

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1033 Agency Inspectors General
SPONSOR(S): Policy & Budget Council; 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></u>	<u></u>
2) <u>Government Efficiency & Accountability Council</u>	<u>13 Y, 0 N, As CS</u>	<u>Ferguson</u>	<u>Cooper</u>
3) <u>Policy & Budget Council</u>	<u>28 Y, 0 N, As CS</u>	<u>Leznoff</u>	<u>Hansen</u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

CS/CS/HB 1033 requires each IG (inspector general), at the conclusion of any audit of a program or contract that involves a singular entity contracting with the state, to submit preliminary findings and recommendations to the entity. The entity has 20 working days to respond to any adverse findings. The entity's response and the IG's rebuttal, if any, must be included in the final audit report.

The bill requires each IG, at the conclusion of each investigation that involves a specific entity contracting with the state or an individual substantially affected, the agency IG must submit its findings and in turn the entity or individual will have 10 days to respond. Such response and the IG's rebuttal, if any, must be included in the final investigative report.

The bill requires each IG, under the Governor's jurisdiction, to report to the CIG (chief inspector general) all written complaints or alleged misconduct concerning the office of the IG or its employees.

The bill requires the CIG to develop policies and procedures (not subject to rulemaking under ch. 120, F.S.) for reviewing complaints against an agency IG or its employees under the jurisdiction of the Governor. These procedures will allow entities contracting with state agencies and individuals substantially affected by an agency IG's findings, conclusions, and recommendations the opportunity to express their complaints and present additional evidence. The bill no longer requires but rather gives the CIG discretion to review an IG's final report. The bill also excludes state and former state employees.

The bill requires the CIG to distribute the report of any investigation conducted or supervised by the CIG to the agency, the agency head, and the person who filed the complaint.

The bill requires the subject agency to reimburse reasonable legal fees and cost, not to exceed \$50,000, specifically associated with filing and pursuing the complaints by entities contracting with the state or individuals substantially affected by an IG's findings, conclusions, and recommendations if the CIG determines that the IG's adverse findings are not substantially justified. The bill does not define "substantially justified."

Under the CS/HB 1033, the CIG estimated its office would require an additional \$4,851,788 in budget authority for 36.3 FTE's to implement the bill based on the assumption that 50% of the cases completed by agency IG would require review by the CIG. The CS/CS/HB 1033 no longer requires the CIG to review agency IG's final investigative report but rather gives the CIG discretion whether or not to review an IG's final investigative report; thus, the fiscal impact is indeterminate since it is unknown how many reviews the CIG will decide to conduct. As the CS/CS/HB 1033 creates no review mandate for the CIG, the CIG can review investigations to the degree permissible within the limitations of existing resources.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill increases government by adding additional responsibilities to each agency IG 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 IG 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, F.S.
- 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 IG deems appropriate.
- Report expeditiously to the Department of Law Enforcement or other law enforcement agencies, as appropriate, whenever the IG 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 IG or the IG'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 IG to the agency head, except for whistle-blower's investigations, which shall be conducted and reported pursuant to s. 112.3189, F.S.

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

CS/CS/HB 1033 requires each IG to comply with instead of adopt the current Association of Inspectors General Principles and Standards.¹

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 IG under the direction of the Governor.

The bill requires each IG, at the conclusion of any audit of a program or contract that involves a singular entity contracting with the state, to submit preliminary findings and recommendations to the entity. The entity has 20 working days to respond to any adverse findings. The entity's response and the IG's rebuttal, if any, must be included in the final report. Similarly, at the conclusion of each investigation that involves a specific entity contracting with the state or an individual substantially affected, the agency IG must submit its findings and in turn the entity or individual will have 10 days to respond. Such response and the IG's rebuttal, if any, must be included in the final investigative report.

CS/CS/HB 1033 requires the CIG to receive and consider all complaints against an IG or its employees, under the jurisdiction of the Governor; and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the CIG considers appropriate.

¹ <http://www.inspectorsgeneral.org/docs/IGStandards.pdf>

The bill provides that the CIG must develop policies and procedures (not subject to rulemaking under ch. 120, F.S.) to review complaints against an agency IG or its employees under the jurisdiction of the Governor. These procedures will allow entities and individuals substantially affected by an agency IG's findings, conclusions, and recommendations the opportunity to express their complaints and present additional evidence. The bill no longer requires but rather gives the CIG discretion to review an IG's final 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." The bill also excludes state and former state employees.

The bill also requires the CIG to distribute the report of any investigation conducted or supervised by the CIG to the agency, the agency head, and the person who filed the complaint.

Agencies are required to reimburse reasonable legal fees and cost, not to exceed \$50,000, specifically associated with filing and pursuing the complaints by entities or individuals substantially affected by an IG's findings, conclusions, and recommendations if the CIG determines that the IG's adverse findings are not substantially justified. The bill does not define "substantially justified."

C. SECTION DIRECTORY:

Section 1. Amends s. 20.055, F.S., to require agency inspectors general and the Chief Inspector General to fulfill certain duties and responsibilities.

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:

Under the CS/HB 1033, the CIG estimated its office would require an additional \$4,851,788 in budget authority for 36.3 FTE's to implement the bill based on the assumption that 50% of the cases completed by agency IG would require review by the CIG. The CS/CS/HB 1033 no longer requires the CIG to

review agency IG's final investigative report but rather gives the CIG discretion whether or not to review an IG's final investigative report; thus, the fiscal impact is indeterminate since it is unknown how many reviews the CIG will decide to conduct.

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.

3. Other:

CS/CS/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.² 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."³

The bill requires the CIG to develop policies and procedures for reviewing complaints against an IG or its employees under the jurisdiction of the Governor. These policies and procedures further require the CIG to identify exemptions from this review process; however, the bill gives no guidance as to what specific categories of investigations will be exempt from the review process. As a result, the CIG will have the authority to decide what specific categories are exempt without guidance or direction from the Legislature.

Another issue is whether the CIG is usurping a judicial function since the bill allows the CIG to determine whether or not an IG's adverse findings, conclusions, and recommendations are "substantially justified." Also, "substantially justified" is not defined and may be challenged as being vague or overly broad.

B. RULE-MAKING AUTHORITY:

The bill requires the CIG to develop policies and procedures to afford entities contracting with the state and individuals who have been substantially affected by an IG's adverse findings the opportunity to express their complaint and present additional evidence. Although the substitute provides that these policies and procedures are not subject to rulemaking under ch. 120, F.S., these policies and procedures will have an effect on persons (i.e. entities contracting with the state and individuals substantially affected) not under the jurisdiction of the Governor and would likely meet the definition of a "rule" under the Administrative Procedures Act (APA). The APA is the only means to provide legislative guidance in the implementation, by the executive branch, of new statutory duties and authority. By exempting the CIG from the provisions of APA, the review process to be created can be established without the consideration of public input or comment.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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

³ Id.

The bill does not define “substantially justified” on page 12 line 346.

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

On March 28, 2007, the Government Efficiency & Accountability Council adopted a strike-all amendment. The amendment does the following:

- Authorizes the Chief Inspector General (CIG) to promulgate rules to implement the requirements of the bill.
- Provides that the review by the CIG will only apply to agencies under the jurisdiction of the Governor.
- Provides for a person wrongfully accused by a state agency in a criminal investigation to be paid for outstanding expenses incurred in defending against the wrongful accusation based on a determination by an administrative law judge that the individual has been wrongfully accused.
- Specifies the categories of investigations that may be exempted by the review process created by the bill.

On April 23, 2007, the Policy & Budget Council adopted a strike-all amendment. The amendment does the following:

- Removes each IG’s requirement to notify entities contracting with the state of reported deficiencies, abuses, or fraud; recommend a corrective plan of action; specify a timeframe for implementing the corrective plan; and report on the progress made implementing the corrective plan
- Requires each IG to comply with instead of adopt the General Principles and Standards for Offices of Inspector General.
- Requires each IG, at the conclusion of each investigation that involves a specific entity contracting with the state or an individual substantially affected, to submit it’s findings and in turn the entity or individual will have 10 days to respond. Such response and the IG’s rebuttal, if any, must be included in the final investigative report.
- Removes each IG’s requirement to employ only trained and experienced investigators.
- Requires each IG, under the Governor’s jurisdiction, to report to the CIG all written complaints or alleged misconduct concerning the office of the IG or its employees.
- Requires the CIG to receive and consider all complaints against an IG or its employees under the jurisdiction of the Governor; and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the CIG considers appropriate.
Requires the CIG to develop policies and procedures (not subject to rulemaking under ch. 120) for reviewing complaints against an IG or its employees, under the jurisdiction of the Governor, as well as identify exemptions from the review process. The amendment no longer requires but rather gives the CIG discretion to review an IG’s final report.
- Requires the CIG to distribute the report of any investigation conducted or supervised by the CIG to the subject agency, the agency head, and the person who filed the complaint.
- Requires the subject agency to reimburse reasonable legal fees and cost, not to exceed \$50,000, specifically associated with filing and pursuing the complaints by entities contracting with the state or individuals substantially affected by an IG’s findings, conclusions, and recommendations if the CIG determines that the IG’s adverse findings are not substantially justified; however, “substantially justified” is not defined.

The bill was reportedly favorably as a Council Substitute upon which this analysis is drafted.