

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1033

Agency Inspectors General

SPONSOR(S): Bean

TIED BILLS:

IDEN./SIM. BILLS: SB 2078

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Audit & Performance</u>	<u>(ref. removed)</u>	<u>Ferguson</u>	<u>De La Paz</u>
2) <u>Government Efficiency & Accountability Council</u>	<u></u>	<u>Ferguson</u>	<u>Cooper</u>
3) <u>Policy & Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Currently, there is no review process for entities contracting with state agencies or individuals substantially affected by an agency inspector general's final investigative report. State employees have an independent review process but that process will not result in changing an inspector general's final investigative report.

HB 1033 requires the Chief Inspector General (CIG) to adopt policies and procedures to specify the conditions and procedures for reviewing an agency inspector general's final investigative report. These policies and procedures will allow entities and individuals (excluding state employees) to have the opportunity to challenge an agency inspector general's final investigative, present additional evidence to the CIG, and possibly have the inspector general's final investigative report changed.

The bill also allows the CIG to independently investigate an agency inspector general's final investigative report.

The CIG has estimated its office would require an additional \$4,851,788 in budget authority for 36.3 FTE's to implement this bill. The CIG's estimate is based on the partial response of 19 of the 36 agency inspector's general, and based on the assumption that 50% of the cases completed by the agency inspectors general would require review by the CIG.

HB 1033 may violate the Separation of Powers Doctrine by unlawfully delegating legislative authority. The bill requires the CIG to adopt policies and procedures specifying the conditions and procedures for reviewing an agency inspector general final investigative report. Among these required policies and procedures, is an exemption from the review process for specific categories of investigations; however, the bill gives no guidance as to what specific categories of investigations will be exempt from the review process.

There is also a possible separation of powers problem since the bill attempts to vest the CIG with authority over state courts which are part of the Judicial Branch, Public Service Commission which is part of the Legislature, and cabinet agencies such as Chief Financial Office or agencies reporting to both the Governor and the Cabinet such as the Fish and Wildlife Commission.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill requires the Inspector General of each state agency to adopt the current Association of Inspectors General Principles and Standards, and the Chief Inspector General to adopt policies and procedures for reviewing an agency inspector general final investigative report. The bill increases government by adding additional responsibilities to the IG of each state agency as well as the CIG.

B. EFFECT OF PROPOSED CHANGES:

Current situation

Section 20.055 (2), F.S., establishes the Office of the Inspector General (OIG) in each state agency to promote accountability, integrity, and efficiency in government. Each inspector general is appointed, supervised, and removed by their respective agency head. The major responsibilities of the OIG include investigations, audits, and reviews of Department programs and activities, which are describe in the following sections:

Investigations

Section 20.055 (6), F.S., states that investigations are designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government.

Accordingly, the following duties are performed by OIG:

- Receive complaints and coordinate all activities of the agency as required by the Whistle-blower's Act pursuant to ss. 112.3187-112.31895.
- Receive and consider the complaints which do not meet the criteria for an investigation under the Whistle-blower's Act and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the inspector general deems appropriate.
- Report expeditiously to the Department of Law Enforcement or other law enforcement agencies, as appropriate, whenever the inspector general has reasonable grounds to believe there has been a violation of criminal law.
- Conduct investigations and other inquiries free of actual or perceived impairment to the independence of the inspector general or the inspector general's office. This shall include freedom from any interference with investigations and timely access to records and other sources of information.
- Submit in a timely fashion final reports on investigations conducted by the inspector general to the agency head, except for whistle-blower's investigations, which shall be conducted and reported pursuant to s. 112.3189.

A typical IG investigation begins with the filing of a complaint, followed by interviewing potential witness, and issuing a final investigative report. A complaint could be filled by someone inside or outside the agency. Based on the filing of the complaint, the IG will contact the complainant and any potential witness who could include co-workers, supervisors, citizens, contractors, etc. The IG will report any violations of criminal law to law enforcement. The IG investigates and describes violations of policy and procedure then submits their findings, conclusions, and recommendations in a final report to their respective agency head for their consideration to accept or reject the IG's findings, conclusions, or recommendations.

Currently, section 110.227, F.S., provides Career Service state employees who are the subject of an investigation the opportunity to refute report findings that result in potential disciplinary action through a predetermination hearing. Additionally, law enforcement and correctional officers have the right to be

provided with a complete copy of the investigative report and supporting documents and have the opportunity to address the findings in the report prior to the imposition of discipline.¹ However, there is no review process for these employees to have an agency inspector general's final investigative report changed.

Audits

Audits are independent appraisals designed to examine and evaluate the department programs and activities as a service to the department. An inherent objective when performing audits is to review and evaluate internal controls necessary to ensure fiscal accountability. After audit reports are issued, a follow-up review is performed six months later to determine the extent of corrective actions implemented by management. Audits may be classified as either financial, compliance, performance, or data and information security.

Reviews

Reviews are independent assessments of program effectiveness and/or management functions. Reviews may also be to determine the perceptions and attitudes of staff regarding management functions. The purpose of the reviews is to assist management in identifying strengths and weaknesses, or provide assistance in developing and implementing corrective actions.

Section 14.32 (1), F.S., creates, in the Executive Office of the Governor, the Office of Chief Inspector General (CIG). The CIG is responsible for promoting accountability, integrity, and efficiency in agencies under the jurisdiction of the Governor. The CIG is appointed by and serves at the pleasure of the Governor. The CIG major responsibilities are investigations and audits.

Investigations

In carrying out the investigative duties, the CIG initiates, conducts, supervises, and coordinates investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in government.

Audits

The audit function is an independent, objective assurance and consulting activity designed to add value and improve the Office of the Governor's operations or operations funded by the Office of the Governor. In carrying out the audit responsibilities, the CIG reviews and evaluates internal controls to ensure fiscal accountability of the agency. Audits are conducted in accordance with professional auditing standards.

The Annual Report of activities of the Offices of Inspectors General for Fiscal Year 2005-2006 includes statistical data from the 18 agencies under the Governor's direct jurisdiction, five Cabinet agencies and one inspector general in the Legislative branch. The Offices of Inspectors General from the agencies represented show that 412 audits were performed that identified over \$25 million in questioned costs. Of the 695 recommendations resulting from these audits, 91% of them were agreed to by management to improve processes and internal control mechanisms. The Offices of Inspectors General completed over 6,000 investigations and handled over 25,000 inquiries from employees and citizens. Of the closed investigations, 866 contained substantiated allegations resulting in more than 1,200 disciplinary actions. Restitutions, recoveries, and other cost impact from these cases totaled over \$570,000.

Proposed change

The bill expands each agency inspectors general current duties and responsibilities by requiring each inspector general to adopt the current Association of Inspector General Principles and Standards.²

The bill requires the CIG to be notified in writing, at least 7 days, prior to an agency head's intention to appoint or terminate an agency inspector under the direction of the Governor.

¹ Section 112.532 (4) (a), F.S.

² <http://www.inspectorsgeneral.org/docs/IGStandards.pdf>

The bill requires the CIG to adopt policies and procedures to specify the conditions and procedures for reviewing an agency inspector general final investigative report. The policies and procedures are required to include provisions related to:

- Offering an opportunity for entities contracting with the state³ and individuals substantially affected⁴ (except state employees) by the findings, conclusions, and recommendations of an agency inspector general's final investigative report the opportunity to challenge, in writing, the inspector general's final investigative report or seek review by the CIG.
- Identifying the entities and individuals allowed to submit a written response.
- Identifying the circumstances under which the entity's or individual's response must be attached to the agency inspector general's final report.
- Providing a review process that allows entities and individuals substantially affected by the findings, conclusions, and recommendations of an agency inspector general final investigative report to present to the CIG, any additional material relevant⁵ to the final investigative report.
- Allowing the CIG to independently investigate the agency inspector general's final report and the original investigation.⁶
- Special conditions for whistle-blower investigations in accordance with ss. 112.3187-112.31895.
- Exemptions from the review process for specific categories of investigations.
- Definitions of terms related to the review process.

These policies and procedures, listed above, will provide a review process for entities and individuals substantially affected by an agency inspector general's final investigative report where there is currently no review process. The CIG's review could result in changing an inspector general's final investigative report. Individuals substantially affected, as defined above, excludes state employees because these employees have an existing right to an independent review of any damaging information that may have been associated with their separation from service in the form of a "name-clearing hearing." However, this right to an independent review will not result in changing an agency inspector general's final investigative report.

The bill requires the CIG to ensure the above policies and procedures are consistent with the report of the: *Council on State Agency Inspectors General* ("Council"). The Council convened ten times between September and December 2006 for over 50 hours of deliberation and debate. HB 1033 incorporates the recommendations of the Council.

The bill also allows the CIG to independently investigate an agency inspector general's final investigative report. An independent investigation of another agency by the CIG would require at a minimum, the same amount of time, effort and energy expended by an agency IG. In addition, since the bill requires consideration of additional material supplied by the person requesting review of another agency's final IG report, it necessarily would entail additional time, effort and energy by the CIG in regards to considering, evaluating and following-up on the additional submission. Further, the bill contemplates a CIG review of another agency IG's final report. Review of the other agency's final investigative report would require an assessment and evaluation of the quality and thoroughness of the initial agency's investigation into all the relevant facts, along with an independent review of the law and polices that led to the findings and recommendations contained in the initial IG's final report.

³ "Entities contracting with the state" means organizations or businesses having a legal existence, as opposed to natural persons, that have entered into a relationship with a state agency to provide goods or services.

⁴ "Individuals substantially affected" means persons inured due to findings, conclusions, or recommendations of a final report of a state agency inspector general, and they have no right to an independent review process.

⁵ "Additional material relevant" means evidence submitted to the state agency inspector general prior to release of the final report that likely would have affected the investigative findings. In order to be relevant, the evidence must tend to prove or disprove the matters at issue in the investigation. Newly discovered evidence may be considered if it was discovered subsequent to the agency inspector general's final report and the agency inspector general has affirmatively refused to reopen the investigation despite such evidence. Such evidence shall not have been withheld from the state agency inspector general during the original investigation.

⁶ "Original investigation" means an official investigative review by a state agency inspector general of information relative to suspected violations of any law, rule, or agency policy resulting in written findings.

C. SECTION DIRECTORY:

Section 1. Amends s. 20.055, F.S., to require agency inspectors general to adopt certain principles and standards, and the Chief Inspector General to adopt certain policies and procedures.

Section 2. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The CIG has estimated its office would require an additional \$4,851,788 in budget authority for 36.3 FTE's to implement this bill. The CIG's estimate is based on the partial response of 19 of the 36 agency inspector's general, and based on the assumption that 50% of the cases completed by the agency inspectors general would require review by the CIG. At this time no fiscal impact assessment has been received by any of the other 36 agency IG's that would be impacted by HB 1033.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

HB 1033 may violate the Separation of Powers Doctrine by unlawfully delegating legislative authority. Article II, section 3 of the Florida Constitution, provides, "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Under the Separation of Powers Doctrine, fundamental and primary policy decisions shall be made by

the Legislature and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.⁷ The Court reasoned, “[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the [L]egislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of law.”⁸

The bill requires the CIG to adopt policies and procedures specifying the conditions and procedures for reviewing an agency inspector general final investigative report. Among these required policies and procedures, is an exemption from the review process for specific categories of investigations; however, the bill gives no guidance as to what specific categories of investigations will be exempt from the review process. As a result, the Chief Inspector General will have the authority to decide what specific categories are exempt without guidance or direction from the Legislature.

Another issue is whether the CIG, as an appointee of the Governor, has jurisdiction over the actions of state agencies not under the direct supervision of the Governor. The Governor has authority over the Executive branch. There is a possible separation of powers problem since the bill attempts to vest the CIG with authority over state courts which are part of the Judicial Branch, Public Service Commission which is part of the Legislature, and cabinet agencies such as Chief Financial Office or agencies reporting to both the Governor and the Cabinet such as the Fish and Wildlife Commission.

B. RULE-MAKING AUTHORITY:

The bill requires the Chief Inspector General, in the Executive Office of the Governor, to adopt policies and procedures for reviewing an agency inspector general final investigative report. These procedures will allow individuals who have been substantially affected by an agency inspector general’s final investigative report the ability to seek a review of that report and possibly change that report. As a result, the Chief Inspector General will need rule-making authority under chapter 120.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Rep. Bean questions the determination of 36 FTEs by the CIG to carry out the provisions of this bill.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

⁷ Avatar Development Corp. v. State, 723 So.2d 199, 202 (Fla. 1998); citing, Askew, 372 So.2d 913 (Fla. 1978).

⁸ Id.