

Assembly Bill No. 1102

Passed the Assembly September 6, 2011

Chief Clerk of the Assembly

Passed the Senate August 31, 2011

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2011, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 8544.5, 8545, 8545.2, 8546.5, 8547.2, 8547.5, 8547.6, 8547.7, 8548, 8548.2, and 8548.9 of, and to repeal Section 12430 of, and to repeal Article 2 (commencing with Section 10520) of Chapter 4 of Part 2 of Division 2 of Title 2 of, the Government Code, relating to the State Auditor.

LEGISLATIVE COUNSEL'S DIGEST

AB 1102, Lara. State Auditor.

(1) Existing law sets out the authority and duties of the State Auditor in conducting audits and surveys of specified entities, and of contracting for goods and services on behalf of the Bureau of State Audits. Existing law provides for reimbursement of the State Auditor by annual appropriation in the Budget Act, for specified costs incurred by the State Auditor in the performance of certain duties. Existing law authorizes and provides access to the State Auditor and his or her authorized representatives to examine and reproduce various records of any agency of the state. Existing law provides that any law providing for the confidentiality of any records or property will not prevent the State Auditor from having access to those records or property, unless the law specifically refers to and precludes the State Auditor from accessing those records or property.

This bill would revise the provisions governing the scope and conduct of audits and surveys by the State Auditor and costs for which the State Audit Fund may be reimbursed.

The bill would define the phrase “confidentiality of records or property” to mean, for the purposes of these provisions, that the record or property may lawfully be kept confidential as a result of a statutory or common law privilege or any other provision of law. This bill would also provide that providing confidential information to the State Auditor, including information subject to a privilege, does not constitute a waiver of that privilege. This bill would state that these changes are declaratory of existing law.

(2) The California Whistleblower Protection Act requires the State Auditor to administer the act and to investigate and report on improper governmental activities, as defined. The act requires

the State Auditor to establish a means of submitting allegations of improper governmental activity, and prohibits the State Auditor from disclosing the identity of a person who provides information that results in an investigation unless the person provides written permission to make that disclosure.

This bill would instead prohibit the State Auditor from disclosing the identity of the person who provides information that results in an investigation without obtaining the person's express permission.

This bill would revise the definition of improper governmental activities to include more activities, including actions that are a violation of an Executive order, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual.

(3) The act authorizes the State Auditor to request the assistance of any state department, agency, or employee in conducting any investigation required by the act.

This bill would expand that authorization to also authorize the State Auditor to request assistance evaluating an allegation or conducting any investigation of an improper governmental activity as authorized by the act.

(4) The act requires the State Auditor, if he or she determines that an employee or agency has engaged in improper governmental activity, to issue an investigative report regarding that employee's specific activities, for purposes of pursuing adverse action against that employee. The act also requires the State Auditor to report the nature and details of the activity to the head of the agency or the appropriate appointing power, and authorizes the report to include recommended actions to prevent the reoccurrence of the activity.

This bill would revise those provisions to also authorize the State Auditor to report the findings of an investigation, and certain evidence to support that finding, to additional entities or individuals, including the head of any other agency that has direct oversight over the agency involved, a criminal law enforcement agency, an administrative law enforcement agency, or a licensing agency that has authority to investigate the matter.

This bill would also provide that, as an alternative to conducting its own investigation, the State Auditor is authorized to, if the State Auditor makes a certain finding on an allegation of improper governmental activities, refer an allegation to the involved state

agency, or to another state agency having direct oversight of the involved state agency, to conduct an investigation of the allegation under the State Auditor's supervision. This bill would similarly authorize the State Auditor to refer an allegation to a criminal or administrative law enforcement agency.

(5) Existing law requires the State Auditor to prepare for state employees a written explanation of the California Whistleblower Protection Act that includes prescribed information. Existing law requires the State Auditor to provide a notice to state agencies, as defined, that includes the information contained in the written explanation. Existing law prohibits state agencies from modifying the text of the notice.

This bill would, for purposes of these provisions, conform the definition of state agency to the definition used in the California Whistleblower Protection Act, to include the Supreme Court, Court of Appeal, superior courts, and the Administrative Office of the Courts.

The bill would require any agency that posts or advertises the opportunity to submit whistleblower complaints through a program administered by the agency, to also disclose the opportunity to submit complaints to the State Auditor under the California Whistleblower Protection Act.

(6) This bill would also delete various obsolete provisions of law.

The people of the State of California do enact as follows:

SECTION 1. Section 8544.5 of the Government Code is amended to read:

8544.5. (a) There is hereby established in the State Treasury the State Audit Fund. Notwithstanding Section 13340, the State Audit Fund is continuously appropriated for the expenses of the State Auditor. There shall be appropriated annually in the Budget Act to the State Audit Fund, from the General Fund and the Central Service Cost Recovery Fund, the amount necessary to reimburse the State Audit Fund for the cost of audits and any other duties to be performed that are not directly reimbursed under subdivision (c), including for the cost of any other duties imposed on the bureau by statute. "Cost of audits or any other duties" means all direct and indirect costs of conducting the audits or other duties, and any

other expenses incurred by the State Auditor in fulfilling his or her statutory responsibilities.

(b) With regard to the funds appropriated pursuant to subdivision (a), upon certification by the State Auditor of estimated costs on a monthly basis, the Controller shall transfer the amount thus certified from the General Fund or the Central Service Cost Recovery Fund, as applicable, to the State Audit Fund. The Controller shall thereafter issue warrants drawn against the State Audit Fund upon receipt of claims certified by the State Auditor.

(c) To ensure appropriate reimbursement from federal and special funds for the costs of the duties performed pursuant to Section 8546.3, the State Auditor may directly bill state agencies for the costs incurred, subject to the approval of the Director of Finance.

(d) To ensure adequate oversight of the operations of the bureau, the Milton Marks “Little Hoover” Commission on California State Government Organization and Economy shall annually obtain the services of an independent public accountant to audit the State Audit Fund and the operation of the bureau to assure compliance with state law, including Section 8546. The results of this audit shall be submitted to the commission and shall be a public record.

(e) To ensure that audits of the Milton Marks “Little Hoover” Commission on California State Government Organization and Economy are conducted in conformity with government auditing standards, any audit of the commission that is required or permitted by law shall be conducted by the independent public accountant selected pursuant to subdivision (d).

SEC. 2. Section 8545 of the Government Code is amended to read:

8545. The State Auditor shall not destroy any papers or memoranda used to support a completed audit sooner than three years after the audit report is released to the public. All books, papers, records, and correspondence of the bureau pertaining to its work are public records subject to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 and shall be filed at any of the regularly maintained offices of the State Auditor, except that none of the following items or papers of which these items are a part shall be released to the public by the State Auditor, his or her employees, or members of the commission:

(a) Personal papers and correspondence of any person providing assistance to the State Auditor when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn or upon the order of the State Auditor.

(b) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed.

(c) Papers, correspondence, or memoranda pertaining to any audit that has been completed, which papers, correspondence, or memoranda are not used in support of any report resulting from the audit.

(d) Any survey of public employees that the State Auditor determines should be kept confidential because the employees have expressed fear of retaliation by their employer if they respond to the survey.

SEC. 3. Section 8545.2 of the Government Code is amended to read:

8545.2. (a) Notwithstanding any other provision of law, the State Auditor during regular business hours shall have access to and authority to examine and reproduce, any and all books, accounts, reports, vouchers, correspondence files, and all other records, bank accounts, and money or other property, of any agency of the state, whether created by the California Constitution or otherwise, any local governmental entity, including any city, county, and school or special district, and any publicly created entity, for any audit or investigation. Any officer or employee of any agency or entity having these records or property in his or her possession, under his or her control, or otherwise having access to them, shall permit access to, and examination and reproduction thereof, upon the request of the State Auditor or his or her authorized representative.

(b) For the purposes of access to and examination and reproduction of the records and property described in subdivision (a), an authorized representative of the State Auditor is an employee or officer of the state or local governmental agency or publicly created entity involved and is subject to any limitations on release of the information as may apply to an employee or officer of the state or local governmental agency or publicly created entity. For the purpose of conducting any audit or investigation, the State

Auditor or his or her authorized representative shall have access to the records and property of any public or private entity or person subject to review or regulation by the public agency or public entity being audited or investigated to the same extent that employees or officers of that agency or public entity have access. No provision of law providing for the confidentiality of any records or property shall prevent disclosure pursuant to subdivision (a), unless the provision specifically refers to and precludes access and examination and reproduction pursuant to subdivision (a). Providing confidential information to the State Auditor pursuant to this section, including, but not limited to, confidential information that is subject to a privilege, shall not constitute a waiver of that privilege. This subdivision does not apply to records compiled pursuant to Part 1 (commencing with Section 8900) or Part 2 (commencing with Section 10200) of Division 2.

(c) Any officer or person who fails or refuses to permit access and examination and reproduction, as required by this section, is guilty of a misdemeanor.

(d) For purposes of this section “confidentiality of records or property” means that the record or property may lawfully be kept confidential as a result of a statutory or common law privilege or any other provision of law.

SEC. 4. Section 8546.5 of the Government Code is amended to read:

8546.5. (a) The State Auditor may establish a high-risk government agency audit program for the purpose of identifying, auditing, and issuing reports on any agency of the state, whether created by the California Constitution or otherwise, as well as statewide issues, that the State Auditor identifies as being at high risk for the potential of waste, fraud, abuse, and mismanagement or that has major challenges associated with its economy, efficiency, or effectiveness.

(b) In addition to identifying an agency as high risk on the basis of weaknesses identified in audit and investigative reports produced by the bureau, the State Auditor may consult with the Legislative Analyst, the Milton Marks “Little Hoover” Commission on California State Government Organization and Economy, the Office of Inspector General within the Department of Corrections, the Department of Finance, and other state agencies that have

oversight responsibilities over any other agency of the state, in identifying state agencies that are at high risk.

(c) The State Auditor shall notify the Joint Legislative Audit Committee whenever it identifies a state agency as at high risk.

(d) The State Auditor may issue audit reports with recommendations for improvement in state agencies, and for statewide issues, identified as at high risk not less than once every two years.

(e) The State Auditor may require state agencies identified as high risk, or as responsible for all or a portion of a statewide issue identified as high risk, to periodically report to the auditor regarding the status of recommendations for improvement made by the State Auditor or other state oversight agencies.

SEC. 5. Section 8547.2 of the Government Code is amended to read:

8547.2. For the purposes of this article, the following terms have the following meanings:

(a) “Employee” means an individual appointed by the Governor, or employed or holding office in a state agency as defined by Section 11000, including, for purposes of Sections 8547.3 to 8547.7, inclusive, an employee of the California State University, or an individual appointed by the Legislature to a state board or commission and who is not a Member or employee of the Legislature. In addition, “employee” means a person employed by the Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts for the purposes of Sections 8547.3 to 8547.7, inclusive, and Section 8547.13, except for those provisions of Section 8547.4 concerning notice of adverse action and the State Personnel Board. “Employee” includes a former employee who met the criteria of this subdivision during his or her employment.

(b) “Illegal order” means a directive to violate or assist in violating a federal, state, or local law, rule, or regulation, or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(c) “Improper governmental activity” means an activity by a state agency or by an employee that is undertaken in the performance of the employee’s duties, undertaken inside a state office, or, if undertaken outside a state office by the employee,

directly relates to state government, whether or not that activity is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, (2) is in violation of an Executive order of the Governor, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual, or (3) is economically wasteful, involves gross misconduct, incompetency, or inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.7, 8547.10, and 8547.11, “improper governmental activity” includes any activity by the University of California or by an employee, including an officer or faculty member, who otherwise meets the criteria of this subdivision. For purposes of Sections 8547.4, 8547.5, and 8547.13, “improper governmental activity” includes any activity by the Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts, or by an employee thereof, who otherwise meets the criteria of this subdivision.

(d) “Person” means an individual, corporation, trust, association, a state or local government, or an agency or instrumentality of any of the foregoing.

(e) “Protected disclosure” means a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition. Protected disclosure specifically includes a good faith communication to the Bureau of State Audits alleging an improper governmental activity and any evidence delivered to the Bureau of State Audits in support of the allegation. “Protected disclosure” also includes, but is not limited to, a complaint made to the Commission on Judicial Performance.

(f) “State agency” is defined by Section 11000. “State agency” includes the University of California for purposes of Sections 8547.5 to 8547.7, inclusive, and the California State University for purposes of Sections 8547.3 to 8547.7, inclusive. Sections

8547.3 to 8547.7, inclusive, shall apply to the Supreme Court, the courts of appeal, the superior courts, and the Administrative Office of the Courts in the same manner as they apply to a state agency.

SEC. 6. Section 8547.5 of the Government Code is amended to read:

8547.5. (a) The State Auditor shall create the means for the submission of allegations of improper governmental activity both by transmission via mail or other carrier to a specified mailing address and electronic submission through an Internet Web site portal. The State Auditor may request that a person submitting an allegation provide his or her name and contact information and provide the names and contact information for any persons who could help to substantiate the claim. However, the State Auditor shall not require any person submitting an allegation to provide his or her name or contact information and shall clearly state on the agency Internet Web site that this information is not required in order to submit an allegation.

(b) Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the State Auditor may conduct an investigation of the matter. The identity of the person providing the information that initiated the investigation, or of any person providing information in confidence to further an investigation, shall not be disclosed without the express permission of the person providing the information except that the State Auditor may make the disclosure to a law enforcement agency that is conducting a criminal investigation.

SEC. 7. Section 8547.6 of the Government Code is amended to read:

8547.6. (a) The State Auditor may request the assistance of any state department, agency, or employee in evaluating an allegation or conducting any investigation of an improper governmental activity as authorized by this article. In response to a request for assistance from the State Auditor, that state department, agency, or employee shall provide the assistance, including, but not limited to, providing access to documents or other information in a timely manner, as required by Section 8545.2. If an investigation conducted by the State Auditor involves access to confidential academic peer review records of University of California academic personnel, these records shall be provided in a form consistent with university policy effective on August 1,

1992. No information obtained from the State Auditor by any department, agency, or employee as a result of the State Auditor's request for assistance, nor any information obtained thereafter as a result of further investigation, shall be divulged or made known to any person without the prior approval of the State Auditor.

(b) As an alternative to conducting its own investigation, if the State Auditor determines that there is reasonable cause to believe that a state agency or employee may have engaged in an improper governmental activity, the State Auditor, subject to the limitations of Section 8547.5, may refer the allegation to the involved state agency, or to another state agency having direct oversight of the involved state agency, to conduct an investigation of the allegation under the State Auditor's supervision. If the State Auditor refers an allegation to the involved state agency or to another state agency having direct oversight of the involved state agency, that state agency shall investigate the allegation and report the results of the investigation to the State Auditor within 60 days of the referral and monthly thereafter until final action has been taken. In addition, whenever the State Auditor determines that there is reasonable cause to believe that a state agency or employee may have engaged in an improper governmental activity, the State Auditor, subject to the limitations of Section 8547.5, may refer the allegation to a criminal or administrative law enforcement agency in lieu of conducting or supervising an investigation of the matter.

SEC. 8. Section 8547.7 of the Government Code is amended to read:

8547.7. (a) If, after investigating an allegation, the State Auditor finds that a state agency or employee may have engaged or participated in an improper governmental activity, he or she shall prepare an investigative report and send a copy of that report to the head of the agency involved and to the head of any other agency that has direct oversight over that involved agency. The investigative report may include the State Auditor's recommended actions to prevent the continuation or recurrence of the activity. If appropriate, the State Auditor shall report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority that the State Auditor determines appropriate. Subject to the limitations of Section 8547.5, the State Auditor may provide to the involved agency any evidence gathered during the

investigation that, in the judgment of the State Auditor, is necessary to support any of the recommendations. Within 60 days of receiving the State Auditor's investigative report, the involved agency shall report to the State Auditor any actions that it has taken or that it intends to take to implement the recommendations. The agency shall file subsequent reports on a monthly basis until final action has been taken.

(b) The State Auditor shall not have any enforcement power. In any case in which the State Auditor finds that a state agency or employee may have engaged in an improper governmental activity, the State Auditor may provide the finding, and any evidence supporting the finding, subject to the limitations of Section 8547.5, to a criminal law enforcement agency, an administrative law enforcement agency, or a licensing agency that has authority to investigate the matter.

(c) The State Auditor shall keep confidential every investigation, including, but not limited to, all investigative files and work product, except that the State Auditor, whenever he or she determines it necessary to serve the interests of the state, and subject to the limitations of Section 8547.5, may issue a public report of an investigation that has substantiated an improper governmental activity, keeping confidential the identity of the employee or employees involved. In addition, subject to the limitations of Section 8547.5, the State Auditor may release any findings or evidence supporting any findings resulting from an investigation conducted pursuant to this article whenever the State Auditor determines it necessary to serve the interests of the state.

(d) This section does not limit any authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.

SEC. 9. Section 8548 of the Government Code is amended to read:

8548. For purposes of this article, "state agency" means every state office, officer, department, division, bureau, board, and commission, including the California State University, the University of California, the Supreme Court, the Court of Appeal, the superior courts, and the Administrative Office of the Courts.

SEC. 10. Section 8548.2 of the Government Code is amended to read:

8548.2. The State Auditor shall prepare for distribution to each state agency in an electronic format a notice containing the information in the written explanation prepared pursuant to Section 8548.1. No later than July 1, 2002, each state agency shall print and post this notice at its state office or offices in a location or locations where employee notices are maintained. A state agency shall not edit the written text of the notice but it may publish the notice in a manner it chooses, and it may include its own introductory language in the notice, provided that the language and the format selected do not alter the meaning of the notice. In addition, whenever a state agency posts or advertises the opportunity to submit whistleblower complaints through a program administered by the agency, it shall also disclose the opportunity to submit complaints to the State Auditor under the California Whistleblower Protection Act (Article 3 (commencing with Section 8547)).

SEC. 11. Section 8548.9 of the Government Code is amended to read:

8548.9. (a) The State Auditor shall, by January 15th of each year, report to the Joint Legislative Budget Committee, the Joint Legislative Audit Committee, and the Department of Finance with respect to each recommendation he or she has made based on an audit or investigation that was reported more than one year prior and that has not been fully implemented by the affected agency.

(b) The report shall clearly identify the state agency audited or investigated, the audit or investigation that contained the recommendation, a brief description of the recommendation, the date it was issued, and the most recent explanation provided by the agency to the State Auditor on the status of the recommendation.

(c) Any state agency that is notified by the State Auditor that it has not fully implemented a recommendation made pursuant to this chapter more than one year prior, shall do either of the following:

(1) Provide a written report to the State Auditor, the respective policy committees and budget subcommittees of the Assembly and Senate with oversight of the agency, and the Department of Finance, explaining why the audit recommendation or investigation has not been fully implemented.

(2) Notify all entities described in subdivision (a) that it will begin implementing the audit recommendation or investigation recommendation within 90 days of the notification by the State Auditor, and include the estimated date of full implementation.

(d) For the purposes of this section, “state agency” means a state agency as defined by Section 11000, the California State University, the Supreme Court, a Court of Appeal, a superior court, and the Administrative Office of the Courts.

SEC. 12. Article 2 (commencing with Section 10520) of Chapter 4 of Part 2 of Division 2 of Title 2 of the Government Code is repealed.

SEC. 13. Section 12430 of the Government Code is repealed.

SEC. 14. The amendments made to Section 8545.2 of the Government Code by this act are declaratory of existing law.

Approved _____, 2011

Governor