

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

STATE OF MISSOURI ex rel. )  
MISSOURI BANKERS ASSOCIATION, )  
LEGENDS BANK and )  
JOHN A. KLEBBA, )  
 )  
Plaintiffs, )  
 )  
v. ) No.11AC-CC00550  
 )  
THOMAS A. SCHWEICH, AUDITOR )  
OF THE STATE OF MISSOURI, and )  
 )  
RICHARD J. WEAVER, DIRECTOR, )  
DIVISION OF FINANCE OF )  
THE STATE OF MISSOURI, )  
 )  
Defendants. )

**ORDER GRANTING PRELIMINARY INJUNCTION**

The Court, having considered the evidence and arguments of counsel, and being duly advised in the premises, enters its findings and orders.

COLLATERAL ESTOPPEL

The Court has considered this argument and rejects the same. There was no final judgment on the merits which is an essential element of collateral estoppel. Likewise, the denial of a petition for a writ of prohibition on the grounds that the underlying action was dismissed has no preclusive effect.

STANDING

The Court first considers the challenges to the Plaintiffs' standing. The plaintiffs include an individual banking customer, a state chartered bank and an association made

up of members, at least some of whom are state chartered banks. All plaintiffs claim to be taxpayers to the State of Missouri.

As to the individual banking customer, his rights to privacy of his information is created not only under the FDIC and Federal Reserve Rules, but also under state law. To the extent that his individual and identifying information would be made available to the State Auditor, he has an interest in his confidentiality.

As to a state chartered bank, the state statutes provide for the confidentiality for certain information provided to the Division of Finance. To the extent that this information is made available to the State Auditor, that right is implicated.

As to the association, to the extent that its members have standing and are not required individually, the association has standing.

In response, the State Auditor claims that 1) such information is already public; 2) the FDIC has already blessed the release of such information to the auditor; 3) it is not asking for such information, in the case of individuals; and 4) the confidentiality agreement makes everything all right.

First, the Court assumes that the State Auditor desires more information than available on the Web. If not, this entire litigation is not an effective use of resources on all sides. Second, the fact that the FDIC/Federal Reserve has blessed the disclosure, doesn't really solve the state law problem. Third, to the extent that information about individual account holders is not required, they would lack standing under this theory.

The original subpoenas does request such information, although the limitations by the privacy agreement may limit such disclosure. However, the Court does not have sufficient information about what would be required to rule as a matter of law. Finally, the confidentiality agreement only serves to illustrate the lack of clarity of the right of the State Auditor to this information. If it was clearly available, the agreement would not be required. It also only protects the Division of Finance and not the parties who claim a right of privacy, should the State Auditor release confidential information. There is no legal basis to prevent the State Auditor from asserting its original request.

Because the information sought is more than just financial information about the receipts and expenditures of the Division of Finance, the Court finds that the Plaintiffs' state statutory rights on confidentiality confers standing.

Alternatively, the Plaintiffs claim to have taxpayer standing. At issue is the authority of the State Auditor to expend taxpayer funds to conduct a type of audit which is alleged to be in excess of their statutory authority. It is not questioned that the Plaintiffs are taxpayers or that taxes are being expended. Plaintiffs are alleging that the State Auditor is using tax money to perform audits which they argue are unauthorized by the Missouri Constitution. As noted in *Eastern Mo. Laborers:*

Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. Even though an expenditure might produce a net gain, if the expenditure is not contemplated

by the enabling legislation, it is illegal and should be enjoined. Taxpayers must have some mechanism of enforcing the law.

781 S.W.2d at 47.

The Court has considered the cases cited by the State Auditor and finds that they can be distinguished. In both *Columbia Sussex* and *Mid American Georgian Gardens*, the challenge was to a governmental decision which was alleged as wrong. In these cases, while the agency may be have made a wrong decision, it had the authority to make a decision. In the instant cause, the challenge is to the authority to conduct an audit which goes beyond the constitutional limitations.

The Court find that Plaintiffs have alleged sufficient facts to confer standing.

#### BASIS FOR PRELIMINARY INJUNCTION

#### LIKELIHOOD OF SUCCESS ON THE MERITS

The authority of the State Auditor comes from the Missouri Constitution. It is a grant of limited authority. The last sentence of Article IV, Section 13 limits the authority of the State Auditor to conduct post audits. It states under the title of limitation of duties that: “[n]o duty shall be imposed upon him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.” The question is exactly what limits are created by this phrase?

It is not disputed that the State Auditor is limited to “post-auditing” which is a review of already completed transactions or a retrospective analysis. However, his “post-

auditing” must be “related to the supervising and auditing of the receipt and expenditure of public funds.”

There is little question that a traditional financial audit meets this criteria. Furthermore, an examination of the statutory directives given the auditor set forth in the State Auditor’s suggestions, indicates that they too involve a review of the receipt and expenditure of public funds. For example:

1. Local School Districts and Petition Audits- the State Auditor “may” audit any school district or a political subdivision upon request. Nothing in these statutory directives indicates that this is anything more than a financial audit. It is just as likely that the legislature meant to provide a backup should a district fail to comply with the biennial audit law or if the citizens did not have confidence in their local audit or if they failed and refused to conduct an audit. The inference suggested by the State Auditor that this language suggests something else is not consistent with a grant of limited authority.
2. MoHealthNet and DSS Program Integrity - this is a quantitative audit to compare amount invested (expenditures) with the amounts recovered (receipts). Surely if the legislature meant to authorize performance audits, they would have used the word qualitative.

3. Court Audits - determining if the receipt were properly expended as opposed to be diverted by theft clearly is related to receipts and expenditures.
4. The Low Income Housing Tax Credit Model. While a cost-benefit analysis would clearly have to deal with receipts and expenditures, it would appear that some of this charge would not be related to receipts and expenditures.

The words “related to the supervising and auditing of the receipt and expenditure of public funds” clearly provide some a limitation. There is no question that public entities receive and expend public funds. If the words “related to the supervising and auditing of the receipt and expenditure of public funds” are not read to limit the authority of the State Auditor to conduct post-audits, they are then ignored. This would be a violation of the canons of construction. It does not appear to the Court that the legislature has imposed duties which are not related to the supervising and auditing of the receipt and expenditure of public funds, with the exception noted for the Low Income Housing program.

It is difficult to reconcile the Yellow Book definition of a performance audit with this constitutional limitation. In paragraph 1.25, the Yellow Book provides this definition of a performance audit:

engagements that provide assurance or conclusions based on an evaluation of sufficient, appropriate evidence against stated criteria, such as specific requirements, measures or defined business practices. Performance audits provide objective analysis so that management and those charged with

governance and oversight can use the information to improve program performance and operations, reduce costs, facilitate decision making by parties with responsibility to oversee or initiate corrective action, and contribute to public accountability.

Clearly, an engagement of this nature is not limited to the supervising and auditing of the receipt and expenditure of public funds. This is best illustrated by an audit of Sunshine Law compliance. While not addressing the propriety of the State Auditor, when not an attorney, to give legal opinions, it is difficult to see how such an analysis could result from the supervising and auditing of the receipt and expenditure of public funds.

The State Auditor would direct this Court to the constitutional debates of 1945 to help construe the last clause of Article IV, Section 13. The Court would note that this provision is clearly written, is not ambiguous. Accordingly, resort to indirect sources is not required. The plain language says it all. The Court would further note that the State Auditor's reference to "efficiency" is not a statement from a delegate, but a quotation from a publication, State Government for May, 1941. There is no evidence that such quotation was adopted by the delegates, but merely that it was read to them.

The recent amendments to § 29.235.1 RSMo do not save the State Auditor. They merely substitute the Yellow Book for the term "recognized governmental auditing practices." Surely the State Auditor is not suggesting that the Yellow Book is something else. Furthermore, for this argument to have merit, every audit would have to include a

performance audit. This sub-section says whatever audit the State Auditor conducts, he must comply with these standards.

The Court has previously noted that this question has not been directly addressed by a Missouri appellate court. However, the dicta in *Director of Revenue* and the *Joint Committee* case support the Court's conclusion.

The Court finds that the Plaintiffs have demonstrated a likelihood of success on the merits.

#### IRREPARABLE HARM

If confidential information is disclosed, there will be irreparable harm. If funds generated from taxation are spent in contravention of the Constitution, a taxpayer is irreparably harmed. Plaintiffs have met this prong of *Gabbard*.

#### BALANCING THE HARM

That performance audits are a good thing and a valuable tool for accountability in government is not disputed. However, this good cannot be claimed if it is the result of unauthorized conduct. Because the Court has found that the Plaintiffs have demonstrated a likelihood of success on the merits, the balance is in favor of preliminary relief.

#### PUBLIC INTEREST

The Court has considered the arguments of the State Auditor that granting preliminary relief would destroy the legislature's constitutional authority to mandate the types of audits conducted the State Auditor and damages the public's interest in

transparency and accountability of the Division of Finance. As noted above, the Legislature cannot impose a duty which is not related to the supervising and auditing of the receipt and expenditure of public funds, so they have not constitutional authority to be destroyed. The public's interest in transparency and accountability does not authorize the State Auditor to disregard his constitutional limitations.

Also as noted earlier, performance audits, by their very nature, are retrospective. The records will continue to exist for the duration of this litigation. There is little harm asserted which would negate the rights of the Plaintiffs to judicial review of the decision to ignore what appears to be a statutory right of confidentiality or a right to challenge the expenditures of their taxes.

Accordingly, the Court finds that a preliminary injunction is authorized and required under the circumstances.

IT IS HEREBY ORDERED that pending the final hearing and determination of this cause, the Court enters its orders as follows:

- a. The State Auditor and his employees, agents and servants are hereby restrained and enjoined from accessing or attempting to access or obtaining or attempting to obtain records or information pertaining to any existing bank or bank customers in conjunction with the performance of his audits or other examinations of the Division of Finance;

b. The State Auditor and his employees, agents and servants are hereby restrained and enjoined from expending state funds in obtaining or reviewing records of specific banks and bank customers;

c. The State Auditor and his employees, agents and servants are hereby restrained from expending state funds in an audit of the Division of Finance which goes beyond a review of its receipts and expenditures;

d. The Director and his employees, agents and servants are hereby restrained from providing records or information pertaining to any existing bank or bank customer to the State Auditor or anyone from or associated with the State Auditor's office; and

e. The Director and his employees, agents and servants are hereby restrained from expending state funds for an audit of the Division of Finance which goes beyond a review of its receipts and expenditures;

IT IS FURTHER ORDERED that Plaintiffs' bond filed with the Circuit Clerk under Supreme Court Rule 92 in the sum of One Hundred Dollars (\$100.00) shall serve as the bond for this preliminary injunction.

The Clerk is directed to fax copies of this order to counsel of record.


Counsel are encouraged to contact the Court to schedule a mutually convenient time for further proceedings.

IT IS FURTHER ORDERED that service of a copy of this Order Granting Preliminary Injunction shall be made upon Defendants on or before September 23, 2011, by 5:00 p.m.

SO ORDERED.

Date: 9/22/11

Time: 8:01 AM

  
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JUDGE