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STATE OF MICHIGAN
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OPEN MEETINGS ACT: Audit of a local assessing district is not subject to Open Meetings Act.

The audit of a local assessing district's assessment roll on behalf of the State Tax Commission (STC) under MCL 211.10f(1) of the General Property Tax Act, MCL 211.1 *et seq.*, is not subject to the Open Meetings Act (OMA) MCL 15.261 *et seq.* However, the STC, as a public body, is subject to the OMA when it deliberates or decides to assume jurisdiction over a local assessing district's assessment roll under MCL 211.10f(1).

Opinion No. 7288

March 4, 2016

The Honorable Edward McBroom
State Representative
The Capitol
Lansing, MI 48909

You ask whether an Audit of Minimum Assessing Requirements (AMAR) is subject to the Open Meetings Act (OMA), 1976 PA 267, MCL 15.261 *et seq.*

An AMAR is an audit of a local assessing district that takes place under the authority of the State Tax Commission (STC). The STC has "general supervision of the administration of the tax laws of the state." MCL 209.104. The STC has the duty to "exercise general supervision over the supervisors and other assessing officers of this state, and to take such measures as will secure the enforcement of the provisions" of the General Property Tax Act (GPTA), 1893 PA 206, MCL 211.1 *et seq.* MCL 211.150(1). Consistent with that duty, the STC "shall render such assistance and give such advice and counsel to the assessing officers of the state as they may deem necessary and essential to the proper administration of the laws governing assessments and the levying of taxes in this state." MCL 209.104. All assessing officers and other public officers have a duty to comply with the STC's requests for information and to provide assistance to the STC in carrying out its duties. *Id.* In addition, the STC or its authorized representatives "shall have . . . access to all books, papers, documents, statements and accounts on file or of record in counties, townships and municipalities, and shall have authority to take possession of any assessment roll for use in carrying out the provisions of [the GPTA] . . ." MCL 211.148.

The STC has jurisdiction to determine whether a local assessing district's assessment roll, certified assessor, and board of review are in substantial compliance with the requirements of the GPTA. Subsection 10f(1), provides:

If a local assessing district does not have an assessment roll that has been certified by a qualified certified assessing officer, or if a certified assessor or a board of review for a local tax collecting unit is not in substantial compliance with the provisions of this act, the state tax commission shall assume jurisdiction over the assessment roll and provide for the preparation of a certified roll. [MCL 211.10f(1).]

If the STC assumes jurisdiction it may order the county tax or equalization department to prepare the roll; provide for the use of state employees to prepare the roll; or order the local assessing unit to contract with a commercial appraisal firm to conduct an appraisal of the property in the assessing unit. *Id.* Before ordering a local assessing unit to contract for an appraisal, the STC must "consider the quality of the tax maps and appraisal records required by section 10e as part of its investigation of the facts . . ." *Id.* And after

investigation, the “commission shall provide the tax tribunal with a certified copy of its orders and a copy of each final determination made under this section.” MCL 211.10f(8).

In evaluating whether a local assessing district’s practices substantially comply with the GPTA, the STC uses an audit process to gather facts. The STC adopted its current practice, referred to as an AMAR, at its October 13, 2014, meeting. As part of the AMAR, the STC developed a review sheet to be used during the audit.^[1] Under the STC’s current schedule, each local unit in the State will participate in an AMAR every five years.^[2]

While the STC may use state employees to conduct an AMAR of a local assessing district’s compliance, it currently contracts with a private auditing firm to perform these audits.^[3] Before initiating an AMAR, the auditor sends notice to the local assessing district to be audited, and requests access to the unit’s assessment records. One or two employees of the auditing firm travel to a county to review records that were not provided electronically and to confer with the assessor and other staff of the local unit. The auditor routinely invites staff from a county’s equalization department to attend such a conference.

The auditor also selects a random sample of appraisal record cards and, after notice to property owners and the local assessing district, conducts field reviews of the randomly-selected properties to verify the accuracy of the local unit’s records.^[4] The STC has set a standard of 90% overall accuracy for the local assessing district’s record cards.

The auditor reports his or her findings regarding the local unit’s assessing practices to the STC using the STC approved AMAR review sheet. Staff from the Michigan Department of Treasury review this report for the STC and notify a local assessing district of any failures to substantially comply with the minimum assessing requirements. The local unit is then required to draft a plan of corrective action and submit that to the STC. Notably, the local unit is required to identify a reasonable date by which corrective action will be completed. After that date, field staff from the Department of Treasury travel to the local unit to verify that the unit has implemented the corrective action plan. If the corrective action plan is not fully completed or does not result in the local unit returning to substantial compliance, staff from the Department of Treasury may again notify the local unit of deficiencies and allow it to submit an amended corrective action plan. Currently, a local unit’s failure to submit a correction action plan, or its persistent failure to correct deficiencies may result in the STC’s assumption of jurisdiction over the local unit’s assessment roll. See MCL 211.10f(1).

The STC has adopted a Statement of Policy Regarding Assumption of Jurisdiction of Assessment Rolls.^[5] The statement provides that staff will notify a local unit of the facts that may form the basis for the STC’s assumption of jurisdiction. That notification is to include the results of an AMAR or other investigation into a local unit’s compliance. A local unit has 21 days to respond to the facts provided by the STC. After reviewing the local unit’s response, if staff continue to recommend that the STC assume jurisdiction, the STC will, consistent with its past practice, consider assumption of jurisdiction at an open meeting that occurs after additional notice to the local unit.

Against this background, you ask whether the audit of a local assessing district’s assessment roll is subject to the OMA.

The OMA promotes transparency and accountability in government by requiring, in general, that all “deliberations” or “decisions” of “public bodies” be made at “meetings” that are “open to the public.” MCL 15.262; 15.263.^[6] Meetings subject to the OMA must be held in a place available to the general public, and must be properly noticed. MCL 15.263 and 15.264. Members of the public have a right to attend an open meeting, as well as address the public body, and may record the proceedings, subject to reasonable regulations. MCL 15.263(1), (5). But if an entity is not a “public body,” its meeting are not subject to the requirements of the act. *A & E Parking v Detroit Metropolitan Wayne County Airport Authority*, 271 Mich App 641, 651; 723 NW2d 223 (2006) (“The OMA applies to ‘meetings of a public body.’”).

Subsection 2(a), MCL 15.262(a), defines “public body” to mean, in relevant part:

[A]ny state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, *that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function* [Emphasis added.]

Under this definition, a “public body” must be (1) a state or local “legislative or governing body,” and (2) empowered to exercise governmental or proprietary authority or perform a governmental or proprietary

function. *Herald Co v Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000). A “legislative body” is one empowered to “make or enact law, to bring something into or out of existence by making law, or to attempt to bring about or control by legislation.” *Davis v City of Detroit Financial Review Team*, 296 Mich App 568, 593; 821 NW2d 896 (2012). A “governing body” is “a body that makes or administers public policy for a political unit or exercises independent authority,” and that is empowered to make “decisions” as that term is defined in the OMA. *Davis*, 296 Mich App at 597.^[7]

The auditing firm contracted by the STC to conduct audits of local assessing districts is not a “legislative body” because it is not empowered to make or enact law. *Id.* at 593. Nor is it a “governing body” because it does not make or administer public policy for the STC, or exercise independent authority, and does not render “decisions” as defined by the OMA. *Id.* at 597. These conclusions would be the same even if an audit is performed by governmental employees.

Here, the auditor collects information for the STC through the audit, and reports that information to the STC on a form. Although the auditor reviews whether the local assessing district is meeting certain standards, the auditor does not make a recommendation, determination, or decision with respect to whether the local unit is substantially complying with the GPTA for purposes of subsection 10f(1). And even if the auditor did make a recommendation, it would only be advisory and not a final decision. Rather, the auditor’s report is reviewed by Department of Treasury staff, who then notify the local unit of any failures to substantially comply and work with the unit to achieve compliance through corrective action plans submitted to the STC. If compliance cannot be achieved in this way, it is the STC that ultimately decides whether it will assume jurisdiction of the local unit’s assessment roll under section 10f. The STC has not delegated this decision-making function to the auditor or any other entity, group, or person.^[8]

Under these circumstances, the auditor does not fall within the definition of a “public body,” and any document review, interview, or meeting with the local assessing district or county equalization department is not subject to the requirements of the OMA. This conclusion is consistent with the decision in *Davis* noted above. There, the Court of Appeals addressed whether financial review teams appointed by the Governor under the Local Government and School District Fiscal Accountability Act, 2011 PA 4, now repealed, were public bodies subject to the OMA. Under the act, review teams were authorized to meet with local governmental officials, review the books and records of local governments, negotiate consent agreements with local governments for approval by the State Treasurer, report team findings to the Governor, and make recommendations to the State Treasurer and Governor regarding the financial condition of the local governments. *Davis*, 296 Mich App at 595-608. The Governor used this information to assist in determining whether to declare a local unit of government in a state of financial emergency.

The Court of Appeals determined that the review teams were not “legislative” bodies because they could not “legislate” and had no “legislative functions.” *Id.* at 591-593. Turning to whether they were “governing” bodies, after careful review the Court of Appeals concluded that the actions or functions of the financial review teams were “investigative in nature” or “purely advisory,” and did not constitute “governing” through independent decision-making that effectuates or formulates public policy.” *Id.* at 601-609. Thus, the financial review teams were not public bodies subject to the OMA. *Id.* at 593, 608-609. In the same way here, the auditor is not a public body because it is not a legislative body and performs only an investigative function.

In addition, this office has previously opined that advisory bodies are not public bodies subject to the OMA. See e.g. OAG, 1977-1978, No 5183, pp 21, 40 (March 8, 1977) (OMA does not apply to committees and subcommittees of public bodies which are merely advisory or only capable of making “recommendations concerning the exercise of governmental authority.”); OAG, 1979-1980, No 5505, p 221 (July 3, 1979); OAG, 1981-1982, No 6053, p 616 (April 13, 1982); OAG, 1997-1998, No 6935, p 18 (April 2, 1997).

While an auditor contracted by the STC to perform an AMAR audit is not a public body for purposes of the OMA, it is important to note that the STC is a public body. It is a State “governing body” empowered by statute to “make[] or administer[] public policy for a political unit or exercise[] independent authority,” and which makes “decisions” effectuating “public policy” by administering the tax laws of the State. *Davis*, 296 Mich App at 593-594; MCL 15.262(a); 15.262(d).^[9] And the assumption of jurisdiction over a local assessing district’s assessment roll under section 10f(1) is a “decision” that “effectuates” the “public policy” of the State of Michigan. MCL 15.262(d). Thus, a meeting at which the STC is deliberating or deciding to assume jurisdiction over a local assessing district’s assessment roll is subject to the OMA.

It is my opinion, therefore, that the audit of a local assessing district's assessment roll on behalf of the STC under MCL 211.10f(1) is not subject to the OMA. However, the STC, as a public body, is subject to the OMA when it deliberates or decides to assume jurisdiction over a local assessing district's assessment roll.

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[1] A copy of the current review sheet is available on the STC's website at http://www.michigan.gov/documents/treasury/2013ApprovedAMAR_441090_7.pdf?20151214150249 (last accessed February 8, 2016). For the adoption of the current review sheet, see minutes of the STC's October 13, 2014, meeting, available at http://www.michigan.gov/documents/treasury/Meeting_Minutes_10-13-2014-Final_476851_7.pdf (last accessed February 8, 2016).

[2] A copy of the AMAR schedule is available at http://www.michigan.gov/documents/treasury/AMAR_County_List_2016 - 2020_491376_7.pdf?20151214104125 (last accessed February 8, 2016)

[3] Under MCL 209.102(1), the STC "may engage the services of assistants and employees as necessary to carry out the provisions of this act, or of any other law of the state affecting the powers and duties of the state tax commission."

[4] Since 1978, local units have been required to maintain appraisal record cards, land value maps, and other records consistent with standards set by the STC. MCL 211.10e. These records are reviewed in an AMAR. MCL 211.10f(1).

[5] A copy of the Statement of Policy Regarding Assumption of Jurisdiction of Assessment Rolls is available online at http://www.michigan.gov/documents/treasury/STC_Policy_Regarding_Assumption_of_Jurisdiction_of_an_Asessment_Roll_494625_7.pdf?20151207122608 (last accessed February 8, 2016).

[6] A "meeting" is defined in the OMA as the "convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o." MCL 15.262(b).

[7] Subsection 2(d) of the OMA, MCL 15.262(d), defines "decision" to mean a "determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy."

[8] As a result, cases addressing delegation like *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993), and *Morrison v East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003), are inapplicable.

[9] The business which the STC may perform must be conducted at a public meeting held in compliance with the OMA. MCL 211.149 (2). Previously, the Legislature expressly provided that meetings of the State Assessor's Board were subject to the OMA. MCL 211.10c (2) (now repealed). The authority, powers, duties, functions, and responsibilities of the State Assessor's Board were transferred to the STC by Executive Order No. 2009-51. See also OAG, 1981-1982, No 6007, pp 450, 457-458 (November 18, 1981), which opined that the STC retained administrative functions that included conducting its meetings in compliance with the OMA after some of its functions were transferred to the Michigan Tax Tribunal.