



June 20, 2024

The Honorable Karen E. Spilka
Senate President
State House, Room 332
Boston, MA 02133

The Honorable Ronald Mariano
Speaker of the House
State House, Room 356
Boston, MA 02133

The Honorable Bruce E. Tarr
Senate Minority Leader
State House, Room 308
Boston, MA 02133

The Honorable Bradley H. Jones, Jr.
House Minority Leader
State House, Room 124
Boston, MA 02133

Re: Response to the OIG’s June 18, 2024 Letter to the Legislature

Dear President Spilka, Speaker Mariano, Minority Leader Tarr and Minority Leader Jones:

I write in response to the June 18, 2024 letter from Inspector General Jeffrey Shapiro. Before I share my individual concerns as Acting Chair of the Cannabis Control Commission (Commission / CCC) regarding the Office of the Inspector General’s (OIG) directive, I want to center my correspondence on the productive work and accomplishments of the Commission on behalf of the people and communities we serve, particularly those harmed by cannabis prohibition and enforcement.

The Commonwealth’s \$7 billion regulated cannabis industry is a national trailblazer, hosting delegations from other jurisdictions looking to adopt our best practices and learn from our missteps. After a brief six years in existence, the industry is producing \$1 billion in sales annually from adult-use marijuana establishments, generating more revenue for state coffers than the long-established alcohol industry. In fact, at budget time you may be particularly attuned to the fact that the industry provided \$322 million in tax and non-tax revenue in fiscal year 2023 alone.

What’s missing from the public narrative and ignored by the OIG’s directive is the Commission’s remarkable success. Just last week the Commission approved a measure that provides for legal transportation of cannabis to Dukes and Nantucket counties to counter an illicit market surge during the tourist season.¹ Our recent enforcement actions include one of the

¹ Cannabis Control Commission, Cannabis Control Commission Approves Administrative Order Regarding Transport of Marijuana and Marijuana Products to and from Licensees Located in Dukes County and Nantucket (June 14, 2024), <https://masscannabiscontrol.com/2024/06/cannabis-control-commission-approves-administrative-order->



largest fines ever [issued to Trulieve](#), stemming from unsanitary conditions and workplace safety issues. This fine clearly signals that we insist that members of this industry provide safe working conditions without exception.

Further, we are a national leader in promoting equity in our industry. At great effort and on a short timeline, we developed regulations and implemented landmark legislation expanding opportunities for social equity businesses.²

With all this in mind, I was surprised to read that the OIG is calling for the Legislature to urgently appoint a receiver for an organization that is effectively regulating 634 open and operational adult-use licensees, including 28 Economic Empowerment Applicants, 51 Social Equity Program Participants, 79 Disadvantaged Business Enterprises, with hundreds more applicants in our licensing queue, and 15,161 registered Marijuana Establishment agents, as well as 87,335 certified active patients and 6,690 active caregivers, and to do so in the final weeks of this legislative session.

What is urgent, is filling 22 vacancies (in an agency now staffed at 134), including the Executive Director's position, and addressing concerning personnel issues that have been widely aired in news reports. That's why last week the Commission voted to ensure the Acting Executive Director can prioritize the human resources function she was hired to fulfill as Chief People Officer. This decision was reviewed and approved by the Commission's legal team and interpreted to be consistent with G. L. c. 10, §76 (j).

The Acting Executive Director remains the head of agency and continues to have Department Head Signature Authorization. She is "responsible for administering and enforcing the law relative to the commission and each unit thereof" and "employ[ing] other employees, consultants, agents and advisors, including legal counsel." The intent was to provide public direction to realign her job responsibilities to ensure the work gets done and that she relies upon those individuals specifically contemplated in G. L. c. 10, §76 (j), including the General Counsel and Chief Financial and Accounting Officer.

The challenges at the Commission are far from secret. We are committed to resolving them. In fact, we have a blueprint for a governance structure that is in its final stages of legal review and will be taken up at a public meeting.

Going back to the drawing boards with the OIG's proposal of receivership (a concept undefined and with no statutory basis provided) is ill-advised. And increasing government secrecy by removing the Commission from the purview of the Open Meeting Law is hardly a solution.

Concerns with the OIG's process

[regarding-transport-of-marijuana-and-marijuana-products-to-and-from-licensees-located-in-dukes-county-and-nantucket/](#).

² Cannabis Control Commission, Cannabis Control Commission Approves Historic Regulatory Changes to Implement Commonwealth's Equity Reform Law (September 27, 2023), <https://masscannabiscontrol.com/2023/09/cannabis-control-commission-approves-historic-regulatory-changes-to-implement-commonwealths-equity-reform-law/>.



I have significant concerns with both the process the OIG has engaged in, and the substance of the directive itself. In sum, it appears the OIG, whose website states its purpose “promotes transparency,” instead is advocating for greater government secrecy and concentration of power at the Commission. I disagree with that approach.

In the fall of 2023, the OIG informed the Commission of an investigation. The Commission has been under review by other agencies in the past (including the OIG), and routinely cooperates to ensure the agency is held to the highest standards of good government.

On both January 19 and February 13, 2024, the Commission lodged its concerns that the OIG was overstepping its statutory authority, which is limited to waste, fraud, and abuse of public funds. See G. L. c. 12A. I have enclosed our correspondence for your reference.

Most notably, the OIG appeared to step into the exclusive purview of the Legislature, regarding the structure of the Commission. *See* February 13, 2024 Commission Letter to the OIG General Counsel at 2. The OIG also appeared to step into the exclusive purview of the constitutional appointing authorities, regarding the qualifications and appointment of Commissioners. *Id.* at 4.

Despite our objections, it appears that the OIG has escalated its quest to insert itself into Commission business. I reiterate our concerns that the OIG has failed to demonstrate a statutory basis pursuant to G.L. c. 12A to review the structure of an agency created by the Legislature or Commissioner appointments made by the constitutional appointing authorities. Now, the OIG has failed to cite legal authority to support its position regarding receivership.

As the Commission understands it, the OIG’s investigation remains open. Surprisingly, the Inspector General chose to make recommendations to the Legislative leadership and publish their correspondence through a press [release](#) while the OIG’s investigation is still pending. The IG has not offered evidence to warrant issuing conclusions before it completes its investigation.

Indeed, the Inspector General concedes his office has conducted a “limited review.” *See* June 18, 2024 OIG Letter to the Legislature at 1. The OIG’s letter cited a single media report and the fact that the Commission operates under the Open Meeting Law to justify its conclusions. On this basis—and before issuing any investigatory report or close out documentation—the OIG calls for profound changes to be made to a public entity’s structure, and with great urgency. The OIG in fact concedes it has not performed a substantive review or shared any findings with us before calling for the Legislature to make sweeping changes regarding our agency.

The OIG is advocating for greater government secrecy

The OIG also calls for a structural change that would result in the Commission conducting its work in secret, outside the public view of an open meeting. This proposal has wide implications not only on our agency, but the Massachusetts Gaming Commission (MGC) (which operates



under the same structure³), and potentially the Alcoholic Beverages Control Commission (ABCC), and the Massachusetts Commission Against Discrimination (MCAD). The OIG's line of thinking on the Open Meeting Law could be reasonably applied to other boards and commissions, both at the state and municipal level, resulting in less public awareness of government decisions.

This recommendation seems ill-advised given that cannabis, like gaming and alcohol, has a history of an illicit market. Furthermore, the OIG is aware of instances of public corruption surrounding cannabis licensure on the municipal level.⁴ I disagree with the OIG's recommendation that increased secrecy at the Commission is the solution to any challenge.

With knowledge of that reality, the people, through their elected members of the Legislature crafted a regulatory structure that shared power,⁵ with five appointed Commissioners operating under the Open Meeting Law.⁶ The Commission must operate by consensus, as our statute requires three affirmative votes of Commissioners to act.⁷

In the instances of the CCC and the MGC, the Legislature separated power even further, by sharing the appointments of Commissioners among three independently elected constitutional offices, the Governor, Attorney General, and Treasurer and Receiver General. In total, the division of power protects the public interest by sharing in decision making, reducing the potential for public corruption.

In my view, the Open Meeting Law enhances public accountability by requiring Commission deliberations, including licensing decisions, to be conducted in public. The people of the Commonwealth can scrutinize our decision making because it is conducted openly. Unlike other jurisdictions, the Commission has largely avoided accusations of favoritism in its licensing decisions because we operate in public.

Request for partnership

³ G. L. c. 23K, §3. <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter23K/Section3>.

⁴ Office of Inspector General, Former Fall River mayor sentenced to six years in prison for extortion, fraud; ordered to pay more than \$878,000, September 2021, (Published, November 10, 2021), <https://www.mass.gov/news/former-fall-river-mayor-sentenced-to-six-years-in-prison-for-extortion-fraud-ordered-to-pay-more-than-878000-september-2021>.

⁵ G. L. c. 10, §76. <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter10/Section76>.

⁶ I note that the 2016 ballot referendum, Question 4, passed by the people of the Commonwealth, also mandated a multi-member commission subject to the Open Meeting Law, <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter334>.

⁷ The OIG's letter notes that there is not always agreement amongst Commissioners. That is correct and by design. Three independently elected constitutional officers make Commissioner appointments, and thus as a democratic body, there may be policy disagreements from time to time.



As the Legislature intended, we are operating effectively and regulating the industry of cannabis, the number one cash crop in the Commonwealth.⁸ We are a national leader in promoting equity in our industry.

We do not have to look very far to see other jurisdictions struggling to replicate the success of the Massachusetts cannabis industry.⁹ We must be judicious to ensure we do not take steps to destabilize a regulated multibillion dollar market that provides access to medicine, and thousands of businesses and jobs.

With a new Executive Director on the horizon, the Commission is on the precipice of writing a new chapter. One that builds on our work, expanding and maintaining a safe, well-regulated, and equitable cannabis industry. We must continue to ensure that our Commonwealth is the best market for such investment. Substantial capital, economic development, and many jobs are on the line.

At this critical juncture, I am asking for your continued partnership and support. I welcome the opportunity to discuss areas for improvement, including potential statutory revisions.

Best regards,



Ava Callender Concepcion, Esq.
Acting Chair

Enclosures:

Cc:

The Hon. Maura Healey, Governor
The Hon. Kim Driscoll, Lieutenant Governor
The Hon. Andrea Joy Campbell, Attorney General
The Hon. Deborah B. Goldberg, Treasurer and Receiver General
The Hon. Michael J. Rodrigues, Chair, Senate Committee on Ways and Means
The Hon. Aaron M. Michlewitz, Chair, House Committee on Ways and Means
The Hon. Adam Gomez, Chair, Joint Committee on Cannabis Policy
The Hon. Daniel M. Donahue, Chair, Joint Committee on Cannabis Policy
Kate Cook, Chief of Staff to Massachusetts Governor Maura T. Healey
Nurys Camargo, Commissioner, CCC
Kimberly Roy, Commissioner, CCC

⁸ Hill, Marta, Boston.com, Cannabis passes cranberries as the state's top crop (November 3, 2022), <https://www.boston.com/news/local-news/2022/11/03/cannabis-passes-cranberries-as-the-states-top-crop>.

⁹ Adlin, Ben, Marijuana Moment, Multiple States Across the Country See Record-Breaking Marijuana Sales To Close Out 2023 (January 25, 2024), <https://www.marijuanamoment.net/multiple-states-across-the-country-see-record-breaking-marijuana-sales-to-close-out-2023>.



Bruce Stebbins, Commissioner, CCC
Debra Hilton Creek, Acting Executive Director / Chief People Officer, CCC
Kristina Gasson, General Counsel, CCC
Jeffrey S. Shapiro, Esq., CIG, Inspector General



Raymond Moss
Deputy Director of Investigations
Office of the Inspector General
Via Email to: raymond.moss2@mass.gov

January 19, 2024

RE: Objections to Production of Certain Documents in Response to Request Pursuant to M.G.L. c. 12A, § 9 – Response Confidential Pursuant to M.G.L. c. 66, § 10; M.G.L. c. 4, § 7, cl. 26(a) and (f); M.G.L. c. 12A, § 13 and 945 CMR 1.04(2)(b).

Dear Deputy Director Moss,

During our meeting on January 10, 2024, the Office of the Inspector General (OIG) requested that the Cannabis Control Commission (“Commission”) communicate any concerns/objections with respect to the request for documents pursuant to M.G.L. c. 12A, § 9 in writing .

The Commission objects to producing limited remaining categories of documents requested by the OIG on November 7, 2023 and clarified in subsequent communications and meetings between the Commission and OIG:

1. The Commission has a general objection to the production of documents within a timeframe of September 2017 to the present as being overly burdensome;
2. The Commission specifically objects to requests relating to personnel or human resources (“HR”) complaints made against Commission staff, including Commissioners and certain members of Commission (Request no. 12);
3. The Commission further objects to the production of personnel/HR documents relating to evaluations and reviews of the Commission and individual Commissioners (Request no. 4) and exit interview responses (Request no. 11(c)); documents relating to Executive Meeting minutes concerning mediation (Request no. 10(c)), and documents relating to drafts and/or work product of the Commission (Requests nos. 10, 12, and the Definitions Section in Exhibit A).

The Commission’s grounds for the objection are as follows:



A. The OIG’s Scope of Investigative Authority is Limited to Investigations of Fraud, Waste and Abuse in Public Funds for the Procurement of Construction, Supplies, and Services.

The November 7, 2023 request to the Commission sought “certain information and documents available to, or in the possession, custody or control of, the Cannabis Control Commission.” Pursuant to M.G.L. c. 12A, § 7, the “office of inspector general shall act to prevent and detect fraud, waste and abuse in the expenditure of public funds, whether state, federal, or local, or relating to programs and operations involving the procurement of any supplies, services, or construction...”

With the exception of Requests 10 & 12(b), the vast majority of the requests are not related to contracts, invoices, or financial records of the Commission, but instead encompass records largely responsive to program or employee performance matters normally within the purview of the Office of the State Auditor (“OSA”), which conducts audits to ensure “to promote accountability and transparency, improve performance, and make government work better.” (<https://www.mass.gov/orgs/office-of-the-state-auditor>); (See M.G.L. c. 11, § 12, which includes “accounts, programs, activities and functions directly related to the aforementioned accounts of all departments, offices, commissions, institutions and activities of the commonwealth.” Accordingly, the Commission has no objection to the OIG’s review of legal and mediation invoices and interim reports of services provided to the Commission. As such, these requested records were provided to the Inspector General without objection.

The OIG clearly has statutory authority to investigate issues of program mismanagement and hostile work environments occurring at three public entities, pursuant to express statutory authority: 1. the Executive Office of Health and Human Services (M.G.L. c. 6A, § 16V), 2. the Massachusetts Department of Transportation (M.G.L. c. 6C, § 9), and 3. the Division of Police Oversight (M.G.L. c. 22C, §§ 72-73); See also OIG Bulletin, Volume 2, Issues 3-4, dated October 2021, at page 7, paragraphs 2-5. Pursuant to that authority, the OIG performed a performance audit regarding concerning issues at the Holyoke Soldier’s Home and specifically relied upon its authority in both M.G.L. c. 12A and 6A. The OIG does not have this authority to conduct a similar performance audit of the Commission.

While we welcome your continued communications concerning this issue, including information explaining why these documents are necessary in order to investigate the Commission’s expenditures related to mediation and legal services, it is the Commission’s position that the OIG does not have the authority to investigate Commission management practices that are unrelated to allegations of fraud, waste and abuse of public funds.

B. The OIG Request for Personnel Records, Employee Evaluations and Complaints is Overly Broad and Burdensome, Jeopardizes the Confidentiality of Personnel Records, and Requires Additional Time to Complete.

The Commission raises the objection on the bases that the request is overly broad and unduly burdensome and seeks documents all the way back to the establishment of the Commission. The Commission's Handbook lists three persons to whom one may initiate a formal complaint: (1) the

employee's supervisor, (2) any other supervisor of one's choosing, and/or (3) to the Commission's Chief People Officer ("CPO"). Particularly, in instances when a complainant or supervisor has left the Commission, searching potentially thousands of emails and other documents to find evidence of written complaints, would take significantly more time than the two months currently afforded by the OIG.

The OIG is seeking copies of HR, operations, and other management documents from the date of the Commission's inception and initially requested that all documents be delivered within a two-week timeframe. While the Commission is appreciative of the additional time that the OIG has afforded the Commission in order to conduct this search and review and limiting the scope of certain categories of requested documents, searching for these records from more than six years is similarly taxing, and overly broad, insofar as it is unclear if the request is limited to allegations of fraud, waste and abuse of public funds in the procurement of construction, supplies, and services.

Notwithstanding the limited guarantees of exemption from public records disclosure and confidentiality pursuant to M.G.L. c. 66, § 10; c. 4, § 7, cl. 26(a) and (f), we note that the OIG is permitted to disclose information "if it is necessary for the inspector general to make such records public in the performance of his duties." M.G.L. c. 12A, § 13, and 945 CMR 1.04(2)(b). Given the very sensitive nature of the contents of confidential employee personnel files and complaint information, the Commission is concerned that should the OIG receive such records, they may be disclosed pursuant to this statutory and regulatory authority or accessed by current or future litigants, as two federal cases have ruled is permitted via court order, and then released to the public. See *Bliss v. Fisher*, 743 F. Supp. 2d 25, 2010 U.S. Dist. LEXIS112240 (D. Mass. 2010); *Town of Grafton v. Pulte Homes of New Eng., LLC*, C.A. No. 12-10524-TSH (D. Mass. Order dated May 21, 2014). If the requested personnel records are released to the OIG, they can almost instantly be obtained by litigants, and potentially and indiscriminately released to the public.

Finally, complaints lodged against personnel who may have left the Commission many years ago, for example, are not relevant to any current investigation with regard to safeguarding against fraud waste and abuse of public funds for the procurement of construction, supplies, and services, and the prejudice to a current or former employee or supervisor regarding resolved complaints, would greatly outweigh any possible probative value with respect to the authority of the OIG.

C. The OIG Request for Mediation Records and Executive Session Minutes Concerning Mediation Includes Documents Properly Withheld from Disclosure.

The Commission is permitted to meet in closed executive session for the purposes of mediation pursuant to G.L. c. 30A, § 21(a)(9). At the Commission's January 11, 2024, Open Meeting, the Commissioners voted to withhold all Executive Session minutes regarding governance mediation(s) until the purpose of the mediation was complete, which is consistent with previous

votes by the Commissioners to withhold these minutes, predating the Inspector General's request for them, and consistent with G.L. c. 30A, § 22(f). Once the mediation work product is reviewed by agency counsel, the Commission will release these documents to the public for their review and the Commission will review and deliberate upon the documents in an open public meeting. It is anticipated that this meeting will take place in February or March 2024 and these documents will be immediately released to the OIG at that time.

This withholding of minutes is also consistent with M.G.L. c. 223, § 23C, which states that “[a]ll memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding...”

Recognizing the importance of confidential mediation sessions, the Appeals Court in ZVI Construction Co. v. Levy, 90 Mass. App. Ct. 412, 420 (2016), stressed “that our Legislature has recognized the importance of preserving the confidentiality of communications made during mediation, where those communications have been made in the presence of a qualified mediator.” Additionally, “the statute is instructive. It gives broad confidentiality protection to mediation communications, barring disclosure in any judicial or administrative proceeding, and creating only one express exception for the mediation of labor disputes. Significantly, the statute does not include an exception for fraud.” *Id.* at 420-421.

Clearly, the Court has held that the mediation communications cannot be disclosed in litigation where fraud is alleged, and the Commission also believes that such protection is not restricted to judicial or administrative cases, since no agency in the Commonwealth would proceed with a mediation if it thought the mediation communications would be disclosed during the pendency of the process.

Indeed, the Court in ZVI referred to the Uniform Mediation Act for guidance, and nowhere in the UMA is there any exception allowing access to mediation records by one Massachusetts agency investigating another one, such as the Commission, unless and until they are released by the Commission. *Id.* at 421 and note 13. Lastly, confidential communications of the Commission were recently filed in court by a litigant and became readily accessible to the public; since Commission records turned over to the OIG can be accessed by civil litigants, it is likely that other records will be prematurely filed or otherwise released in current and/or future legal action.

Furthermore, as a general objection, the Commission also objects to the requests for attorney-client work product. Requests for work product are traditionally not discoverable in the Commonwealth unless there has been a “showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” *See* M.R.C.P. 26(b)(3), which contains the language cited by the courts to assess requests for work product, in civil cases.

Commission counsel participated in the production of opinion-based work product, often prepared in anticipation of litigation, and these documents cannot be compelled. Attorney General

v. Facebook, Inc., 487 Mass. 109, 121-123, 126-131 (2021). Under these circumstances, the Commission objects to work product in which the Commission's counsel participated in the generation of opinion-based material and/or work conducted in anticipation of litigation.

Despite these objections and concerns we have raised, the Commission has great respect for the work of the OIG and seeks to continue to cooperate with respect to this request for documents. Please feel free to reach out should you have questions or to discuss further and we appreciate your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Kristina Gasson".

Kristina Gasson
General Counsel, Cannabis Control Commission

Cc: Phillip Mantyla, Office of the Inspector General
Debra Hilton-Creek, Acting Executive Director, Cannabis Control Commission

February 13, 2024

Via Electronic Mail

Susanne O'Neil
General Counsel
Office of the Inspector General
Susanne.m.oneil@mass.gov

Re: Concerns regarding OIG investigation

Dear General Counsel O'Neil:

The Cannabis Control Commission (“Commission”) writes to express its serious concerns regarding the direction and scope of an ongoing Office of the Inspector General (“OIG”) investigation and request for documents pursuant to G.L. c. 12A, § 9. Although the Commission is committed to assisting the OIG fulfill its statutory mandate “to prevent and detect fraud, waste and abuse in the use of public funds and public property,”¹ we are concerned that questions raised by your investigators and documents requested by the OIG fall outside of that scope and/or within other government entities’ authority.² A non-exhaustive list of our concerns are as follows:

Participation of Agency Counsel

During a January 12, 2024 Microsoft Teams meeting between the Commission’s counsel and OIG investigators, we raised questions regarding agency counsel attending interviews between your office and Commission employees. We were informed that agency counsel may not participate or observe, but that individuals may bring private counsel to these voluntary meetings. We asked your investigators to provide us in writing with the OIG’s policy regarding agency counsel participation, and we were told one does not exist.³ In our meeting, we raised

¹ See <https://www.mass.gov/info-details/learn-about-the-oig#our-legislative-mandate->.

² We previously lodged objections to the production of certain documents requested by the OIG in a January 19, 2024 letter to OIG Deputy Director Raymond Moss. The OIG is seeking extensive personnel, operations, and other management documents from the date of the Commission’s inception. To date, we have not received a response from the OIG.

³ Although OIG investigators raised that the Ethics Commission has a similar policy for its inquiries, we would note that the Ethics Commission’s policy does not outright bar agency counsel participation in interviews but instead raises State Ethics Law considerations and indicates that agency counsel may participate if the agency policy is that agency counsel attend all such employee interviews. Indeed, pursuant to the Ethics Commission’s written policy, the subject of the interview may decline to have agency counsel present at the interview at their option only. See State Ethics Commission Enforcement Procedures, *adopted May 30, 1979, amended February 17, 2016*, stating “Agency counsel’s presence during such interviews will not violate [State Ethics Law] if it is the usual practice of



that in the Spring/Summer of 2023, agency counsel attended interviews of Commission employees conducted by your office in connection with another OIG request issued pursuant to M.G.L. c. 12A, § 9 with no objection. However, the investigators and counsel in the meeting attempted to distinguish the previous document request as being a discrete matter and posited that our agency counsel did not participate in their capacity as attorneys during those interviews. Of note, the Commission did not raise objections to the scope of that investigation, as the document request clearly encompassed matters of public funding and questions were focused on the subject of the investigation, a licensee's participation in the Commission's Social Equity Program, which provides certain benefits, including expedited license review, to qualified applicants.

OIG investigators have stated the interviews are being conducted in our employees' personal capacity; however, your investigators' questioning relates to official Commission business and their discharge of their duties and job responsibilities. One investigator, when asked a question by a Commission employee, referred to her as a "witness."⁴ Furthermore, it is unclear how employees should report their time because the OIG is conducting voluntary interviews concerning Commission business during business hours. The mixed messages received from your investigators have led to confusion amongst Commission employees, who have significant job responsibilities regulating a \$5.5 billion plus industry.

Organizational Structure

The Commission's formation and organizational structure is in the exclusive purview of the Massachusetts General Court.⁵ The number of commissioners, the commissioners' powers, duties, and responsibilities, adherence to the Open Meeting Law, and related matters were contemplated and legislated by the Legislature and signed into law by then Governor Charles Baker.

We are sure you can appreciate our concerns when we learned that during interviews, OIG investigators asked Commission employees to opine on whether it would be better to have a smaller number of commissioners, or whether the Legislature should change the structure of the Commission to avoid being required to conduct Commission business in public session as required by the Open Meeting Law. As we understand it, your investigators went as far as to ask Commission employees leading questions if having one or three commissioners would be a more advisable structure to the current five commissioners, who are differentiated due to their subject

the particular agency or municipal counsel's office, in the discharge of their official duties, to represent agency employees or former agency employees at depositions, trials, investigative interviews, or other proceedings where testimony is taken. Counsel accompanying a public employee to provide sworn testimony in a Preliminary Inquiry will be asked to verify that this is the agency's or municipal counsel's office usual practice at the beginning of the interview on the record."

⁴ On January 31, 2024, a commissioner who was interviewed requested clarification from the OIG's Senior Investigator on this issue as well as the issue regarding participation of agency counsel. The Senior Investigator indicated that the request would be forwarded to the OIG's Legal Department. Neither the Commissioner nor the Commission's Legal Department has yet received a response.

⁵ See Chapter 55 of the Acts of 2017. <https://malegislature.gov/Laws/SessionLaws/Acts/2017/Chapter55>



matter expertise in public health and substance abuse, public safety, corporate management, industry management, or legal, policy, or social justice issues.⁶

The Legislature has expressly contemplated the organizational structure of the cannabis regulatory agency in the Commonwealth on numerous occasions. As you may know, cannabis was regulated by a single commissioner (and business was conducted outside of the Open Meeting Law) when the Medical use of Marijuana Program was administered by the Department of Public Health.⁷ The Legislature further considered the question of the number of commissioners when it revised the 2016 ballot question legalizing adult use cannabis, expanding the number of commissioners from three to five.⁸

These questions appear to fall outside the scope of the OIG's enabling statute, G.L. c. 12A, § 7. Further, it is unclear why the OIG believes its investigators are authorized to step into the shoes of the duly elected Legislature and question the structure of an independent agency created by statute. If the Legislature wishes to amend the number of commissioners, that is within their exclusive purview. Equally concerning, the OIG apparently asked Commission employees, who were denied the opportunity to have agency counsel accompany them to interviews at their option, to identify what statute authorized the Commission to designate an acting chairperson. The OIG does not possess the authority to review the Commission's interpretation of its own statute or its power to make appointments.⁹ The interpretation of our statutes fall within the exclusive jurisdiction of the Commission and/or a reviewing court. Massachusetts courts have given substantial deference to administrative agencies' interpretations of their own statutes and regulations.¹⁰

When a commissioner serves as an acting chair due to the absence of the chair, the commissioner receives no additional financial compensation.¹¹ The same is true for statutorily mandated officers, such as the commissioners who serve as Secretary and Treasurer.¹² The Commission's authority to appoint officers¹³ was granted by the Legislature in its enabling statute. Therefore, we see no connection between the election of these officer roles to the OIG's investigative mandate regarding waste, fraud, and abuse of public funds. This line of questioning again demonstrates our concerns that the OIG is stepping into the jurisdiction of the Legislature. If the Legislature wishes to opine on the Commission's authority or enact statutory changes, once again, that is within their exclusive purview.

⁶ G.L. c. 10, § 76(a). This line of questioning may also directly impact the Massachusetts Gaming Commission, with an organizational structure that is nearly identical. See G.L. c. 23K, § 3.

⁷ Chapter 369 of the Acts of 2012. <https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369>.

⁸ Chapter 334 of the Acts of 2016. <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter334>.

⁹ G.L. c. 94G §4(a). "The commission shall have all the powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the power to: (i) appoint officers and hire employees." G.L. c. 10, § 76(f).

¹⁰ See *Goldberg v. Board of Health of Granby*, 444 Mass. 627 (2005) (directing courts to defer to evaluation of agency interpretations of statutes when the statute does not speak directly to a question and so long the agency interpretation of the regulation "may be reconciled with governing legislation").

¹¹ G.L. c. 94G §4(a). Compensation for the roles of Commissioners and Chair is clearly defined in the Commission's enabling statute.

¹² G.L. c. 10, § 76(g).

¹³ See G.L. c. 94G, § 4(a)(i).



Commissioner Qualifications

During an interview between your office and two commissioners, an investigator apparently asked the commissioners to detail how their qualifications comply with the statutory requirements to serve as a commissioner under G.L. c. 10, § 76.¹⁴ As you are likely aware, the appointment of a commissioner falls within the exclusive purview of the appointing authorities, *i.e.* the Governor, Attorney General, and/or Treasurer.¹⁵ We fail to see where your office possesses the statutory authority to review an individual’s qualifications to serve as a commissioner. The review and decision on commissioner appointments are within the exclusive purview of the Governor, Attorney General, and/or Treasurer, as the appointing authority is required by law to conduct a background investigation *prior to* a commissioner’s appointment.¹⁶

Performance, Human Resources, and Management Matters

It is our understanding that your investigators have asked Commission employees questions regarding the discharge of their duties, such as how often they met with the Executive Director or Chair, and what their relationship was like with these individuals. Certain employees were asked if they recognized agency documents that were not produced by the Commission or their opinions about the human resources complaints process. This line of questioning, related to performance and management of a government agency, appears to fall within the purview of the Office of the State Auditor, as the Auditor is charged with conducting audits, investigations, and studies to promote accountability and transparency, improve performance, and make government work better.¹⁷ Again, we fail to see the connection between the dynamics of working relationships between Commission employees, and the mandate of the OIG to conduct investigations into public funds and procurements.

Relatedly, we understand your investigators had questions regarding the delegation of Executive Director authority and we want to clarify the Commission’s actions during this time. On this point, the former Executive Director submitted a Key Contact Form to the Comptroller’s office designating the Chief Operating Officer (“COO”) as agency head during his leave of absence, even though this action was unnecessary as he was still actively employed by the Commission, and the COO had been duly authorized to perform agency financial functions since 2020. The Comptroller’s office notified the Commission that it was returning the filing as invalid since the Executive Director remained the duly appointed agency head pursuant to G.L. c. 10, § 76(j). Upon review, the Comptroller’s Office notified the Commission that the previous Key Contact filing remained effective and that since the COO retained Department Head Signature Authorization and credit card designation, all Commission financial functions were valid and authorized during this period of time. Pursuant to G.L. c. 10, § 76(j), “[t]he commission **shall** [emphasis added] appoint an executive director . . . In the case of an absence or vacancy in the office of the executive director or in the case of disability as determined by the commission, the

¹⁴ It is also concerning that based upon reports of these interviews, not all commissioners were asked to detail how they were qualified to serve.

¹⁵ G.L. c. 10, § 76(a).

¹⁶ *Id.*

¹⁷ <https://www.mass.gov/orgs/office-of-the-state-auditor>



commission **may** [emphasis added] designate an acting executive director to serve as executive director until the vacancy is filled or the absence or disability ceases.”

In October 2023, the Commission exercised this authority to appoint Debra Hilton-Creek as Acting Executive Director during the Executive Director’s absence. The Acting Executive Director has all the powers and duties of the Executive Director and is the executive and administrative head of the Commission. Notification of the vote was sent to the Comptroller and the key contact forms were updated to reflect that designation and were accepted without issue. All Commission business, financial or otherwise, was duly conducted while the former Executive Director was on leave, and he served as our agency head until the Acting Executive Director’s appointment.

Pending Legislation

The Commission is aware of filed legislation, currently in the Joint Committee on Cannabis Policy, that would grant the OIG oversight of Commission operations, structure, and management. The existence of this proposed legislation clearly demonstrates that the OIG, to date, does not possess such authority. Given the line of questioning detailed above, we are concerned that your investigators may be confused about their current authority or may be taking steps in response to a particular piece of pending legislation throughout this investigation. The OIG’s “Mission, Vision, and Values” website states that its work is “fact-based, independent, without bias or undue influence, and supported by sufficient and credible evidence in accordance with professional standards.”¹⁸ Investigations should not be influenced by political considerations.

Indeed, the OIG appears to be currently exerting the exact authority proposed in Bill S.58, “An Act Establishing An Internal Special Audit Unit Within the Cannabis Control Commission,” with its proposal that “[t]he internal special audit unit shall monitor the quality, efficiency and integrity of the commission’s operations, including but not limited to, operations under chapters 94G and 94I, host community agreements, investigation and audit policies and procedures, **organizational structure and management functions** and seek to prevent, detect and correct fraud, waste and abuse in the expenditure of public funds”¹⁹ (emphasis added).

In the spirit of transparency, and to assist your office in investigating agency expenditures that are under the OIG’s purview, the Commission produced to the OIG organizational charts, onboarding documents, internal policies, and other public records. This commitment to transparency should not be construed as the Commission consenting to oversight by the OIG beyond your current statutory mandate. Again, this objection was lodged in our January 19, 2024 letter to the OIG’s Deputy Director.

Conclusion

Due to the continued federal prohibition of cannabis, the Commission was required to establish much of the necessary research, policy, and operational requirements of a state agency

¹⁸ <https://www.mass.gov/info-details/oig-mission-vision-and-values>

¹⁹ <https://malegislature.gov/Bills/193/S58>



on its own. Despite these unique challenges, the Commission's work has been modeled by other states as they set up their own regulatory agencies. Our organizational structure and regulations have been replicated, in whole or in part, by Vermont,²⁰ Rhode Island,²¹ , Hawaii,²² and other jurisdictions.

To date, the Commission regulates a \$5.5 billion plus licensed industry that generates hundreds of millions of dollars in state and local revenue each year. Currently, cannabis generates more tax revenue than the alcohol industry, at \$134.7 million year to date ("YTD") and is the most profitable crop in Massachusetts. The regulated marketplace further contributes between 15,000 and 20,000 well-paying jobs to our state economy. The Commission's non-tax revenue is just as substantial. In FY 2024 YTD, the Commission has generated more than \$8 million, and the Commission projects total non-tax revenue receipts will end the fiscal year with more than \$21 million.

To reiterate, while the Commission will comply with requests from the OIG within its mandate, we object to your office exerting authority granted to other government entities, including but not limited to the Legislature, Governor, Attorney General, Treasurer, Auditor, Commission, or a reviewing court. Furthermore, we request that you review your stance regarding the presence of agency counsel at voluntary interviews of agency employees given the concerns we have raised and in the absence of a written policy.

Despite these concerns, the Commission has great respect for the work of the OIG and its mission. Please feel free to reach out should you have questions or to discuss further and we appreciate your attention to this matter.

Best regards,



Kristina Gasson
General Counsel

cc: Paige Scott Reed, Chief Legal Counsel, Office of the Governor
Paula McManus, General Counsel, Office of the Attorney General
Sarah Kim, General Counsel, Office of the Treasurer
Michael Leung-Tat, General Counsel, Office of the State Auditor
Liza Rosenof, Legal Counsel, Joint Committee on Cannabis Policy, Massachusetts General Court
Ava Callender Concepcion, Acting Chair, Cannabis Control Commission
Debbie Hilton-Creek, Acting Executive Director & Chief People Officer, Cannabis Control Commission

²⁰ <https://ccb.vermont.gov/>

²¹ <https://ccc.ri.gov/>

²² <https://www.hawaiinewsnow.com/2023/11/18/hawaii-attorney-general-issues-clear-roadmap-legalizing-recreational-marijuana/>

