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December 27, 2024

William Kaplita, Director of State Audits
Office of the State Auditor Diana DiZoglio
521 East Street
Chicopee, MA 01020

Dear Mr. Kaplita:

On behalf of the offices and agencies of the executive department, the Office of the Governor appreciates the opportunity to respond to the Office of the State Auditor's (OSA) Audit of State Employees Settlement Agreements Across Multiple State Agencies.

This performance audit conducted by OSA addresses state employee settlement agreements entered during a thirteen-year period between January 1, 2010 and December 31, 2022. The audit period predates the start of the Healey-Driscoll Administration, and the audit's findings reflect improvements to policies and practices brought about by advocacy and leadership in this area over time. The audit's findings also demonstrate that state employees overwhelmingly acted with diligence, professionalism, and adherence to long-standing policy in the vast majority of instances. In reviewing the findings, we are reassured to see that settlement activity and expense remained largely constant across the audit period and did not grow over time. And we are also reassured to see that the use of non-disclosure agreements in state settlements has been increasingly rare.

The investigation and resolution of employment claims is important and often challenging work. We are grateful for the efforts of the public servants who work daily to fairly resolve workplace disputes and promote compliance with our employment laws, rules, and policies. We are also grateful for the extensive efforts made by many to produce and analyze the settlements and related documentation at issue in this report.

We share OSA's overarching goal of promoting a settlement and claims payment process that is consistent, transparent, and fair. We disagree with some of the audit's specific findings and recommendations, but these disagreements should not overshadow our shared commitment to continue to ensure fairness and transparency in this important area. As further outlined below, the executive department is committed to taking several steps to further advance our shared goals.

We offer the below specific responses to the audit report:

Audit Finding 1: "Executive branch state agencies and departments do not have documented internal policies or procedures on the authorization, development, documentation, and retention of state employee settlement agreements and supporting records."

Response to Finding 1:

The executive department agrees that documenting policy and procedures can help ensure consistent practice across a broad and wide-ranging government. The audit report's conclusions notwithstanding, several internal and external policies and procedures governed the authorization, development, documentation, and retention of state employee settlement agreements during the audit period:

- The Office of the Comptroller's Policy on Settlements and Judgments, and the associated regulations at 815 CMR 5.00 *et seq.*, applied to the processing of settlements during the audit period, and were mandatory for executive department offices and agencies to follow. *See* 815 CMR 5.02. The policy and regulations prescribed, among other things, record-keeping requirements and required written justifications for settlements (815 CMR 5.09(1)); required approvals for settlements at certain monetary levels (S&J Policy at p. 34); limitations on settlement agreement terms and available monetary compensation (S&J Policy at pp. 12-25); and limitations on the enforceability of confidentiality provisions (S&J Policy at p.8).

- The Secretary of State's Statewide Records Retention Schedule required the retention of settlements and relevant supporting documentation during the audit period and applied to executive department offices and agencies. While the requirements differed somewhat depending on the nature of the claim being settled, the Schedule largely required that settlements and relevant supporting documentation be retained for a period of six years. *See* Schedule at D01-01(c): Primary copies of payment support documentation and transaction Postings; E05-01: Employee Compliant/Investigation/Disciplinary Records; and E05-02(c): All other records.

- For all cases handled by the Attorney General's Office, or by Special Assistant Attorneys General, offices and agencies followed the required settlement procedures of the Attorney General's Office. This included seeking and securing approval from the Attorney General's Office for all settlement amounts and terms.

- For grievances by union members, offices and agencies followed the terms of collective bargaining agreements, which in some case expressly provide that grievance settlements must be non-precedential.

- During the audit period, the Governor's Chief Legal Counsel issued several memoranda to the general counsels of the offices and agencies, prescribing additional required

considerations, approvals, and limitations on settlement agreements and terms. While these memoranda were attorney-client privileged communications, their terms were mandatory. The memoranda were intended to ensure additional consistency and accountability in the negotiation and approval of settlements across the executive department.

The report appears to suggest that, in addition to these policies and procedures, it would be helpful to have a written policy, issued to each office and agency, and governing the authorization, documentation, and retention of settlement agreements and supporting records. The executive department welcomes this suggestion and commits to the following steps:

- The Office of the Governor will issue a public Executive Department Settlement Policy applicable to all executive department offices and agencies. The policy will address procedures for settling complaints filed by nonunion employees; the types of supporting documentation to be considered and maintained when settling such complaints; document retention and settlement tracking obligations; limitations on settlement terms; and the required approvals for settlements.

- All executive department offices will adopt their own settlement and judgment policies applicable to themselves and their agencies that adhere to the policies issued by the Office of the Governor and the Office of the Comptroller and set additional appropriate requirements, if any.

- The Office of the Governor will partner with the Office of the Comptroller on both the Comptroller's ongoing review of its settlements and judgments policy and related regulations, and on developing new training material for use throughout the executive department.

Audit Finding 2: "Executive offices have no documented policies and procedures over the use of confidentiality language in state employee settlement agreements."

Response to Finding 2:

The executive department cannot concur with Audit Finding 2 to the extent that it appears to overlook the Comptroller's Settlement and Judgments Policy which explains that "confidentiality language mandating that a settlement or settlement terms be kept confidential may not be enforceable"; that "[c]onfidentiality provisions will not create protections that do not already exist under the Public Records Law or other statutory bar to disclosure"; and that "the name of a recipient payee of a settlement or judgment payment made from the settlement and judgment account is considered a public record."

Since 2018, the policy of the executive department has generally precluded the use of nondisclosure agreements. As recognized in the report, the Attorney General's Office and the Office of the Governor have advised since 2018 that executive branch offices and agencies should not include nondisclosure agreements as a part of employee settlement agreements.

Since taking office in 2023, Governor Healey and Lieutenant Governor Driscoll have been outspoken in their direction to executive branch offices and agencies: nondisclosure agreements are not to be used. Government benefits from transparency, and anyone who has suffered mistreatment should have the right to tell their story and advocate for change.

As the audit report documents, the use of non-disclosure agreements in employee settlements was rare during the audit period, particularly in recent years. Based on our review of Appendix C to the audit report, we believe that fewer than 60 settlements during the audit period included language indicating that a settlement or settlement terms should be kept confidential, including just twelve settlements with documented confidentiality language between 2018 and 2022. These twelve settlements comprise about 1% of settlements between 2018 and 2022. And of these twelve settlements, seven appear to arise from one agency repeating an identical clause in its agreements without regard to the circumstances of each case. The audit's findings indicate that such clauses continue to appear in sporadic cases largely due to the use of dated "boilerplate" agreement templates in some agencies. To the extent non-disclosure language remains in any form agreements, we agree it should be eliminated.

Finally, we note that the report appears to conflate non-disclosure agreements, which are forbidden by policy, with several other contract provisions, which serve legitimate purposes in appropriate circumstances. Within its definition of "confidentiality language," the report includes "not for publication" clauses (appearing in about 100 of the 159 agreements identified as including confidentiality language) and "non-disparagement" clauses (appearing in about 10 of the 159 agreements identified as including confidentiality language). Contrary to OSA's interpretation, neither type of clause seeks to limit a settling employee from discussing the purpose or terms of a settlement agreement.

A "not for publication" clause is a standard clause in labor grievance settlements reciting that the agreement will not be treated as precedent, whether by the settling employee, their employer, or their union. "Non-disparagement clauses" similarly do not limit employees from discussing the purpose or terms of their settlement agreements. These clauses typically involve limits on defamatory or derogatory statements, but do not limit discussion of a settlement or the reasons for a settlement. In our experience, such clauses are most commonly requested by employees themselves who seek a sense of finality and assurances against reputational harm.

Finally, while the time period allowed for our response has not allowed us to review every factual assertion in the report, we note that OSA's statement on page 35 of the report that it was not provided access to the original claim for a particular MassDOT settlement of a sexual harassment claim is incorrect. According to our records, MassDOT provided OSA with a copy of the original claim on July 19, 2024. This settlement was completed in 2014, and the records were provided notwithstanding OSA's limiting of its testing to the period from 2019 to 2022.

These points of dispute should not overshadow our fundamental agreement with OSA that non-disclosure agreements erode public trust and are largely unenforceable as a matter of law in

Massachusetts.[1] To further our shared goal, the Executive Department Settlement Policy will include clear guidelines prohibiting the use of non-disclosure language except in highly limited circumstances where unusual privacy interests may be at stake, such as a demonstrated safety need to protect a complainant's identity from public disclosure.

Audit Finding 3: "Executive Offices did not report 40 state employee settlement agreements to the Office of the Comptroller of the Commonwealth when required."

Response to Finding 3:

OSA identified 40 "monetary" state employee settlement agreements, totaling $104,209, and all paid through agency funds, that were not reported to the Office of the Comptroller in accordance with the Comptroller's Settlements and Judgments Policy. While we are uncertain of how OSA defined "monetary" agreements for purposes of this analysis[2], we agree that offices and agencies must follow the Comptroller's reporting requirements, even when the settlement at issue requires no disbursement from the settlements and judgments fund. As indicated above, the Office of the Governor will collaborate with the Office on the Comptroller on new training materials to ensure understanding of and compliance with the Comptroller's requirements, including reporting requirements. In addition, as part of their adoption of their own updated settlement and judgment policies, executive department agencies will be expected to implement appropriate monitoring controls to address this issue.

Audit Finding 4: "Agencies did not provide all requested employee settlement agreements."

Response to Finding 4:

In responding to this audit, the executive department worked collaboratively and cooperatively with OSA to locate and produce information and documents from a thirteen-year audit period, nine years of which fell outside of the presumptive records retention period. Hundreds of employees across at least seventy-five offices and agencies collectively dedicated hundreds of hours, including through searches of archived paper files and electronic databases, to compile and produce information on the over 2,000 settlement agreements discussed in the report.

We respectfully disagree with the report's assertion that "57 executed settlement agreements" requested by OSA "were not provided." Agencies were unable to locate a small number of

[1] The report notes a "risk [of] confidentiality language [being] used to protect or obscure from public view repeated instances of poor management or inappropriate or unlawful behavior at agencies of government" or "public employees . . . continu[ing] to face abusive or harassing treatment from perpetrators." While it is appropriate for the report to note this risk, we observe that the report identifies no examples of such things occurring during the audit period.

[2] The Office of the Comptroller's Settlements and Judgments Policy limits its applicability to a subset of monetary settlements and excludes those settlements that result in "retroactive salary adjustments, unpaid regular time, collective bargaining agreement increases or other routine payroll corrections of errors, or adjustments." (S&J Policy at p.1).

settlement agreements requested by OSA, many fewer than 57, particularly agreements that pre-date 2019.[3] Over the thirteen-year audit period, many executive department offices and agencies underwent broad organizational changes or consolidated their human resources functions, updated their computer systems, and sent older case-related materials to offsite paper storage. In each case in which settlement agreements could not be located, the offices and agencies explained or offered to explain to OSA how its searches were conducted and why certain requested agreements could not be found. Consequently, we disagree with the report's unfounded implication that settlement agreements may have been "unlawfully withheld" from OSA. We are confident that all individuals involved in conducting and responding to this audit—OSA and executive department employees alike—acted diligently and in good faith.

In this regard, the executive department and OSA have also attempted in good faith to resolve a legal disagreement over the applicability of G. L. c. 66A to certain requests made as part of the audit. In July 2024, OSA asked to review of a random sampling of several hundred personnel records of current and former executive department employees to "test" for the presence of settlement-related materials. Following consultation with the Attorney General's Office, we advised OSA that the request to review unredacted personnel information in a large number of personnel records—inclusive of personal identifying information, bank account numbers, social security numbers, medical information, and disciplinary information, for both employees and their family members—likely triggered the protections of G. L. c. 66A. *See* G. L. c. 66A, s. 2(k) (requiring agencies to "maintain procedures to ensure that no personal data are made available in response to a demand for data made by means of compulsory legal process, unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed"); *Torres v. Att'y Gen.,* 391 Mass. 1, 12 (1984) (G. L. c. 66A applies to requests made by the Attorney General's Office for confidential, personal information, even in the context of ongoing litigation); *Allen v. Holyoke Hosp.*, 398 Mass. 372, 381 (1986) ("[W]here a party . . . seeks materials arguably protected by [G. L. c. 66A], that party must demonstrate that, based on the particular circumstances of the case, the collective public interest in disclosure warrants an invasion of the data subject's privacy.")

To try to resolve the G. L. c. 66A issue, the executive department offices and agencies offered to review the personnel records at issue and produce to OSA any responsive information that might be located. OSA rejected this suggestion, contending that G. L. c. 66A was categorically inapplicable to its request. The Attorney General's Office thereafter suggested that the impacted agencies should send notices to data subjects under G. L. c. 66A, s. 2(k) and, absent any court orders to the contrary, provide OSA with access to the requested personnel records. To facilitate OSA's access to the documents, these notices were sent in early December 2024. To date, none of the employees have sought a court order to block review of the records.

As we have previously advised the OSA, the agencies are now prepared to schedule time for OSA's review of all records for which there is no court order to the contrary. As such, the report's suggestion that OSA has been "denied access" to the requested personnel records is

[3] Audit Finding 4 appears to: (a) treat settlement agreements that were produced after OSA's initially requested deadlines as having been not produced at all (including, for example, agreements from EOPSS and EOHLC); and (b) include settlements that predate OSA's testing period of 2019 to 2022.

incorrect. We have also acknowledged that OSA's review would be without prejudice to any of OSA's legal positions on the applicability or inapplicability of G. L. c. 66A.

Audit Finding 5: "Agencies did not provide us 78% of the underlying employee complaints for employee settlements that involved confidentiality language."

Response to Finding 5:

Audit Finding 5 appears to inadvertently overstate the percentage of employee complaints that should have been retained under the applicable record retention policy but could not be located upon request. The report notes that in 124 of 159 instances, OSA did not receive requested copies of the original claim, complaint, or grievance associated with a settlement OSA classified as having "confidentiality language." The report notes, however, that most such records can "be assumed to have records retention periods of 6 years from the date of final resolution or final activity." The report does not indicate how many of the 124 agreements fell outside of the records retention period, but that number is likely to be substantial given that approximately two-thirds of the 159 settlements identified on the report's Appendix C were entered outside of the referenced records retention period.

Regardless of the numbers, we agree that the report has identified historical record-keeping issues requiring attention. To that end, and as noted in the response to Finding 1, the Executive Department Settlement Policy will address document retention and settlement tracking obligations and, we expect, will assist offices and agencies with improving their settlement-related record keeping as a forward-looking matter.

Other Matters: "The system to report state employee settlement agreements to the Office of the Comptroller of the Commonwealth does not provide transparency into all monetary state employee settlement agreements made with taxpayer funds."

Response to Other Matters:

The current format for settlement and judgments reporting by the Office of the Comptroller is dictated by the Settlements and Judgments line item (1599-3384). The Office of the Governor and the Office of the Comptroller are committed to working together to explore ways to improve the timeliness, quality, and transparency of reporting.

* * *

We strongly share OSA's goal of promoting a settlement and claims payment process that is consistent, transparent, and fair. As we have noted, the audit's findings point to several tangible ways in which future policies and practices in this area can be, and will be, improved. We look forward to continued collaboration with OSA on these important issues.

Sincerely,

/s/ Jesse M. Boodoo

Jesse M. Boodoo
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Office of the Governor