LEGISLATIVE AUDIT DIVISION

Angus Maciver, Legislative Auditor
Deborah F. Butler, Legal Counsel

Deputy Legislative Auditors:
Cindy Jorgenson
William Soller

MEMORANDUM

TO: Legislative Audit Committee Members

FROM: Deborah F. Butler, Legal Counsel

DATE: June 20, 2022

RE: Audit Access to Agency Information

ATTACHMENT: Peer State Statutes

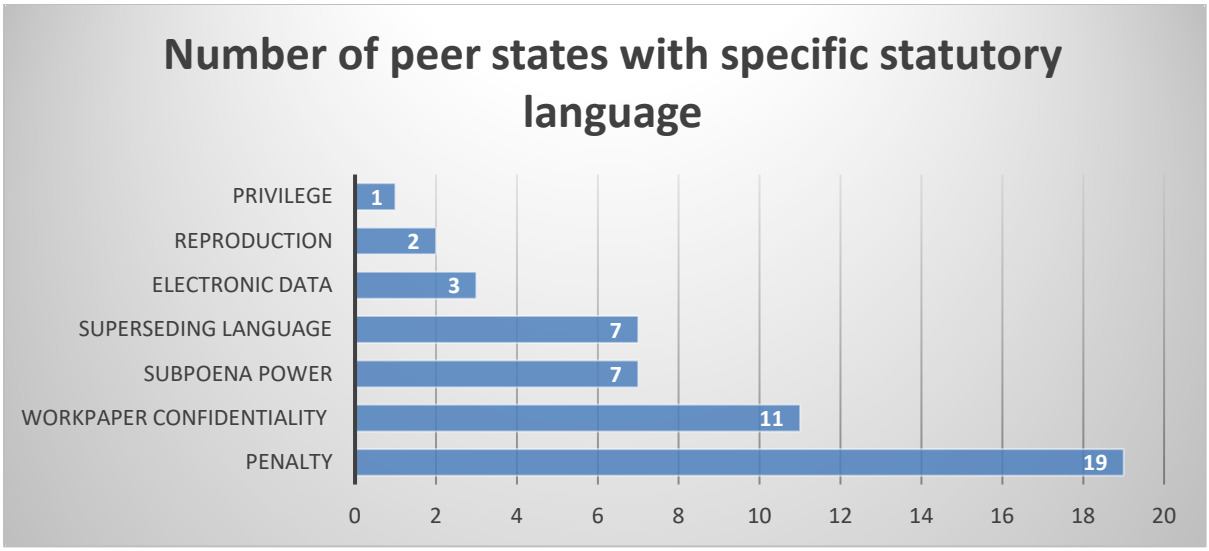
Section 5-13-309, MCA, requires state agencies to aid and assist the legislative auditor in the auditing of books, accounts, activities, and records. It also allows the legislative auditor to "examine at any time the books, accounts, activities, and records, *confidential or otherwise*," of a state agency. In recent years, we have seen an increase in agencies refusing or delaying access to records we have requested. While we understand and appreciate agencies taking their responsibility to protect their information very seriously, a refusal or delay can severely impact our ability to do our work.

We conducted peer state research to better understand the landscape. We often employ this methodology in audit work and believe it shows, in this case, Montana's statutes could be improved to provide a clearer understanding of the types and methods of audit access to records held by agencies.

As you can see on the attachment, we compared Montana to 24 other states in seven categories which are specifically referenced in those states' audit access statutes:

- **Privilege** – *attorney-client privilege* protects confidential communications between an attorney and their client. – *attorney opinion work-product privilege* shelters the mental process of the attorney. Fundamental right to know is not absolute, neither are these privileges; they are not a means for public bodies and government agencies to impede transparency. *Nelson v City of Billings 412 P3rd 1058 (Mont. 2018)*
- **Reproduction** – copy or reproduce
- **Electronic Data** – specific reference to include electronic data in addition to traditional hard copy/paper records or documents
- **Superseding Language** – examples: notwithstanding any other provision of law to the contrary; except as expressly prohibited or denied access by law (federal or state)
- **Subpoena Power** – legislative auditor or specific reference to committee
- **Workpaper Confidentiality** – exempt from public records laws; confidential until report completion and approval of committee; confidential by statute; confidential until report issued then balancing test (public's right to know vs individual privacy interest) to release; confidential by statute, release only by subpoena
- **Penalties**
  - **Misdemeanor** – fine (up to $1,500) and/or less than one year in jail
  - **Felony** – fine (up to $10,000) and/or up to six years in jail
  - **Other** – cause for or subject to removal from office; withholding of state funds until full compliance; fine and deemed guilty of malfeasance and gross misconduct in office; failure to obey subpoena – punishable by contempt (fine and/or jail)

Room 160 · State Capitol Building · P.O. Box 201705 · Helena, MT · 59620-1705
Phone (406) 444-3122 · FAX (406) 444-9784 · E-Mail lad@mt.gov
https://leg.mt.gov/lad



Source: Compiled by the Legislative Audit Division

The current language of the statute allowing LAD to "examine at any time the books, accounts, activities, and records, *confidential or otherwise*," has served us well but could be enhanced to align with our peer organizations more closely. We believe legislative consideration of the following changes would give agencies and LAD staff a better understanding of what "audit access" means.

1. Privileged information is not specified in current statute. When, not if, an agency claims privilege to deny us access to their information, we believe the "or otherwise" language allows us access. However, access could be unnecessarily delayed, impacting our ability to complete our work without this addition.
2. Recently, we were questioned about our ability to copy or reproduce the information we were requesting. To fully analyze the information, we almost always need to copy or reproduce it, regardless of its form. Adding this specific language would clarify our ability to obtain the information in a format needed to perform methodologies established through the audit process.
3. Many records today are created and/or stored electronically and the current statutory language does not reflect this advancement. Adding "electronic data" to the list of types of records accessible to LAD would create more clarity.
4. An alternative to creating a laundry list of types of information or making changes to other statutes prohibiting public access would be to add superseding language to the statute. Adding superseding language would clarify our role and access to information that is typically thought of as confidential and not subject to release (or redaction) pursuant to a public records request.
5. The peer states where the legislative auditor or the committee has subpoena power report it was added to their statute as a mechanism to force agencies to comply with a request or face contempt (penalty) for refusal. This option would create a separate legal process, likely involving a district court, to issue and compel compliance. The process would be time consuming for LAD and the agency staff, only further delaying, or halting the audit process.
6. The Audit Act is silent about the confidential nature of information we obtain during an audit. Once we receive information our policy and practice is to treat it as confidential and not subject to a public records request until the audit is complete and the report is issued. Adding this language would better align our statute with our peer organizations and clarify our treatment of information in our possession.
7. The final topic for discussion is a penalty provision in the statute. Criminal penalties (fines and jail) are put into place as a deterrent for actions, omissions, or violations. Some may disagree that criminal penalties are a deterrent, but in this situation, peer organizations report they are. As you can see from the figure above, 19 out of the 24 states compared have some

type of penalty for refusal of audit access, most of them are criminal. These penalties are primarily levied against appointed officials as the parties ultimately responsible for refusing access. Misdemeanors are most prevalent, but many states combine a criminal penalty with other penalties, such as "subject to removal from office" or the withholding of funds until compliance. While they may never be used, a penalty has shown to be a deterrent for agencies to refuse or substantially delay providing access.

S:\Admin\Correspondence\22\LAC\June 28-29\db-LAC-audit-access-memo.docx\cr

STATE	PRIVILEGE	REPRODUCTION	ELECTRONIC DATA	SUPERSEDING LANGUAGE	SUBPOENA POWER	WORKPAPER CONFIDENTIALITY	PENALTY-MISDEMEANOR	PENALTY-FELONY	PENALTY-OTHER
Montana (MT)									
Alaska (AK)									
Arizona (AZ)						✓	✓		
Arkansas (AR)	✓		✓			✓		✓	
California (CA)		✓		✓			✓		
Colorado (CO)				✓		✓	✓		
Florida (FL)							✓		✓
Idaho (ID)									
Kansas (KS)						✓	✓		✓
Kentucky (KY)					✓	✓	✓		✓
Louisiana (LA)		✓	✓						✓
Maryland (MD)				✓	✓	✓	✓		
Massachusetts (MA)						✓			
Minnesota (MN)					✓	✓			✓
Mississippi (MS)									
Nebraska (NE)			✓	✓		✓			
Nevada (NV)						✓			
North Dakota (ND)				✓				✓	
Oklahoma (OK)									
South Dakota (SD)					✓				✓
Texas (TX)				✓	✓		✓		
Utah (UT)				✓	✓		✓		
Washington (WA)					✓				✓
Wisconsin (WI)						✓			
Wyoming (WY)								✓	