STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0069

LOUISIANA DEPARTMENT OF INSURANCE THROUGH JAMES J. DONELON, COMMISSIONER OF INSURANCE

VERSUS

STEVE J. THERIOT, LOUISIANA LEGISLATIVE AUDITOR FOR THE STATE OF LOUISIANA, THE LOUISIANA LEGISLATURE THROUGH THE LEGISLATIVE AUDIT ADVISORY COUNCIL, HONORABLE JOHN N. KENNEDY, TREASURER OF THE STATE OF LOUISIANA AND HONORABLE ANGELE DAVIS, COMMISSIONER OF ADMINISTRATION FOR THE STATE OF LOUISIANA

Judgment Rendered: MAY 03 2011

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 572,609

Honorable Todd W. Hernandez, Judge Presiding

****

David S. Rubin
Baton Rouge, LA
and
Warren Byrd
Barry E. Ward
Baton Rouge, LA

Counsel for Plaintiff/Appellant,
Louisiana Department of Insurance
through James J. Donelon,
Commissioner of Insurance

E. Wade Shows
Jacqueline B. Wilson
Baton Rouge, LA
and
John Weeks, II
T. Allen Usry
New Orleans, LA
and
Jenifer Schaye
Baton Rouge, LA

Counsel for Defendant/Appellee,
Steve J. Theriot, CPA, Louisiana
Legislative Auditor

Whipple, J. dissents, for reasons assigned.

Alfred W. Speer **Mary F. Quaid** **Baton Rouge, LA** **and**	**Counsel for Defendant/Appellee, Louisiana Legislature, acting through the Legislative Audit Advisory Council**
Glenn A. Koepp **Jerry J. Guillot** **Baton Rouge, LA**	
Paul A. Holmes **Baton Rouge, LA**	**Counsel for Defendant/Appellee, Angele Davis, Commissioner of Administration for the State of Louisiana**
James H. Napper **Baton Rouge, LA**	**Counsel for Defendant/Appellee, John N. Kennedy, Treasurer of the State of Louisiana**
Uma M. Subramanian **Benjamin A. Huxen, II** **Baton Rouge, LA**	**Counsel for Defendant/Appellee, State of Louisiana**

****

BEFORE: WHIPPLE, PARRO, McDONALD, McCLENDON, AND KLINE, JJ.[1]

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore, and ad hoc* by special appointment of the Louisiana Supreme Court.

McDONALD, J.

The Louisiana Department of Insurance, through the Commissioner of Insurance, appeals a judgment of the trial court, which maintained various exceptions and dismissed with prejudice the Department of Insurance's petition. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

In October 2007, the Louisiana Legislative Auditor (Auditor)[2] commenced an audit of Louisiana Citizens Property Insurance Corporation, the Property Insurance Association of Louisiana, and the Louisiana Automobile Insurance Plan, insurance companies managed by the Louisiana Department of Insurance (hereinafter referred to as the Department). The audit was subsequently expanded, and the Auditor commenced an audit of the Department for the fiscal year 2006-2007. On October 18, 2007, the Auditor requested that the Department produce all emails from October 1, 2003, through the current date. The Department agreed to produce all documents they deemed necessary for financial and compliance audit purposes, but claimed that it was prohibited from providing access to documents protected by privileges, particularly the attorney-client and deliberative process privileges.

Failing to receive all the information it had requested, the Auditor and the Louisiana Audit Advisory Council issued a subpoena to the Commissioner of Insurance on November 7, 2007, requesting:

1. All Department of Insurance email beginning October 1, 2003 to date; and
2. A copy of all Department of Insurance backup tapes beginning October 1, 2003 to date.

[2] References to the Auditor in this opinion include members of his staff authorized to act on his behalf.

Thereafter, on November 15, 2007, the Department filed suit against the Auditor, seeking a determination that the privileges it had asserted were superior to any of the Auditor's statutory rights of access to data.

This suit was dismissed after the parties entered into a Confidentiality Agreement in March 2008, which was intended to provide the protections that concerned the Department and would grant to the Auditor the information needed to complete the audit. The chairman of the Legislative Audit Advisory Council submitted a motion to the Council to rescind the subpoena issued to the Department, advising that it was "the opinion of the Legislative Auditor that the Confidentiality Agreement has resolved the problems regarding the Auditor's access to records maintained by the LDOI for the completion of its audits." The motion also noted that the Auditor believed that the issues that were the basis for the Department's lawsuit had been resolved by the agreement.

However, in spite of the agreement, on June 20, 2008, the Auditor delivered a draft of his audit to the Department in which he claimed he was unable to complete the audit unless provided with all the information requested in the subpoena. The Auditor terminated the Confidentiality Agreement in September, because he had not received the requested records, which the Department believed it was not legally required to submit.

On September 23, 2008, the Auditor sent a letter to the Attorney General, advising that the Auditor had attempted to review records of the Department necessary to perform both financial and compliance audits, and "To date, we have not received all of the records requested." Pursuant to LSA-R.S. 24:513H,[3] the Auditor requested assistance in securing these

[3] Louisiana Revised Statutes 24:513H provides, "All auditees and their officials and staff are hereby directed to assist the legislative auditor in his work and to furnish such information, reports, aid, services, and assistance as may be requested, all without any cost or charge. It shall be the duty of the attorney general and the local district attorney

records. The letter asked that "you take whatever action you deem necessary to enforce state law," referencing several statutes, namely LSA-R.S. 24:513J, LSA-R.S. 24:518A(1)(c), LSA-R.S. 24:518A(2), LSA-R.S.14:134, LSA-R.S. 44:37. In concluding, the letter stated, "Please advise us whether or not you anticipate any action on this matter.[4] If not, I must bring the issue before the Legislative Audit Advisory Council at its next meeting."[5]

On November 12, 2008, the Auditor issued his audit, in which he asserted that he was unable to issue an opinion, "because the legislative auditor was not able to obtain complete, unfettered access to audit evidence and because [he was] unable to apply other auditing procedures to ensure completeness of the DOI records affecting the audit." The Auditor further stated that the Department "is in noncompliance with state audit law" for failing to produce all the Section 513 Data.

The Department filed a petition for preliminary injunction, permanent injunction, and declaratory judgment, which, after adjudication by the trial court, is the subject of the appeal before us. The suit asserted numerous claims, most notably for purposes of this appeal, a request for a declaratory judgment affirming that the Auditor's ability to have access to and be permitted to examine and copy Section 513 Data is subject to the protections, safeguards, privileges, and guaranties accorded by the attorney-client privilege and the deliberative process privilege. The Auditor and legislature, through the Legislative Audit Advisory Council, filed several exceptions, including a declinatory exception of lack of subject matter

---

to give assistance to the legislative auditor. The attorney general shall render his opinion in writing on any subject requested by the legislative auditor."

[4] The Auditor, explaining that the letter was not sent specifically to single out the Department for any improper purpose, testified that it was "a standard letter that our office sends when we have not gotten full cooperation from an auditee."

[5] Testimony in the trial court established that the attorney general's office did investigate the matter, but did not find any evidence of fraud that would necessitate taking further action.

jurisdiction and/or mootness, peremptory exceptions of no cause of action and no right of action, and dilatory exception of vagueness.[6]

The trial court granted the exceptions raising the objections of lack of subject matter jurisdiction and/or mootness, no right of action, and no cause of action, and all claims of the Department were dismissed. The exception raising the objection of vagueness was found to be moot. A judgment to this effect was signed by the trial judge on August 7, 2009. The Department has appealed the portion of the judgment granting the peremptory exception raising the objection of no cause of action, and cites two assignments of error:

1. The trial court erred in its ruling that an entity subject to audit by the Louisiana Leglislative Auditor has no cause of action to assert that the type of data enumerated in La-R.S. 24:513(A)(1)(a) does not include documents protected by the attorney-client privilege.

2. The trial court erred in its ruling that an entity subject to audit by the Louisiana Legislative Auditor has no cause of action to assert that the type of data enumerated in La-R.S. 24:513(A)(1)(a) does not include documents protected by the deliberative process privilege.

DISCUSSION

Initially, we address the arguments of the Auditor and the Legislative Audit Advisory Council that the issues presented in the Department's assignments of error are moot, because the final audit has been issued and the Auditor is no longer seeking the data that the Department contends is protected by privilege. As noted by the Department, the correctness of the disclaimer in the final audit, i.e., that the Auditor could not render an opinion on the financial statements of the Department, because he did not have complete access to all documents requested, remains at issue herein. If, in fact, a determination were made that the Auditor was not entitled to access privileged data in conducting financial and compliance audits,

[6] The only exception addressing the Department's request for a declaratory judgment on privileged information was the peremptory exception raising the objection of no cause of action.

then the underlying basis for his refusal to render an opinion in the final audit could be erroneous. Moreover, in determining whether an issue is moot, a court should consider whether there is any reasonable expectation that the complained-of conduct will recur. *Louisiana State Board of Nursing v. Gautreaux*, 2009-1758 (La. App. 1st Cir. 6/11/10), 39 So.3d 806, 812; *writ denied,* 2010-1957 (La. 11/5/10 50 So.3d 806. Clearly, this is an issue that will continue to arise between the Auditor and the agencies of the state, given the scope of the Auditor's duties and obligations.

The Auditor has a daunting function to perform, because the legislature relies on the Auditor's office in large part in ensuring the financial solvency of the State.[7] It is necessary and essential that each auditee cooperate with the Auditor in order for these duties to be lawfully completed. Several provisions in the Louisiana Revised Statutes Title 24, Chapter 8, entitled, "Legislative Auditor; Legislative Audit Advisory Council," provide for the duties of auditees and the penalties for failure to perform them. Louisiana Revised Statutes 24:513H was noted previously. Louisiana Revised Statutes 24:513K provides: "Whoever violates the provisions of this Section shall be fined not more than one thousand dollars and shall be deemed guilty of malfeasance and gross misconduct in office, and shall be subject to removal." Malfeasance and removal from office are very stringent penalties. Clearly, this indicates that the legislature intended for auditees to cooperate with the Auditor.

In addition to the provisions in Title 24 addressing duties of auditees, in 2008 the legislature amended portions of Title 39, dedicated to public finance, and enacted LSA-R.S. 39:72.1 to provide, in part:

---

[7] The financial condition of the State obviously is a concern that all branches of government consider, but the control of monies and responsibility for fiscal policy statewide is shared between the legislative and executive branches.

> (A) Notwithstanding any contrary provision of law, no funds appropriated in the general appropriations act, the capital outlay act, or other appropriation act, shall be released or provided to any recipient of an appropriation if, when, and for as long as, the recipient fails or refuses to comply with the provisions of R.S. 24:513.

Because of the strict penalties for failure "to comply with the provisions of R.S. 24:513," or otherwise cooperate with the legislative auditor, the Department seeks judicial interpretation of this statute. The Department has indicated that it has concerns regarding the constitutionality of the statute. We recognized in *Kyle v. Louisiana Public Service Commission,* 2003-0584 (La. App. 1st Cir. 4/2/04), 878 So. 2d 650, 657, that separation of powers issues are implicated in judicial interpretation of the statutes in Title 24 dealing with the Auditor. We decline to address any constitutional issues here. We note that it is preferable to render judgments, when possible, by interpretation of a statute without reaching issues of constitutionality, because statutes are presumed to be constitutional. See *Southern Silica of La. v. La. Ins. Guaranty Assoc.* 2007-1680 (La. 4/8/08), 979 So.2d 460, 466-67. The Department may seek judicial interpretation of LSA-R.S. 39:72.1 through another suit for injunctive relief, in the event an action is taken that affects its funding.

An examination of Title 24 is sufficient to resolve the issue in this case. Originally a subpoena was issued for access to the documents that the Auditor claimed were necessary. Pursuant to LSA-R.S. 24:513M(1), the Auditor and the chairman of the Legislative Audit Advisory Council may jointly issue a subpoena for the production of documents it deems necessary to perform its duties. This procedure was initially followed when a subpoena was issued on November 7, 2007. If the subpoenaed information is not forthcoming, then the statute provides that a district court, upon joint application by the Auditor and the chairman of the Legislative Audit Advisory Council, should address

the matter. LSA-R.S. 24:513M(2). In this case, however, as noted, the Auditor and the Department reached an agreement regarding the production of documents, and the subpoena was recalled. When the Auditor later did not receive data that it thought it needed to complete its audit, instead of following the procedure statutorily established to address this situation, the Auditor took the action outlined above.

When the statute is followed, an auditee will be required to have the issue decided by the district court. Courts routinely decide matters over which parties disagree. It is problematic for one of the parties, unilaterally, to decide the issue, especially considering the enormity of the consequences of a finding of failure to comply with the provisions of LSA-R.S. 24:513. The nature of the procedure and the importance of the Auditor receiving the data necessary to complete an audit timely must influence the court to give the matter an expeditious hearing.

The Department maintains that privileged documents are not data subject to LSA-R.S. 24:513. The Auditor's interpretation of LSA-R.S. 24:513 allows it "complete and unfettered access to audit evidence," including privileged documents. We agree that the Auditor must have "unfettered access to audit evidence." What's at issue here, however, is what constitutes "audit evidence." As stated in the Government Accounting Standards, "The principles of transparency and accountability for the use of public resources are key to our nation's governing processes. Government officials and recipients of federal moneys are responsible for carrying out public functions efficiently, economically, effectively, ethically, and equitably, while achieving desired program objectives." Government Accounting Standards, July 2007 revision, page 1. The data necessary to conduct a proper audit depends on the

nature of the audit; and the Government Accounting Standards details the requirements.

The Auditor interprets the phrase "confidential or otherwise" found in LSA-R.S. 24:513I to include privileged documents. After careful examination of the law, we do not agree. Certain duties of the Auditor and his concomitant authority to access, examine, and copy documents in the possession of an auditee are set forth in LSA-R.S. 24:513, which provides, in pertinent part, as follows:

> A. (1)(a) Subject to Paragraph (3) of this Subsection, the legislative auditor shall have authority to compile financial statements and to examine, audit, or review the books and accounts of the state treasurer, all public boards, commissions, agencies, departments, political subdivisions of the state, public officials and employees, public retirement systems enumerated in R.S. 11:173(A), municipalities, and all other public or quasi public agencies or bodies, hereinafter collectively referred to as the "auditee". The scope of the examinations may include financial accountability, legal compliance and evaluations of the economy, efficiency, and effectiveness of the auditee's programs or any combination of the foregoing. In addition to the authority granted above, the legislative auditor shall have access to and be permitted to examine all papers, books, accounts, records, files, instruments, documents, films, tapes, and any other forms of recordation of all auditees, including but not limited to computers and recording devices, and all software and hardware which hold data, is part of the technical processes leading up to the retention of data, or is part of the security system. This access shall not be prohibited by Paragraph (3) of this Subsection.
>
> * * *
>
> E. In the performance of his duties as herein stated, the legislative auditor, or any member of his staff designated by him, shall have the power to inspect and to make copies of any books, records, instruments, documents, files, films, tapes, and other forms of recordation, including but not limited to computer and recording devices, of the auditee. He may call upon the auditee and any of its officials and staff for assistance and advice, and such assistance shall be given through the assignment of personnel or in such other manner as necessity requires.
>
> * * *
>
> I. The authority granted to the legislative auditor in this Section to examine, audit, inspect or copy shall extend to all

> books, accounts, papers, documents, records, files, instruments, films, tapes, and any other forms of recordation, including but not limited to computers and recording devices, whether **confidential or otherwise**. However, the legislative auditor shall comply with any and all restrictions imposed by law on documents, data, or information deemed confidential by law and furnished to the legislative auditor. (emphasis added).
>
> * * *
>
> M.(1) In the performance of his duties the legislative auditor, or any member of his staff designated by him, may compel the production of public and private books, documents, records, papers, films, tapes, and electronic data processing media. For such purpose the legislative auditor and the chairman of the Legislative Audit Advisory Council may jointly issue a subpoena for the production of documentary evidence to compel the production of any books, documents, records, papers, films, tapes, and electronic data processing media regarding any transaction involving a governmental entity.

The Department contends that there is a difference between information that is "privileged" (i.e., protected by a recognized legal privilege) and information that is "confidential." It argues that the data to which the Auditor has been granted access pursuant to LSA-R.S. 24:513 cannot and does not extend to privileged data, nor to information that is part of the deliberative process. In support, the Department argues that while the language of LSA-R.S. 24:513, as set forth in LSA-R.S. 24:513I, refers to and authorizes the Auditor to access confidential information, the statute omits (and therefore does not allow for) access to privileged information.

The attorney-client privilege is recognized by the legislature in LSA-C.E. art. 506, which specifically provides that "[a] client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication" under certain circumstances.[8] LSA-C.E. art.

[8]A "confidential" communication is further defined as a communication that "is not intended to be disclosed to persons other than" those to whom the disclosure is made in furtherance of obtaining or rendering professional legal services, those reasonably necessary for the transmission of the communication, and, when special circumstances warrant, those who are

506B. It is a very important privilege, with a long jurisprudential history. See Frank L. Maraist, Evidence and Proof in 19 Louisiana Civil Law Treatise, §8.6 (2d ed. 2007). The deliberative process privilege protects "confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government." *Kyle v. Louisiana Public Service Commission,* 878 So.2d at 659, quoting *Taxation With Representation Fund v. Internal Revenue Service,* 646 F.2d 666, 677 (D.C. Cir. 1981).

The Auditor contends that the requirement of LSA-R.S. 24:513I that the Auditor maintain confidentiality of any confidential documents received is sufficient to safeguard the privileges. While the legal requirement regarding the confidentiality is correct, and is sufficient to prevent access to documents pursuant to the Public Records Law, we do not find it persuasive in this context. See *Kyle v. Perrilloux,* 02-1816 (La. App. 1 Cir. 11/7/03), 868 So.2d 27. We note the mandate of LSA-R.S. 24:513I that the Auditor comply with any and all "restrictions imposed by law." A "privilege" constitutes a "restriction imposed by law." Further, the law controls how the Auditor must treat the information it receives. The Auditor must maintain confidentiality. However, this does not answer the question before us, which is whether the Auditor has a right to receive the information in the first place.

We find merit in the Department's assertion that the language of LSA-R.S. 24:513, which grants the Auditor broad access to information, "confidential or otherwise," does not extend to "confidential" communications that might be subject to an evidentiary privilege. We note that Louisiana Code of Evidence article 1101A(2) provides, in pertinent part, with regard to privileges:

> Furthermore, except as otherwise provided by legislation, Chapter 5 of this Code with respect to testimonial privileges applies to all stages

---

present at the behest of the client and are reasonably necessary to facilitate the communication. LSA-C.E. art. 506(A)(5).

> of all actions, cases, and proceedings where there is power to subpoena witnesses, including administrative, ... legislative, ... and judicial proceedings.

Additionally, there are numerous instances in the law where the legislature has explicitly mentioned, or differentiated "confidential" from "privileged" in order to show whether it intended the words "confidential or otherwise" to encompass privileged material. Statutes have repeatedly designated when a privilege is to be included when dealing with information or communications. One example is found in Title 24, and particularly references the Department. Subsection C of LSA-R.S. 24:775 provides that "[t]he commissioner [of insurance] shall furnish the committee [legislative committee] with all information and data which the committee requests except for any such information which is privileged or confidential by law." See also LSA-R.S. 22:2, LSA-R.S. 22:639, LSA-R.S. 40:1232.7.

Had the legislature intended privileged information to be included in LSA-R.S. 24:513I, it would have said "confidential, privileged, or otherwise," and not just "confidential or otherwise." Information that is privileged is always confidential, but confidential information is not always privileged. When the legislature intends for privileged information to be overridden by statute, the statute clearly indicates that the privilege is trumped by the statute. In the present case, there is no indication that the statute in question is specifically intended to supplant any privilege. Due to the importance of the attorney-client privilege, any doubt as to whether privilege should be encompassed by the words "confidential or otherwise" should be resolved in favor of the two words' separate natures in order to preserve the privilege.

We find further support for this position by interpreting the provisions of Chapter 8 of Title 24 only. The legislature repeatedly employs the qualifier, "in the performance of his duties" when providing for the authority of the

Auditor. We are led inescapably to the conclusion that the access to information granted to the Auditor is only to include information that is reasonably related to a lawfully performed audit. Therefore, we find that an auditee has the right to challenge access to any documents that it believes it is not legally required to submit. In the case of disputes regarding the necessity for receipt of documents in order for the Auditor to lawfully perform his duties, the district court must resolve the dispute, and *in camera* inspections are available for balancing the need to protect privileged documents with the requirement for transparency in fiscal matters involving public funds. Further, considering the vital roles and competing interests of the Auditor and Department in serving the people of Louisiana and the need for openness and prompt resolution of disputes that arise in the auditing process, it is imperative that any legal challenge be decided expeditiously so as to avoid undue delay. There is a compelling interest to do so.

CONCLUSION

We conclude that an auditee's duty to provide information to the Auditor in connection with an audit is restricted by evidentiary privileges, whether legislatively enacted or jurisprudentially created. We further conclude, that any dispute between the Auditor's office and an auditee must be resolved in accordance with the statute, i.e., that a subpoena must be filed jointly by the Auditor and the Legislative Audit Advisory Council. If the documents subpoenaed are not provided, then an action may be initiated in the appropriate district court, which must be heard expeditiously. An auditee also has the right to seek a ruling from the district court as to whether the documents sought by the auditor's office are legally required to be submitted. Accordingly, we find error in the trial court's conclusion that the Department failed to state a cause of action for a judgment declaring that the type of

information enumerated in LSA-R.S. 24:513A(1)(a) excludes documents protected by the attorney-client and deliberative process privileges.

For the above and foregoing reasons, that portion of the trial court's August 7, 2009 judgment granting the exception raising the objection of no cause of action is reversed. This matter is remanded for further proceedings, if necessary. Costs of this appeal in the amount of $1,697.49 are assessed against the Auditor.

REVERSED AND REMANDED.

LOUISIANA DEPARTMENT OF INSURANCE THROUGH JAMES J. DONELON, COMMISSIONER OF INSURANCE

VERSUS

STEVE J. THERIOT, LOUISIANA LEGISLATIVE AUDITOR FOR THE STATE OF LOUISIANA, THE LOUISIANA LEGISLATURE THROUGH THE LEGISLATIVE AUDIT ADVISORY COUNCIL, HONORABLE JOHN. N. KENNEDY, TREASURER OF THE STATE OF LOUISIANA AND HONORABLE ANGELE DAVIS, COMMISSIONER OF ADMINISTRATION FOR THE STATE OF LOUISIANA

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0069

WHIPPLE, J., dissenting.

The majority holds that "an auditee's duty to provide information to the legislative auditor in connection with an audit is restricted by any evidentiary privileges, whether legislatively enacted or jurisprudentially created." In my view, this conclusion is unsupported by law and, more importantly, undermines important public policy considerations: the need and desire for open and transparent accountability regarding the public fisc. Thus, I respectfully dissent from the majority's decision to reverse the judgment of the trial court, which: (1) had maintained the Legislative Auditor's exception of no cause of action on the basis that the Department of Insurance had not stated a cause of action for judgment declaring that the records sought by the Legislative Auditor were not discoverable due to the attorney-client and deliberative process privileges and (2) which also had maintained the exceptions of lack of subject matter jurisdiction and/or mootness with regard to the requests for injunctive relief.

According to the Department of Insurance, the legal question presented in this appeal is whether the Legislative Auditor is permitted to

obtain documents from a state agency (or other entity subject to its audit authority) where those documents are protected by the attorney-client and deliberative process privileges. Thus, this court was called upon to determine whether the law affords the Department of Insurance the right to assert, through a declaratory judgment action, these privileges against the Legislative Auditor's request for access to Department of Insurance documents in conjunction with financial and compliance audits.

The Office of the Legislative Auditor is established in the Louisiana Constitution. Article III, Section 11 provides that "[t]here shall be a legislative auditor responsible solely to the legislature." This constitutional article further provides that the Legislative Auditor shall serve as fiscal advisor to the legislature and "shall perform the duties and functions provided by law related to auditing fiscal records of the state, its agencies, and political subdivisions." LSA-Const. art. III, § 11. Certain duties of the Legislative Auditor and his concomitant authority to access, examine, and copy documents in the possession of an auditee are set forth in LSA-R.S. 24:513, which provides, in pertinent part, as follows:

> A. (1)(a) Subject to Paragraph (3) of this Subsection, **the legislative auditor shall have authority to compile financial statements and to examine, audit, or review the books and accounts of** the state treasurer, **all** public boards, commissions, **agencies, departments**, political subdivisions of the state, public officials and employees, public retirement systems enumerated in R.S. 11:173(A), municipalities, and all other public or quasi public agencies or bodies, hereinafter collectively referred to as the "auditee". **The scope of the examinations may include financial accountability, legal compliance and evaluations of the economy, efficiency, and effectiveness of the auditee's programs or any combination of the foregoing.** In addition to the authority granted above, **the legislative auditor shall have access to and be permitted to examine all papers, books, accounts, records, files, instruments, documents, films, tapes, and any other forms of recordation of all auditees, including but not limited to computers and recording devices, and all software and hardware which hold data, is part of the technical processes**

> **leading up to the retention of data, or is part of the security system.** This access shall not be prohibited by Paragraph (3) of this Subsection.
>
> * * *
>
> E. **In the performance of his duties** as herein stated, **the legislative auditor**, or any member of his staff designated by him, **shall have the power to inspect and to make copies of any books, records, instruments, documents, files, films, tapes, and other forms of recordation, including but not limited to computer and recording devices, of the auditee.** He may call upon the auditee and any of its officials and staff for assistance and advice, and such assistance shall be given through the assignment of personnel or in such other manner as necessity requires.
>
> * * *
>
> I. The authority granted to the legislative auditor in this Section to examine, audit, inspect or copy shall extend to all books, accounts, papers, documents, records, files, instruments, films, tapes, and any other forms of recordation, including but not limited to computers and recording devices, **whether confidential or otherwise**. However, the legislative auditor shall comply with any and all restrictions imposed by law on documents, data, or information deemed confidential by law and furnished to the legislative auditor.
>
> * * *
>
> M. (1) In the performance of his duties the legislative auditor, or any member of his staff designated by him, may compel the production of public and private books, documents, records, papers, films, tapes, and electronic data processing media. For such purpose the legislative auditor and the chairman of the Legislative Audit Advisory Council may jointly issue a subpoena for the production of documentary evidence to compel the production of any books, documents, records, papers, films, tapes, and electronic data processing media **regarding any transaction involving a governmental entity**.

(Emphasis added).

In furtherance of the statutory authority granted to the Legislative Auditor in LSA-R.S. 24:513 to access, examine, and copy documents of the auditee, the legislature has also imposed upon the auditee the duty to furnish such information to the Legislative Auditor. Specifically, LSA-R.S. 24:513(H) provides that "[a]ll auditees and their officials and staff are

hereby directed to assist the legislative auditor in his work and to furnish such information, reports, aid, services, and assistance as may be requested, all without any cost or charge." Additionally, LSA-R.S. 24:518 imposes penalties upon an auditee who refuses to furnish the Legislative Auditor with requested data, "**whether confidential or otherwise.**" (Emphasis added). Further, LSA-R.S. 24:513(M), which grants the Legislative Auditor and the Audit Advisory Council the authority to issue a subpoena to compel the production of data, further provides that the failure to obey such a subpoena may be punished as a contempt of court. Finally, LSA-R.S. 39:72.1(A) provides that "no funds...shall be released or provided to any recipient of an appropriation if, when, and for as long as, the recipient fails or otherwise refuses to comply with the provisions of R.S. 24:513." Thus, these provisions clearly grant the Legislative Auditor broad authority to access, examine and copy documentation of state agencies and departments and seek to compel compliance by an auditee to any requests for access.

In its brief on appeal, the Department of Insurance recognizes that the Legislature has the "prerogative to enact a statute that explicitly requires that documents produced to the [Legislative Auditor] must include documents protected by the attorney-client and deliberative process privileges, and, if such statute passes constitutional muster, auditees will be subject thereto." Contending that there is a difference between "information that is 'privileged' (i.e., protected by a recognized legal privilege) and information that is 'confidential,'" it argues that the data to which the Legislative Auditor has been granted access pursuant to LSA-R.S. 24:513 "[cannot] and does not extend to privileged data." In support, the Department of Insurance argues that while the language of LSA-R.S. 24:513, as set forth in LSA-R.S. 24:513(I), refers to and authorizes the Legislative Auditor to access

confidential information, the statute omits (and therefore does not allow for) access to **privileged** information.

The attorney-client privilege is a statutory creation and is set forth in LSA-C.E. art. 506, which specifically provides that "[a] client has a privilege to refuse to disclose, and to prevent another person from disclosing, a **confidential** communication" under certain circumstances.[1] LSA-C.E. art. 506(B) (emphasis added). The "deliberative process privilege protects '**confidential** intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government.'" Kyle v. Louisiana Public Service Commission, 2003-0584 (La. App. 1st Cir. 4/2/04), 878 So. 2d 650, 659, quoting Taxation With Representation Fund v. Internal Revenue Service, 646 F.2d 666, 677 (D.C. Cir. 1981) (emphasis added). On review, I find no merit to the Department of Insurance's assertion that the language of LSA-R.S. 24:513, which grants the Legislative Auditor broad access to information, "**confidential or otherwise**," does not extend to "confidential" communications that might otherwise be subject to an evidentiary privilege.

In further support of its position that it has stated a cause of action for judgment declaring that the Legislative Auditor's access to Department of Insurance data is limited by the attorney-client and deliberative process privileges, the Department of Insurance relies upon this court's previous opinion in Kyle v. Louisiana Public Service Commission. At the outset, I note that in Kyle, the Legislative Auditor sought to obtain emails from the Louisiana Public Service Commission as part of a **performance** audit, an

[1]A "confidential" communication is further defined as a communication that "is not intended to be disclosed to persons other than" those to whom the communication is made in furtherance of obtaining or rendering professional legal services, those reasonably necessary for the transmission of the communication, and, when special

audit specifically limited in scope by the statute authorizing it.[2] When the Public Service Commission denied the Legislative Auditor access to certain emails until they could be reviewed to insure that they did not contain privileged material, the Legislative Auditor filed a petition for writ of mandamus in the district court, contending that the Public Service Commission had no discretion in regard to producing the documents needed by the Legislative Auditor to conduct the performance audit. Kyle, 878 So. 2d at 651.

In reversing the district court's grant of a writ of mandamus, this court held that mandamus was not the proper procedural vehicle to compel production of the emails sought by the Legislative Auditor. Rather, this court held the Legislative Auditor should have sought the documentation purportedly necessary for a **performance** audit "through the courts by subpoena." Kyle v. Louisiana Public Service Commission, 878 So. 2d at 654; see LSA-R.S. 24:513(M)(1) (which provides that the Legislative Auditor may compel the production of documentation by jointly issuing a subpoena with the Audit Advisory Council). Thus, because this court determined that mandamus was "not lawful" as a procedure to compel production of the documentation sought, Kyle v. Louisiana Public Service Commission, 878 So. 2d at 655, we did not have to reach the substantive issue of whether the Legislative Auditor's access to documentation could be restricted by any privileges.

---

circumstances warrant, those who are present at the behest of the client and are reasonably necessary to facilitate the communication. LSA-C.E. art. 506(A)(5).

[2]The Louisiana Performance Audit Program was created to identify and plan for the state's long-term needs in addition to finding solutions to present fiscal problems and, in furtherance of that goal, empowers the Legislative Auditor to evaluate and audit the functions and activities of the agencies of state government. LSA-R.S. 24:522; La. Op. Att'y Gen. No. 07-0168, p. 3 (2008).

Moreover, although this court thereafter discussed, arguably in dicta, an auditee's right to assert the attorney-client and deliberative process privileges, this court specifically noted that our analysis of that issue was limited to the particular facts before us, i.e., a **performance** audit, a type of audit not at issue herein.[3] Kyle v. Louisiana Public Service Commission, 878 So. 2d at 657-659. Accordingly, because the audits at issue herein were fiscal and compliance audits, I would conclude that any opinions or observations made by the court in Kyle are not dispositive of the issues squarely before us in the present case. As stated above, in the context of a fiscal audit, the access granted to the Legislative Auditor pursuant to LSA-R.S. 24:513, by the very language of the statute, is broad, extending to data that is "confidential or otherwise." LSA-R.S. 24:513(I).

Nonetheless, the Department of Insurance suggests that this broad grant of authority is nonetheless limited by the attorney-client privilege, an evidentiary privilege set forth in LSA-C.E. art. 506, and the deliberative process privilege, a jurisprudentially created doctrine. I note, as did this court in Kyle, that there is little jurisprudence in this state interpreting LSA-R.S. 24:513. Moreover, I have found no jurisprudence in this state discussing whether the broad access granted to the Legislative Auditor by this statute may be limited by the privileges at issue where the Legislative Auditor seeks the information in the performance of financial and compliance audits.

---

[3]In Kyle, this court suggested that an auditee had the right to assert both the attorney-client and the deliberative process privileges to limit the Legislative Auditor's access to information he sought in conducting a performance audit. Stating that the statutorily created Performance Audit Program did not require the Legislative Auditor to perform the functions he was attempting to perform, i.e., evaluating, verifying, and analyzing the communications between employees of a particular agency, the entities it regulates, and the citizens as a whole when that agency is an executive branch office, we questioned whether, under the facts therein, the Public Service Commission had a duty to disclose the communications at issue. Kyle v. Louisiana Public Service Commission, 878 So. 2d at 656-657 & 658-659.

However, one opinion I have found to be persuasive and instructive, even though it involved a performance audit rather than a financial or compliance audit, is a 2007 opinion of the Nebraska Attorney General in which he was called upon to determine whether the authority of Nebraska's Legislative Performance Audit Committee to review the records of state agencies was subject to the attorney-client privilege. Neb. Op. Att'y Gen. No. 07004 (2007). In its 2007 opinion, the Nebraska Attorney General noted that previously in 2004, the Nebraska Legislative Performance Audit Committee had asked the Nebraska Attorney General for an opinion on whether the audit committee had inherent authority to access any and all of an agency's information and records, confidential or otherwise. Neb. Op. Att'y Gen. No. 07004 at p. 1; Neb. Op. Atty. Gen. No. 04022, p. 2 (2004). In that previous opinion, the Nebraska Attorney General opined that state "agencies may well be able to assert evidentiary privileges in response to records requests from the Committee in connection with an audit," but noted that some of the uncertainties in the state's statutes could be remedied by clarifying legislation to overcome an evidentiary privilege in an audit.[4] Neb. Op. Att'y Gen. No. 04022 at p. 4.

In his 2007 opinion, the Nebraska Attorney General further noted that after the issuance of the 2004 opinion, the Nebraska Legislature had amended the Nebraska statutes to specifically provide that the Legislative Performance Audit Section "shall have access to any and all information and records, **confidential or otherwise**, of any agency." Neb. Rev. Stat. § 50-1213(1); Neb. Op. Att'y Gen. No. 07004 at p. 3. The Attorney General noted, however, that the attorney-client privilege was also codified in

[4]However, the Nebraska Attorney General further opined that the general authority of the Nebraska Legislative Auditor was broader than that of the Performance Audit Committee. Neb. Op. Att'y Gen. No. 04022 at p. 4.

Nebraska law in Neb. Rev. Stat. § 27-503. Neb. Op. Att'y Gen. No. 07004 at p. 3. Nonetheless, the Nebraska Attorney General concluded that it was possible to construe and apply § 50-1213(1) and § 27-503 in a way that gave effect to both statutes by taking into account the confidentiality provisions contained in additional subsections of § 50-1213. Neb. Op. Att'y Gen. No. 07004 at p. 4.

Specifically, the Nebraska Attorney General noted that after § 50-1213(1) established the Legislative Performance Audit Section's right to access information in connection with a performance audit, additional subsections of that same statute imposed confidentiality requirements upon the Legislative Performance Audit Section and the members of the Legislative Performance Audit Committee. The Statute provided, in part: (1) that "any confidential information or confidential records shared with the section shall remain confidential"; (2) that any speaker, chairperson or employee who knowingly divulged such confidential information or records shall be guilty of a misdemeanor; (3) that no member of the committee or section employee acting at the direction of the committee shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters relating to the work of the section; and (4) that the working papers obtained or produced by the committee or section shall not be considered public records. Neb. Rev. Stat. § 50-1213(2)-(5); Neb. Op. Att'y Gen. No. 07004 at pp. 4-5.

Thus, the Nebraska Attorney General concluded that while § 50-1213(1) clearly granted the Legislative Performance Audit Section broad access to confidential information for the purpose of performance audits, latter subsections of the statute strictly prohibited the disclosure and dissemination of that confidential information. Accordingly, the Nebraska

Attorney General concluded that, giving effect to both § 50-1213 and the attorney-client privilege as set forth in § 27-503, the Legislative Performance Audit Section would "have access to confidential material subject to the attorney/client privilege, yet the privilege could be preserved, since the material could not be disclosed." Neb. Op. Att'y Gen. No. 07004 at p. 5.

For those reasons, the Nebraska Attorney General opined that, in connection with the performance audit of an agency, the Legislative Performance Audit Section could access information and records belonging to that agency which were subject to the attorney-client privilege. However, like Louisiana's statutory scheme, the Nebraska statute includes protections from unwarranted disclosures by providing that privileged information could neither be included nor discussed in the Section's audit report, nor could the Section, its employees, or the Committee disclose that privileged material in any manner contrary to § 50-1213. Neb. Op. Att'y Gen. No. 07004 at p. 5.

Similarly, in the instant case, while the access granted to the Legislative Auditor pursuant to LSA-R.S. 24:513 is broad, extending to data that is "confidential or otherwise," LSA-R.S. 24:513(I) further provides that the Legislative Auditor must "comply **with any and all restrictions** imposed by law on documents, data, or information deemed confidential by law and furnished to the legislative auditor." (Emphasis added); Kyle v. Perrilloux, 2002-1816 (La. App. 1st Cir. 11/7/03), 868 So. 2d 27, 32-33; La. Op. Att'y Gen. No. 08-0055A (2008). Clearly, this provision places a recognizable duty on the Legislative Auditor to protect the data provided to

him which is confidential and which may be protected by any evidentiary privilege.[5]

Moreover, pursuant to LSA-R.S. 24:513(G), although the audit reports issued by the Legislative Auditor are public records as provided by LSA-R.S. 44:6, "any documents, data, or information furnished the legislative auditor which are deemed confidential by law" are specifically exempted from the Public Records Law. Kyle v. Perrilloux, 868 So. 2d at 32-33. Similarly, LSA-R.S. 44:4(6) exempts from the Public Records Act "any records, writings, accounts, letters, letter books, photographs, or copies or memoranda thereof in the custody or control of the legislative auditor," thereby further protecting data provided to the Legislative Auditor from disclosure.[6] See La. Op. Att'y Gen. No. 08-0055A at p. 1.

Additionally, as further protection against a breach of the duties set forth in LSA-R.S. 24:513, subsection K of LSA-R.S. 24:513 provides that "[w]hoever violates the provisions of this Section shall be fined not more than one thousand dollars and shall be deemed guilty of malfeasance or gross misconduct in office, and shall be subject to removal."

Thus, similar to the statutory framework of Nebraska, the legislation of our state granting the Legislative Auditor access to data of state agencies

---

[5]See also LSA-C.E. art. 502B, which provides that "[a] claim of privilege is not defeated by a disclosure which . . . was compelled."

[6]Louisiana Revised Statute 44:4(6) provides: "This Chapter shall not apply ... [t]o any records, writings, accounts, letters, letter books, photographs, or copies or memoranda thereof in the custody or control of the legislative auditor, or to the actual working papers of the internal auditor of a municipality **until the audit is complete**, unless otherwise provided." (Emphasis added). The language "or to the actual working papers of the internal auditor of a municipality until the audit is complete" was added by Louisiana Acts 1991, No. 167. In interpreting LSA-R.S. 44:4(6), the Louisiana Attorney General has opined that the language addressing the length of the exemption (i.e., until the audit is complete) should not apply to the Legislative Auditor. La. Op. Att'y Gen. No. 08-0055A at p. 1. Given that this particular language was added as part of the phraseology exempting working papers of the internal auditor of a municipality, I agree with the Attorney General's interpretation that the time limitation imposed on this exemption from the Public Records Act does not apply to the Legislative Auditor. See generally Kyle v. Perrilloux, 868 So. 2d at 32-33.

in the performance of financial and compliance audits, "whether confidential or otherwise," can be reconciled with other legislation or jurisprudence establishing evidentiary privileges as to certain confidential information. Because of the protections against disclosure by the Legislative Auditor of confidential information that is provided to the Legislative Auditor by an auditee, I would conclude that an auditee's duty to provide information to the Legislative Auditor in connection with a financial or compliance audit is not tempered or restricted by any evidentiary privileges, whether legislatively enacted or jurisprudentially created. Accordingly, I find no error in the trial court's conclusion that the Department of Insurance had failed to state a cause of action for judgment declaring that the type of data enumerated in LSA-R.S. 24:513(A)(1)(a) excludes documents protected by the attorney-client or deliberative process privileges.

For these reasons, I respectfully dissent.