethics Commission about this engagement. *See id.* (“DiZoglio said her office consulted with the state Ethics Commission before entering into the agreement with the law firm. Leung-Tat said that based on the commission’s guidance, ‘there are no concerns related to state ethics laws, conflict of interest, or required financial disclosures’ with this type of third-party arrangement”).

A request by an agency or public official to initiate privately funded litigation on behalf of the Commonwealth is not one we commonly field. To assist our consideration of that proposed arrangement, please provide all available detail as to the funding of the legal representation, specifically including, but not limited to (i) any correspondence the SAO has had with the Ethics Commission on this or any related issue; (ii) any correspondence with the funder (or funders) of the SAAG engagement; and (iii) any involvement the funder (or funders) of this litigation has had in the SAO’s decision-making to date and with respect to any prospective litigation.

Kind regards,
Pat

Pat Moore
First Assistant Attorney General
Office of Massachusetts Attorney General Andrea Joy Campbell
Pat.Moore@Mass.gov
(617) 963-2495

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Friday, August 22, 2025 9:57 AM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: George W. Vien <gwv@dcglaw.com>
Subject: Correspondence from the Office of the State Auditor

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recognize the sender and know the content is safe.

Pat – Attached is the Office of the State Auditor’s response to your letter dated August 4, 2025.

Sincerely,

Michael Leung-Tat
General Counsel | Deputy Auditor
Office of the State Auditor
One Ashburton Place, Room 1819
Boston, MA 02108
Michael.Leung-Tat@MassAuditor.gov
(m) 857-331-5394

From: [Fowler, Erin \(AGO\)](#)
To: [Leung-Tat, Michael K. \(SAO\)](#); [Moore, Pat \(AGO\)](#)
Cc: [George W. Vien](#); [Stermann, Anne \(AGO\)](#)
Subject: Re: Correspondence from the Office of the State Auditor
Date: Wednesday, September 10, 2025 1:56:43 PM

Michael:

Thank you for this information. We have follow-up questions regarding the funding agreement with Mr. Minogue:

- How did the OSA come to obtain funding from Mr. Minogue (i.e., was this solicited or did he approach the OSA or the Firm)?
- Is there a written contract between OSA and Mr. Minogue? Between the Firm and Mr. Minogue?
- Under what conditions can Mr. Minogue terminate the agreement to pay for legal fees?
- Are there conditions associated with the receipt of payment from Mr. Minogue?
- What decision-making authority does Mr. Minogue have about potential litigation?
- What access to information regarding potential litigation does Mr. Minogue have? How is the OSA ensuring that "confidential information relating to the representation of the client is protected as required by the relevant rules"?
- You state, "We see no reason to believe that Mr. Minogue's payment of those fees would impair our independence of our attorney-client relationship with the Office." How did you come to this conclusion? Was any conflict check completed on Mr. Minogue?
- What organizations is Mr. Minogue affiliated with? What is Mr. Minogue's affiliation with the Firm? Does Mr. Minogue have any existing engagements with the Commonwealth?
- How many times has OSA met with Mr. Minogue?

Please let us know if you would like to discuss.

Thank you,

Erin Fowler

--

Erin E. Fowler (she/her/hers)
Assistant Attorney General
Constitutional and Administrative Law Division
Office of Attorney General
One Ashburton Place
Boston, MA 02108
Direct: (617) 963-2523
Erin.E.Fowler@mass.gov

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>

Sent: Monday, September 8, 2025 2:10 PM

To: Moore, Pat (AGO) <Pat.Moore@mass.gov>

Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>

Subject: RE: Correspondence from the Office of the State Auditor

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Pat – I appreciate your patience as I was out of the office. It is unclear to me whether we are operating under an attorney-client relationship. Accordingly, I am not producing our office's engagement letter with Donnelly, Conroy & Gelhaar, LLP in connection with our Audit of the General Court in whole. Below are excerpted portions of the engagement letter that are responsive to your inquiry:

Michael R. Minogue has agreed to pay the Firm's fees in connection with this engagement. Under the Massachusetts Rules of Professional Conduct, a lawyer may accept fees paid by a third-party so long as: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and (3) confidential information relating to the representation of the client is protected as required by the relevant rules.

In this instance, the Office has consented to the payment of fees by Mr. Minogue. We see no reason to believe that Mr. Minogue's payment of those fees would impair our independence or our attorney-client relationship with the Office; and we will maintain client confidential information as required by the relevant lawyer ethics rules. As we have discussed, although the Firm is amenable to receiving payment directly from Mr. Minogue, we will always exercise our independent professional judgment concerning what is in *the Office's* best interests.

Finally, as you are undoubtedly aware, requests and responses for legal advice from the State Ethics Commission (SEC) are confidential, however, my statement, as referenced in your email below, regarding our consultation with the SEC and its guidance is accurate.

We await your substantive responses to our August 22nd correspondence.

Thanks,
Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Friday, September 5, 2025 3:36 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>
Subject: RE: Correspondence from the Office of the State Auditor

Michael:

I write to follow up on the inquiry below.

Thanks and my best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Saturday, August 23, 2025 11:40 AM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>
Subject: RE: Correspondence from the Office of the State Auditor

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Pat – Confirming receipt of your email. I am out of the office through September 2nd but will review your most recent requests and respond as appropriate.

Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Friday, August 22, 2025 1:12 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: George W. Vien <gwv@dcglaw.com>; Sterman, Anne (AGO) <anne.sterman@mass.gov>; Fowler, Erin (AGO) <Erin.E.Fowler@mass.gov>
Subject: RE: Correspondence from the Office of the State Auditor

Michael:

Thank you. We will have response to the various assertions in your letter in due course.

I noted the reference in your letter to a SAAG being engaged “at no expense to the taxpayer.” I understand from public reporting that a private citizen is funding the engagement. Matt Stout, “Seeking to bring her fight to audit the Legislature to court, DiZoglio hires outside law firm – funded by a GOP donor,” *Boston Globe* (Aug. 6, 2025). And that reporting indicates that the SAO consulted with the Ethics Commission about this engagement. *See id.* (“DiZoglio said her office consulted with the state Ethics Commission before entering into the agreement with the law firm. Leung-Tat said that based on the commission’s guidance, ‘there are no concerns related to state ethics laws, conflict of interest, or required financial disclosures’ with this type of third-party arrangement”).

A request by an agency or public official to initiate privately funded litigation on behalf of the Commonwealth is not one we commonly field. To assist our consideration of that proposed arrangement, please provide all available detail as to the funding of the legal representation, specifically including, but not limited to (i) any correspondence the SAO has had with the Ethics Commission on this or any related issue; (ii) any correspondence with the funder (or funders) of the SAAG engagement; and (iii) any involvement the funder (or funders) of this litigation has had in the SAO’s decision-making to date and with respect to any prospective litigation.

Kind regards,
Pat

Pat Moore
First Assistant Attorney General
Office of Massachusetts Attorney General Andrea Joy Campbell
Pat.Moore@Mass.gov
(617) 963-2495

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Friday, August 22, 2025 9:57 AM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: George W. Vien <gwv@dcglaw.com>
Subject: Correspondence from the Office of the State Auditor

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Pat – Attached is the Office of the State Auditor’s response to your letter dated August 4, 2025.

Sincerely,

Michael Leung-Tat
General Counsel | Deputy Auditor
Office of the State Auditor
One Ashburton Place, Room 1819
Boston, MA 02108
Michael.Leung-Tat@MassAuditor.gov
(m) 857-331-5394



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

September 18, 2025

VIA E-MAIL

Michael Leung-Tat
General Counsel and Deputy Auditor
Office of the State Auditor (OSA)
Michael.Leung-Tat@massauditor.gov

Dear Michael:

I write in response to your letter of August 19, as well as our subsequent email exchanges. As we have stated before, and reiterate here, we remain willing to designate a Special Assistant Attorney General (SAAG) to represent the Auditor in this matter under certain, straightforward conditions. Rather than meeting those conditions, you have indicated your intent to initiate a lawsuit, brought by private counsel funded by a private, third-party. That tactic has not moved us any closer to a resolution of this matter.

Below we will explain, again, why certain simple steps by the Office of the State Auditor (OSA) are needed before a SAAG is appointed and litigation is ripe. But, first, circumstances require us to address two points.

First, in correspondence with our office, the OSA has expressed reluctance to share information based on a purported concern about the applicability of the attorney-client privilege. That concern stems from OSA's previous decision to publicly release all correspondence with the Attorney General's Office (AGO) earlier this year, potentially waiving the privilege. The potential consequence of that decision was outlined to you in advance, and that choice cannot now serve as a legitimate basis to withhold information that the AGO needs to assess prospective litigation between state entities.

Second, the OSA has explained to us that a private party has chosen to finance its representation by a private law firm. This is an unusual arrangement, especially because the OSA lacks the statutory authority to accept gifts that certain other Executive Branch offices have. *E.g.*, G.L. 6A, § 16G(a); G.L. c. 6C, § 68; G.L. c. 21A, § 9; G.L. c. 23B, § 7. The arrangement presents, at minimum, certain complex state ethics issues and, possibly, campaign finance issues. For example, it is important to understand how the private financing was arranged, as it may present issues under G.L. c. 268A, § 23. Clear prohibitions set forth in G.L. c. 268A, § 4 may impact whether the law firm may accept payment from a private party for its representation of OSA. We have asked you for information to assist our

analysis of these issues, as the OSA has asked the AGO to endorse the arrangement by authorizing your selected firm to litigate on behalf of the Commonwealth. In response, you asserted that these details are irrelevant, when, in fact, they are essential to our evaluation of whether your proposal complies with state law. Please provide them. If you decide you cannot do that, please provide all pertinent details to the State Ethics Commission and request a written opinion letter authorizing the arrangement; while such letters are confidential, they may be provided by the OSA to the AGO at your election, which we have confirmed with the Commission. Without the requested details or a written opinion from the Commission, we cannot endorse this unusual arrangement.

Turning now to the outstanding items. We understand your most recent correspondence to indicate that the scope of the audit of the Legislature that is now underway is limited to the Legislature's "contracting and procurement procedures, settlement agreements and the use of non-disclosure agreements, [and] a review of the balance forward line item." The OSA needs to tell the Legislature that it has set aside its previously stated intent to explore each issue addressed in its October 2024 audit (which included, for example, how certain legislation is handled by each chamber, and how committee appointments are made) and allow the House and Senate to determine whether each will produce the sought after records given the narrower scope. It may be that, even with the audit scope clarified, each chamber continues to withhold all requested documents (and certainly public comments to date suggest as much); but they must be given that choice before litigation is appropriate.

Next, despite our repeated inquiries, the OSA has not yet articulated whether and how its authority with respect to the General Court is limited by Mass. Const. Pt. I arts. 21 and 30, despite the inevitability of that issue being at the core of any litigation. This is not the tact taken by other state offices with respect to how legislative privilege affects statutes they administer or enforce. For example, state ethics law plainly applies to members of the Legislature, but the State Ethics Commission has routinely recognized that application must navigate constitutional limitations. The AGO has also navigated these issues. When a former state senator was indicted for misuse of his official staff to perform campaign functions, his defense counsel asserted a complete defense of legislative privilege. In briefing before the Supreme Judicial Court earlier this year, the AGO explained its view of what is, and is not, privileged legislative conduct. See *Tran v. Commonwealth*, Docket No. SJC-13641.

Notably, in deciding *Tran v. Commonwealth*, the SJC recognized that the scope of legislative privilege is not often litigated in our appellate courts. 496 Mass. 518, 528-29 (2025). Indeed, *Tran* was the first detailed explication of the issue by the SJC since *Coffin v. Coffin* in 1808. *Tran*, 496 Mass. at 528. Accordingly, the SJC was reluctant to issue broad proclamations as to the scope of the privilege, holding only that "campaign[] activities . . . are political rather than legislative in nature" and the privilege consequently did not shield the former senator from prosecution. *Id.* at 535. Your office now proposes to bring the next case implicating these issues.

Though legislative privilege is not often litigated, it is important to the functioning of state government. The privilege arises from provisions in the Massachusetts Declaration of Rights to ensure the Legislature is able to do its work without undue executive interference, and accordingly, the House and the Senate have a considerable interest in the scope of the privilege. The AGO does too, as does each district attorney's office. Our respective offices are charged with enforcing general criminal statutes against members of the Legislature if and when criminal conduct has occurred and the privilege is inapplicable. The State Ethics Commission and the Office of Campaign and Political Finance also have considerable interest in the scope of legislative privilege, as each must administer and enforce statutes of general applicability, mindful of the scope of constitutional protections uniquely afforded to the Legislature.

How the OSA litigates against the Legislature, therefore, will affect considerably the operation of different parts of state government. It seems to us, after lengthy exchanges over the past months, that the OSA is reluctant to share its understanding of how the legislative privilege affects its work because any reasonable construction of that privilege complicates the OSA's prior stated intent to compel documents and issue reports concerning the legislative process and committee and leadership appointments.

Responsible litigation on behalf of the Commonwealth requires a thoughtful presentation of statutory and constitutional issues to our courts. For many months, we have asked the OSA to demonstrate to us how it plans such a presentation, involving very basic questions concerning the cause of action to be brought and the OSA's position on the central issue in the case. We still have not received answers. We now reiterate that lest the OSA explain the cause of action it intends to bring and commit to a scope of litigation, it will not receive authorization to file suit. These are straightforward questions that other state agency clients answer as a matter of course in other cases.

It is plain that the OSA has a political dispute with the Legislature. We take no position on that dispute other than to note it is natural; our constitutional structure anticipates friction between the executive and legislative branches. But the state court system must not be asked to resolve purely political disputes among the branches. Part of the AGO's role is to prevent the courts from being asked to do so. That is the basis of our as yet unanswered inquiries. With answers, the present political dispute may reduce to a legal dispute worthy of judicial attention, and accordingly, a SAAG appointment. Without them, the OSA is free to continue to make its political case, outside the courtroom.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Patrick Moore Jr.", is written over the typed name.

M. Patrick Moore Jr.
First Assistant Attorney General

Subject: Meeting w/ Michael Minogue

Location: Fill-A-Buster Luncheonette, 142 Bowdoin St, Boston, MA 02108, USA

Start: 3/25/2025 10:30 AM

End: 3/25/2025 11:00 AM

Show Time As: Busy

Recurrence: (none)

Organizer: DiZoglio, Diana (SAO)

Required Attendees: DiZoglio, Diana (SAO)

Subject: Meeting w/ Michael Minogue, George Vien
Location: Virtual

Start: 5/29/2025 1:30 PM
End: 5/29/2025 2:30 PM
Show Time As: Busy

Recurrence: (none)

Meeting Status: Accepted

Organizer: DiZoglio, Diana (SAO)

Required Attendees: DiZoglio, Diana (SAO); Sarah-Catherine M. Moen; Leung-Tat, Michael K. (SAO)

Optional Attendees: Michael R. Minogue; George W. Vien; Nicholas J. Ramacher

Resources: Virtual

<https://us02web.zoom.us/j/84953739604?pwd=OO0538z6FS1uJCPaFfRZ636ww0vHQc.1>

Meeting ID: 849 5373 9604
Passcode: 123456

One tap mobile
+13092053325,,84953739604#,,, *123456#



Donnelly, Conroy & Gelhaar, LLP
260 Franklin Street, Suite 1600
Boston, MA 02110
617.720.2880 ph.
617.720.3554 fx.
www.dcglaw.com

George W. Vien
gwv@dcglaw.com

June 27, 2025

**PERSONAL & CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGED**

Diana DiZoglio, Auditor of the Commonwealth
Office of the Auditor of the Commonwealth of Massachusetts
Massachusetts State House
24 Beacon Street
Room 230
Boston, MA 02133

Re: Audit of the General Court of Massachusetts

Dear Auditor DiZoglio:

This letter is intended to confirm the terms of the engagement of Donnelly, Conroy & Gelhaar, LLP (the "Firm") by the Office of the Auditor of the Commonwealth of Massachusetts (the "Office"). The Firm will represent the Office in relation to its dispute with the General Court of Massachusetts (the "General Court"), concerning the enforcement M.G.L. c. 11, § 12 and the requested Audit of the General Court (the "Matter"). We will represent the Office concerning all phases of the Matter, including potentially filing a lawsuit against the General Court, should the Commonwealth of Massachusetts Office of the Attorney General ("AGO") expressly or implicitly decline to file one on the Office's behalf. We will prepare witnesses for any depositions, trial or other testimony should anyone from the Office be required to be deposed or testify. We will also represent the Office at any such proceedings and communicate on the Office's behalf with counsel for all parties to the Matter.

Michael R. Minogue has agreed to pay the Firm's fees in connection with this engagement. Under the Massachusetts Rules of Professional Conduct, a lawyer may accept fees paid by a third-party so long as: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and (3) confidential information relating to the representation of the client is protected as required by the relevant rules.

In this instance, the Office has consented to the payment of fees by Mr. Minogue. We see no reason to believe that Mr. Minogue's payment of those fees would impair our

June 27, 2025

Page 2

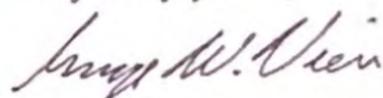
independence or our attorney-client relationship with the Office; and we will maintain client confidential information as required by the relevant lawyer ethics rules. As we have discussed, although the Firm is amenable to receiving payment directly from Mr. Minogue, we will always exercise our independent professional judgment concerning what is in *the Office's* best interests.

We will not look to the Office for the payment of *any* fees or expenses arising out of the Firm's representation of the Office in this Matter. If the Office has any questions concerning our services at any time, please let me know. We welcome a frank and open discussion of these issues.

We ordinarily maintain client files for 10 years from the completion of the representation, absent any other arrangements we make. If the Office does not request its file documents within 10 years after completion of the representation, we shall presume that the Office no longer wishes any file documents and the file may be destroyed.

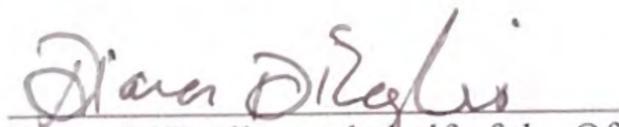
If this letter comports with the Office's understanding of our agreement of representation, please indicate the Office's acceptance by signing below and returning this letter to me via email, fax or mail. Thank you again for engaging our firm, and we look forward to working with the Office on this Matter.

Very truly yours,



George W. Vien

Acknowledged and Accepted:



Diana DiZoglio, on behalf of the Office of the Auditor of the Commonwealth of Massachusetts

Date: 7/25/2025

GWV/lm



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

ONE ASHBURTON PLACE, ROOM 1819
BOSTON, MASSACHUSETTS 02108

DIANA DIZOGLIO
AUDITOR

TEL (617) 727-6200
FAX (617) 727-5891

October 15, 2025

VIA E-MAIL

The Honorable Andrea Joy Campbell
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell:

I write regarding my office's engagement with the Office of the Attorney General in connection with our current performance audit of the Massachusetts General Court.

As previously disclosed to the Office of Attorney General, the scope of our audit is state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of the balance forward line item - including a review of all relevant financial receipts and information during fiscal years 2021, 2022, 2023, and 2024 (July 1, 2020 through June 30, 2024). Although this has been the scope of our audit since my office engaged the General Court on January 3, 2025, my office most recently re-articulated the scope of our audit in a September 24, 2025 letter to the General Court to clarify any supposed uncertainty on the part of the General Court regarding our audit's scope. In connection with the afore-mentioned scope of our audit, my office requested the following records from the General Court:

1. The official budgets for the House and Senate for Fiscal Years 2021, 2022, 2023, and 2024.
2. Copies of official audits of the House and Senate for Fiscal Years 2021, 2022, 2023, and 2024.
3. A listing of all transactions related to the House's and Senate's balance forward line item for Fiscal Years 2021, 2022, 2023, and 2024.
4. A listing of all monetary settlement agreements entered into by the House and Senate with any current or former employees or members of the House and Senate during Fiscal Years 2021, 2022, 2023, and 2024.

To date, my office's request for the above-referenced records remains outstanding and unfulfilled.

Since January 9, 2025, my office has been engaged with your office to enforce our statutory authority to audit the General Court under G.L. c. 11 § 12. We have presented your office with a legal issue that is not only ripe for litigation, but for which litigation is the only means of resolution given the General Court's refusal to comply with our audit. The legal issue is the General Court's refusal to comply with our request for records that are related to the scope of our audit. We are seeking to litigate this discrete issue, not any hypothetical questions that may or may not present themselves in the future.

The scope of our audit and the related records request do not conflict with any constitutional principles of our Commonwealth. Neither violates or otherwise endangers the General Court's freedoms under Mass. Const. Pt. I art. 21 or the separation of powers doctrine under Mass. Const. Pt. I art. 30. We are auditing the General Court's administrative functions, not its legislative functions. Our review of budgetary, financial, and contractual records does not constitute an exercise of the General Court's legislative powers by my office in violation of Mass. Const. Pt. I art. 30. Moreover, the relief that my office is seeking is for a court to order the General Court to take an administrative action – producing the requested budgetary, financial, and contractual records – not a legislative action. Accordingly, any concerns with respect to Mass. Const. Pt. I arts. 21 and 30 are moot.

My office has communicated the above to your office repeatedly over the past nine months. Yet, you maintain that you are unable to take any action because we have allegedly not answered your questions regarding the scope of our audit, our proposed legal claim against the General Court, the relief we are seeking in court, and constitutional concerns. This is clearly inaccurate and I disagree. However, if you genuinely believe that I or my office are somehow preventing or obstructing you from carrying out your statutory duty to enforce the law, I call on you to sue me and/or my office. Sue me to have a court resolve these matters if you really require additional answers – other than the answers already provided to you by my office – that you allegedly need to enforce the law.

Your office's recent September 18, 2025 correspondence stated, "It is plain that the OSA has a political dispute with the Legislature." I disagree. My office has a legal dispute with the General Court that requires adjudication in court. Conversely, you have abdicated your responsibility as our Attorney General to enforce the law due to your political allegiances to Beacon Hill, against the people of this Commonwealth.

However, because it is apparent to me that you believe there is a political dispute between our respective offices, it is incumbent upon you to allow us to hire our own attorneys to pursue litigation immediately. We have a clear, legitimate legal dispute for which adjudication in court is appropriate. So, sue me, sue the General Court, or immediately authorize our office to move forward with litigation without you. To do anything less is obstruction of justice on the part of the Attorney General's Office.

Sincerely,

A handwritten signature in cursive script that reads "Diana DiZoglio". The ink is dark and the signature is fluid and connected.

Diana DiZoglio
Auditor of the Commonwealth



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

October 30, 2025

VIA E-MAIL

Michael Leung-Tat
General Counsel and Deputy Auditor
Office of the State Auditor (OSA)
Michael.Leung-Tat@massauditor.gov

Dear Michael:

I write concerning several outstanding inquiries and to respond to a letter directed to our office by the Auditor of the Commonwealth.

As we have discussed, the Attorney General's Office continues to have significant concerns and unanswered questions relating to OSA's proposal that a private individual be permitted to fund a Special Assistant Attorney General (SAAG) to represent the OSA in proposed, but unspecified, affirmative litigation against the Legislature. The arrangement appears to exceed OSA's statutory authority (which does not empower your office to accept gifts), and, at the very minimum, gives rise to serious concerns under the state ethics law. We have asked you to provide information necessary to allow us to evaluate those issues, which may now be further complicated by the individual's declared candidacy for statewide office. We have also indicated that OSA may share with us any opinion from the State Ethics Commission that authorizes the proposed arrangement. No material information has been provided to date.

We do note that OSA has now limited the scope of its audit to certain enumerated issues (i.e., contracting and procurement procedures, non-disclosure agreements, and the balance-forward line item), and has tabled further pursuit of issues addressed in OSA's October 2024 audit (which included the legislative process and committee appointments). We understand that OSA believes these enumerated matters to fall outside any constitutionally protected legislative privilege.

Nevertheless, we anticipate that if the matter is litigated, OSA will have to take a position on the existence and scope of the legislative privilege. The issue will be core in the case, even if OSA does not affirmatively raise it; and, as we have explained in prior correspondence, a judicial decision on this issue affects state government beyond OSA,

including the AGO itself. We reiterate our ask that OSA share the position now that the courts will demand of it if and when any litigation is filed.

We likewise reiterate our request that OSA disclose to us the cause of action it intends to bring and the defendants it intends to sue. As we have shared time and again, authorizing a lawsuit by one part of state government against another is exceptionally rare; and it is rarer still when constitutional and separation of powers issues are implicated. The AGO will not authorize the filing of a lawsuit, or the appointment of a SAAG to handle that lawsuit, without a concise and specific description of the intended claims, such that our authorization, if given, can be limited to precisely such a suit. If litigation is authorized, the authorization will ensure that only legal disputes, over which litigation is the only potential resolution will proceed into court. Political disputes, by contrast, are not appropriate for judicial resolution; and the AGO will not delegate its authority in a way that unnecessarily drags the judiciary into political disputes among the branches of state government.

These are straightforward requests that are routinely satisfied by state agencies requesting authorization to file litigation. Never before have they been met by the odd suggestion that the AGO must initiate its own lawsuit to obtain answers. Lest there be any confusion, let us state without qualification: we will file no such lawsuit. Until you provide the information routinely provided by agencies, including the OSA, seeking authority to file suit, no legal dispute is ripe and no SAAG will be appointed.

We look forward to your response.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Patrick Moore Jr.", is positioned above the typed name.

M. Patrick Moore Jr.
First Assistant Attorney General



DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

TEL (617) 727-2075
FAX (617) 727-3014

January 26, 2026

BY EMAIL

M. Patrick Moore Jr.
First Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 20th Floor
Boston, MA 02108

Re: Appointment of Special Assistant Attorneys General for the Office of the State Auditor

Dear Pat:

I am writing to formally request the appointment of George W. Vien, Nicholas J. Ramacher, and Pietro A. Conte of Donnelly, Conroy & Gelhaar, LLP (“DCG”) as Special Assistant Attorneys General (“SAAG”) to represent the Office of the State Auditor (“OSA”) in its dispute with the General Court of Massachusetts (“General Court”). As you are aware, in November 2024, the voters of the Commonwealth granted the OSA the express authority under M.G.L. c. 11, § 12 to audit the “[G]eneral [C]ourt itself.” On January 6, 2025, the OSA served the General Court with requests for documents concerning the General Court’s “accounts, programs, activities, and functions.” To date, the General Court has refused to comply with those document requests—thus preventing the OSA from fulfilling its statutory duties.

Since January 9, 2025, the OSA has been engaged with the Office of the Attorney General (“AGO”), seeking assistance with the enforcement of its audit of the General Court. The AGO itself has declined to initiate litigation on the OSA’s behalf. But in an August 4, 2025 letter to the OSA, the AGO instead proposed the idea of appointing a SAAG to pursue such litigation. As part of the proposal, the AGO requested—among other things—that the OSA provide a precise description of: the full scope of the proposed audit of the General Court; the documents requested as part of the audit; the OSA’s position on whether core legislative

functions would be the subject of the audit; and the cause of action that the OSA intends to bring against the General Court. Thereafter, in a letter dated October 15, 2025, we once again provided such information to the AGO and requested that outside counsel be permitted to pursue litigation on the OSA's behalf.

As has been the AGO's pattern throughout this protracted process, the AGO sent another letter, dated October 30, 2025, that yet again repeated the same questions to the OSA regarding the cause of action that we intend to bring and the defendants we intend to sue—all of which have been previously asked by the AGO and previously answered by the OSA. Our office continues to have grave concerns with respect to the troubling conflict of interest issues and the attorney-client relationship that is supposed to exist between our offices in connection with this matter. We also have serious concerns with the AGO's documented public opposition to our efforts surrounding this audit and the enforcement of the law with respect to the OSA's authority to audit the General Court. There is a very real possibility that the AGO will represent the General Court against the OSA. Nonetheless, we will again answer your questions.

To be clear, the OSA office is seeking to bring a single justice complaint against the Speaker of the House, Senate President, House Clerk, and Senate Clerk to compel the production of the requested records under M.G.L. c. 11, § 12, in connection with our statutorily authorized audit of the General Court. The AGO's letter also raised the issue of legislative privilege for the first time, which can only be viewed as a red herring and irrelevant hypothetical that is unrelated to the issues that are the subject of our audit and dispute with the General Court. My office has repeatedly stated—and indeed, your office has acknowledged—that the audit and associated requests only pertain to taxpayer-funded administrative and financial activities and records, which would not and cannot infringe on any applicable privilege under Massachusetts General Laws and the Constitution.

Lastly, pursuant to written guidance from the State Ethics Commission, 930 CMR 6.13(4) “allow[s] the attorneys who are appointed by the AGO as a SAAG to be paid by Mr. Minogue as long as they comply with the provisions of the Massachusetts Rules of Professional Conduct.” As my office has stated before, the OSA maintains complete control and independence in decision-making authority and has full faith that DCG has fulfilled, and will continue to fulfill, all of its ethical and professional obligations, including those with respect to the confidentiality of information, as prescribed by the Massachusetts Rules of Professional Conduct, including, but not limited to Rules 1.6, 1.8 (f), and 5.04 (c), and memorialized in the engagement letter between the OSA and DCG. We need this appointment only due to the AGO's failure to enforce the law itself and to represent our office and the people of Massachusetts.

M. Patrick Moore Jr.
First Assistant Attorney General
Office of the Attorney General
Page 3

Accordingly, we seek the formal appointment of George W. Vien, Nicholas J. Ramacher, and Pietro A. Conte as SAAGs to represent the OSA in litigation against the General Court—at no expense to the taxpayers of the Commonwealth—to enforce the OSA’s statutory duties pursuant to M.G.L. c. 11, § 12, and more specifically, the current audit of the General Court.

Due to the serious nature of the conflict and the more than year-long delay, we ask that the AGO provide us with a resolution to this matter no later than Friday, January 30, 2026.

Sincerely,

/s/ Michael Leung-Tat

Michael Leung-Tat
Deputy Auditor & General Counsel

From: [Moore, Pat \(AGO\)](#)
To: [Leung-Tat, Michael K. \(SAO\)](#)
Cc: [George W. Vien](#); [Stermann, Anne \(AGO\)](#)
Subject: RE: OSA Correspondence to AGO re: SAAG Appointment
Date: Monday, January 26, 2026 8:12:00 PM

Michael:

Thanks. There's no confusion; we know what the regulation says. We will look forward to seeing the written guidance that you reference.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Sent: Monday, January 26, 2026 7:41 PM
To: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Cc: George W. Vien <gww@dcglaw.com>; Stermann, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Correspondence to AGO re: SAAG Appointment

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Pat – To clear up any confusion, 930 CMR s. 6.13(4) is the regulatory provision cited by the State Ethics Commission in its guidance, which stated, “The language in the regulation would allow the attorneys who are appointed by the AGO as a SAAG to be paid by Mr. Minogue as long as they comply with the provisions of the Massachusetts Rules of Professional Conduct.”

Michael

From: Moore, Pat (AGO) <Pat.Moore@mass.gov>
Sent: Monday, January 26, 2026 7:28 PM
To: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>
Cc: George W. Vien <gww@dcglaw.com>; Stermann, Anne (AGO) <anne.sterman@mass.gov>
Subject: RE: OSA Correspondence to AGO re: SAAG Appointment

Michael:

Thanks. We will review in detail.

In the meantime, however, I note that --- as a former SAAG who myself has been guided by 930

CMR s. 6.13(4) --- the regulatory provision on which you rely to suggest that there is not an ethics issue plainly has no application here. The provision allows for SAAGs to continue to practice privately in circumstances where they may be adverse to the Commonwealth (so that a SAAG, for example, can represent, say, DCF in one case and still be adverse to the Commonwealth in another, as the Professional Rules allow). It does not allow a SAAG to be paid by a private party for services *as a* SAAG.

I note, though, that the letter represents otherwise by suggesting that the Ethics Commission agrees and has issued written guidance to that effect. We reiterate our request for any such correspondence with the Ethics Commission on which you presently rely (and, frankly, any correspondence the SAO has had with the Commission on this matter). In addition, should you have any prior example of a private party financing SAAG litigation brought on behalf of a state office or official, we would welcome learning of it.

My best,
Pat

From: Leung-Tat, Michael K. (SAO) <Michael.Leung-Tat@massauditor.gov>

Sent: Monday, January 26, 2026 7:08 PM

To: Moore, Pat (AGO) <Pat.Moore@mass.gov>

Cc: George W. Vien <gwv@dcglaw.com>

Subject: OSA Correspondence to AGO re: SAAG Appointment

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Pat – Attached please find correspondence from the Office of the State Auditor.

Sincerely,

Michael Leung-Tat
General Counsel | Deputy Auditor
Office of the State Auditor
One Ashburton Place, Room 1819
Boston, MA 02108
Michael.Leung-Tat@MassAuditor.gov
(m) 857-331-5394