

From: [Clark, Charity](#)
To: [Henry Epp](#)
Subject: Vermont Public Records Act request -- responsive documents
Date: Thursday, February 11, 2021 2:28:09 PM
Attachments: [Letter Re Auditor & VEGI Program Data Access Redacted.pdf](#)
[VEPC letter.pdf](#)
[Screenshot of Text with Olsen 2.3.21.jpg](#)

Hi, Henry,

Per our phone conversation today, attached are two documents responsive to Nos. 1 and 2 of your public records request. Note that I have redacted personal contact information of an individual pursuant to 1 V.S.A. §§ 315(a), 317(c)(7). Any remaining responsive documents will be provided within the 10-day timeframe.

I also confirm that, based on our conversation today, you wish to include not just correspondence with the Attorney General, but also with the Attorney General's Office.

Best,
Charity

Charity R. Clark
Chief of Staff
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802-828-3171
Pronouns: she/her/hers

From: Sullivan, Megan <Megan.Sullivan@vermont.gov>
Sent: Monday, February 1, 2021 11:44:50 AM
To: Donovan, Thomas <Thomas.Donovan@vermont.gov>
Cc: johnd@dh-cpa.com <johnd@dh-cpa.com>; Kessler, John <John.Kessler@vermont.gov>
Subject: Letter from the Vermont Economic Progress Council

Dear Attorney General Donovan,

Please find attached a letter from Vermont Economic Progress Chair John Davis, on behalf of Vermont Economic Progress Council, regarding a disagreement between the State Auditor and Oliver Olsen related to the purposes for which confidential information can be legally requested from the Council by the State Auditor of Accounts. Also attached are the two relevant documents referred to in the letter.

Letters have also been sent to Representative Ancel and Representative Marcotte, Senator Cummings and Senator Sirotkin, and ACCD Secretary Kurrle. A request for copies of all letters has been made by a member of the Vermont media, which will be complied with after all letters have been sent.

If you have any questions or comments about this letter, we are happy to discuss.

Best Regards,
Megan

Megan Sullivan
Executive Director
Vermont Economic Progress Council
Vermont Agency of Commerce & Community Development
1 National Life Dr, Davis Bldg, 6th Floor | Montpelier, VT 05620-0501
(802)798-2221
Megan.Sullivan@Vermont.Gov
accd.vermont.gov

Written communications to and from state officials regarding state business are considered public records and, therefore, may be subject to public scrutiny.



VERMONT ECONOMIC PROGRESS COUNCIL

Vermont Economic Progress Council
National Life Building – Davis Building, 6th Floor
One National Life Drive
Montpelier, VT 05620-0501

[phone] 802-828-3211
[fax] 802-828-3383

February 1, 2021

The Honorable TJ Donovan
Office of the Vermont Attorney General
109 State Street
Montpelier, VT 05609

Dear Attorney General Donovan,

The Vermont Economic Progress Council (VEPC) met on Friday, January 8th to discuss an emerging question concerning the statutory authority of the State Auditor of Accounts to access confidential information provided by Vermont Employment Growth Incentive applicants for non-audit purposes. We are respectfully requesting your review and opinion on this issue in order to provide clarity to the meaning of the relevant statutory language.

Background

In November of 2019, The Auditor represented to VEPC staff that he would be conducting a “Risk Assessment” in accordance with the SAO’s Professional Standards Manual. The Auditor requested and was provided with copies of all documents related to the five VEGI-approved applications from 2019. Some of those documents contained significant information of a confidential and proprietary nature.

Nine months after VEPC provided the information, the Auditor published (where? How?) a work product that was not a risk assessment, but instead was merely a “non-audit” document.

Oliver Olsen, former Vermont State Representative from 2010-17, recently performed an analysis of the documents produced by the State Auditor. Mr. Olsen argues in his analysis that the State Auditor’s statutory authority restricts his access to confidential documents for the purposes of an audit only and not for what the Auditor published as a non-audit review. Mr. Olsen offered an assessment that this was a “key omission that constitutes a misrepresentation that supported an unlawful request for confidential information.”

The Auditor’s email response rejected Olsen’s interpretation of the Auditor’s statutory authority and claimed Statute gives him “virtually unlimited authority.” The relevant correspondence between the Auditor and Mr. Olsen is attached for your reference.

Issue at hand

VEGI applicants entrust VEPC with confidential and proprietary documents including employee names and social security numbers, and historical and projected payroll information. They rely on the legal protections in statute as the state’s legal assurance that confidential and proprietary information will only be made available for specifically identified purposes. VEPC is legally obligated to protect that

The Honorable TJ Donovan
Office of the Vermont Attorney General
February 1, 2021
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proprietary and confidential information and to ensure it is accessible only as explicitly authorized by statute.

The dispute over the interpretation of statutes governing such significant matters as the scope of the Auditor's statutory authority and VEPC's duty to only release confidential business information for specifically identified statutory purposes needs resolution. VEPC respectfully requests a legal opinion from the Attorney General that would clarify VEPC's legal duties and obligations that govern its provision of confidential business information to the Auditor.

We appreciate your consideration of this sensitive legal question and look forward to your opinion and the valuable clarification it will surely provide.

Thank you.

On behalf of the Vermont Economic Progress Council,



John Davis

Chair

Vermont Economic Progress Council

Memorandum

Review of SAO Non-Audit Reviews 20-6 & 20-7 (VEGI)

To: Doug Hoffer, Vermont State Auditor

CC: Megan Sullivan, Executive Director, Vermont Economic Progress Council
Commissioner Joan Goldstein, Department of Economic Development
Secretary Lindsay Kurrle, Agency of Commerce & Community Development

From: Oliver Olsen

December 23, 2020

Dear Mr. Hoffer,

As a follow-up to my December 15, 2020 email, I have had the opportunity to review additional material related to your recent assessment of the VEGI program (Non-Audit Reviews [20-6](#) & [20-7](#)), which you conducted personally. In addition to the issues I raised in my December 15th email, I have uncovered additional areas of concern. I have summarized all of these issues and my findings to date in this memo, and invite you to comment on each of them.

Your reports on the VEGI program are identified as “non-audit” products and, for the most part, are not subject to the same rigor, standards, and controls required of government audits, particularly [Generally Accepted Government Auditing Standards](#) (GAGAS). That said, these products are still subject to applicable standards adopted by your office in its [Professional Standards Manual](#) (PSM).

While the GAGAS audit work conducted by the professional auditors in your office is subject to a formal peer review process conducted by the [National State Auditors Association](#) (NSAA), other ***non-audit work conducted by your office is not subject to the NSAA peer review process***¹. It is left to members of the public to scrutinize these work products for their accuracy, impartiality, and compliance with applicable standards. Based on my preliminary review of your recent VEGI work, I have serious concerns about the objectivity of these reports, and the adherence to professional standards and basic internal controls. We are fortunate that Vermont law affords citizens with free and open access to public records, which is the only effective tool to ensure the transparency and accountability of your office, which obviously cannot audit itself.

Most Vermonters assume a degree of objectivity and independence in the work produced by the State Auditor’s Office (SAO). The strict government auditing standards that apply to the work of the professional auditors in your office help instill public confidence in their work, but when you and your political appointees conduct non-audit advocacy work, there is a need for more

¹ December 21, 2020 email from Doug Hoffer

transparency about the nature of this work, the lack of professional rigor, and lack of objective standards applicable to the development of the work products. It is in this context that I have provided a side by side comparison of the standards applicable to the two types of work performed by your office: the professional audits conducted by the civil servants who are career auditors and the non-audit advocacy work conducted by you and your political appointees, which I have presented in the following table.

Requirement / Standard	Professional Audits Conducted by Professional Audit Staff	Non-Audit Advocacy Work Conducted by Elected Official and Political Appointees
Peer review	A sample of professional audits are peer reviewed by NSAA every three years	No independent third-party peer review
Planning requirements	GAGAS Standards 8.03 - 8.35.	No formal planning standards identified
Initial communications to responsible entity	GAGAS Standard 8.20: auditors communicate an “overview of the objectives, scope, and methodology and the timing of the performance audit and planned reporting”	PSM Standard 9.1.2: “...informing the applicable entity that the SAO is planning to investigate an issue, including notification that this work is not being performed as an audit...”
Competency of staff assigned to engagement	GAGAS Standards 8.31 and 4.02 - 4.15.	No formal standards identified
Evidentiary standards	GAGAS Standards 8.13, 8.77 - 8.79, 8.90 - 8.115	PSM Standard 9.1.2: “...non-audit reports are not required to contain data validated via the audit process...”
Documentation of objectives, scope, and methodology	GAGAS Standards 8.135(a)	No formal standards identified

With all of this in mind, I have outlined a set of issues that I have identified with your work on non-audit reports 20-6 and 20-7, along with my analysis of these issues and a summary of my findings.

Issue 1: Reports Fail to Comply with PSM 2.1.2.2 - Required Independence Assessment

PSM 2.1.2.2 includes the following requirement for non-audit engagements:

Non-audit services undertaken at the initiative of the SAO. Such non-audit services (e.g., non-audit work products as described in PSM chapter 9) shall be evaluated by the Deputy State Auditor for independence threats prior to their being undertaken. This evaluation should entail evaluating the facts and circumstances related to the proposed non-audit service in the context of the GAGAS independence conceptual framework. (GAGAS 3.86) Specifically, the Deputy State Auditor shall evaluate the proposed non-audit service against the criteria in GAGAS 3.64 to 3.106 and identify any threats to independence if the non-audit service is executed, whether the threat is significant, and, if so, what safeguards can be put into place to mitigate or reduce the threat to an acceptable level, if possible (if it is not possible to reduce the threat to an acceptable level, the SAO should not undertake the non-audit service). The Deputy State Auditor will document the results of this evaluation in accordance with GAGAS 3.107.

Your memorandum dated December 17, 2020 (attached), indicated that an independence assessment was not undertaken for these non-audit reports; you noted that it was an “oversight” and that there is no documentation of the independence assessment for these reports.

While GAGAS standards are generally not applicable to the provision of non-audit services, the independence assessment is an important exception, as the provision of these services can potentially impair the independence of the SAO in current and future audits. Refer to GAGAS Standard 3.64². In your memorandum, you seem to excuse your “oversight” by pointing out that you file annual independence reports. This excuse ignores the fact that your PSM and GAGAS both require an assessment of independence for *every non-audit engagement*, as each piece of work needs to be evaluated against the risk of potential threats that the work may pose to the independence of professional audit work conducted in the present or in the future by the SAO.

These specific non-audit reviews potentially jeopardize the SAO’s ability to conduct professional audits (i.e. GAGAS audits) of the VEGI program in the future, because of the self-review threat described in GAGAS 3.30(b)³. If there is a GAGAS performance audit conducted in the future by the professional auditors who are subordinate to you, they will be placed in the conflicted position of potentially making findings that contravene your judgements within these non-audit work products.

Issue 2: Author of Non-Audit Reports is Not Objective

Without a reasonable assessment of the author’s independence, the public have no assurances that these non-audit reports were developed in an objective manner. In this instance, however,

² GAGAS 3.64 Requirement: Nonaudit Services - Before auditors agree to provide a nonaudit service to an audited entity, they should determine whether providing such a service would create a threat to independence, either by itself or in aggregate with other nonaudit services provided, with respect to any GAGAS engagement they conduct.

³ GAGAS 3.30(b) Self-review threat: The threat that an auditor or audit organization that has provided nonaudit services will not appropriately evaluate the results of previous judgments made or services provided as part of the nonaudit services when forming a judgment significant to a GAGAS engagement.

there is little doubt about your lack of objectivity with respect to the VEGI program. Your hostility towards this program (and its predecessor) are well documented and well known.

In one published commentary you wrote that you don't like the VEGI program.⁴ You likely have a comprehensive understanding of the mechanics of this program, and have gained that familiarity through years of experience researching, writing, and opining about the program. But it is this deep level of familiarity and **your outspoken criticisms** of the program that make you unqualified to conduct an **independent** assessment of the program. More specifically, your past advocacy around VEGI creates a bias threat to independence, as defined in GAGAS 3.30(c)⁵.

Issue 3: Reports Failed to Include PSM 9.1.2 Required Disclaimer in Non-Audit Reports

PSM standard 9.1.2 dictates that the following statement should be included in all non-audit reports:

“A non-audit report is an effective tool used to inform citizens and management of issues that may need attention. It is not an audit and is not conducted under generally accepted government auditing standards. This type of report contains no recommendations. Instead, the report contains information and possible risk mitigation strategies relevant to the entity.”

As of December 15, 2020, non-audit reports 20-6 and 20-7 available on the SAO website failed to include this disclaimer. In your memorandum of December 17, 2020, you acknowledged this failure, and the reports on the website have since been modified to show the requisite disclaimer. However, I do not see any notes on the modified reports indicating that these revisions were made post-publication. It is generally considered good practice to make prominent notation of any changes to a document post-publication.

Issue 4: SAO Failed to Notify VEPC of Non-Audit Nature of Inquiry

PSM 9.1.2 requires that authors of non-audit reports are “responsible for (1) informing the applicable entity that the SAO is planning to investigate an issue, *including notification that this work is not being performed as an audit...*” (emphasis added).

After reviewing correspondence that you sent to the Executive Director of the Vermont Economic Progress Council (VEPC), I found no evidence that you ever notified VEPC of the fact that the inquiries related to reports 20-6 and 20-7 **were not being conducted as part of an audit**. The initial communication from you to the Executive Director of VEPC, dated November 18, 2019, indicated that you were initiating a “risk assessment” as defined by the PSM, which is a preliminary step in the identifying audit candidates. From that point on, there was a steady

⁴ August 2009 Green Mountain Daily Commentary & Peace & Justice Center Newsletter

⁵ GAGAS 3.30(c) Bias threat: The threat that an auditor will, as a result of political, ideological, social, or other convictions, take a position that is not objective.

stream of requests for additional information, consistent with an audit, but I was unable to find any indication or communication of the fact that you were actually working on a non-audit report.

Issue 5: SAO Unlawfully Accessed Confidential Proprietary Business Information

The final issue concerns unlawful requests for confidential information by your office, specifically proprietary business information submitted with VEGI applications, which is deemed confidential under 32 V.S.A. § 3341(b).

The SAO is entitled to access this confidential data, but that access is limited under V.S.A. § 3341(b) to only be "...available to the Auditor of Accounts in connection with the performance of duties under section 163 of this title..."

32 V.S.A. § 163 enumerates the duties of the State Auditor, which are framed around the performance of **audits**. You acknowledge that non-audit reports 20-6 and 20-7 are, in fact, **not audits**, so these products and the work leading to their development fall outside the scope of statutory duties imposed on your office. While there is nothing in statute that would prohibit the SAO from performing work beyond the scope of the SAO's prescribed duties, you have no legal entitlement to access confidential information that would otherwise be restricted for the SAO's use in the performance of an audit.

In connection with non-audit reports 20-6 and 20-7, there were at least two instances when you made a request for information that you expected to include confidential material, but in neither case did you disclose that these requests were in support of a non-audit inquiry:

- (1) On November 18, 2019, you sent a request to the Executive Director of VEPC, requesting a significant number of records, many of which you acknowledged to be confidential, and indicated that you were undertaking a "risk assessment" under PSM.
- (2) On June 15, 2020, you sent an email to the Executive Director of VEPC, asking for additional information, which you acknowledged could include confidential material. You further stated that a draft report would be forthcoming, but never indicated that the report was actually not an audit (as discussed earlier in this memo) or that your request for information was not in the service of an audit.

Your initial request for information was within the context of an audit selection process, which was followed by follow-up requests for supplemental information would lead any reasonable person to conclude that they were providing information to support an audit. This expectation is further supported by your own PSM, which requires your office to notify responsible entities when a particular effort is not part of an audit. **Your apparent failure to disclose the fact that your inquiries were, in fact, not part of a professional audit, is a key omission that constitutes a misrepresentation that supported an unlawful request for confidential information.**

Summary of Findings

Based on the available evidence, here is a summary of my key findings:

1. It appears that your office has failed to meet PSM 2.1.2.2 and GAGAS Standard 3.64 for non-audit reports 20-6 and 20-7.
2. It appears that you fail to meet the independence (bias threat) requirements of GAGAS 3.30(c).
3. Your office appears to have failed to follow PSM Standard 9.1.2, as it relates to providing disclaimers about the limitations of these non-audit reports.
4. Your office appears to have failed to notify VEPC that the work conducted by your office was not related to an audit, which is a requirement of PSM 9.1.2.
5. Throughout the 20-6 and 20-7 engagement process, it appears that you failed to disclose the fact that you were pursuing a non-audit effort, and unlawfully requested confidential proprietary information through your continued omission of this important disclosure; information that your office is only entitled to receive in the performance of audits.



**STATE OF VERMONT
OFFICE OF THE STATE AUDITOR**

To: Oliver Olsen
Date: 17 December 2020
Re: Response to public records request

This is in response to your December 17, 2020 inquiry. Four of the questions posed are not public records requests, but I will answer them.

1. Under what statutory authority were these reports produced?

As the State Auditor, I am expected to ensure that taxpayer funds are used efficiently and effectively. This responsibility is defined in the enabling statute, as well as other statutes that provide the authority and tools to accomplish those tasks. For example, 32 V.S.A. § 163 states that:

"In addition to any other duties prescribed by law, the Auditor of Accounts shall:

(2) In his or her discretion, conduct a continuing post audit of all disbursements made through the Office of the Commissioner of Finance and Management or the Office of the State Treasurer..."

As part of the Agency of Commerce, the VEGI program (administered by VEPC) is included in the State's financial statements and covered in the [independent audit of the CAFR](#). Although considered a tax abatement, VEPC awards are disbursements, so they clearly fall within this charge.

In addition, 32 V.S.A. § 167 grants virtually unlimited authority to access records for the purposes described.

"(a) For the purpose of examination and audit authorized by law, all the records, accounts, books, papers, reports, and returns in all formats of all departments, institutions, and agencies of the State...shall be made available to the Auditor of Accounts. It shall be the duty of each officer of each department, institution, and agency of the State...to provide the records, accounts, books, papers, reports, returns, and such other explanatory information when required by the Auditor of Accounts."

While the authority in § 167 is expansive ("all records"), the Legislature chose to provide explicit authority for the Auditor to access the confidential information obtained from applicants by VEPC.

32 V.S.A. § 3341 (b) *"Information and materials submitted by a business concerning its income taxes and other confidential financial information shall not be subject to public disclosure under the State's public records law in 1 V.S.A. chapter 5, but shall be available to the Joint Fiscal Office or its agent upon authorization of the Joint Fiscal Committee or a standing committee of the General Assembly, and shall also be available to the Auditor of Accounts in connection with the performance of duties under section 163 of this title..."*

There can be no doubt that the Legislature's intent was to enable the State Auditor to examine or audit the VEGI program. Otherwise, there would be no need to access such materials. This is especially important here because 1) the reliance on confidential information, along with decisions made in executive session, makes VEPC's process opaque and 2) the statutory prohibition against administrative or judicial review makes it unaccountable [\[32 V.S.A. § 3325 \(g\)\]](#) .

Therefore, in the absence of any independent review of the VEGI program by JFO (the only other entity authorized to access the necessary confidential information), it is left to the Auditor's office to undertake this task.

There were two reasons why I decided to conduct a "non-audit" investigation. First, the scope was modest (a small sample of applicants), and therefore I saw no reason to allocate scarce audit resources to the job. Second, having studied the VEGI program for many years, I am the most knowledgeable person in the office on the subject and was best able to do the work without a learning curve. Note that I was the principal author of the first review of VEGI's predecessor EATI back in 2000 when many of the issues addressed in the current report were first raised.

2. How much effort was expended by your office in the development of these reports, and at what cost?

The work was conducted by me. The State Auditor is not required by DHR to track his or her time so I can't say how much time I devoted to these reports. The work was interrupted repeatedly due to other obligations and further impeded by the impact of the pandemic on the operations of our office so I can't even hazard a reliable guess. In addition, my Deputy reviewed each of the reports several times before issuance, and my Executive Assistant (who is a former Staff Auditor II and is familiar with quality control procedures) reviewed the first part of the report (Marvell). Neither of those two employees are required to track their time by project or task and work on a broad range of projects and issues.

3. Section 9.1.2 of your office's Performance Standards Manual (PSM) states that non-audit reports should contain a statement that this type of report, "...is not an audit and is not conducted under generally accepted government auditing standards." I see no such statement in either report. Can you explain why it was not included in either report?

I believe your reference is to the office's "Professional" Standards Manual. The failure to include the statement was simply an oversight. Thanks for bringing this to my attention. We will correct the reports.

As you can see in the links below, the statement is standard on all non-audit investigative reports. It is part of the report template and is found on the second page. Here are links to the most recent such reports ([health care](#), [remote workers](#), and [lake clean-up](#)), all of which contain the statement.

It is clear that we failed to include the entire second page when compiling the end product. In any event, it says quite clearly at the bottom of the cover page that each one is a "non-audit report" and makes no claims to be a GAGAS audit.

Finally, notwithstanding the disclaimer, our investigative (non-audit) reports are subject to the same evidentiary standards as GAGAS audits, namely “sufficient and appropriate evidence” as defined in the PSM (7.1.2.2b).

- 4. Appendix 9.1 of the PSM provides a checklist of tasks that should be completed for every non-audit product. Can you send me a copy of the checklist(s) for Reviews 20-6 & 20-7. Please consider this a public records request under 1 V.S.A. § 316.**

While the reports were issued separately, the work was done as part of a single job, so there is only one checklist. Parts 2 and 3 were updated after VEPC issued its latest annual report.

Task	Yes	No	NA	Comments
Independence form completed		✓		Oversight. See below.
Affected organization notified	✓			
If written product issued, the standard statement explaining the nature and limitation of the product included		✓		Oversight. See above.
Prior to issuance, the responsible staff member performed a walkthrough of the draft report with another staff member	✓			
State Auditor approved written product before issuance	✓			
Supporting materials maintained in accordance with public records requirements	✓			

- 5. The checklist in Appendix 9.1 of the PSM references an independence form to be completed, which is provided in Appendix 2.2 of the PSM. Can you send me a copy of this independence form for Reviews 20-6 and 20-7? Please consider this a public records request under 1 V.S.A. § 316.**

I sign an annual independence statement but did not complete one for this particular job.

- 6. Can you outline the internal review process that these reports went through before being released?**

Each iteration of the reports was reviewed by my Deputy. The final draft of the full report was read by the Director of Performance Audits, and my Executive Assistant reviewed Part 1.

From: [Oliver Olsen](#)
To: [Clark, Charity](#)
Subject: Letter Re: Auditor & VEGI Program Data Access
Date: Wednesday, February 3, 2021 4:06:58 PM
Attachments: [Letter to Attorney General.pdf](#)

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Hi Charity -

It was great chatting with you!

Attached is the letter we discussed. If you can forward to the folks looking at this issue, I would appreciate it.

Thanks, Oliver

--

Oliver Olsen

Tel: [REDACTED]

Oliver Olsen

South Londonderry, VT 05155

February 3, 2021

Attorney General TJ Donovan
109 State Street
Montpelier, VT 05609

RE: Auditor of Accounts Access to Confidential VEGI Records under 32 V.S.A. § 3341(b)

Dear Attorney General Donovan:

After reviewing the Vermont State Auditor of Accounts' recent "non-audit" reviews of the Vermont Employment Growth Incentive (VEGI) program, I have concerns that the Auditor of Accounts has unlawfully accessed confidential records pertaining to this program. I presented this issue to the Vermont Economic Progress Council (VEPC), and I understand that they have written to your office to seek clarity on the Auditor's authority to request and receive confidential records from the VEGI program for non-audit purposes.

I thought it would be helpful if I shared my analysis of the issue for your consideration.

Applicable Regulations

32 V.S.A. § 3341(b) states that "Information and materials submitted by a business concerning its income taxes and other confidential financial information shall not be subject to public disclosure under the State's public records law in 1 V.S.A. chapter 5, but shall be available to the Joint Fiscal Office or its agent upon authorization of the Joint Fiscal Committee or a standing committee of the General Assembly, and shall also be **available to the Auditor of Accounts in connection with the performance of duties under section 163 of this title...**" (emphasis added).

32 V.S.A. § 163 outlines the duties and authority granted to the State Auditor. Two provisions provide the Auditor with discretionary authority that is relevant to the question at hand: 32 V.S.A. § 163(1)(C) authorizes the Auditor to conduct "governmental audits as defined by governmental auditing standards issued by the U.S. Government Accountability Office (GAO)"; 32 V.S.A. § 163(2) authorizes the Auditor to "conduct a continuing post audit of all disbursements made through the Office of the Commissioner of Finance and Management or the Office of the State Treasurer."

32 V.S.A. § 167(a) provides the Auditor with broad authority to access records: "For the purpose of examination and audit authorized by law, all the records, accounts, books, papers, reports, and returns in all formats of all departments, institutions, and agencies of the State, ...shall be

made available to the Auditor of Accounts. It shall be the duty of each officer of each department, institution, and agency of the State or municipality, school supervisory union, school district, or county to provide the records, accounts, books, papers, reports, returns, and such other explanatory information when required by the Auditor of Accounts.”

Discussion

A starting point for this analysis is 32 V.S.A. § 3341(b), enacted in 2016, which explicitly authorizes the State Auditor of Accounts to access confidential and proprietary information submitted with VEGI applications that would otherwise be kept confidential.

The Auditor of Accounts has claimed that 32 V.S.A. § 3341(b) and 32 V.S.A. § 167(a) provide him with authority to access proprietary information from the VEGI program that would otherwise be kept confidential. While 32 V.S.A. § 167(a) does indeed grant the Auditor of Accounts with broad authority to examine records, that authority is limited by the more specific, relevant, and more recent statutory provision in 32 V.S.A. § 3341(b), which specifically governs access to VEGI records.

There are two principles of statutory construction to consider in this situation. First, specific statutory provisions generally prevail over more general ones. Second, more recent statutes take precedence over older ones.

Since access to confidential VEGI records is explicitly addressed in 32 V.S.A. § 3341(b), which was enacted *after* 32 V.S.A. § 167(a), the more limited and specific authority conveyed to the Auditor under 32 V.S.A. § 3341(b) takes precedence over the more general grant of authority under 32 V.S.A. § 167(a), and thus controls. The provision in 32 V.S.A. § 3341(b) allows the Auditor to access confidential VEGI records, but only “*...in connection with the performance of duties under section 163...*” (emphasis added). Those duties include audits, as noted earlier; they do not extend to “non-audit” efforts.

Most of the duties in 32 V.S.A. § 163 are obligatory, and are not relevant to this matter, since these “non-audit” reviews were conducted by the Auditor at his discretion. The Auditor’s discretionary authority is conveyed in 32 V.S.A. § 163(1)(C) and 32 V.S.A. § 163(2). Both of these provisions are specific to bonafide audits; neither provision speaks to anything other than an audit. There is no mention of “non-audits”, inquiries, investigations, reviews, commentary, or anything of the sort. The Auditor has expressly classified his reviews of the VEGI program as “non-audits” and the two reports clearly state that they are not audits. Under a plain reading of the relevant statutory provisions, these “non-audits” do not fall within the authority outlined in 32 V.S.A. § 163 that would permit him access to confidential VEGI data.

The General Assembly could have reaffirmed the Auditor’s broad authority under 32 V.S.A. § 167(a) when it enacted 32 V.S.A. § 3341(b) in 2016 (e.g. through the use of a “notwithstanding” clause with explicit reference to 32 V.S.A. § 167), but it did not. Instead, the General Assembly limited the Auditor’s authority by permitting access to confidential VEGI records only in

instances where the Auditor is exercising statutory duties defined in 32 V.S.A. § 163, namely when conducting an official audit. The relevant authority granted in 32 V.S.A. § 163(1)(C) and 32 V.S.A. § 163(2) is limited to the performance of audits, which the Auditor's recent VEGI reviews are plainly not.

It is important to note that formal audits provide a number of safeguards, through the use of generally accepted auditing standards, to ensure objectivity and veracity of the work. The Auditor's "non-audit" reviews are not conducted with the safeguards afforded by generally accepted auditing standards.

Conclusion

It is my conclusion that the State Auditor of Accounts is authorized to **audit** the VEGI program, and he is authorized to access confidential records in connection with an **audit** of the VEGI program, but that it is unlawful for the Auditor to access confidential VEGI records for the any other purpose, including his "non-audit" reviews.

Sincerely,

A handwritten signature in black ink, appearing to read "O.K. Olsen", with a large, stylized flourish extending from the end of the signature.

Oliver K. Olsen

CC: Megan Sullivan, VEPC Executive Director
John Davis, VEPC Board Chair



Oliver >

Text Message
Wed, Feb 3, 7:48 PM

Charity Clark
Vermont Attorne... cc >

Great speaking with you today!

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