

# Legislative Budget Office Oversight Commission

## Draft Meeting Minutes

December 16, 2019

### **Present:**

Sen. Mary Kiffmeyer, Chair

Sen. Richard Cohen

Rep. Jerry Hertaus

Rep. Bob Vogel

James Nobles, Legislative auditor (ex-officio)

Eric Nauman, Lead Fiscal Analyst, Senate (ex-officio)

Britta Reitan, Assistant Commissioner, MMB (ex-officio)

Bill Marx, Chief Fiscal Analyst, House of Representatives (ex-officio)

### **Excused:**

Sen. Julie Rosen

Sen. Melissa Wiklund

Rep. Lyndon Carlson, Vice Chair

Rep. Mohamud Noor

Sen. Kiffmeyer, Chair, called the meeting of the Legislative Budget Office Oversight Commission to order at 9:12 a.m. in Room 1100 of the Minnesota Senate Building.

A quorum was not present.

### **Approval of Minutes**

The minutes from August 23 and October 8 were set aside to approve when a quorum is present.

### **October 1 MMB Memo: Review of Fiscal Notes**

Britta Reitan, MMB State Budget Director and Kristyn Anderson, MMB General Counsel discussed MMB's responsibility to manage the state's financial affairs and their broad financial responsibility supported by statute. Their plan is to engage with agencies in an advisory capacity early in the fiscal note process so as not to impact timeliness of responses. MMB is particularly interested in fiscal notes for legislation with significant impact, forecast implications, or notes with technical difficulties.

For confidential fiscal notes, Ms. Reitan stated that only MMB staff with a business need to know will have access to the data. MMB intends to work in partnership with agencies and the LBO to make sure high-quality information is available so fiscal notes can be prepared with efficiency, accuracy, and clarity.

Ms. Anderson stated MMB access to classified fiscal notes is lawful because of Minnesota Statutes 13.64, 15.08, and 16A.06 subd. 7. She stated that MMB does not want to interfere with the legislature having a secure channel.

## **Classified Fiscal Notes Under Minnesota Government Data Practices Act**

Priyanka Premo, Senate Council, discussed the 2012 Office of the Legislative Auditor report that was the impetus of the Minnesota statute for classified fiscal note requests. The report said that legislators have a legitimate concern that their information could be made public when it is still being crafted. Ms. Premo pointed out that the Fiscal Notes Uniform Standards and Procedures approved by the Legislative Budget Office Oversight Commission on August 23, 2019 does not specifically allow MMB access to the classified fiscal notes.

Nathan Hopkins, House Research Legislative Analyst, spoke about classified notes protecting legislator's thoughts and ideas during the development of a bill. Similar protection exists for the executive branch during the preparation of the budget proposals. Mr. Hopkins stated that Chapter 13 restricts the sharing of nonpublic data. He emphasized the importance of nonpublic data being controlled and contained, because every time private data changes hands, it increases the chances of a leak. Mr. Hopkins posed the question: If MMB is not assigned to a note, does MMB have authorization to get that data? There are arguments on both sides. It is unclear that MMB's statutes allow for their access to all fiscal notes.

Mr. Hopkins discussed the definition of "state financial policy" used in Minnesota Statute 16A.06, subd. 7. He said it is difficult to argue that confidential unofficial fiscal notes have a role in state financial policy when they are about unintroduced legislation. He stated that because this issue has been raised, if MMB directs agencies to supply MMB with the classified data, the agencies may be seen as knowingly and willingly violating the data privacy act. Mr. Hopkins stated that it is important to make sure that agencies and legislators have a clear understanding of who has access to what.

Rep. Hertaus asked if Mr. Hopkins was advocating for extra privacy for draft legislation and authors throughout the preliminary status of the note. He noted that sometimes a tension exists between the legislature and executive branch. Would an agency try to thwart legislation?

Mr. Hopkins replied that if a legislator decides to introduce a bill, the fiscal note becomes public. MMB's argument is that they should always have access. Mr. Hopkins said it is not 100% clear if MMB has that access under statute. Legislators need to know who's going to have access to these ideas.

Sen. Kiffmeyer remarked that it is a timing issue. Statutes are clear when it is private and when it is public. It is public when it is introduced.

Rep. Hertaus explained that sometimes a member may think an idea is a good idea, and find out it is too expensive. Keeping the information private allows members to tailor their idea to something that could be acceptable.

Mr. Nobles asked Ms. Reitan if MMB was going to require agency commissioners to notify MMB when they receive a classified fiscal note request? Ms. Reitan indicated that the October 1 memo essentially does that. Mr. Nobles also asked how far up the chain the information would be available. Ms. Reitan indicated the information would remain with the executive budget officer (EBO) unless it is complex, then the EBO may loop in their team leader. Ms. Reitan indicated that the information would not be shared with her or other appointed staff. MMB's goal is to make sure legislators are making decisions with the best possible information. The biggest area of concern is areas that affect the forecast. MMB often found issues that had been missed by DHS, for example.

Sen. Kiffmeyer stated that while she appreciated MMB's intent, the legislator's right to privacy supersedes the requirement to have access to the data. Not having the option of confidentiality would have a chilling effect on a legislator's ability to do their work.

Mr. Nobles asked a question about data practices, and why the statute setting up the Legislative Budget Office has a provision that the director will have access to data, unless there is a federal law that prohibits access to the data. Mr. Nobles inquired as to whether or not that restriction also applied to EBOs.

Mr. Hopkins explained that the provision in the LBO statute is there primarily because the legislature is not subject to the data practices act, so it is there to specify how the Legislative Budget Office will go about accessing private data. On the other hand, MMB is subject to the data practices act.

Ms. Premo agreed that is why that provision of statute exists.

Mr. Nauman asked about item number 8 on the MMB October 1 memo, directing agencies to share with MMB assumptions and fiscal note content about unofficial and classified fiscal notes. He suggested that fiscal analysts would need to advise authors that MMB will also see the fiscal note request.

Sen. Kiffmeyer described Mr. Nauman's idea as a kind of Tennessean warning to the legislator. She would like to see House and Senate nonpartisan staff work with the LBO to develop a process that will protect classified data, to be discussed at the next Legislative Budget Office Oversight Commission meeting.

## **LBO Update and Discussion Items**

### **Update**

Michelle Weber, Legislative Budget Office Director presented an update on LBO activities, including fiscal note requests received, knowledge building sessions held September 11-December 11, completion of fiscal note tracking system changes, and a full-day meeting that was conducted on December 2.

### **IT Costs**

Ms. Weber discussed IT costs, and the interest in looking at both costs associated with bills that have significant costs and long term costs that extend beyond the table of the fiscal note. The LBO wants to engage in a cooperative conversation with MNIT, and MMB on the subject. The LBO draft User Guide will identify this issue and offer options to account for these costs, including a range, or set of options and then costs for the most likely scenario.

Rep. Vogel pointed out that when he asked for a fiscal note on MNLARS, one was not provided because it was a line item in the governor's budget and became a continuing line item. He noted that if we don't have a fiscal note, we have nothing to compare the costs to. Rep. Vogel thinks it is important to have information about IT costs up front. We could still make mistakes, but there will be well thought-out decisions and have something in mid-stream to compare costs to.

Sen. Kiffmeyer asked if the User Guide would be fleshed out more than the Uniform Standards and Procedures, and when will that be available?

Ms. Weber replied that the classified note conversation may need to happen before releasing the User Guide. The goal of the LBO is to make sure agencies identify the costs by giving agencies topical areas to use as a guide.

Sen. Kiffmeyer stated that there should be clearly defined, descriptive labels to identify the costs rather than leaving it up to each agency to decide. Definitions of what kind of project it is, what elements should be considered, would be important to consider.

### **FTEs**

The LBO goal for agencies reporting FTEs is to apply a consistent and standard methodology. The LBO plans to meet with larger agencies so they can share their methodology. LBO review of fiscal notes will require that agencies identify when they stray from their methodology.

Rep. Hertauss noted that often legislation's goal is to eliminate FTEs.

### **Absorbed Costs**

Ms. Weber discussed absorbed costs, indicating three aspects that will be followed: 1) agencies need to show justification (what and why they can absorb the costs). 2) Use of absorbed costs should be carefully tracked and standardized, and 3) costs cannot be absorbed for forecasted programs, based on instructions in the bill, or based on an agency position on the bill.

Rep. Vogel noted that absorbed costs bring up the question to legislators: Are we over allocating to agencies?

Ms. Weber was also asked if there will be behavioral changes in agencies indicating they can absorb costs in a non-budget year. Ms. Weber stated that the LBO would not expect a behavioral change with agencies identifying more or less absorbed costs in a budget or non-budget year.

### **Assumptions**

Ms. Weber pointed to two areas where there has been discussion and exploration: sharing assumptions and developing assumptions with bill language that is unclear or may not be consistent between author and agency assumptions. This has implications on timeliness and independence of agencies. The LBO Uniform Standards and Procedures instruct agencies not to comment on the merits of a bill. They can discuss technical issues with the language. Fiscal notes should not include secondary costs.

The LBO will work with agencies to coordinate assumptions for consolidated fiscal notes. First step is the bill summary, explaining what the bill is doing. Then assumptions are developed. Next the agency's expenditure/revenue methodology. Agencies must take a neutral approach.

The LBO will actively work with fiscal analysts who will work with bill authors if bill language is unclear or it seems an amendment may be helpful.

Sen. Kiffmeyer asked for an example of secondary costs.

Ms. Weber used the motorcycle helmet legislation example. Secondary costs are "might" costs—lower medical costs. Another example: constitutional amendment—only the costs of putting the amendment on the ballot, not the costs associated if the bill passes are counted.

### **Future Meeting Topics**

Sen. Kiffmeyer asked for a brief explanation of the future topics listed on the agenda: fiscal estimates, secondary costs and dynamic scoring, and who may request a fiscal note.

Mr. Nauman explained that fiscal estimates are information conversations fiscal staff use before requesting an unofficial fiscal note. It has been a practice since before the unofficial fiscal note process was put in place. Mr. Marx explained that if it is a simple number to get, fiscal analysts may be able to get it easier than requesting a fiscal note. Mr. Nauman added that it is typically a simple question where a relatively simple estimate is available. Sen. Kiffmeyer said it may be beneficial to have a discussion about it at the next meeting if time allows.

Ms. Weber said secondary costs and dynamic scoring is a complex topic that may require more time to prepare before discussing.

Ms. Weber explained that two different statutes differ on who may request a fiscal note, and also that the LBO continues the practice of recognizing fiscal analysts acting on behalf of the legislators in requesting the fiscal note through the fiscal note tracking system.

Mr. Nobles suggested an additional topic to explore the protocol MMB would use to protect classified data. He would like that process to be a matter of public record which the legislature may want to override.

Rep. Vogel would like to discuss all the topics included in the MMB memo, not just confidential fiscal notes. Need to have a discussion on whether MMB is trying to influence legislation.

### **Potential Future Meeting Dates**

Sen. Kiffmeyer talked about some meeting date options and stated that Kathryn Ho, Legislative Budget Office Coordinator, will contact the commission members to find a suitable date. Sen. Kiffmeyer stated that this will be an important meeting for members to attend.

### **Adjournment**

The meeting adjourned at 11:05 a.m.