Office of the Auditor's Response to Final Report of the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01

Written Response
May 4, 2022

OFFICE OF THE AUDITOR
STATE OF HAWAIʻI

OFFICE OF THE AUDITOR
STATE OF HAWAIʻI

Constitutional Mandate

Pursuant to Article VII, Section 10 of the Hawaiʻi State Constitution, the Office of the Auditor shall conduct post-audits of the transactions, accounts, programs and performance of all departments, offices and agencies of the State and its political subdivisions.

The Auditor's position was established to help eliminate waste and inefficiency in government, provide the Legislature with a check against the powers of the executive branch, and ensure that public funds are expended according to legislative intent.

Hawaiʻi Revised Statutes, Chapter 23, gives the Auditor broad powers to examine all books, records, files, papers and documents, and financial affairs of every agency. The Auditor also has the authority to summon people to produce records and answer questions under oath.

Our Mission

To improve government through independent and objective analyses.

We provide independent, objective, and meaningful answers to questions about government performance. Our aim is to hold agencies accountable for their policy implementation, program management, and expenditure of public funds.

Our Work

We conduct performance audits, which examine the efficiency and effectiveness of government programs or agencies, as well as financial audits, which attest to the fairness of financial statements of the State and its agencies.

Additionally, we perform procurement audits, sunrise analyses and sunset evaluations of proposed regulatory programs, analyses of proposals to mandate health insurance benefits, analyses of proposed special and revolving funds, analyses of existing special, revolving and trust funds, and special studies requested by the Legislature.

We report our findings and make recommendations to the governor and the Legislature to help them make informed decisions.

For more information on the Office of the Auditor, visit our website:
https://auditor.hawaii.gov

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STATE OF HAWAIʻI
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaiʻi 96813-2917

LESLIE H. KONDO
State Auditor

(808) 587-0800
lao.auditors@hawaii.gov

May 4, 2022

VIA HAND DELIVERY

Members of the House of Representatives
Hawaiʻi State Capitol
Honolulu, Hawaiʻi 96813

Re: Office of the Auditor's Response to the Final Report of the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01

Dear Representatives:

We had intended to publish the enclosed Office of the Auditor's Response to the Final Report of the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01 after the committee's report was submitted to the House of Representatives, as the committee is required to do by its authorizing resolution.[1] As far as we can tell, however, the committee issued its report on Saturday, January 29, 2022, only to Speaker Saiki. See Spec. Com. Rep. No. 1-22.

We do not know whether Speaker Saiki or Representative Belatti, the committee chairperson, will present the report to the House of Representatives before adjournment sine die. Even if the final report is not presented to the House of Representatives, it is necessary to address the various inaccuracies, misleading statements, and unsupported conclusions in the committee's report; it is necessary to clearly establish the committee's blatant abuse of the limited and very specific investigative power conferred by the House of Representatives in House Resolution No. 164. We believe the response does both and exposes the politically motivated nature of the committee's efforts to damage the Auditor and exert political pressure on the Office of the Auditor.

We had provided written comments about the committee's draft report in January, and those are attached as an appendix to the committee's final report. However, the draft report upon which our comments were based was missing findings, had numerous placeholders, and was missing complete sections altogether. In addition, the committee included other substantive changes to its final report. Those changes further demonstrate the committee's willingness to disregard not only its legal authority but also the evidence.

[1] According to House Resolution No. 164, the committee was required to "submit its written findings and recommendations, including any proposed recommendations, *to the House of Representatives* prior to the convening of the Regular Session of 2022" (emphasis added).

Because the committee conspicuously failed in its statutory duty to conduct its proceedings "in a fair and impartial manner,"[2] we are compelled to document the most significant flaws and misleading aspects of the final report and the proceedings that gave rise to it. It is critical that the constitutionally created Office of the Auditor be protected from undue political influence and interference, to ensure our independence, so we can work to provide independent and objective assessments of state programs, hold state agencies accountable, and improve state government.

We hope this abuse of legislative power – this form of political corruption – ends with the termination of the committee upon adjournment sine die.

Very truly yours,

Leslie H. Kondo
State Auditor

Enclosure

cc/encl: Members of the Senate

[2] Section 21-1, Hawai'i Revised Statutes.

PHOTO: OFFICE OF THE AUDITOR

Office of the Auditor's Response to Final Report of the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01[1]

Introduction

The committee's final report is flawed and misleading. It is the product of an investigative committee that was created and authorized by a House Resolution to do one thing, but ultimately chose to do something quite different – something it was not legally empowered or authorized to do. Regarding what the committee was properly authorized to do, we welcome the committee's efforts to understand the significant agency dysfunctions that we brought to light in Audit Report Nos. 19-12 and 21-01, as authorized by the House of Representatives in House Resolution No. 164 (2021). We welcome

"Investigative committees should never be vehicles for personal or political animus."

[1] We use the committee's actual title, not the less specific title the committee used for purposes of its report. See below, pp. 6-7.

the committee's efforts to remedy those dysfunctions through statutory revisions or other means.

In contrast, we do not welcome the unprecedented use of an investigative committee as a vehicle for a personalized attack on the Auditor and a generalized attack on the Office of the Auditor, all under the guise of "auditing the auditor." That was never authorized by the House Resolution that created the committee with only specific and limited investigatory powers. And it goes without saying that investigative committees should never be vehicles for personal or political animus.

State law requires investigative committees in Hawai'i "to perform properly the powers and duties vested in them." Hawai'i Revised Statutes (HRS) § 21-1. The same statute imposes a conspicuous duty: investigative committees must conduct their proceedings "in a fair and impartial manner." Here, the process was anything but fair and impartial, and the resulting report even less so. Legislative committees should comply with state law. That should not be a controversial proposition.

The many problems with the report, and with the committee's proceedings, go beyond the significant, but presumably unintentional, pattern of mistakes and oversights, or even the intentional innuendo and animus. Instead, the report offered by the chair,[2] and the proceedings she presided over, bear all the indicia of a disingenuous and politically driven effort to inflict political damage on the Auditor and to exert political pressure on the Office of the Auditor. That is unacceptable. It is reminiscent, in its own way, of the kind of defective and unprincipled political ethos that most recently manifested itself in state legislators accepting bribes in exchange for altering or killing pending legislation.

Government auditors have a professional obligation to remain independent from political pressures. That is why the framers of our state constitution intended the Office of the Auditor to be free from undue political influence. We simply cannot do our job without that independence. Yet the committee, or its chair, engaged in a sustained attempt to undermine and compromise that independence. That effort went far outside anything authorized by the House and represents a shameful, punitive, and unprofessional use of legislative powers.

We realize that not all members of the committee shared the chair's insistence on misusing the committee in order to, in part, perpetrate an unwarranted and political attack on the Auditor and on the Office of the Auditor. We appreciate their sincere and dedicated attempts to get to the bottom of the problems at the Department of Land and Natural

[2] The committee's hearing on January 10, 2022, appeared to confirm that the report is chair Della Au Belatti's report.

Resources (DLNR) and the Agribusiness Development Corporation (ADC) revealed by the respective audits. We apologize to those members if their good work seems tarred by our necessary effort to call out the chair's and certain other members' transparent attempts to create a pretext for improper political pressure on, and further "investigation" of, the Auditor and the Office of the Auditor.

In what follows, we highlight the most significant flaws and the most misleading aspects of the committee's final report and the proceedings that gave rise to it. Throughout our response we contrast the committee's claims with the actual facts the committee ignores or distorts.

First, we show that the committee's attempt to investigate the Office of the Auditor – under the guise or pretext of a narrow and specific resolution concerning two *other* agencies' compliance with *our* audit recommendations – was an unlawful abuse of power. The committee went far beyond the boundaries of the limited powers delegated to it by the House authorizing resolution. There are many problems with this maneuver – not least that it is unethical and unprofessional for legislators to abuse their powers or to arrogate to themselves powers they do not, in fact, possess. In addition, an unauthorized investigation is an illegal investigation, and an illegal investigation is illegitimate at its core. Moreover, acting beyond the powers granted by the authorizing resolution also potentially strips those legislators of what is normally an absolute immunity from lawsuits, and thereby exposes the State to significant legal liability.

Next, we show that the committee conspicuously failed in its statutory duty to conduct its proceedings "in a fair and impartial manner." Then we explain the difference between a report whose results rest on rigorously verified fact – such as an audit report – and a report that starts with the conclusions it wants to arrive at and then selects and distorts facts so they will support a pre-determined narrative. The latter is the route the committee report chose to follow. Real and reliable findings are not a hodgepodge of ill-founded impressions in the service of a pre-ordained conclusion.

We then address the final report's contention that the Auditor somehow culpably failed to cooperate with the committee's investigation. The Auditor was forced to go to court to enforce a statute that protects the confidentiality of what are called audit "working papers." The court agreed with the Auditor that the committee had no right to those working papers. Rather than admit it was seeking documents it had no right to, the committee in its report characterizes the Auditor's efforts to comply with state law – remarkably – as a failure to cooperate with the committee. Such accusations are not the product of a fair

and impartial proceeding. They are not even the product of a rational proceeding.

Finally, we take issue with the committee's contention that its "brief investigation into the Office of the Auditor raised serious concerns regarding the practices and policies of the Office of the Auditor." Leaving aside for a moment the committee's qualifications to issue such an assessment, or its willingness to make such a claim based on what it admits was a "brief investigation," we note that we are regularly peer-reviewed by auditing professionals with experience in performance auditing. Those in-depth peer reviews have been uniformly positive, including the two most recent reviews completed during the current Auditor's tenure. The committee's contention arises not from the relevant facts or pertinent data or adequate analysis, but rather from the committee's own desire to find fault with the Auditor.[3]

[3] Speaking of qualifications to make such an assessment, the only member of the committee with a background in auditing, Representative Dale Kobayashi, concluded that the report's draft of chapter 4, "Office of the Auditor," was mostly "innuendo" that "seemed designed to cast a negative light on the Office of the Auditor." His own professional assessment of the defects went further. "Much of what was said pertaining to the auditor was way over the line and can even be construed as defamatory." His assessment of the draft as a whole? "Much of what is said in this report is incorrect and improper." See below at p. 29 for citations.

I. An unlawful abuse of power

An investigative committee's powers are delegated from the House as a whole by means of an authorizing resolution. Here, the resolution delegated only limited and very specific investigatory powers to the committee. The committee ignored those limits. By ignoring those limits, it committed an unlawful abuse of power.

The committee was created by House Resolution No. 164, passed the very last day of the 2021 legislative session, and was authorized by it to investigate two specific state agencies' compliance with two specific audits. The chair's attempt to misuse the committee to "audit the Auditor" under the guise of House Resolution No. 164 was never authorized by the House of Representatives, is far outside the committee's delegated powers, and is therefore an illegal abuse of power.[4]

Government officials must act within the limits of their powers, not outside them. This principle applies to chairs and members of legislative investigative committees. Even they must act within the boundaries of the powers delegated to them by the broader Legislature,[5] in this case by the House of Representatives.

Investigative committees enjoy only the limited powers granted to them by the Legislature. When an investigative committee acts outside those powers, that is by definition an abuse of power. The single-body

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[4] Obviously enough, we are not suggesting there are no circumstances in which outside review of the Auditor's Office would be appropriate. An inquiry into employment law violations would be as appropriate in our Office as it would be in the legislature or in any agency of the executive branch, given relevant evidence of such a violation. See *Honolulu Civil Beat v. Dep't of the Attorney General*, SCAP-21-0000057 (Hawai'i Supreme Court, April 26, 2022). And, of course, we are subject to regular outside review by professionals in the field of performance auditing. Rather, we are saying that pretextual investigations of the Office of the Auditor designed to serve political ends are inappropriate and, when they fail to secure the consent of the Legislature through an explicit authorizing resolution, are illegal.

[5] *Watkins v. United States*, 345 U.S. 178, 201 (1957) ("An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power *delegated* to them. … Those instructions are embodied in the authorizing resolution." (emphasis added)); *id.* at 206 ("Plainly these committees are restricted to the missions *delegated* to them" (emphasis added)). As the statute governing investigative committees in Hawai'i states, its purpose is to enable such committees "to perform properly *the powers* and duties *vested in them*[.]" HRS § 21-1 (emphasis added). Elsewhere the same statute speaks of the "single house resolution … from which it [the committee] derives its investigatory powers." HRS § 21-3(a). The statute's legislative history is even more emphatic on the delegated nature of an investigative committee's powers. Stand. Com. Rep. No. 48, 1969 House Journal, p. 629 (referring to "the proper *delegation* of investigative authority to interim committees" (emphasis added), *id.* (explaining that "the issue of concern is the proper method by which investigative authority is *delegated*" to a committee (emphasis added)); *id.* (noting that under chapter 21, HRS, investigative committees may "have investigative authority *delegated* by a single house resolution" (emphasis added)).

resolution creating and authorizing the committee includes a specific section devoted to the "scope of its investigatory authority," as required by Hawai'i law. HRS § 21-3(b). That scope is carefully and explicitly delineated, as required by the Hawai'i statute and by U.S. Supreme Court holdings.[6]

The resolution delegates only specific and limited powers to the committee – powers explicitly spelled out in its scope of authority section. The resolution's "purpose … of the investigating committee" and "scope of its investigative authority" sections mention only two state agencies.[7] The Office of the Auditor is not one of them. The resolution's title mentions only two state agencies; neither of them is the Office of the Auditor.

The committee's own name – "the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01" – testifies to its specific scope and limited powers.[8] As its name reveals, the committee is tasked with investigating the "compliance" of the two relevant agencies with the two specific audits. That is what House members who voted for the resolution understood its scope to be. Until the chair attempted to co-opt the committee to serve some other purpose *not* present in the resolution, that is what the committee itself understood its purpose, subject matter, and scope of authority to be.[9]

In its report, the committee now calls itself "the House Investigative Committee Established under HR 164." Any mention of its actual name – with its connotations of an investigation of the "compliance" of two specific agencies with the recommendations of two specific audits –

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[6] *United States v. Rumely*, 345 U.S. 41, 44 (1953) (noting that the legislative resolution authorizing an investigative committee "is the controlling charter of the committee's powers.") *id.* at p. 44 (noting that an investigating committee's "right to exact testimony and to call for the production of documents must be found in this language.").

[7] House Resolution No. 164, at p. 3, lines 21-23; *id.*, lines 25-35.

[8] The committee's real name – as opposed to the one it crafted for itself in the report – appears on every one of the subpoenas the committee issued, every one of its hearing notices, in the title of the committee's rules, and on the committee's own website.

[9] The committee describes itself this way on its own website. "House Resolution No. 164 (House Resolution No. 164) established the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01. The Committee is tasked with following up on the audits which focused on the management and operations of the Department of Land and Natural Resources' Special Land and Development Fund (Report No. 19-12) and Agribusiness Development Corporation (Report No. 21-01). The Committee will examine the recommendations made in those audits for the purposes of improving the operations and management of those state agencies, their funds, and any other matters."

has been airbrushed out of the report.[10] And by rechristening itself, the committee or its chair can proceed with conveying the mistaken impression that it was properly empowered to investigate the Auditor and the Office of the Auditor all along.

Nevertheless, the House resolution creating the committee does not authorize "auditing the Auditor." Far from it. Here is what it says, in plain English. According to the resolution, the "purpose and duties of the investigating committee and the subject matter and scope of its investigative authority" are threefold: (1) "[to] follow up on the audits," that is, the two specific audits of two specific agencies, (2) "to examine the recommendations made in those audits," and (3) "for purposes of improving the operations and management of these state agencies, their funds, and any other matters."

No one, not even the committee, thinks the phrase "these state agencies" includes the Office of the Auditor.[11] No one, not even the committee, thinks the related language in the resolution "improving the operations" of the two specified agencies somehow empowers the committee to "improve the operations" of the Office of the Auditor. No one who knows law or grammar thinks the phrase "and any other matters," tacked on at the end of clause (3), gives the committee the power to investigate whatever agency or topic it wants, for example, the Office of the Governor, the Office of Hawaiian Affairs, or Ringling Brothers' circus.[12]

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[10] To be precise, the committee was forced to use its real name once in the final report, in a footnote, when referring to the committee's rules, since its real name is incorporated into the title of the committee's rules. Report, p. 6, n. 6.

[11] That is not to say the committee or its chair did not try to obscure the point. On the face of each of its subpoenas, the committee has a "notice to witness" that accurately describes its purpose and scope of power under House Resolution No. 164 – with one very conspicuous omission. It says, "The Investigative Committee is authorized to follow up" on the two specific audits "and to examine the recommendations made in those audits, for purposes of improving the operations and management of state agencies, their funds, and any other matters."

The limiting word "these," from the resolution's actual phrase, "these state agencies," is conspicuously omitted in the "notice to witness" on the committee's subpoenas. In one stroke, the committee transformed its authorized purpose from "improving the operations and management of these state agencies," namely two, to a general purpose of improving the operations and management of an indeterminate number of state agencies. It is possible the omission of that key limiting word was an innocent mistake. It seems more likely that it was not.

[12] Delegation of legislative authority cannot be unlimited, that is, "for any purpose." Even at its outermost legal limits, delegation of legislative power presupposes "an intelligible principle" of delegation, according to numerous and longstanding U.S. Supreme Court decisions. It is absurd to pretend that this tiny tail of "and any other matters" wags the whole dog of the resolution. And even if, against all reason, it did, the phrase "and any other matters" does not remotely qualify as an "intelligible principle" of delegated powers. It would be an illegal and improper delegation of legislative power.

The chair has attempted to rationalize away these limitations on the committee's power in several ways. First, she claimed the committee had "inherent power"[13] to investigate the Auditor. That is flatly wrong as a matter of law. The Legislature has inherent powers. But the *committee* itself has only the powers delegated to it by the broader House. Simply put, the committee's powers consist only of those powers specifically delegated to it by the authorizing resolution which created the committee. Those delegated powers are defined and limited. They do not include a roving commission to wholesale investigate the operations and management of other state agencies.

Nor does the committee have the power to extend its own powers. Only the House as a whole can do that.

Second, the report now claims the committee is only following unspecified "congressional practice" and other states in going beyond the scope of its authorizing resolution. This is an odd claim. Hawai'i legislators, in particular, should be very clear about the fact that they must follow Hawai'i laws and U.S. Supreme Court precedents governing the delegation of legislative power. That is not optional. Claiming to possess unspecified and non-delegated powers to follow vague and unspecified "practices" of Congress and other states just does not cut it.

Third, the chair appears to claim that she "specifically drafted" House Resolution No. 164 "to allow the committee to delve into other matters[.]" That may have been her private intent, but if she is referring to "other matters" outside the scope of the two specified agencies complying with the two specified audits, that is not the legal effect of her drafting. The phrase "and any other matters" refers to any other matters relating to "improving the operations and management of these state agencies" and "their funds." That is clear from the fact that the phrase appears at the end of clause (3) and is therefore limited to that clause; it is not given its own clause (4). It is not somehow a grant of unlimited authority to investigate whatever the committee wishes to investigate.

The limited nature of that phrase follows also from standard canons (or principles) of legal interpretation. The authorizing resolution is a legal instrument, a product of the House. Under standard canons of statutory construction, the phrase "and any other matters," tacked on at the end of very specific scoping language in the resolution, must be interpreted to modify only the specific language preceding the phrase in the resolution

[13] https://www.youtube.com/watch?v=5S3UyJdECkM. Timestamp 00:12:25 of the October 21, 2021 hearing. (Chair Belatti: "we are a legislative committee and an inherent power and fundamental right of this body is to investigate …")

and not as some kind of unlimited grant of plenary investigative authority.[14]

The committee interprets the phrase "and any other matters" as though it were magically unmoored from the specific words that precede it. In effect, the committee pretends the phrase has no context, and thereby attempts to create the impression the committee has been delegated an unlimited power to investigate from the Legislature. Under the standard principles of legal interpretation, however, the phrase "and any other matters" applies only to the purpose of "improving the operations and management of these state agencies [DLNR and ADC],"[15] and therefore applies at its widest only to those two specific state agencies.

Fourth, the chair has claimed that the committee is merely "following up" on the recommendations in the two audits. That claim is belied by the fact that, for example, the chair attempted to go well outside the boundaries of the two agencies' compliance with their respective audits, to throw Honolulu Authority for Rapid Transportation (HART) and various other wide-ranging and unauthorized investigations into the mix. Quite obviously, that is not a "follow-up" to the recommendations in the two audit reports concerning the two agencies. It has nothing to do with those agencies' compliance with the two audits specified in the resolution. It is, instead, a transparent pretext for pursuing political machinations in the service of a political agenda to pressure the Auditor to do the bidding of certain politicians rather than remain independent as his professional role requires.

"We are a government of laws and not of men," as John Adams famously said. We all know what happens when government officials ignore the boundaries of their legal and legitimate power; it is sufficient to mention Senator Joseph McCarthy's rogue investigative committee in this regard. In other words, for government officials to act outside their legal authority is no minor matter. That is why the law takes officials acting without proper legal authorization very seriously.

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[14] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, 199 (the canon *ejusdem generis* "applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics[.]"); *id*. (the phrase *ejusdem generis* is Latin for "of the same kind"); *id*. (characterizing the canon as, "Where general words follow an enumeration of two or more specific things, they apply only to persons or things of the same general kind or class specifically mentioned."). See also *Priceline.com, Inc. v. Dir. Taxation (In re Priceline)*, 144 Hawai'i 72, 436 P.3d 1155, 1173 (2019) ("The doctrine of ejusdem generis states that where general words follow specific words in a statute, those general words are construed to embrace *only* objects similar in nature to those objects enumerated by the preceding specific words. Courts employing the doctrine identify the commonality shared by the enumerated examples and use this commonality to limit the reach of the general term." (citations and quotation marks omitted) (emphasis added)).

[15] House Resolution No. 164, p. 3, lines 33-35.

To be clear, we are not saying *the Legislature* lacks power to investigate what it wants, when it wants, with very few (mostly constitutional) limitations. We are saying *this committee* lacks the power to investigate what it wants, when it wants, under the pretext of "following the evidence" to a pre-ordained conclusion. It lacks that power because that power was never delegated to the committee from the broader House. No House member voted for an investigative committee with a roving commission. They voted for a very specific and limited delegation of investigative authority to the committee.

The Legislature could have granted broad and wide powers in the authorizing resolution had the Legislature wanted to do so. We have no quarrel with the Legislature's ability to do that. But that is not what the Legislature did in House Resolution No. 164. Again, if the Legislature wanted Hawai'i law to follow congressional practices or those of other states, it has the power to change Hawai'i law to do so. But it did not, and it has not, and the committee's attempts to simply pretend otherwise, and to act on that pretense, represent an abuse of power.[16]

The committee was unconcerned about staying within the legal limits of its power

The committee possesses only the specific and limited powers delegated to it by House Resolution No. 164. Some members of the committee justified operating well beyond those delegated powers by saying they learned about legislative oversight at a conference for legislators at the Council of State Governments West in the fall of 2021, and they were told by a speaker at the conference they had the inherent power to follow up on questions, investigating wherever their own questions might lead. Leaving aside the possibility that the members garbled the speaker's comments, this alleged basis for operating far beyond the committee's authorized and delegated powers reflects a remarkably cavalier attitude by members of the committee toward the source, nature, and limitations of the committee's powers.

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[16] The importance of observing the boundaries set by the legislature in delegating power to investigative committees has been underscored by a federal court. The case involved legislative subpoenas issued from a state investigative committee that was operating outside the boundaries of its authorizing resolution. *Thompson v. Ramirez*, 597 F.Supp. 730, 735 (D.P.R. 1984). The case raised an important legal question. "If the challenged subpoenas were not issued pursuant to an authorized legislative resolution, do the legislators enjoy immunity under" 42 U.S.C. § 1983 (the federal statute that allows government officials to be sued for constitutional violations)? The court answered that the legislators were stripped of legislative immunity under those circumstances. *Id.* ("[W]e now find that the legislators do not enjoy absolute immunity when the Legislative Rules and Resolutions are not strictly followed in taking action.") The relevant point here is that when legislators violate authorizing resolutions in the context of investigative committees, it is not a minor legal inconvenience. To the contrary, under some circumstances, it may even put legislators' legislative immunity from suit at risk.

A presentation at that conference appears to have been given by members of the Levin Center of Wayne State University Law School. One of the Levin Centers presenters on the topic of legislative oversight is Elise Bean. Prior to her position at the Levin Center, she was a staffer on the U.S. Senate Permanent Subcommittee on Investigations for 15 years. That Senate investigative subcommittee has what Bean herself describes as a "mind-blowingly broad mandate."[17] The subcommittee has authority to investigate "'the efficiency, economy, and effectiveness' of all federal agencies, including any instance of fraud, mismanagement, corruption, or unethical practice," together with the authority to investigate "all criminal activity that crossed state lines," not to mention an extraordinary range of additional topics.

The Hawai'i investigative committee, in contrast, does not possess a mind-blowingly broad mandate. Far from it. Instead, the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01 has a very specific and very limited mandate. As its name implies, the committee's authorized purpose and scope was to investigate two specific agencies' compliance with the recommendations in two specific audit reports issued by our office. The committee has no power to go beyond that authorized purpose and scope. Exercising powers it did not possess is, by definition, an illegal abuse of power.[18]

Members of the committee were apparently unaware that authorizing resolutions for investigative committees are not interchangeable. Some are broadly scoped, and some are narrowly scoped. It is shocking that the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01 operated without an accurate legal analysis of its own power and, more specifically, the legal limits to that power.[19] The committee repeats the misleading refrain that it was just "following the evidence"[20] in expanding its scope to include "auditing the auditor."

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[17] Elise J. Bean, *Financial Exposure: Carl Levin's Senate Investigations into Finance and Tax Abuse* (Cham, Switzerland: Palgrave Macmillan, 2018), p. 13.

[18] It also raises additional questions concerning unauthorized acts by persons acting under color of state law.

[19] A member of the committee, Representative Dale Kobayashi, repeatedly asked the committee chair to request an Attorney General opinion on whether the committee had the legal authority to go beyond the scope of its authorizing resolution; committee chair Belatti repeatedly denied his request.

[20] Report, p. 6. It is sometimes difficult to tell whether the committee's failure to understand the legal limits of its delegated power is deliberate or merely willfully ignorant. In its report, the committee states that "[i]f an oversight committee investigating audits has questions about the auditor, the way the audit was conducted, or omissions from the audit, it is within the jurisdiction and the responsibility of the oversight committee to follow up and investigate further." First, that depends on whether "the audit" referred to falls within the investigatory authority specifically delegated to the committee in its authorizing resolution. Here, the committee was authorized to investigate two, and only two, specific audit reports. It was not authorized to investigate the HART audit, for example, or the Office of the Auditor. The committee has no power to "investigate further" beyond the scope of its delegated authority. Second, the

But that response commits the logical fallacy of begging the question; it assumes as a premise the very thing it is supposed to be proving, namely, whether the committee had the power to investigate well-beyond its delegated scope of authority. No amount of "following the evidence" can expand the committee's powers beyond those delegated by the House in its authorizing resolution. In addition, the committee's failure to understand the limits of its own power leaves the State open to lawsuits based on abuse of power and to the significant monetary liabilities that accompany such lawsuits.

There is at least one federal case that says that when legislators on an investigative committee operate beyond the bounds of the committee's authorizing resolution, it strips the legislators of their legislative immunity from lawsuits.[21] Given how serious that consequence is, one would expect an investigative committee to be more informed and mindful about the source, nature, and limits of its own powers. In addition, there are serious ethical issues raised when a committee or chair consistently oversteps the boundaries of their legitimate powers. When public officers act beyond their lawful authority, it represents a serious ethical lapse. As the Hawai'i constitution emphasizes, "The people of Hawai'i believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government." Haw. Const. art. XIV. What are the people of Hawai'i to make of committee members or chairs who are apparently blithely unconcerned with willfully operating well beyond their legitimate and authorized powers? Shouldn't everyone be concerned about this kind of thing?

committee is not, in fact, an oversight committee. It is an investigative committee; it does not have broad or continuing jurisdiction over state agencies. Third, as its own names suggests, the investigative committee's purpose and scope of authority was limited to investigating two agencies' compliance with the recommendations in two specific audits. Fourth, the committee's statement conflates two radically different things, (a) the legislature's general powers of oversight and (b) the specific authority to investigate delegated in the specific resolution authorizing the committee. The legislature has the power to follow up on whatever it wants. But it is a non sequitur to conclude the committee therefore does as well. The committee has only those specific powers delegated to it by the House in its authorizing resolution. Repeating clichés about "following the evidence" cannot hide the fact that the committee went far beyond its delegated powers and, in so doing, committed an abuse of power.

[21] *Thompson v. Ramirez*, 597 F.Supp. 730, 735 (D.P.R. 1984). Potential civil liability for members of the committee resulting from stripped legislative immunity for operating beyond the scope of its authorizing resolution includes liability for defamatory statements made by the committee, its report, and statements repeated or republished in the report. See Report, Appendix I; Restatement 2d of Torts, § 577A.

A Year-Long Attack on Good Government

THE UNSUPPORTED AND UNJUSTIFIED ATTACKS on the Office of the Auditor are even more egregious – and the deceptive "gut and replace" of the resolution that created this committee to look at the findings and recommendations made in the reports on the Special Land and Development Fund and the Agribusiness Development Corporation are even more intolerable – when seen as part of a year-long, relentless attack on the office and on good government oversight.

Speaker Scott Saiki's State Auditor Working Group and legislation introduced in 2021 (including slashing our budget by over 50 percent) were designed to gut the Office of the Auditor and interfere with Auditor independence.

January 14, 2021
Speaker Scott Saiki issues a memorandum to all House members announcing his unilateral creation of a "State Auditor Working Group" ("Working Group") to "determine whether the Office of the State Auditor is in compliance with Art. VII, section 10 of the Hawai'i Constitution." The Working Group is led by appointed chair Edwin Young. The Working Group initiated interviews of individuals outside of the Office of the Auditor before it contacted the State Auditor or this office.

January 20, 2021
Speaker Saiki introduces House Bill No. 1, which slashes the office's personnel and operational budget by 52.6 percent. The bill not only eliminates positions and threatens the viability of the office, it eliminates funding for the financial statement audits of 22 state departments and programs as well as the State of Hawai'i Annual Comprehensive Financial Report, all of which are paid through the Audit Revolving Fund that Speaker Saiki removes from the Office of the Auditor's budget. House Bill No. 1 also excludes funding for special studies by the Auditor and removes boilerplate language that allows the Auditor to expend funds appropriated to the office.

January 22, 2021
Speaker Saiki and House Majority Leader Della Au Belatti co-introduce House Bill No. 354, which allows the Legislature to determine the Auditor's salary, this despite section 23-3, HRS, which states that "[t]he salary of the auditor shall not be diminished during the auditor's term of office, unless by general law applying to all salaried officers of the State." Currently set by the State's Salary Commission, the Auditor's salary is the same as the salaries of the heads of the three other legislative service agencies. House Bill No. 354 does not propose altering the salary structures of the three other legislative service agency heads.

January 27, 2021
House Majority Leader Belatti introduces House Bill No. 1341, which creates another level of bureaucracy to oversee the activities of the Office of the Auditor and other "good government" offices.

January 29, 2021
Working Group Chair Edwin Young emails the State Auditor stating that the Working Group will be performing an "independent and objective" assessment of office operations. Most, if not all, of the requested documents and questions seem unrelated to and well outside the Working Group's purpose, as defined by Speaker Saiki. Among the documents that Young requests are confidential personnel files, including private contact information for former employees; audit work papers confidential pursuant to section 23-9.5, HRS; litigation files, including "lawyer files"; and information about "media battles," staff evaluations, and staff turnover.

February 5, 2021
An email from Rona Suzuki, Speaker Saiki's senior advisor, to Working Group members is mistakenly sent to the Office of the Auditor. In the email, Suzuki, a non-member of the Working Group, updates the group members on research she has done on its behalf.

Among the recipients of the email is the former Administrative Deputy Auditor, Ronald Shiigi, who will later testify before the House Investigative Committee that, in his opinion, Auditor Kondo omitted important information from an audit. Shiigi, a non-member of the Working Group and a current Executive Branch Interim Division Head, provides the Working

Group private contact information for former Office of the Auditor employees.

April 1, 2021
The Working Group releases its report, which contains many personal attacks against the Auditor. The report relies heavily on accusations and lacks factual support. The Working Group never took the Auditor up on multiple invitations to meet and never responded to the Auditor's questions, including questions about its authority to access personnel records and the office's confidential work papers. The Working Group principally relies on interviews of a few former employees. It does not identify its sources and does not give the Office of the Auditor an opportunity to respond, which the chair had promised. It does not interview the Auditor or any current staff.

"I am going to let it speak for itself," she said. "I believe anyone who takes the time to read it will see that was not predetermined, and neither is the next step we will take." – Della Au Belatti, House Majority Leader, Civil Beat, April 1, 2021.

Belatti is later named Chair of the House Investigative Committee to Investigate Compliance with Audits Nos. 19-12 and 21-01.

April 29, 2021
On the last day of session, Majority Leader Belatti offers, and the House adopts, House Resolution No. 164, which establishes the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01.

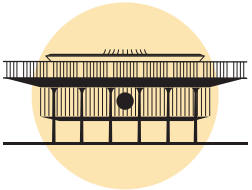
The committee is tasked with following up on two audits that were completed in 2019 and 2021. The audits focused on the management and operations of the Department of Land and Natural Resources' Special Land Development Fund (Report No. 19-12) and Agribusiness Development Corporation (Report No. 21-01).

June 14, 2021
House Speaker Scott Saiki appoints eight members to serve on the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01. The members are:

- Representative Della Au Belatti, Chair
- Representative Linda Ichiyama, Vice Chair
- Representative Mark J. Hashem
- Representative Dale T. Kobayashi
- Representative Val Okimoto
- Representative Amy A. Perruso
- Representative David A. Tarnas
- Representative Kyle T. Yamashita

According to Saiki, "The Investigative Committee will advance the House's goal of reforming and improving government. The DLNR Land Division and ADC carry out critical programs. We must ensure that they do so in a transparent and above-board manner. The House wants to build public confidence in these two agencies." The investigating committee will submit a report of its findings and recommendations, including any proposed legislation, to the House of Representatives prior to the convening of the Regular Session of 2022.

Why Words and Legislative – Not Legislator – Intent Matter



THE STATED PURPOSE of the investigating committee was to follow up on the audits and examine the recommendations made, "for the purposes of improving the operations and management of these state agencies, their funds, and any other matters." Chair Belatti argued that "and any other matters" authorized the committee to include the Office of the Auditor in its investigation. She also claimed that the committee had "inherent power" to broaden its investigation to include the Office of the Auditor. This was wrong. While the Legislature has inherent powers, the committee was limited to the powers delegated to it in the resolution by the broader House.

September 29, 2021
At a procedural hearing of the House Investigative Committee, early in its investigation, chair Belatti claims that "there may be something amiss in the scope of these audits" and is concerned that some important issues may have been omitted from scrutiny of the Auditor. "We would not be doing our job as legislators if we turned a blind eye to the problems being raised in this Committee," she says. The chair opines that the committee's follow up of the audit recommendations could have been disposed more quickly if the Office of the Auditor had followed *Government Auditing Standards*, promulgated by the U.S. Comptroller General (also referred to as the Yellow Book or generally accepted government auditing standards (GAGAS)). She announces that the committee will examine if, in fact, the Office of the Auditor followed Yellow Book standards at the various stages of its audit process. "Members, we are going to be asking these questions and doing our due diligence. That is what we have been tasked to do by House Resolution 164," she says.

October 20, 2021
Before the committee is to hear the testimony of Ronald Shiigi, former Administrative Deputy Auditor for the Office of the Auditor, chair Belatti states that the committee believes omissions in evidence by the Auditor warrant further investigation since the issues "concern policy making and at minimum auditing irregularities that should be explained, and at worst cases of abuse and misuse of power, mismanagement, malfeasance and/or fraud that need to be audited pursuant to Yellow Book standards." Chair Belatti then announces that the next two weeks of testimony will be dedicated to better understanding the circumstances surrounding the omissions, actions or inactions of the Auditor, as well as the policies, procedures, management oversight and disposition of public lands by DLNR and ADC.

October 28, 2021
At a public hearing, the chair states that day's testimony would concern "the management and function of the Office of the Auditor" and that she is committed "to stay focused on ensuring the proper management and oversight of now all three agencies: the Department of Land and Natural Resources, the Agribusiness Development Corporation, and the Office of the Auditor."

December 30, 2021
The House Investigative Committee releases its draft report to the witnesses it subpoenaed during its investigation. The draft contains nearly two dozen incomplete pages, many of them featuring recommendations and commentary that are incomplete, accompanied by editorial notes or placeholder text. A couple of recommendations feature options from which committee members could choose the outcome. Several recommendations and the report's "closing conclusion" are missing altogether. One of the recommendations is: "The Committee recommends further investigation into the Office of the Auditor by the House of Representatives,

Following the Evidence?

THE AUDITOR was the first witness called by the House Investigative Committee. During the hearing, the chair stated the committee was conducting formal interviews with employees and former employees and would be "looking to where the evidence leads us."

Among the questions the Auditor was asked was whether he had disregarded an instance of fraud, whether former state employees now in the employ of the Office of the Auditor compromised the independence and integrity of the Special Land and Development Fund (SLDF) audit, and whether the scope of work performed by the office was consistent with the statute authorizing the SLDF audit.

This was before the committee formally interviewed anyone from the Department of Land and Natural Resources or its Land Division.

a future investigative committee, or an independent third party that can conduct a thorough performance audit of the Office of the Auditor."

January 10, 2022
Although the draft report has already been distributed to affected parties for response, the committee holds a public hearing that makes clear that it has not concluded its investigation, and that the affected parties will not have an opportunity to respond to any substantive changes. The committee recalls a partner from KMH LLP to testify under oath, allowing him to correct inaccurate sworn testimony he provided at an earlier hearing. The committee also issues subpoenas duces tecum to ADC, KMH, and "other organizations identified in the review of documents and testimony provided to the Committee."

January 14, 2022
The Office of the Auditor submits a 72-page response to the draft committee report.

January 18, 2022
The committee chair extends the deadline for issuing the final committee report by 10 days.

January 20, 2022
The Office of the Auditor receives a UIPA request from the Honolulu Star-Advertiser for the Office's response to the committee's draft and provides it in accordance with state laws. The committee chair, citing committee rules, claims the draft report is confidential and the Auditor is not authorized to release it, or "selective portions of the draft report," presumably referring to pieces of the draft included to give context to our response.

January 28, 2022
The committee approves the final report 6-2, with House Minority Leader Val Okimoto and Representative Dale Kobayashi voting in opposition. The six members who vote to adopt the report are committee chair Della Au Belatti; vice chair Linda Ichiyama, David A. Tarnas, Mark J. Hashem, Amy A. Perruso, and Kyle T. Yamashita.

The committee releases the executive summary and recommendations from its final report to the media, but not to the Office of the Auditor.

January 29, 2022
The committee transmits its final report to Speaker Saiki and posts the final report online.

II. Unfair, Improper, and Unauthorized Committee Proceedings

As we just described in some detail, the committee received a specific and limited grant of authority from the House to investigate the compliance of DLNR and ADC with the recommendations we made in two audits of those agencies. In October 2021, the committee began to insist it also had the authority to investigate the Office of the Auditor. It lacked that authority – which must be delegated from the House in the authorizing resolution creating the committee – and it is unfair, to say the least, for the committee to arrogate to itself powers that were never granted to it.

In its later phases, the committee departed even more markedly from conducting its proceedings in a "fair and impartial manner." For example, the January 10, 2022, committee hearing at one point descended into a circus-like atmosphere when the chair threatened to refer the Auditor for investigation by the Attorney General on charges of tampering with a witness. The chair, the committee, and the witness in question all know full-well that the witness changed his sworn testimony to more accurately reflect the actual facts, not to distort, falsify, or obscure them. We know that because the witness put his corrected testimony on the record while under oath.

Nonetheless, the chair suggested that the Auditor had tampered with the witness. She then engaged in a scripted set of limited questions to the witness designed to reinforce the false impression that the Auditor had engaged in nefarious criminal conduct. She proceeded to threaten to refer the Auditor to the Attorney General for investigation for the crime of witness tampering. Maybe this makes for what the chair considers good political theater. But it is in fact an abuse of power, and everyone knows that. Baseless public insinuations of criminal conduct have no place in a "fair and impartial" proceeding. Those types of made-up allegations have no place in state government.

This "investigation" may represent a new low in Hawai‘i power politics. It is in its way, sadly, reminiscent of that famous slogan, "show me the man and I'll show you the crime." A chair and a committee interested in the actual facts would not attempt to bludgeon the Auditor through threats of criminal prosecution for promoting a true and more accurate record of the proceedings. Something is very wrong with this picture, and you do not have to be an avid political observer to notice that fact.

The committee's report shows that it conducted its proceedings in anything but a fair and impartial manner. To take a simple example, the committee's report is devoid of any specifically identified or

Evidentiary findings missing in action

FINDINGS ARE based on criteria; in government auditing this generally starts with the statutory provision that created the program – determining what the program's mission is and how the Legislature intended the program to achieve it. Using those criteria, auditors assess whether the program's performance is effective and efficient, among other things. Findings must be supported by sufficient and appropriate evidence – not unsupported speculation and innuendo. And that evidence is subject to a rigorous internal quality control process, as is virtually every individual sentence in our reports.

Witnesses for the Persecution

THE "EVIDENCE" set forth by the committee in the final report almost wholly consists of testimony from hand-picked witnesses.

- The report cites Edwin Young as an authority for various supposed violations of government auditing standards, only some of which have any possible relation to the audits of DLNR and ADC. His testimony, which did not include any direct criticism of either audit report, was biased, unsupported, and in some cases dangerously misleading. Much of it appeared to be based on previous Working Group accusations against the Office of the Auditor, which were still unfounded. Rather than call an independent expert on government auditing standards, the committee hand-picked Mr. Young, chair of House Speaker Scott Saiki's unilaterally created "State Auditor Working Group" that issued an unsupported, one-sided report critical of the Office of the Auditor, to continue the improper attack on our office.

- The report cites testimony by Randal Lee, who was briefly contracted by the Office of the Auditor to do some work on an audit of the Honolulu Authority for Rapid Transportation (HART) – not ADC or DLNR – as evidence that the Auditor omitted or suppressed work Mr. Lee did before terminating his contract with the office. Aside from the fact that Mr. Lee worked on a project that has nothing to do with this committee, Mr. Lee admittedly had no knowledge as to what happened with the issues – mainly regarding change orders – that he raised. If Mr. Lee or anyone else read our report, it is plain to see that we did discuss this in our HART audit reports to the extent appropriate.

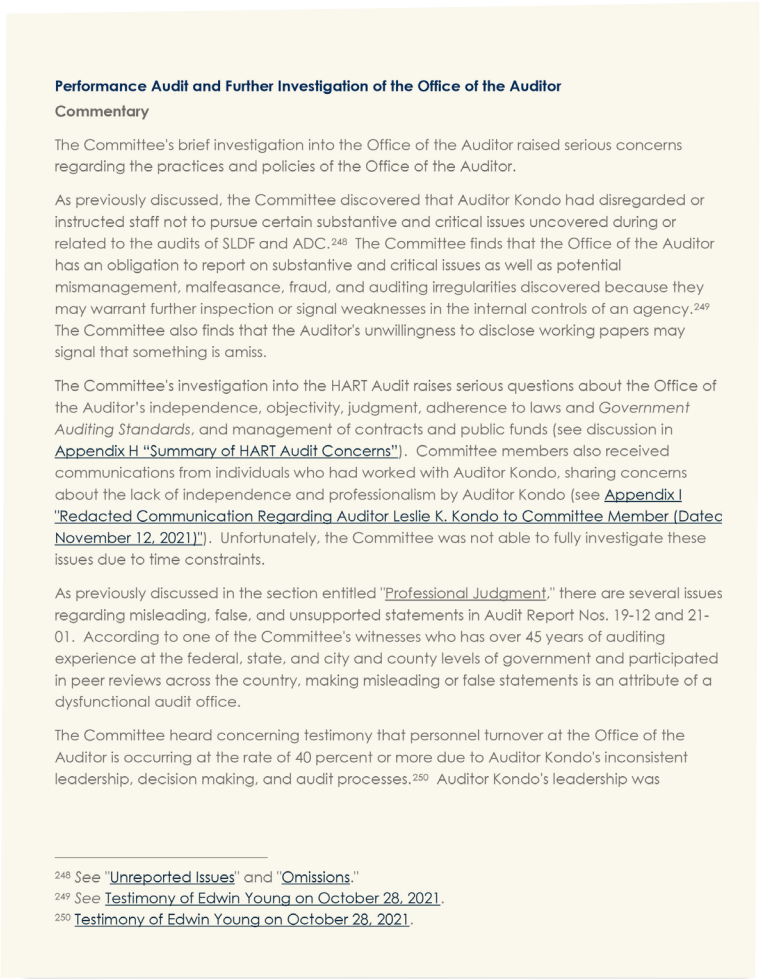
- The report cites testimony from former Administrative Deputy Auditor Ronald Shiigi, who was supervisor on the DLNR audit, in a ludicrous attempt to show more "omissions" on the part of this office in the DLNR report. The matters that Mr. Shiigi discusses were dealt with appropriately. There was a forged document by a DLNR land agent that the draft committee report claims we should have included. As DLNR chair Suzanne Case acknowledged, this document had been known to DLNR and dealt with by DLNR before we did our audit. Mr. Shiigi also mentioned a non-profit status issue that even he was not clear on; this issue was not germane to our audit work.

enumerated findings – despite the fact that the report is subtitled "findings and recommendations." In both the legal and auditing contexts, "findings" is a term of art; in both contexts, findings are specifically identified and based on verified fact.[22] In place of such traditional findings, the committee substitutes vague and impressionistic "commentary."

[22] For example, in the context of government auditing, a finding must be supported by the required elements of criteria, condition, cause, and effect. (Paragraphs 6.17; 8.116, 2018 revision of *Government Auditing Standards*.) In the legal context, findings are specifically enumerated and based on admissible evidence. Neither auditing nor legal "findings" rest on impressionistic "commentary" because findings are concerned with establishing verifiable facts which, in turn, ground valid inferences from those facts.

While the chair repeatedly said the committee would "follow the evidence," the report contains little, if any, fact-based evidence. The commentaries appear to serve as a substitute for specific or formal findings; they are riddled with misinterpretations, errors, and inaccuracies. We detail many of them below. Some of them contain remarkably unfair and inaccurate insinuations and inuendo regarding the Auditor under the cover of commentary. We examine many of those below as well.

In the auditing profession, rigorous findings are the prerequisite for formulating recommendations. The recommendations flow from, and develop out of, the factual foundation for those findings and are intended to address the causes of the reported issues. The recommendations are not first arrived at by some other ulterior process or motive and then later retrofitted with matching findings or "commentary." That is because, in the auditing profession, the process is designed to arrive at objective results, not pre-determined ones.



Performance Audit and Further Investigation of the Office of the Auditor

Commentary

The Committee's brief investigation into the Office of the Auditor raised serious concerns regarding the practices and policies of the Office of the Auditor.

As previously discussed, the Committee discovered that Auditor Kondo had disregarded or instructed staff not to pursue certain substantive and critical issues uncovered during or related to the audits of SLDF and ADC.[248] The Committee finds that the Office of the Auditor has an obligation to report on substantive and critical issues as well as potential mismanagement, malfeasance, fraud, and auditing irregularities discovered because they may warrant further inspection or signal weaknesses in the internal controls of an agency.[249] The Committee also finds that the Auditor's unwillingness to disclose working papers may signal that something is amiss.

The Committee's investigation into the HART Audit raises serious questions about the Office of the Auditor's independence, objectivity, judgment, adherence to laws and *Government Auditing Standards*, and management of contracts and public funds (see discussion in Appendix H "Summary of HART Audit Concerns"). Committee members also received communications from individuals who had worked with Auditor Kondo, sharing concerns about the lack of independence and professionalism by Auditor Kondo (see Appendix I "Redacted Communication Regarding Auditor Leslie K. Kondo to Committee Member (Datec November 12, 2021)"). Unfortunately, the Committee was not able to fully investigate these issues due to time constraints.

As previously discussed in the section entitled "Professional Judgment," there are several issues regarding misleading, false, and unsupported statements in Audit Report Nos. 19-12 and 21-01. According to one of the Committee's witnesses who has over 45 years of auditing experience at the federal, state, and city and county levels of government and participated in peer reviews across the country, making misleading or false statements is an attribute of a dysfunctional audit office.

The Committee heard concerning testimony that personnel turnover at the Office of the Auditor is occurring at the rate of 40 percent or more due to Auditor Kondo's inconsistent leadership, decision making, and audit processes.[250] Auditor Kondo's leadership was

[248] See "Unreported Issues" and "Omissions."
[249] See Testimony of Edwin Young on October 28, 2021.
[250] Testimony of Edwin Young on October 28, 2021.

Rumor, Innuendo, and Falsehoods

The Issue

According to the committee, its brief investigation raised concerns regarding the practices and policies of the Office of the Auditor.

The Committee Claims That…

The committee alleges that the Auditor disregarded or instructed staff to not pursue certain substantive and critical issues uncovered during or related to the audits of Special Land and Development Fund (SLDF) and ADC. The committee also "finds" that the Auditor's unwillingness to disclose working papers may signal that "something is amiss." In addition, the committee claims that its investigation into the HART audit raises serious questions about the Office of the Auditor's independence, objectivity, judgement, and adherence to laws and government auditing standards.

As examples of possible wrongdoing, the committee questions the Auditor's staff recruitment practices, claiming that three out of seven

people who filed complaints against Land Division Administrator Russell Y. Tsuji were hired by, or received an unsolicited job offer from, the Office of the Auditor. The committee "finds" these circumstances to be "odd" since the individuals involved do not appear to have had backgrounds in auditing.

Citing a single questionable source, the committee claims that the Auditor's lack of independence and the Office of the Auditor's inability to follow *Government Auditing Standards* could result in the loss of the office's accreditation, which would render its financial audits of state financial statements no longer credible. According to the committee, this could result in the lowering of the government's bond rating which means that the State will have to pay a higher interest rate on its bonds. The committee recommends that the above issues concerning the Office of the Auditor be investigated by an independent third party and the Department of the Attorney General.

The Facts That the Committee Either Ignores or Distorts

The committee's grab bag of innuendo regarding the Auditor's independence and professionalism are unsupported. Some are reckless. The "evidence" cited for these baseless accusations rest largely on the biased, self-serving testimony of the chair of the State Auditor Working Group created by the Speaker that, earlier in 2021, had issued a similarly ill-supported, questionable report critical of the Office of the Auditor. The investigative committee's report section titled, "Performance Audit and Further Investigation of the Office of the Auditor," recycles many of the same comments or criticisms of the Working Group's report. The reason for this is simple. The committee was determined to find support for the conclusions it started with.

There is nothing "amiss" about the Auditor pursuing lines of inquiry and evidence directly relevant to a performance audit's specific objectives and disregarding lines of inquiry or evidence outside the audit's objectives. A performance audit is not a generalized or free-floating inquiry. It is a methodical inquiry guided by specific and laboriously formulated "objectives" as informed by professional judgment. Those objectives operate as a principle of selection for what counts as relevant to the audit. In other words, the universe of relevance for a performance audit is not comprised of everything a non-auditor might find interesting. It is comprised of sufficient and appropriate evidence relative to the objectives.[23]

[23] Paragraph 8.112, 2018 revision of *Government Auditing Standards*. ("Sufficiency and appropriateness of evidence are relative concepts, which may be thought of as a continuum rather than as absolutes."); *id.*, paragraph 8.113 ("The steps to assess evidence may depend on … the audit objectives."); *id.*, paragraph 8.113.a. ("Evidence is sufficient and appropriate when it provides a reasonable basis for supporting the findings or conclusions *within the context of the audit objectives*." (emphasis added)).

There is nothing "amiss" about the Office of the Auditor protecting the confidentiality of its working papers. As previously noted, this office has professional, legal, and ethical obligations to protect its independence and the confidentiality of its workpapers. When the committee subpoenaed our confidential workpapers, the Office of the Auditor went to court to protect them. A circuit court judge agreed with us, followed the law, and quashed the committee's subpoena seeking this information.

The committee falsely implies that the Office of the Auditor is facing decertification or loss of accreditation, and that this would somehow damage the State's bond rating. This is untrue. The untimely issuance of the State's Annual Comprehensive Financial Report (ACFR) could jeopardize the State's bond rating, not the committee's opinion of the Auditor's compliance with *Government Auditing Standards*. Fiscal Year 2021's ACFR was issued on time, as were each of the prior ACFRs issued during the Auditor's tenure. The financial auditor of the State's ACFR must be peer reviewed, which it is. The canard about the State's bond rating being put at risk raises concerns about the committee's ulterior motives, its objectivity, and, frankly, its honesty.

Regarding the claim that the Auditor's hiring practice somehow favored people who filed complaints against Land Division Administrator Russell Y. Tsuji, that claim is false. Two former Land Division employees have been employed by the Office of the Auditor since 2017. The two analysts have been exemplary employees, who bring impressive backgrounds and specialized skills to our staff and have made significant contributions to the audits they have worked on. As our most recent external, independent, peer review in 2019 noted, "The staff's diverse backgrounds and skills are beneficial to the Office of the State Auditor."

Contrary to the committee report's claims, neither analyst received an unsolicited job offer from the Auditor, and neither was involved in the Land Division audit we completed in 2019. To eliminate any actual or perceived threats to independence, both analysts were "walled off" from that audit, assigned to another audit and instructed not to discuss any aspect of their former employment with the Land Division audit team – not that we needed to explain this necessity to them. Both the Auditor and the committee chair's own witness, former Administrative Deputy Auditor Ronald Shiigi, who was the DLNR audit supervisor, appeared before the committee and testified under oath to these facts. Both assured the committee that there was no conflict of interest or any threats to auditor independence to which adequate safeguards had not been applied.

Despite this testimonial evidence under oath, the committee's report insinuates there was something improper about the Auditor hiring

the two former DLNR Land Division employees. It also insinuates they had a hand in the DLNR audit. The committee cites as evidence for this claim a newspaper article in which the director of DLNR conjectures that the two employees may have worked on the DLNR audit after they were hired by the Auditor. Report, p. 77, n. 251. The director was in no position to know that, and there was sworn testimony to the contrary by two people who were in a position to know. The committee's report nonetheless accepts a conjectural comment in a newspaper column – by someone who had no knowledge of the actual facts – as truth, despite the sworn testimony to the contrary of two people who had actual knowledge of the facts.

That fact alone speaks volumes about both the overall quality of the committee's report and the level of its intellectual honesty. Even the most casual observer of this process would be entitled to conclude that something other than facts, fairness, and impartiality drove the process.

The plain fact is that the professionalism of the Office of the Auditor has been improperly maligned for more than a year (see "A Year-Long Attack on Good Government" on pages 13-16), all under the pretext the office needs to be independently reviewed to ensure it is doing its job and doing it well. But the Office of the Auditor already undergoes regular independent reviews by external, independent auditing professionals. Those independent peer reviews already ensure that we are doing our job and doing it well.

A Question of Integrity

Chair Belatti's unprofessional attempt to question the integrity of our employees reveals much about her own.

TWO FORMER LAND DIVISION EMPLOYEES have been employed by the Office of the Auditor since 2017. The two analysts have been exemplary employees, who have brought impressive skill sets to our staff and have made significant contributions to the audits they have worked on.

However, in an effort to bolster a false narrative about Auditor wrongdoing, the committee tars these valuable employees and their contributions with the broad brush of innuendo and insinuation. For example, the committee's report reads, "At least three out of seven people who filed complaints against Land Division Administrator Russell Y. Tsuji were hired by or received an unsolicited job offer from the Office of the Auditor. The Committee finds these circumstances to be odd especially considering that the individuals recruited do not appear to have backgrounds in auditing."

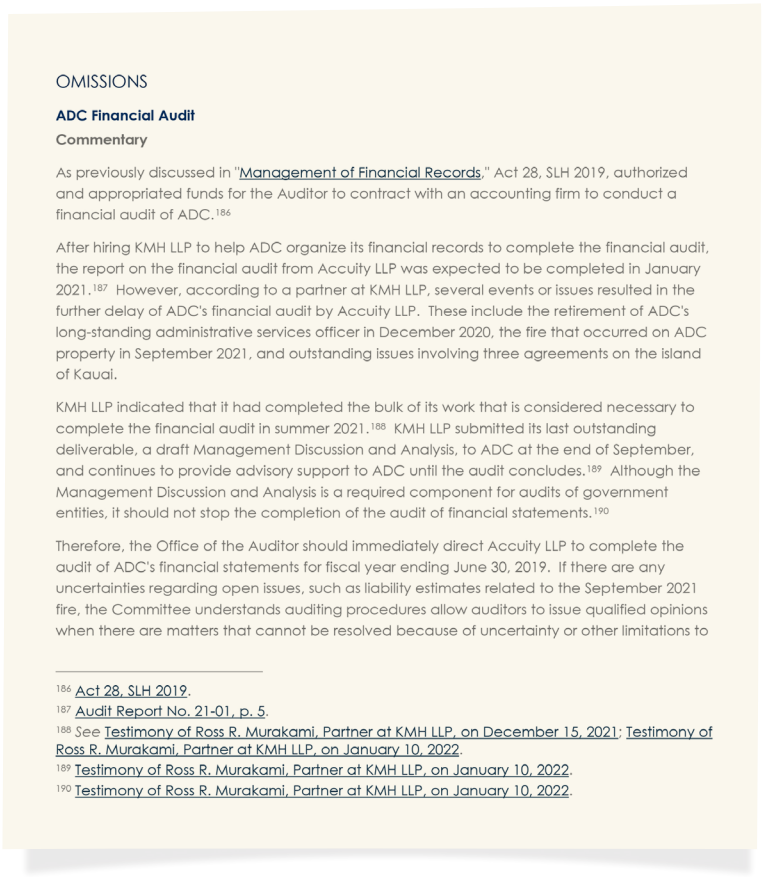
Neither analyst received an unsolicited job offer from the Auditor, and neither was involved in the Land Division audit we completed in 2019. Both were "walled off" from that audit, assigned to another audit and instructed not to discuss any aspect of their former employment with the Land Division audit team, not that we needed to explain this necessity to them. Both the Auditor and the chair's own witness, former Administrative Deputy Auditor Ronald Shiigi, who was the DLNR audit supervisor, appeared before the committee and testified to these facts. Both assured the committee that there was no conflict of interest or any threats to auditor independence to which adequate safeguards had not been applied. Nevertheless, chair Belatti and her committee included these false and offensive accusations in its report, an action that reveals much about their integrity.

One Side Does Not Fit All

AN INVESTIGATIVE COMMITTEE is a kind of "adversarial proceeding," much like a trial. Like a trial, the committee brings the awesome power of the state to bear on individual witnesses, who must testify under oath. Like a trial, an investigative committee can compel attendance of witnesses, compel testimony, and compel the production of documents. Unlike a trial, however, only committee members can ask direct questions of witnesses. Unlike a trial, no one on the receiving end of the committee process is entitled to confront his or her accusers. Unlike a trial, witnesses testify under a continuing threat of criminal contempt.

Also, unlike a trial – or any other adversarial proceeding for that matter – a committee investigation can be deliberately conducted in a one-sided manner, and the one-sided story is not subject to correction. Unlike a trial, in a committee investigation the other side does not have the power to compel witnesses to appear and to ask questions of witnesses or cross-examine them. Unlike a trial, there are not even two sides to begin with – a prosecutor and a defendant. There is only one side – the committee's side – and only the committee is able to present witnesses to support its narrative.

In a trial, one side can ferret out inconsistencies or omissions in the other side's telling of the story through cross-examination. But an investigative committee does not allow questions by anyone not on the committee, and it need not attempt to balance the committee's perspective with contrary perspectives and contrary questions. It need not tell the whole story. In an investigative committee, unlike a trial, testimony can be choreographed to tell only one side of the story. In an investigative committee hearing and report, the committee can write its own script in advance, including its own pre-determined outcome, if it so chooses.



OMISSIONS

ADC Financial Audit

Commentary

As previously discussed in "Management of Financial Records," Act 28, SLH 2019, authorized and appropriated funds for the Auditor to contract with an accounting firm to conduct a financial audit of ADC.[186]

After hiring KMH LLP to help ADC organize its financial records to complete the financial audit, the report on the financial audit from Accuity LLP was expected to be completed in January 2021.[187] However, according to a partner at KMH LLP, several events or issues resulted in the further delay of ADC's financial audit by Accuity LLP. These include the retirement of ADC's long-standing administrative services officer in December 2020, the fire that occurred on ADC property in September 2021, and outstanding issues involving three agreements on the island of Kauai.

KMH LLP indicated that it had completed the bulk of its work that is considered necessary to complete the financial audit in summer 2021.[188] KMH LLP submitted its last outstanding deliverable, a draft Management Discussion and Analysis, to ADC at the end of September, and continues to provide advisory support to ADC until the audit concludes.[189] Although the Management Discussion and Analysis is a required component for audits of government entities, it should not stop the completion of the audit of financial statements.[190]

Therefore, the Office of the Auditor should immediately direct Accuity LLP to complete the audit of ADC's financial statements for fiscal year ending June 30, 2019. If there are any uncertainties regarding open issues, such as liability estimates related to the September 2021 fire, the Committee understands auditing procedures allow auditors to issue qualified opinions when there are matters that cannot be resolved because of uncertainty or other limitations to

[186] Act 28, SLH 2019.
[187] Audit Report No. 21-01, p. 5.
[188] See Testimony of Ross R. Murakami, Partner at KMH LLP, on December 15, 2021; Testimony of Ross R. Murakami, Partner at KMH LLP, on January 10, 2022.
[189] Testimony of Ross R. Murakami, Partner at KMH LLP, on January 10, 2022.
[190] Testimony of Ross R. Murakami, Partner at KMH LLP, on January 10, 2022.

Avoiding the Evidence

The Issue

In accordance with Act 28, Session Laws of Hawai‘i (SLH) 2019, the Office of the Auditor contracted with Accuity LLP, a public accounting firm, to audit ADC’s financial records. The audit, which was initiated in July 2019, was scheduled to be completed by mid-December 2019; however, since its records were not auditable and ADC’s staff did not have the capability to create the necessary accounting records, it hired another public accounting firm, KMH LLP, to assist with the collection and preparation of the financial records, many of which needed to be recreated years after the fact. In the summer of 2021, KMH LLP completed the bulk of its work that is considered necessary to complete the financial audit. Accuity LLP, however, had not issued its audit report as of December 2021.

The Committee Claims That…

In September 2021, KMH LLP submitted its last outstanding deliverable, a draft Management Discussion and Analysis (MD&A), to ADC. According to the committee, although the MD&A is a required component for audits of government entities, the completion and approval of the MD&A should not stop Accuity LLP’s completion of the audit of financial statements.

The committee recommends that the Office of the Auditor immediately direct Accuity LLP to complete its financial audit of ADC and provide this audit to the Legislature.

The Facts That the Committee Either Ignores or Distorts

If the committee was truly interested in the status of ADC's overdue financial audit, it would have simply asked ADC, Accuity LLP, or the Office of the Auditor, which receives regular updates from Accuity LLP on the audit's status. Instead, the committee's fact-finding on this issue began and ended with the two days of testimony by Ross Murakami, partner at KMH LLP, the public accounting firm that assisted with the collection and preparation of ADC's financial records for audit. Murakami, who is KMH LLP's non-audit partner and does not perform financial audits, does not have direct knowledge of the status of the audit and had to correct and clarify his sworn testimony – twice.

If the committee had followed up with ADC, Accuity LLP, or the Office of the Auditor, it would have learned that ADC was still reviewing the MD&A at the time of Murakami's testimony. According to ADC, the review had been delayed because staff had been preoccupied with the collection of documents requested by the House Investigative Committee. ADC completed its review and submitted the draft MD&A to Accuity LLP on January 25, 2022; however, Accuity LLP subsequently requested additional information from the agency for completion.

In addition, on September 27, 2021, a wildfire swept through a vacant ADC property in the Whitmore Village area, exposing an illegal dumpsite and "chop shop" that had been home to hundreds of abandoned cars. The fire burned everything in the cars that was not metal; the intense heat melted car batteries, air conditioning systems, and electronics that contain toxic materials. Consequently, Accuity LLP requested that ADC perform an initial assessment of the legal contingency and pollution remediation obligations associated with the environmental impacts of the dumpsite and fire, both of which could adversely affect ADC's financial position.

Once again, the committee showed little interest in the actual facts, which it could have easily obtained. We therefore feel it necessary to correct the myriad misconceptions, misstatements, and errors found in the report's section, "Omissions: ADC Financial Audit."

First, the committee appears to have a limited understanding of government auditing and the ethics that guide it. In its recommendation, the committee instructs the Office of the Auditor to "immediately direct Accuity LLP to complete its financial audit of

ADC." **If the committee had followed up with Accuity LLP, the Office of the Auditor, or any other reputable government auditor**, it would have learned that compelling Accuity LLP to issue a certain opinion or pressuring the CPA firm to complete an audit that would go against or influence their professional judgment is considered a threat to the firm's independence.

According to *Government Auditing Standards* promulgated by the U.S. Comptroller General, often referred to as the Yellow Book, "in discharging their professional responsibilities, auditors may encounter conflicting pressures from management of the audited entity, various levels of government, and other likely users. In resolving those conflicts and pressures, acting with integrity means that auditors place priority on their responsibilities to the public interest."

Second, citing Ross Murakami's January 10, 2022 testimony, the committee tries to make the case that the delay in the completion of the audit is due to Office of the Auditor and Accuity LLP inaction when it instructs the Office of the Auditor to "immediately direct" Accuity LLP to complete the audit. As we have already noted, the report points out that in late September 2021, KMH LLP submitted its last outstanding deliverable, a draft MD&A to ADC for review. It then erroneously leaps to the conclusion that "[a]lthough the Management Discussion and Analysis is a required component for audits of government entities, it should not stop the completion of the audit of financial statements."

Brushing aside these concerns, the committee wrote in its final report, "If there are any uncertainties regarding open issues, such as liability estimates related to the September 2021 fire, the Committee understands auditing procedures allow auditors to issue qualified opinions when there are matters that cannot be resolved because of uncertainty or other limitations to the audit process or if there are disagreements."

Again, the committee's single source for its understanding of auditing procedures is Ross Murakami's January 10, 2021 testimony, which is incorrect. **If the committee had followed up with Accuity LLP or the Office of the Auditor**, the committee would have learned that Accuity LLP did consider this option but concluded there were so many uncertainties at the time that issuing a "disclaimer of opinion" (which amounts to no opinion) would mean the financial statements were unreliable, a fact that would render the financial audit meaningless. The nearly three-year effort would be invalidated, a waste of time for all involved and a waste of money for the State.

According to a recent audit status update from Accuity LLP, ADC is currently working with the State Department of Health and is

negotiating a contract to retain an environmental engineer to conduct an environmental site assessment report and develop a solid waste removal work plan. The environmental engineer has advised ADC that it will not be able to determine whether the identified decision units of contamination existed prior to June 30, 2019. While ADC cannot reasonably estimate the cost of necessary remediation activities at this time, it is reasonably possible that the cost of such activities will have a material adverse impact on its financial position. As a result, Accuity LLP concluded that ADC's pollution remediation obligation could not be quantified as of June 30, 2019, and decided to disclose that those obligations pose a significant financial risk and proceed with the completion of the audit. However, Accuity LLP could not do so while still awaiting information from ADC regarding the additional information needed to complete the MD&A.

ADC eventually did respond and Accuity LLP issued the ADC financial audit report on March 10, 2022.

Defamation in any other context

THE REPORT contains a large number of what appear to be knowing misstatements. Those misstatements, in almost any other context, would probably constitute defamation.

Defamation in Hawai'i involves, among other things, "a false and defamatory statement concerning another." *Beamer v. Nishiki*, 66 Haw. 572, 670 P.2d 1264, 1271 (1983). A "communication is defamatory when it tends to harm the reputation of another as to lower him in the estimation of the community[.]" *Nakamoto v. Kawauchi*, 142 Hawai'i 259, 270, 418 P.3d 600, 612 (2018) (citation omitted). The standard for defaming a private person involves mere negligence. The standard for defaming a public figure is higher. The person making a defamatory statement regarding a public figure must make the statement knowing that it "was false or with reckless disregard of whether it was false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

While the doctrine of legislative immunity may protect a legislator from legal liability for defamatory statements made in the course of legislative process, which likely includes the committee's legitimate activities, the more important point is not about legal liability, but about factual reliability. If this committee's report contains numerous statements that meet the standard for defaming a public figure – knowing falsity or reckless disregard for truth or falsity – then the report is not a reliable document.

III. Crafting a Convenient Narrative Versus Rigorously Verifying Fact

Anyone can start with a particular narrative and then cherry-pick and force-fit facts to support that narrative. The rigorous quality control and verification procedures used in government performance auditing make that technique impossible to use. Every sentence of every report is rigorously and meticulously verified by an analyst not associated with the subject audit. The independent reviewer must maintain an objective attitude with respect to the audit, work independently, and not have discussions with the project team about the findings and work performed. In contrast, the loose and malleable procedures used by the committee – "commenting" on recommendations unsupported by verified facts – facilitate the use of slanted storytelling over rigorous fact-finding.

It is noteworthy that Representative Dale Kobayashi, the only member of the committee with professional auditing experience, concluded that the penultimate draft of chapter 4, "Office of the Auditor," was mostly "innuendo" that "seemed designed to cast a negative light on the Office of the Auditor."[24] His own professional assessment of the defects went further: "Much of what was said pertaining to the auditor was way over the line and can even be construed as defamatory." His assessment of the draft as a whole? "Much of what is said in this report is incorrect and improper."[25] Another member of the House publicly called the committee's investigation of the Auditor a "charade" and said that the committee's report "amounts to unwarranted attacks" on the Auditor and the Office of the Auditor.[26] While such a report might be useful in a political smear campaign, it is not the kind of report that is reliable, and it should not be used as the basis for far-reaching policy changes.

Finally, what is one to make of such conduct in light of the House's own standards of conduct for its members? Under those standards, members "should conduct themselves in a respectful manner befitting the office with which they as elected officials have been entrusted, respecting and complying with the law and acting at all times in a manner that promotes public confidence in the integrity of the House."[27] When a committee acts far beyond the bounds of its legal and authorized power, it cannot be said to be "respecting and complying with the law," and certainly not "in a manner that promotes public

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[24] https://www.civilbeat.org/2022/01/house-may-ask-ag-to-probe-alleged-criminal-conduct-by-state-auditor/

[25] *Id.*

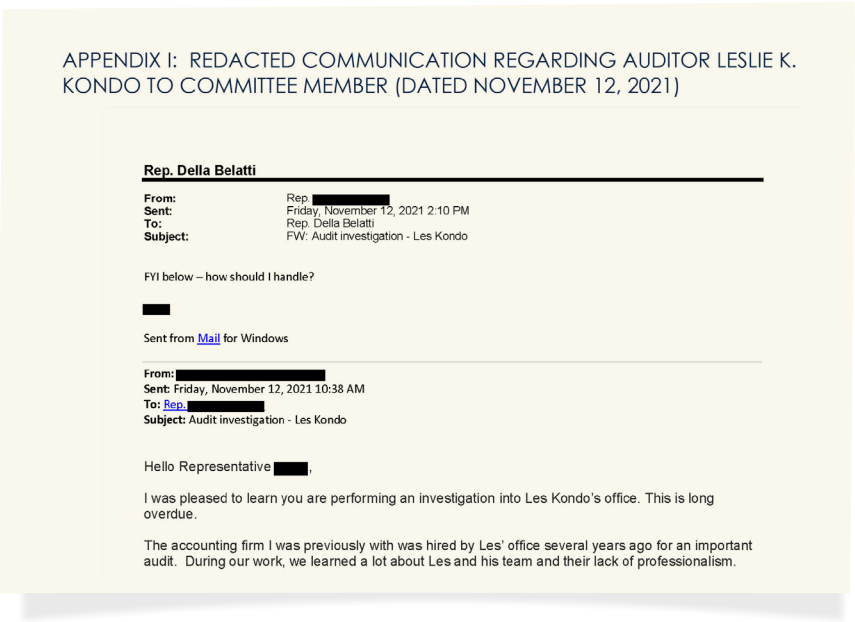
[26] https://www.civilbeat.org/2022/02/rep-gene-ward-legislature-should-back-off-les-kondo/

[27] House Code of Legislative Conduct, Rule 62.1.

confidence in the integrity of the House." Neither does such behavior meet the ethical standard of conduct, that members must consider "at all times whether their conduct would create in reasonable minds the perception that their ability to carry out legislative responsibilities with integrity and independence is either questionable or impaired."[28]

But ultimately that is an assessment politicians themselves must make. They are "peer-reviewed," so to speak, by the voters. In contrast, our business as auditors – as accountability professionals – is to continue performing our job of providing fact-based and meaningful analyses that give independent and objective answers to questions about government performance. Our job is to continue to conduct audits that meet and exceed the expectations of the independent and professional external auditors who regularly peer review the quality of our work. The chair has elected to use her power and position on an investigative committee to conduct an ugly political smear campaign against the one office in state government (other than the judiciary) deliberately created under the Hawai'i constitution to be free from unwarranted political interference. That independence from political pressures is required for the job. Auditors are part of the accountability profession. The Auditor and his staff have to be able to call things as they see them, even if that means stepping on the toes of those who lead agencies or those who are politically connected.

[28] House Code of Legislative Conduct, Rule 62.4(6).



APPENDIX I: REDACTED COMMUNICATION REGARDING AUDITOR LESLIE K. KONDO TO COMMITTEE MEMBER (DATED NOVEMBER 12, 2021)

Rep. Della Belatti

From: Rep. [redacted]
Sent: Friday, November 12, 2021 2:10 PM
To: Rep. Della Belatti
Subject: FW: Audit investigation - Les Kondo

FYI below – how should I handle?

[redacted]

Sent from Mail for Windows

From: [redacted]
Sent: Friday, November 12, 2021 10:38 AM
To: Rep. [redacted]
Subject: Audit investigation - Les Kondo

Hello Representative [redacted],

I was pleased to learn you are performing an investigation into Les Kondo's office. This is long overdue.

The accounting firm I was previously with was hired by Les' office several years ago for an important audit. During our work, we learned a lot about Les and his team and their lack of professionalism.

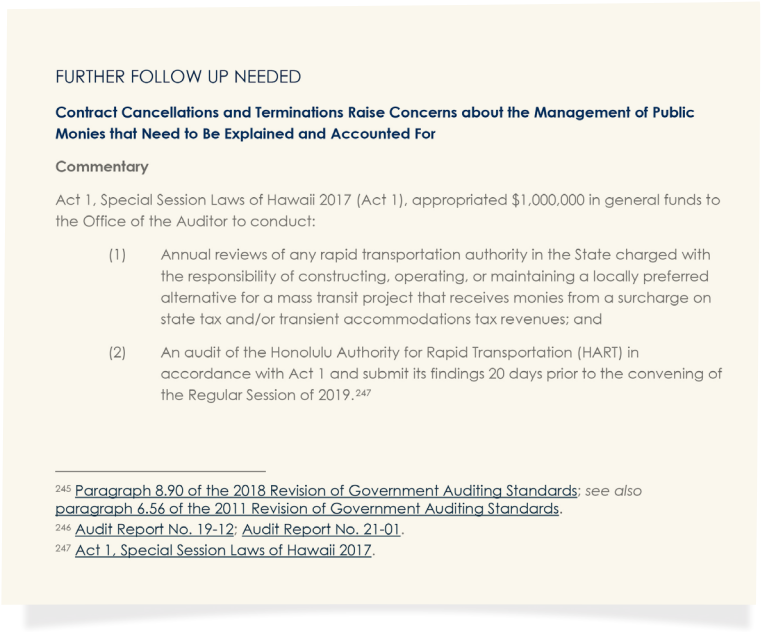
This is evidence?

IN THE REPORT SECTION "Performance Audit and Further Investigation of the Office of the Auditor," the committee recommends further investigation of the Office of the Auditor by an independent third-party as well as the Department of the Attorney General. In support of this, the committee explains that it received communications from individuals who worked with the Auditor who share concerns about the lack of independence and professionalism by the Auditor and then cites "Redacted Communication Regarding Auditor Leslie K. [sic] Kondo to Committee Member (Dated November 12, 2021)," which was reproduced in the report's appendices.

Why wasn't the sender of the email willing to testify before the committee under oath? Why did the committee consider any of this credible, especially knowing the sender was formerly employed by BKD, LLP (BKD), whose contract the Office of the Auditor terminated for default? Why were the names of the sender and the receiver (who the chair stated was a member of the committee) of the email redacted – especially when the chair admitted with respect to that specific email that "any communications to us as public officials are subject to transparency and disclosure"? Why did the committee withhold the email, which was sent and received on November 12, 2021, until January 10, 2022, two months later? Why didn't the committee just ask the Auditor for information about BKD's work product? Why didn't the committee simply ask the Auditor why the office terminated BKD's contract for cause?

The email is presented without explanation or qualification because, according to the report, the committee ran out of time: "Unfortunately, the Committee was not able to fully investigate these issues due to time constraints."

It doesn't take a lawyer or an auditor to know that an anonymously sourced email filled with unsupported, inflammatory, and defamatory accusations is not evidence. If anything, it is proof of the committee's – not the Auditor's – malfeasance and its unwavering campaign to damage the Office of the Auditor and our independence from political intrusions. It also highlights the committee's intentional manipulation and disregard of its own rules, one of which expressly *requires* the committee to deem defamatory and highly prejudicial information confidential and to withhold such information from public disclosure unless authorized by majority vote of the committee.



FURTHER FOLLOW UP NEEDED

Contract Cancellations and Terminations Raise Concerns about the Management of Public Monies that Need to Be Explained and Accounted For

Commentary

Act 1, Special Session Laws of Hawaii 2017 (Act 1), appropriated $1,000,000 in general funds to the Office of the Auditor to conduct:

(1) Annual reviews of any rapid transportation authority in the State charged with the responsibility of constructing, operating, or maintaining a locally preferred alternative for a mass transit project that receives monies from a surcharge on state tax and/or transient accommodations tax revenues; and

(2) An audit of the Honolulu Authority for Rapid Transportation (HART) in accordance with Act 1 and submit its findings 20 days prior to the convening of the Regular Session of 2019.[247]

[245] Paragraph 8.90 of the 2018 Revision of Government Auditing Standards; *see also* paragraph 6.56 of the 2011 Revision of Government Auditing Standards.
[246] Audit Report No. 19-12; Audit Report No. 21-01.
[247] Act 1, Special Session Laws of Hawaii 2017.

Unfounded Allegations of Auditor Interference

The Issue

In Act 1, Special Session Laws of Hawai'i 2017 (Act 1), the Legislature appropriated $1 million in general funds to the Office of the Auditor to conduct: (1) Annual reviews of any rapid transportation authority in the State charged with the responsibility of constructing, operating, or maintaining a locally preferred alternative for a mass transit project that receives monies from a surcharge on state tax and/or transient accommodations tax revenues; and (2) An audit of the Honolulu Authority for Rapid Transportation (HART) in accordance with Act 1 and submit its findings 20 days prior to the convening of the Regular Session of 2019.

The Office of the Auditor contracted with several individuals and accounting firms to work on the audit of HART, including Judge Randal K.O. Lee (ret.), Department of the Attorney General Investigations Division Chief Special Agent Daniel Hanagami, BKD, LLP (BKD), and Baker Tilly Virchow Krause, LLP.

The Committee Claims That…

Shortly after Mr. Lee started reporting his findings[29] about certain of HART's change orders to the Office of the Auditor, he was instructed by the Auditor to "pause" the work. The committee is concerned that part of Mr. Lee's observations included evidence of potential mismanagement of public funds, but according to the committee,

[29] Contrary to the committee's claims, Mr. Lee reported his observations about certain change orders he reviewed, not findings, to the Auditor. These suspicions and concerns were unfounded.

Mr. Lee's concerns were not included in the Office of the Auditor's HART audit report. Eventually, Mr. Lee's contract was terminated by the Auditor.

The committee has questions regarding BKD's prior contracts with the Office of the Auditor, the amount of funds in dispute, and the additional public funds expended after termination of BKD's contract. However, "due to time constraints," the committee said it was unable to investigate the ongoing dispute between the Office of the Auditor and BKD, and BKD's reluctance to participate with the committee's investigation.

The committee recommends that the Legislature require the Auditor to submit reports on these matters.

The Facts That the Committee Either Ignores or Distorts

The committee dedicates 11 pages of the report to selective facts about the Office of the Auditor's contracts with consultants hired for the audit of HART. While the committee tries to insinuate that the Auditor mismanaged those contracts, the information recited by the committee – inaccurate, incomplete, and uninformed – only highlights the committee's commitment to manufacture fault with the Auditor where none exists. The committee suggests the Auditor mismanaged those contracts; that suggestion is inaccurate and irresponsible. Moreover, that suggestion only serves to expose the State to potential liability by mistakenly (or even intentionally) bolstering BKD's unfounded allegations against the Auditor and its demands for additional payment for uncompleted and substandard work.

The committee's recommendation that the Auditor be required to report on the expenditure of the funds appropriated for the purposes of the HART audit "and/or" to report on "the outcomes and costs" involved in its dispute with BKD is puzzling. Chair Belatti, who serves as the House Majority Leader, seems to be unaware that the Auditor regularly informed Senate and House leadership, including Speaker Saiki and House Committee on Finance Chair Sylvia Luke, about the status of the HART audit. House leadership is fully aware of the deficiencies with BKD's work uncovered by the Auditor, with BKD's refusal to address the Auditor's concerns about those and other inaccuracies with its work, and with the decision to terminate BKD's contract for default. In fact, leadership supported the Auditor's termination of BKD's contract.

In what amounts to a recurrent pattern, once again the committee failed to seek easily available information that would contradict its predetermined narrative. Such a pattern is not the mark of a "fair and impartial" proceeding; it is not even the mark of an earnest or good-

faith investigation. Of course, were the committee more truth-driven or fact-oriented, the committee could have simply asked the Auditor any questions it may have had about the contracts with consultants on the HART audit. Since it did not, we provide the relevant and accurate information here.

BKD, LLP

The Office of the Auditor contracted with BKD to review the contracts and change orders relating to eight HART contractors and to assess HART's change order approval process. The contract amount, as amended, was $725,000.

As was reported to House leadership, in November 2018, the Auditor discovered significant issues with BKD's work, including incomplete analyses and material factual errors in its draft report. BKD refused to address the Auditor's concerns about the quality of its work and ignored the Auditor's multiple requests for a plan to provide reasonable assurance that its work was complete, accurate, and supported by appropriate evidence. Considering the magnitude and significance of the known errors in BKD's work, the Auditor determined that it would be unreasonable and imprudent for the Auditor to "assume" the rest of the report had been critically reviewed and was accurate and supported by sufficient and appropriate evidence; the Auditor will not issue a report without reasonable confidence the findings and statements therein are complete, accurate, and supported by sufficient and appropriate evidence. The Auditor rejected the incomplete and mistake-filled draft report and terminated BKD's contract for default, withholding the remaining $284,244.46 under the contract.

It is puzzling that the committee's concern about the Auditor's actions with respect to BKD is based on statements BKD made to Hawai'i News Now alleging that the Auditor's concerns about its work product was a "smokescreen to undermine BKD's credibility." Those statements, made while a mediator was attempting to help resolve the dispute, were self-interested and biased statements to the media; it should go without saying that they do not constitute "evidence," much less conclusive evidence. What possible motivation did the Auditor have to undermine BKD's credibility?

Did the committee review BKD's work and conclude that it was complete, accurate, and sufficiently supported? No. BKD's work was simply subpar, which the committee easily could have confirmed; the Auditor's decision to terminate BKD's contract for default was not only justified but responsible, preventing the waste of public funds that would have resulted if the Auditor ignored BKD's breach of its contractual duties, which the committee seems to suggest the Auditor should have done.

Soon after terminating, for default, the contract relating to HART, the Auditor exercised the right to terminate, for convenience, contracts with BKD to perform the financial audits of the Department of Transportation, Airports Division and the Department of Transportation, Highways Division. The Auditor determined it would be irresponsible – and was not in the best interest of the State – to continue those contracts given BKD's threats and demands against the Office of the Auditor. BKD was paid, in full, for the work it had performed up to the date of termination for convenience.

Randal K.O. Lee and Daniel Hanagami

The Office of the Auditor also contracted with Judge Randal K.O. Lee (ret.) and entered into an agreement with the Department of the Attorney General for the services of its Investigative Division Chief Special Agent Daniel Hanagami to assist the office in its audit of HART. The committee characterizes Mr. Lee's testimony about the circumstances surrounding the office's termination of his contract as "troubling." As Mr. Lee testified, once Speaker Saiki refused to allow the Office of the Auditor to use surplus funds that were about to lapse for the HART audit, the Auditor's hand was forced – the Auditor had to use the funds that had been encumbered to pay for Mr. Lee and Chief Special Agent Hanagami's services to retain another construction consultant to verify that the HART invoices approved for reimbursement by the Department of Accounting and General Services met the eligibility requirements for reimbursement under Act 1. Act 1 did not appropriate any funds to the Office of the Auditor to complete its required annual review of invoices, contracts, progress reports, and other documents to confirm that the expenditures for which HART received reimbursement were allowed under section 46-16.8(e), HRS. However, the Office of the Auditor anticipated an operating budget surplus at the end of Fiscal Year 2018 and requested Speaker Saiki's approval to use those surplus operating funds to retain a consultant to assist with the required review of HART invoices. The Office of the Auditor subsequently retained Baker Tilly Virchow Krause, LLP to test the HART construction invoice review, approval, and administration process for compliance with documented policies and procedures and HART's enforcement of its contracts' billing terms and conditions. It is Speaker Saiki's insistence that the Office of the Auditor obtain his approval to use its surplus operating funds for the HART audit and then his refusal to allow the Office of the Auditor to use those funds that were about to lapse that is "troubling."

The committee again tries to question the Auditor's "independence, objectivity, judgment, and adherence to laws and government auditing standards" based on Mr. Lee's responses to selective and leading questions. According to the committee, the Auditor did not include concerns about irregular change orders and potential bid rigging raised

by Mr. Lee and Chief Special Agent Hanagami in the audit report or to "the proper authorities for investigation." That statement is highly misleading and ignores evidence that directly addresses and rebuts the committee's suggestion that the Auditor "interfered" with their work. It also ignores the statement that the Office of the Auditor issued immediately after Mr. Lee's testimony.

It is unclear if the committee has read our report on HART or is intentionally mischaracterizing it. As plainly stated in the report, we did look at the matters that Mr. Lee identified to us and which he described to the committee. We reported that the City prematurely entered into contracts. Here are some of the headings and subheadings from the report:

> "The City prematurely entered into contracts under an artificial timeline and a fragile financial plan";
>
> "Premature awarding of the initial $483 million contract was driven by concerns that rising costs and loss of tax revenue would derail the Project";
>
> "The City awarded nearly $2 billion more in contracts in 2010 and 2011 despite not achieving milestones needed to begin construction activities";
>
> "Low construction cost estimates, higher than anticipated inflation, and unanticipated issues also drive costs increases";
>
> "Rising costs and revenues shortfall result in $700 million to $910 million budget gap."

We also specifically reported about the utility relocation costs. The Auditor also had multiple discussions with the Federal Bureau of Investigation (FBI) and the U.S. Attorney's office about HART, and immediately after the office released Chief Special Agent Hanagami from his memorandum of agreement, he went to work with the FBI and the U.S. Attorney's office in their criminal investigation of HART. Neither Mr. Lee nor Chief Special Agent Hanagami ever recommended or otherwise suggested any matter that they had uncovered should be referred to a law enforcement or other agency. Chief Special Agent Hanagami surely would have followed up and investigated the issues once he joined forces with the FBI and U.S. Attorney's office if he believed that there may be some misconduct or other issues with the change orders described by Mr. Lee.

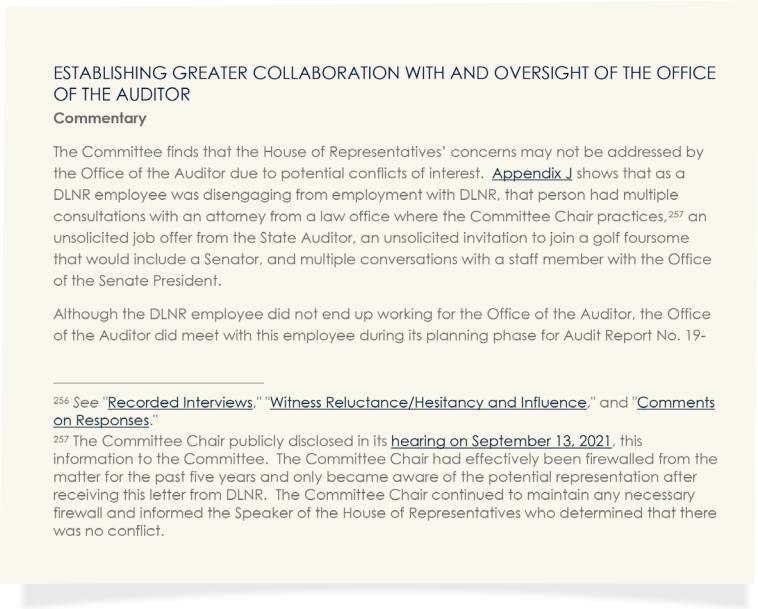
Judgment Call

PROFESSIONAL JUDGMENT requires auditors to make decisions about relevance. "Professional judgment assists auditors in determining the audit scope and methodology needed to address the audit objectives and in evaluating whether sufficient, appropriate evidence has been obtained to address the audit objectives." Paragraph 8.13, 2018 revision of *Government Auditing Standards*.

The committee suggests the Auditor may have purposely blocked Judge Randal K.O. Lee (ret.) and Chief Special Agent Daniel Hanagami from completing their review of change orders by terminating their contracts. The committee relies on a statement by BKD to Hawai'i News Now to suggest that the Auditor's motivation for terminating BKD's contract was similar. That accusation is reckless and untrue. The Auditor has never tried to stop or obstruct a consultant's otherwise relevant work.

In auditing, difficult decisions have to be made about whether particular lines of inquiry are relevant to audit objectives. Those decisions have to be made in a disinterested and ethical manner, informed by professional judgment. For example, after Speaker Saiki publicly disagreed with the Auditor's objection to HART management recording and transcribing employee interviews, a position he expressed without ever hearing the Auditor's concerns, Mr. Lee and Chief Special Agent Hanagami considered whether Speaker Saiki was trying to show support for certain contributors to his campaign and compiled a list of Speaker Saiki's political donors that have HART contracts or interest in the construction of the rail system.

The Auditor directed Mr. Lee and Chief Special Agent Hanagami to stop pursuing that line of inquiry – that is, Speaker Saiki and his possible motivation for seemingly undermining the office's audit of HART. The purpose of an audit is not investigation. And the Speaker's motivations regarding his public disagreement with the Auditor were not relevant to the audit's objectives. Again, Chief Special Agent Hanagami was free to follow-up on any information obtained once he joined forces with the FBI and U.S. Attorney's office.



ESTABLISHING GREATER COLLABORATION WITH AND OVERSIGHT OF THE OFFICE OF THE AUDITOR

Commentary

The Committee finds that the House of Representatives' concerns may not be addressed by the Office of the Auditor due to potential conflicts of interest. Appendix J shows that as a DLNR employee was disengaging from employment with DLNR, that person had multiple consultations with an attorney from a law office where the Committee Chair practices,[257] an unsolicited job offer from the State Auditor, an unsolicited invitation to join a golf foursome that would include a Senator, and multiple conversations with a staff member with the Office of the Senate President.

Although the DLNR employee did not end up working for the Office of the Auditor, the Office of the Auditor did meet with this employee during its planning phase for Audit Report No. 19-

[256] *See* "Recorded Interviews," "Witness Reluctance/Hesitancy and Influence," and "Comments on Responses."

[257] The Committee Chair publicly disclosed in its hearing on September 13, 2021, this information to the Committee. The Committee Chair had effectively been firewalled from the matter for the past five years and only became aware of the potential representation after receiving this letter from DLNR. The Committee Chair continued to maintain any necessary firewall and informed the Speaker of the House of Representatives who determined that there was no conflict.

A Pre-written Recommendation in Search of "Evidence"

The Issue

The committee has concerns about the "overall objectivity" of the Office of the Auditor.

The Committee Claims That…

The interactions with and activities of an individual, who spoke with the Auditor during the planning phase of the audit of DLNR's Special Land and Development Fund, raises concerns about conflicts of interest. The issues of concern include that the individual had consulted with an attorney from the committee chair's law practice while leaving his position at DLNR. The committee also alleges that he received an unsolicited job offer from the Office of the Auditor as well as an invitation to play golf with a foursome that would have included a state senator. The individual also had multiple conversations with a staff member from the Senate President's office. In addition, the committee cites the "absence of any meaningful review of Kauai by the Office of the Auditor," an apparent reference to a claim that a review of the management of Kaua'i lands was absent from Report No. 21-02.

According to the committee, due to these and other concerns about independence, the Office of the Auditor's objectivity, and the need for better collaboration between the Auditor and the Legislature, establishing an "audit committee" would bolster collaboration and give the Legislature more oversight over the Office of the Auditor. Among other things, the audit committee would have the authority

to advise the Auditor on planning and conducting audits, selecting contractors, and evaluating audit findings. The audit committee would also evaluate the Auditor and approve any litigation. The committee suggests such a committee could be modeled after those described in the Honolulu and Kaua‘i county charters, which have not been implemented.

The Facts That the Committee Either Ignores or Distorts

Hiding behind the canard that it was only able to conduct a "limited inquiry," the committee uses rumor and innuendo to imply some kind of nefarious collaboration and subterfuge between the Office of the Auditor and the unnamed individual. These unsupported and unhinged concerns appear to be purposely murky and mysterious. They do warrant further inquiry – but of the committee and its unhinged investigation, not the Office of the Auditor. However, the committee doubles down and uses them as a pretext for the Legislature to exert more control over the Office of the Auditor through the establishment of a legislative audit committee.

The Office of the Auditor was intended by the framers of Hawai‘i's constitution to be independent from undue political pressures. Unlike other offices, we are not an arm of the Legislature, nor is the Legislature our client. Honolulu and Kaua‘i audit offices were not created to have the same level of independence from their respective county councils, which makes it inappropriate to recommend modeling an audit committee after those described in the county charters. This "recommendation" is another thinly veiled, improper effort to exert undue influence over the Office of the Auditor.

It is also misleading and disingenuous to suggest that there is not sufficient collaboration with legislators about the scope of audits. Throughout the legislative session, the Auditor and the Deputy Auditor request meetings with legislators about bills and resolutions that include an audit or other work directed to the Office of the Auditor. Often those bills and resolutions contain broad, undefined audits. For example, Act 28, Session Laws of Hawai‘i 2019, directed the Auditor to "conduct a performance audit of the agribusiness development corporation." We simply do not have sufficient staff resources or time to audit every aspect of ADC's operations. We always ask legislators to identify the specific activities or areas of the agency's operations that they are interested in assessing. And, as we have explained to the committee over and over again, if directed to audit "the agribusiness development corporation," as Act 28 did, we will develop audit objectives, i.e., an audit that we have sufficient resources to complete, based on a risk-based assessment of the agency's key activities. Those objectives, however, may not include activities that certain legislators may be interested in better understanding.

As part of the initial audit planning phase, the Auditor does request meetings with the chairs of the Senate and House subject matter committees as well as with those legislators who strongly advocated for the bill. In most cases, the Auditor has met with those legislators during the legislative session to suggest revisions to the scope of the audit requested in bills and resolutions. In the case of the DLNR audit, the Auditor met numerous times during and after the legislative session with the then-chair of the House Committee on Land and his Senate counterpart. They noted for us that the Land Division's land leases and revocable permits are "contracts" as that term is used in Act 209, Session Laws of Hawai'i 2017. They also expressed questions about the use of state funds appropriated to DLNR to support the International Union for Conservation of Nature conference that would be held in Honolulu. While we agree that individual legislators should not dictate the scope of audits that are not otherwise specified in legislation passed by the Legislature, we do consider legislators' perspectives and concerns about the agency in our audit planning.

Chronicle of a Recommendation Foretold

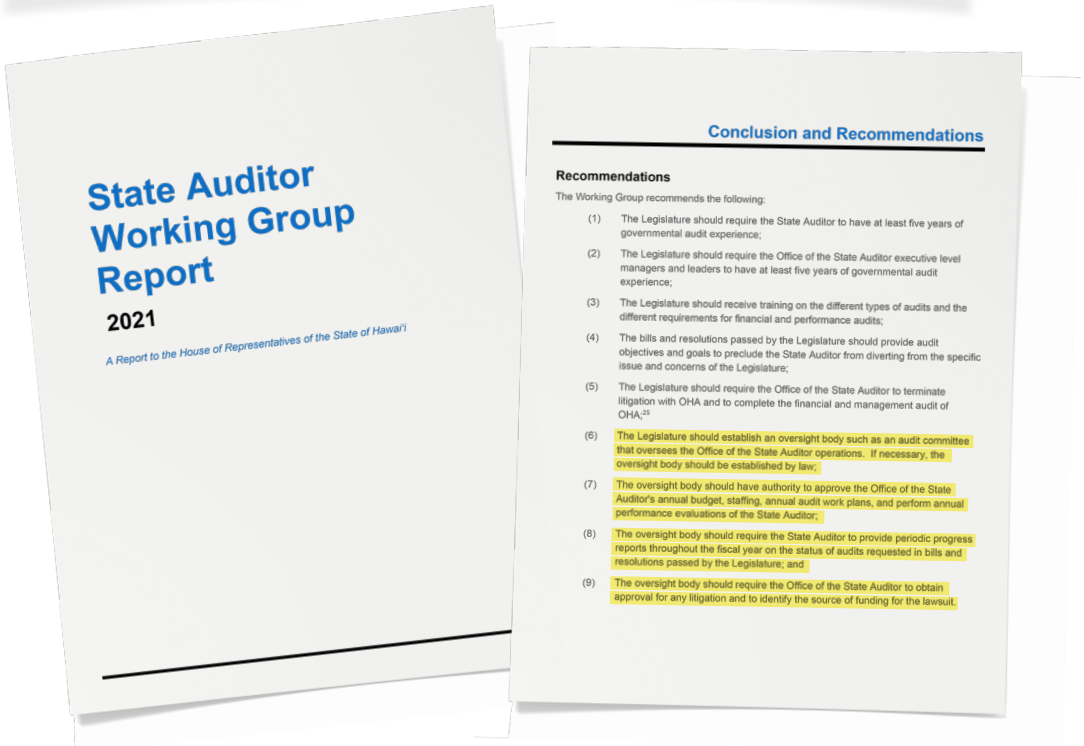
IF AT FIRST YOU DON'T SUCCEED.... The committee's investigation of the Office of the Auditor was a rerun of Speaker Saiki's State Auditor Working Group's "audit of the Auditor," so it comes as no surprise that the recommendation for legislative action is also a repeat.

ESTABLISHING GREATER COLLABORATION WITH AND OVERSIGHT OF THE OFFICE OF THE AUDITOR

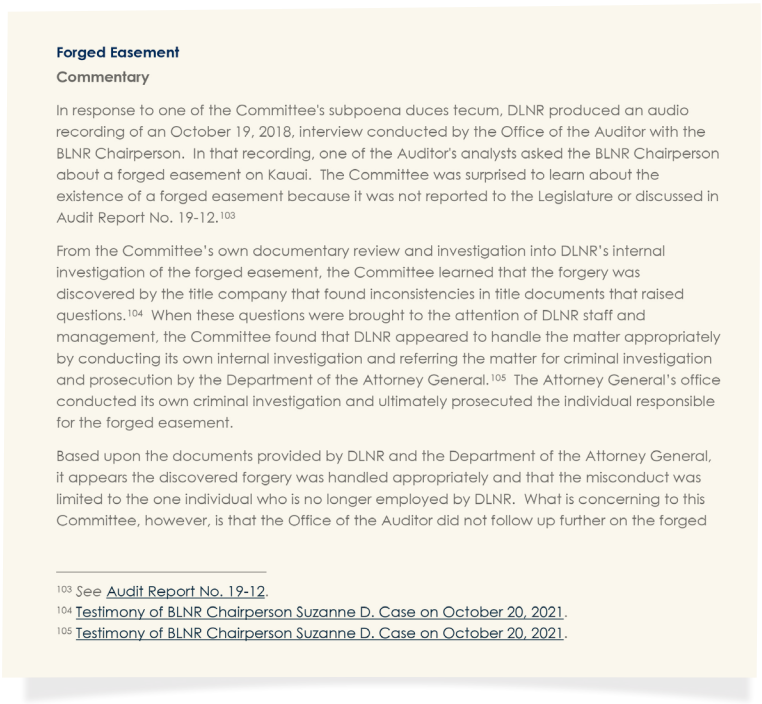
Recommendation

The Committee recommends that the Legislature establish greater collaboration with and oversight of the Office of the Auditor through the establishment of an Audit Committee similar to the audit committees described by the Charters of the City and County of Honolulu and the County of Kauai. This Audit Committee should have authority to advise the Auditor on the formulation of the plan of audits proposed to be conducted by the Auditor; conduct of audits; follow up of audits; selection of private contractors to perform audits for the Auditor; evaluation of preliminary audit findings and recommendations and agency, officer, or employee responses to the preliminary findings and recommendations; and evaluation of the Auditor's performance during each fiscal year. This Audit Committee should further require the Office of the Auditor to obtain approval for any litigation and to identify the source of funding for the lawsuit.

The Committee also recommends that the Auditor be required to consult with the relevant House and Senate subject matter chairs as part of the oversight body to better determine the scope of audits directed or requested by the Legislature, House of Representatives, or Senate.



State Auditor Working Group Report 2021, released April 2021



Forged Easement

Commentary

In response to one of the Committee's subpoena duces tecum, DLNR produced an audio recording of an October 19, 2018, interview conducted by the Office of the Auditor with the BLNR Chairperson. In that recording, one of the Auditor's analysts asked the BLNR Chairperson about a forged easement on Kauai. The Committee was surprised to learn about the existence of a forged easement because it was not reported to the Legislature or discussed in Audit Report No. 19-12.[103]

From the Committee's own documentary review and investigation into DLNR's internal investigation of the forged easement, the Committee learned that the forgery was discovered by the title company that found inconsistencies in title documents that raised questions.[104] When these questions were brought to the attention of DLNR staff and management, the Committee found that DLNR appeared to handle the matter appropriately by conducting its own internal investigation and referring the matter for criminal investigation and prosecution by the Department of the Attorney General.[105] The Attorney General's office conducted its own criminal investigation and ultimately prosecuted the individual responsible for the forged easement.

Based upon the documents provided by DLNR and the Department of the Attorney General, it appears the discovered forgery was handled appropriately and that the misconduct was limited to the one individual who is no longer employed by DLNR. What is concerning to this Committee, however, is that the Office of the Auditor did not follow up further on the forged

[103] *See* Audit Report No. 19-12.
[104] Testimony of BLNR Chairperson Suzanne D. Case on October 20, 2021.
[105] Testimony of BLNR Chairperson Suzanne D. Case on October 20, 2021.

False Narrative: Forged Easement

The Issue

The audit report on DLNR's SLDF did not include a forged easement on Kaua'i that the audit team discovered during fieldwork or an assessment of whether DLNR has the controls and systems in place to ensure that forgeries do not become an issue.

The Committee Claims That…

The Office of the Auditor did not follow up on the forged easement to determine whether it was an isolated incident or if forgeries are a systemic problem at DLNR.

The Facts That the Committee Either Ignores or Distorts

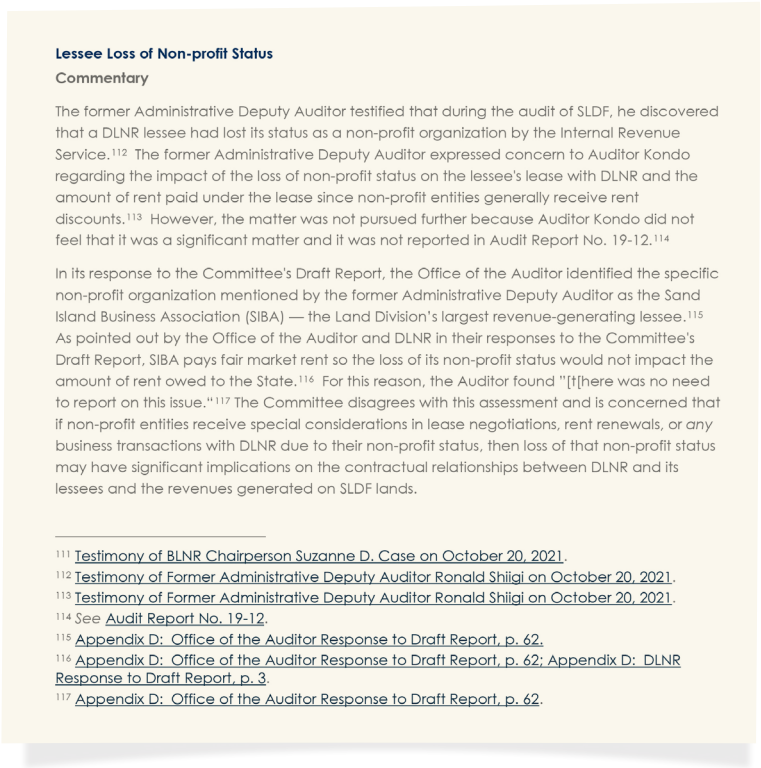
On October 20, 2021, chair Belatti announced that the committee would be pursuing "a larger pattern by the Auditor to unilaterally decide not to report on certain substantive and critical issues discovered in the field, including in some cases of criminal and potentially criminal acts." She made this announcement *before* introducing the first of several witnesses whose recollections supposedly necessitated this change of direction in the committee's investigation. That witness, Ronald Shiigi, former Administrative Deputy Auditor, gave an account of a fraud, a forged signature on an easement on Kaua'i, by a former DLNR Land Division employee that went unreported by the Office of the Auditor. Mr. Shiigi, who was the supervisor on the audit, claimed that he was made aware of the fraud

by two analysts he supervised and passed the information along to the Auditor.

An auditor must report fraud or suspected fraud uncovered during the audit to department management. Conversely, an auditor is not required to report fraud or suspected fraud that is already known to management.

While Mr. Shiigi should know when fraud needs to be reported, he nevertheless implied that the Auditor had arbitrarily dropped the matter. However, Mr. Shiigi could not recall the details of his conversations with the two analysts regarding the fraud or any subsequent discussions with the Auditor.

Mr. Shiigi's claims of negligence were quickly and easily refuted by committee member Representative Dale Kobayashi, who pointed out that not only had DLNR been aware of the fraud before the office's analysts discovered it, but the Department of the Attorney General had prosecuted the case and secured a verdict. Later that day, DLNR chairperson Suzanne Case confirmed to chair Belatti that DLNR had forwarded the case to the Attorney General long before she met with Mr. Shiigi and the DLNR audit team. Undeterred, chair Belatti noted that it was still unclear if the fact that the fraud had been fully prosecuted had been evident to members of the audit team at the time. She also expressed concern that the audit team had not inquired if DLNR had adopted controls to prevent similar fraud in the future. However, if the committee was truly interested in gaining clarity on these and other issues, the committee could have just asked the Auditor. It did not. If it were truly interested in learning whether DLNR had adopted controls to prevent similar fraud in the future, it could have asked the chair of the Board of Land and Natural Resources, who appeared twice before the committee. It did not.



Lessee Loss of Non-profit Status

Commentary

The former Administrative Deputy Auditor testified that during the audit of SLDF, he discovered that a DLNR lessee had lost its status as a non-profit organization by the Internal Revenue Service.[112] The former Administrative Deputy Auditor expressed concern to Auditor Kondo regarding the impact of the loss of non-profit status on the lessee's lease with DLNR and the amount of rent paid under the lease since non-profit entities generally receive rent discounts.[113] However, the matter was not pursued further because Auditor Kondo did not feel that it was a significant matter and it was not reported in Audit Report No. 19-12.[114]

In its response to the Committee's Draft Report, the Office of the Auditor identified the specific non-profit organization mentioned by the former Administrative Deputy Auditor as the Sand Island Business Association (SIBA) — the Land Division's largest revenue-generating lessee.[115] As pointed out by the Office of the Auditor and DLNR in their responses to the Committee's Draft Report, SIBA pays fair market rent so the loss of its non-profit status would not impact the amount of rent owed to the State.[116] For this reason, the Auditor found "[t[here was no need to report on this issue."[117] The Committee disagrees with this assessment and is concerned that if non-profit entities receive special considerations in lease negotiations, rent renewals, or *any* business transactions with DLNR due to their non-profit status, then loss of that non-profit status may have significant implications on the contractual relationships between DLNR and its lessees and the revenues generated on SLDF lands.

[111] Testimony of BLNR Chairperson Suzanne D. Case on October 20, 2021.
[112] Testimony of Former Administrative Deputy Auditor Ronald Shiigi on October 20, 2021.
[113] Testimony of Former Administrative Deputy Auditor Ronald Shiigi on October 20, 2021.
[114] *See* Audit Report No. 19-12.
[115] Appendix D: Office of the Auditor Response to Draft Report, p. 62.
[116] Appendix D: Office of the Auditor Response to Draft Report, p. 62; Appendix D: DLNR Response to Draft Report, p. 3.
[117] Appendix D: Office of the Auditor Response to Draft Report, p. 62.

False Narrative: Loss of Nonprofit Status

The Issue

During the investigative committee's September 20, 2021 hearing, former Administrative Deputy Auditor Ronald Shiigi testified that, during the audit of the Land Division's Special Land and Development Fund, he became aware that a nonprofit had lost its non-profit status after it had failed to file paperwork with the IRS. According to Mr. Shiigi, he was concerned that such a change in status could alter the lease agreement the one-time nonprofit had with the State, since, according to Mr. Shiigi, nonprofits often receive a break on lease rent. Mr. Shiigi said he raised the issue with the Auditor, but the matter was not pursued because it was not considered significant. He did not provide any details about this discussion with the Auditor, nor could he recall details of his discussions of the issue with his audit team members. He also could not recall the identity of the one-time nonprofit.

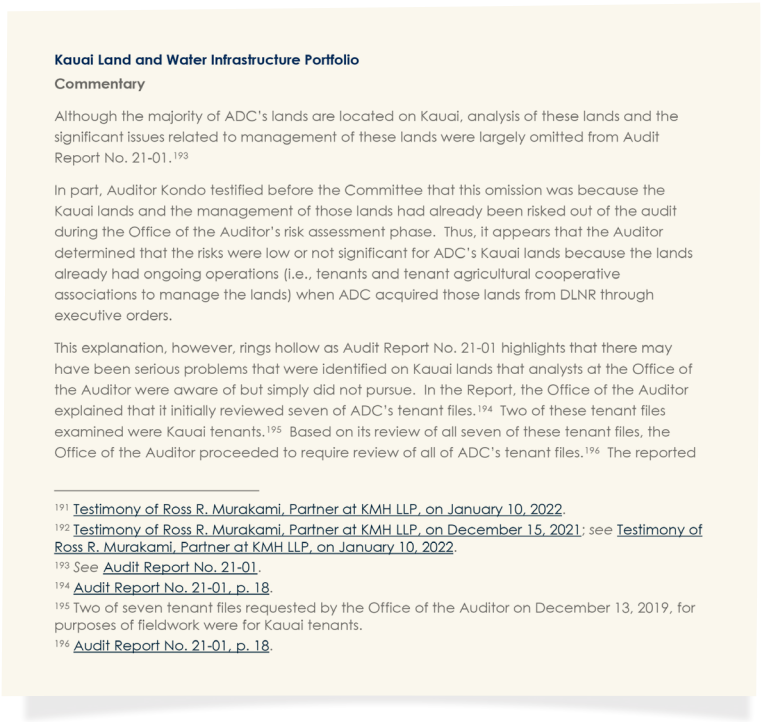
The Committee Claims That…

Both the Office of the Auditor and DLNR's responses to the draft report point out that the organization in question was the Sand Island Business Association (SIBA), the Land Division's largest revenue-generating lessee. Although the committee's recommendations related to this issue are directed at DLNR, the committee notes in the

commentary that it disagrees with the Auditor's decision not to follow up on the issue uncovered by the analysts during fieldwork, "similar to the forged easement."

The Facts That the Committee Either Ignores or Distorts

While it was a nonprofit, SIBA was not a charitable organization and, importantly, had been paying fair market rent. Therefore, when SIBA's non-profit status changed, its lease rent did not. It continued to pay rent based on the fair market appraised value. SIBA was aware of this, the Land Division was aware of this, the Auditor and the analysts on the DLNR audit team were aware of this. Mr. Shiigi, apparently, was not. There was no need to report this issue. Mr. Shiigi's comment about SIBA losing its non-profit status is unrelated to the audit objectives and is simply a red herring that the committee made no effort to understand.



Kauai Land and Water Infrastructure Portfolio

Commentary

Although the majority of ADC's lands are located on Kauai, analysis of these lands and the significant issues related to management of these lands were largely omitted from Audit Report No. 21-01.[193]

In part, Auditor Kondo testified before the Committee that this omission was because the Kauai lands and the management of those lands had already been risked out of the audit during the Office of the Auditor's risk assessment phase. Thus, it appears that the Auditor determined that the risks were low or not significant for ADC's Kauai lands because the lands already had ongoing operations (i.e., tenants and tenant agricultural cooperative associations to manage the lands) when ADC acquired those lands from DLNR through executive orders.

This explanation, however, rings hollow as Audit Report No. 21-01 highlights that there may have been serious problems that were identified on Kauai lands that analysts at the Office of the Auditor were aware of but simply did not pursue. In the Report, the Office of the Auditor explained that it initially reviewed seven of ADC's tenant files.[194] Two of these tenant files examined were Kauai tenants.[195] Based on its review of all seven of these tenant files, the Office of the Auditor proceeded to require review of all of ADC's tenant files.[196] The reported

[191] Testimony of Ross R. Murakami, Partner at KMH LLP, on January 10, 2022.
[192] Testimony of Ross R. Murakami, Partner at KMH LLP, on December 15, 2021; *see* Testimony of Ross R. Murakami, Partner at KMH LLP, on January 10, 2022.
[193] *See* Audit Report No. 21-01.
[194] Audit Report No. 21-01, p. 18.
[195] Two of seven tenant files requested by the Office of the Auditor on December 13, 2019, for purposes of fieldwork were for Kauai tenants.
[196] Audit Report No. 21-01, p. 18.

False Narrative: Kaua‘i Lands Overlooked

The Issue

The management of lands on Kaua‘i was omitted from the performance audit of ADC.

The Committee Claims That…

Although the majority of ADC's lands are located on Kaua‘i, the analysis of the corporation's management of its Kaua‘i lands was largely omitted from Audit Report No. 21-01. As evidence of possible significant issues overlooked on Kaua‘i, the committee pointed out that two of seven incomplete tenant files we reviewed were Kaua‘i tenants. As further proof, the committee claims that the delay in completing ADC's long-overdue financial audit is in part due to issues with three of ADC's Kaua‘i properties.

Since the committee was unable to fully investigate the land and water management on Kaua‘i, it recommends that the Legislature require and appropriate funds for a performance audit of ADC on its land and water infrastructure on Kaua‘i. The committee stipulates that the performance audit should be conducted by an independent auditing firm and not the Office of the Auditor.

The Facts That the Committee Either Ignores, Distorts, or is Unaware Of

The committee's conclusions and recommendations regarding our review of ADC's management practices on Kauaʻi are based on a myriad of false assumptions, misconceptions, and misinformation about our audit of ADC and auditing in general. Contrary to what the committee believes, our audit *did* include ADC's management of its Kauaʻi lands. Our finding, "ADC's land management struggles – inconsistent, incomplete, and, in many cases, non-existent record keeping; prospective tenants occupying lands without signed written agreements; and persistent criminal activity on its properties – expose the State to unnecessary risk," includes those lands ADC controls in the Wahiawā and Whitmore Village areas on Oʻahu *as well as* the Kekaha and Kalepa areas on Kauaʻi.

As we explained in Report No. 21-01, obtaining documents and other information from ADC was a constant struggle throughout our audit. When we requested written policies and procedures, inventories of land holdings, tenant listings, tenant files, or project status reports, we were repeatedly informed that staff would need to pull the information together from various sources. When we requested tenant files for 7 of ADC's 83 tenants, which we randomly selected for review, staff informed us **the corporation did not maintain tenant files**.

The staff offered to *create* the requested files for us and asked what should be included in them, and we obliged by providing staff with a list of items commonly used in property management that we expected ADC would maintain, such as a copy of the tenant's initial application, the corporation's ranking and selection of the tenant, board approval to issue a tenant contract, the tenant contract, determination of annual rents, insurance certificates, site inspection reports, tenant ledgers, notices of default, general correspondence, and any other significant documentation relevant to the management of the specific lease, license, or permit. The following week, ADC staff assembled the requested seven files for us. Upon subsequent review, we found that none were complete.

We then felt it necessary to review all 83 tenant files; however, the staff could only gather the files for 71 of the remaining 76 tenants. In our review of the 71 files, we found significant deficiencies such as 16 tenant files were missing contracts, 21 did not contain the board approvals to issue tenant contracts, and more than half of the files contained no evidence the tenant had complied with insurance requirements.

In Report No. 21-01, we wrote: "This inability to collect and maintain adequate documentation of its business transactions, coupled with the absence of widely used land management practices and tools, makes us question whether 'management' is the proper term to describe ADC's administration of its lands."

We could not have stated our concerns more plainly; however, the committee either misunderstands or simply disregards these pervasive and significant deficiencies of ADC's land management practices, or in many cases, lack of land management practices.[30] Instead, the committee uses the fact that two of the original seven tenant files were for Kaua'i properties to push its narrative "that there may have been serious problems that were identified on Kaua'i lands that analysts at the Office of the Auditor were aware of but simply did not pursue."

The committee also manufactures so-called evidence of Office of the Auditor negligence by claiming that "… the completion of the financial audit of ADC by Accuity LLP was delayed due to outstanding issues that included three parcels on the island of Kauai (see 'ADC Financial Audit')." This accusation is as false as it is dishonest. The real reason that ADC's financial audit was delayed is that its financial records – like its tenant files – did not exist when auditors asked for them. As noted earlier, ADC had to hire another accounting firm, KMH LLP, to collect and create such a financial record. While the committee heard testimony from KMH LLP partner Ross Murakami stating KMH LLP's work was completed by September 2021, ADC's financial auditor, Accuity LLP, provided observations to ADC and KMH LLP requiring further revisions from KMH LLP. ADC management did not review KMH LLP's work product until December 2021. Accuity LLP reported in its

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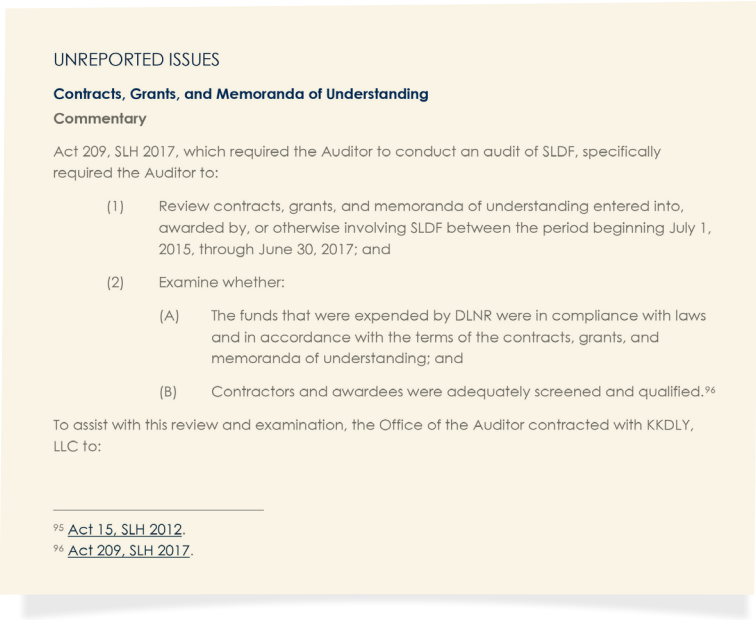
[30] It is also possible that the committee's own research and review was, as a whole, inadequate and unreliable. This possibility is illustrated by a comment that committee member Representative Amy Perruso made in a legislative hearing on April 4, 2022. During that hearing, she stated, "it became clear over the course of our investigatory committee over the interim, with SLDF and ADC, that ADC for 30 years had not paid into the pro rata – that they had not made their pro rata contribution" to the Office of Hawaiian Affairs, as required by statute. https://www.youtube.com/watch?v=a8z-sv0Y8aE [1:45:44]; *id.* (raising a follow-up question about "ADC not paying for 30 years." [2:38:15])

Reports detailing state agencies' transfers to OHA relating to the Public Land Trust are readily and easily available on the DLNR website, going back to 2008. https://dlnr.hawaii.gov/reports/ The reports on DLNR's website from 2008 through 2021 show that for 11 of those 14 years, ADC transferred funds to OHA for the use of Public Land Trust lands (including some from ADC lands on Kaua'i). For those 11 years, ADC transferred funds to OHA for the use of Public Land Trust lands in amounts averaging over $90,000 per year. We offer no opinion on the adequacy or accuracy of those payments. Rather, our point is that Representative Perruso's representation about what the investigative committee found is glaringly contradicted by easily available official records.

status report to the Office of the Auditor that the House Investigative Committee's investigation in Fall 2021 required ADC's immediate attention, delaying the completion of the audit. ADC acknowledged Accuity LLP's requests but did not provide a timetable for the completion of outstanding requests. Another delay in the completion of the financial audit was due to potential environmental remediation obligations from a brush fire in September 2021 on an O'ahu, not Kaua'i, ADC property.



UNREPORTED ISSUES

Contracts, Grants, and Memoranda of Understanding

Commentary

Act 209, SLH 2017, which required the Auditor to conduct an audit of SLDF, specifically required the Auditor to:

(1) Review contracts, grants, and memoranda of understanding entered into, awarded by, or otherwise involving SLDF between the period beginning July 1, 2015, through June 30, 2017; and

(2) Examine whether:

(A) The funds that were expended by DLNR were in compliance with laws and in accordance with the terms of the contracts, grants, and memoranda of understanding; and

(B) Contractors and awardees were adequately screened and qualified.[96]

To assist with this review and examination, the Office of the Auditor contracted with KKDLY, LLC to:

[95] Act 15, SLH 2012.
[96] Act 209, SLH 2017.

False Narrative: "Unreported" Issues

The Issue

Act 209, SLH 2017, required the Auditor to conduct an audit of DLNR's Special Land and Development Fund, including a review of contracts, grants, and memoranda of understanding related to the special fund from July 1, 2015, through June 30, 2017. The Office of the Auditor was directed to examine whether DLNR expended funds in compliance with the law and the terms of the agreements, as well as whether contractors and awardees were adequately screened and qualified. The Office of the Auditor also contracted with KKDLY, LLC to prepare a schedule of expenditures from the special fund and review invoices for select vendors paid more than $100,000 in aggregate, as well as expenditures related to the International Union for Conservation of Nature (IUCN).

The Committee Claims That…

Audit Report No. 19-12 discussed the expenditures related to the IUCN, but the committee questions why the report did not similarly discuss all vendors paid more than $100,000 in the aggregate from the Special Land and Development Fund. The Auditor explained to the committee that KKDLY, LLC had no findings involving expenditures from the fund, which is why there is no discussion in the report. The committee states it was unable to verify this because the Auditor declined to produce information contained in confidential working papers. The committee recommends that the Legislature consider whether further follow up is needed on matters not included in Audit Report No. 19-12.

The committee also questions why the audit focuses on revocable permits rather than contracts, procurement, and the Special Land and Development Fund.

The Facts That the Committee Either Ignores or Distorts

It is untrue that the Office of the Auditor did not review "contracts, grants, and memoranda of understanding involving SLDF" as the commentary suggests. As the then-chairs of the Senate and House subject matter committees noted to the Auditor, the land leases and revocable permits are the Land Division's more significant, if not most significant, contracts and are the most significant source of revenue to the Special Land and Development Fund. Those revenues fund the Land Division and a number of other DLNR programs. Report No. 19-12 reviewed, among other things, the Land Division's management of its income-producing leases and revocable permits.

As Act 209 (SLH 2017) instructed, KKDLY, LLC prepared a schedule of expenditures by cost category. The audit also covered the selected vendors that were paid more than $100,000 in aggregate and reviewed invoices for proper approval, for compliance with government procurement procedures, and for propriety of disbursements, a wider – not narrower – review than what the Legislature requested. As the Auditor explained to the committee, KKDLY, LLC did not have any finding regarding the contracts, grants, and memoranda of understanding involving the Special Land and Development Fund; consequently, there was nothing to report.

Note: Including the Land Division Administrator's "something to the effect" recollection of an alleged conversation he had with the Auditor as evidence of anything is meaningless and unprofessional.

IV. Nothing to Hide; but Plenty to Protect

As you read the committee's report, and this response, one might wonder why the Auditor did not simply turn over all documents and answer all questions sought by the committee. Why resist if you don't have anything to hide?

As the Auditor has said repeatedly, we have nothing to hide. Our work, in stark contrast to that of this committee, is complete, accurate, supported, and contains meaningful findings and recommendations. But our office is established in the Hawai'i State Constitution; it was designed by the framers of that constitution to function free from undue influence by politicians and politics.

Why not just give the committee our workpapers and other confidential information? The answer to that question has two parts.

First, the committee was formed to investigate compliance with recommendations made in two audit reports regarding two agencies – ADC and DLNR's Special Land and Development Fund. The resolution that was offered by the chair contained nothing about investigating the Office of the Auditor. It became evident early on that the committee was improperly exceeding its authority by looking into matters unrelated to ADC and DLNR.

Second, this office has legal and ethical obligations to protect its independence and the confidentiality of its workpapers. When the committee subpoenaed our workpapers, which are confidential by law, the Office of the Auditor had to go to court to protect them. A Circuit Court judge agreed with us, followed the law, and quashed the committee's subpoena seeking our workpapers. The report attempts to downplay this, of course, and suggests it reflects an unwillingness to cooperate with the committee.

It is neither accurate nor credible to say that the Auditor refused to cooperate with the committee. A simple look at the record shows that the Auditor gave almost eight hours of testimony over the course of several hearings, going through the findings made in the audit reports, the audit process used by our office, and answering the committee's questions; however, when the committee widened the scope of its investigation to include the Office of the Auditor, it did not ask the Auditor back for additional testimony.

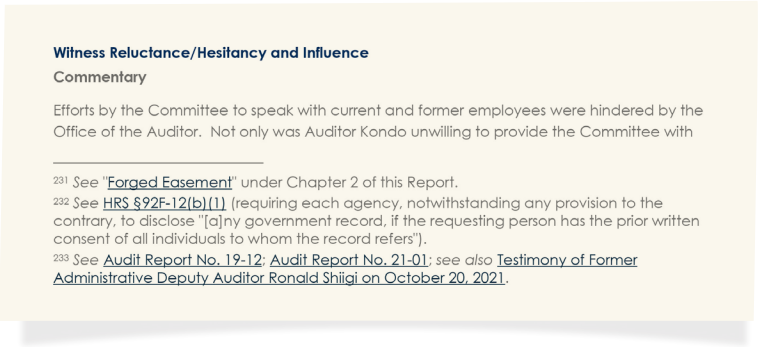
But the Auditor is under no obligation to cooperate with illegal acts. When the committee made clear that it intended to violate the boundaries of its authorizing resolution, and then later named the Office of the Auditor as a subject of investigation, the Auditor had an

obligation to protect this office's independence. The critical role of our office and all good government agencies must be protected.

Our working papers are confidential and protected from disclosure by law. To protect the Office of the Auditor's independence and credibility, it was reasonable and necessary to seek legal clarification about the committee's authority, purpose, and objectives. In addition, free and open communication with employees and supervisors of the agencies we audit is paramount to our function, a function that is critical to efficient and effective state government. Everyone should be concerned about the predictable chilling effect when staff know that management may eventually hear their responses to our questions.

The present response details many of the inaccuracies, half-truths, and insinuations contained in the committee's report. An official report issued by a legislative committee should consist of more than a patchwork of unsupported statements, fact-less yet strangely prefabricated recommendations, periodic accusations of impropriety, and – in Representative Kobayashi's words – innuendo apparently designed for the very purpose of casting the Office of the Auditor in a negative light. That goes without saying. Yet the report is not only tantamount to a failure to conduct a professional, fair, or impartial proceeding with regard to the Auditor. It is also at least vaguely suspicious. If, as Representative Kobayashi noted, "much of what is said in this report is incorrect and improper," that was not caused by a mere failure of due diligence on the part of the committee or its staff.

Indeed, the chair made a point of repeating that she and the committee had poured over tens of thousands of pages of subpoenaed documents. One would expect such a widely cast net to yield more fish. But, strangely, it did not. The periodic accusations of impropriety, sprinkled throughout the report, are supported by no documentary evidence. To be sure, the voluminous testimony has been scoured for tidbits that are then framed in the light least favorable to the Auditor or the Office of the Auditor. For example, some of the testimony regarding the Auditor himself was so extreme, so inaccurate, so emotive, and so untethered to fact that it can be fairly categorized as defamatory, and some of that found its way into the report.



Witness Reluctance/Hesitancy and Influence

Commentary

Efforts by the Committee to speak with current and former employees were hindered by the Office of the Auditor. Not only was Auditor Kondo unwilling to provide the Committee with

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[231] *See* "Forged Easement" under Chapter 2 of this Report.

[232] *See* HRS §92F-12(b)(1) (requiring each agency, notwithstanding any provision to the contrary, to disclose "[a]ny government record, if the requesting person has the prior written consent of all individuals to whom the record refers").

[233] *See* Audit Report No. 19-12; Audit Report No. 21-01; *see also* Testimony of Former Administrative Deputy Auditor Ronald Shiigi on October 20, 2021.

False Allegations of Witness Tampering and Intimidation

The Issue

The committee "found" that current and former employees of the Office of the Auditor, as well as current and former contractors, were reluctant or unwilling to informally meet with or testify before the committee.

The Committee Claims That…

The Auditor was intimidating potential witnesses by "threatening ethics violations." In addition, the committee accuses the Auditor of improperly influencing the testimony of a subpoenaed witness. For instance, on December 15, 2021, Ross Murakami, a partner at KMH LLP, the accounting firm that assisted with the collection and preparation of ADC's financial records for audit, testified on his firm's work in connection with the financial audit of ADC, which was conducted by Accuity LLP. Following that hearing, the committee received two letters from Mr. Murakami, one on December 17 and another on December 27, "modifying" his testimony. The committee accuses the Auditor of improperly influencing Mr. Murakami to change his testimony.

The committee recommends passage of legislation that clarifies that cooperation with a legislative investigative committee is not an ethics violation that jeopardizes a potential witness. In addition, while the committee said that it is not within its purview to determine if the Auditor's alleged interference was unlawful or violated any ethical or professional standards, it did reference another section of the report that recommended further investigation by the Department of the Attorney General.

The Facts That the Committee Either Ignores or Distorts

The committee's inquiry into the status of ADC's financial audit did not include Accuity LLP, the accounting firm that conducted the audit. It also did not ask the Auditor about the status of the financial audit

during any of his three appearances before the committee. Instead, the committee's fact-finding began and ended with the two days of testimony by Mr. Murakami, who is not an auditor, and who does not have direct knowledge of the status of ADC's financial audit.

On December 15, 2021, Mr. Murakami testified, under oath, that KMH LLP had completed its bookkeeping work and the audit of ADC's financial statements could be completed. "And at this point, we believe we have addressed everything that has been asked of us. So, it is really now in Accuity's court," he told the committee.

That sworn testimony was factually inaccurate. While KMH LLP had submitted the Management Discussion and Analysis (MD&A) to ADC, its work was not completed, and ADC's financial statements were not ready to be audited by Accuity LLP. **If the committee had followed up with ADC, Accuity LLP, or the Office of the Auditor**, it would have learned that ADC was still reviewing the MD&A document at the time of Mr. Murakami's testimony. The ball was *not* in Accuity LLP's court.

The Auditor spoke with a colleague of Mr. Murakami at KMH LLP, *after* the testimony, and pointed out these factual inaccuracies in Mr. Murakami's sworn testimony. Subsequently, Mr. Murakami wrote to the committee on December 17 and December 27, each time correcting and clarifying his December 15 testimony. The Auditor did not ask Mr. Murakami or his colleague to do so.

On January 10, 2022, Mr. Murakami once again appeared before the committee and corrected his prior sworn testimony, on the record and again under oath, appearing to cure his prior inaccurate testimony. Instead of inquiring about the actual status of the financial audit, the chair seized on the opportunity to imply that the Auditor had tampered with the witness. Chair Belatti engaged in a scripted set of limited questions to Mr. Murakami, apparently rehearsed but definitely designed to reinforce the false impression that the Auditor had engaged in nefarious criminal conduct. At the conclusion of her questioning, chair Belatti noted her serious concerns about the conduct that occurred, warning Mr. Murakami that all communications – emails, text messages, letters, memos, etc. – between KMH LLP and the Office of the Auditor needed to be preserved in the event there might be further investigations.

The chair stated, "So today we heard and learned … that there may have been improper conduct of the Office of the Auditor with respect to witness testimony." She then raised the specter of witness tampering and witness intimidation by the Auditor. When a member of the committee, Representative Dale Kobayashi, asked incredulously

whether she was really asserting "that there was criminal witness tampering occurring here, potentially," chair Belatti responded that she was not asserting that definitively, but her "concern is that it might be," and therefore it needed to be investigated. As chair Belatti put it, "I think my recommendation to this Committee will be to recommend this to the AG's office for investigation and for further investigation … it should be turned over to the Attorney General's Office." Yet even chair Belatti's claim that the Auditor's conduct in this context "might be" witness tampering is false and is therefore an improper basis for threatening a criminal investigation.

Witness tampering occurs when someone attempts to induce a person to testify falsely or to withhold evidence or information.[31] As a crime, it has two essential elements, the first of which is that the defendant intentionally engaged in conduct to induce a witness to testify falsely.[32]

The required element of *falsity* makes obvious sense, even to non-lawyers. Judges and prosecutors attempt to induce witnesses to testify *truthfully* and accurately all the time. It is not witness tampering. Bailiffs administer oaths to virtually every witness in a court of law in an attempt to induce them to testify truthfully. It is not witness tampering. Everyone understands this. It is so obvious it should not have to be stated explicitly. By the same token, a judge, prosecutor, or bailiff does not engage in the crime of intimidating a witness merely by attempting to induce the witness to tell the truth or to correct previously inaccurate testimony.

It is therefore astonishing and disturbing that the committee, or rather its chair, threatened to refer the Auditor to the Attorney General for investigation for the crime of witness tampering for attempting – indirectly – to assist a witness to testify truthfully and accurately on matters about which the witness had previously testified inaccurately while under oath. Such a threat violates the Hawai'i Rules of Professional Conduct for lawyers.[33] In addition, if made against a witness or potential witness in an official proceeding, such a threat to

[31] Haw. Criminal Jury Instruction No. 12.22 Tampering With a Witness.

[32] Haw. Criminal Jury Instruction No. 12.22 Tampering With a Witness.

[33] Hawai'i Rules of Professional Conduct, Preamble, paragraph 5 ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."); *id.*, Rule 3.4(i) ("A lawyer shall not … threaten to present criminal charges solely to obtain an advantage in a civil matter.")

refer the matter for criminal prosecution may itself be tantamount to intimidating a witness.[34]

In other words, the Auditor attempted to help a witness before the committee give more accurate and truthful information than the witness had previously provided. In response, the chair of the committee threatened the Auditor with referral to the Attorney General for investigation on a criminal charge of witness tampering or witness intimidation – a threat that itself potentially amounts to intimidating a witness. Apparently, the corrected testimony did not support the narrative desired by the chair.[35]

In regard to the committee's accusations that the Auditor intimidated potential witnesses by "threatening ethics violations," the Auditor never communicated with current or former employees about potential ethics violations.[36] In addition, State Ethics Code provisions relating to confidential information (sections 84-12 and 84-18(a), HRS) prohibit both current and former employees of the Office of the Auditor from disclosing information contained in confidential working papers and any other information that by law or practice is not available to the public and which the employee or former employee acquired in the course of the employee or former employee's official duties.

> § 84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal

[34] Haw. Criminal Jury Instruction No. 12.21 Intimidating a Witness. The crime of intimidating a witness has two elements. First, that the defendant uses force or directs a threat to a person who is going to be called as a witness. Second, that the defendant did so with the intent to influence the testimony of the witness. *Id.* "Threat" is expressly defined and includes "threatening by word or conduct to … [a]ccuse some person of any offense or cause a penal charge to be instituted against some person[.]" HRS § 707-764(e); HRS § 710-1071(2).

[35] The committee's report acknowledged receipt of "corrected" testimony from Ross Murakami. Report, p. 7. See also Report, p. 142 (KMH LLP's response to the draft report, characterizing Mr. Murakami's letters of December 15, 2021 and December 27, 2021 letters as "corrections" to his sworn testimony.) Yet those corrections to Mr. Murakami's prior public, sworn testimony were not made available to the public, nor were they included as an appendix to the final report. Why not?

[36] In a letter to former employees of the Office of the Auditor regarding Speaker Saiki's State Auditor Working Group's attempts to obtain confidential information, Auditor Kondo included this sentence regarding former employees and confidential materials: "It is your decision whether to answer the Working Group's questions. I do request that you be mindful of and respect the confidentiality of audit workpapers and other sensitive information obtained during your work with the office." This is completely innocuous; contrary to the report's insinuation, there is no mention of ethics requirements, or their violation, and there are no threats regarding the legal consequences of providing confidential materials to the committee.

> gain or for the benefit of anyone; provided that this section shall not preclude a person who serves as the designee or representative of an entity that is a member of a task force from disclosing information to the entity which the person acquires as the entity's designee or representative.
>
> § 84-18 Restrictions on post employment. (a) No former legislator or employee shall disclose any information that by law or practice is not available to the public and that the former legislator or employee acquired in the course of the former legislator's or employee's official duties or use the information for the former legislator's or employee's personal gain or the benefit of anyone.[37]

Again, the Auditor never talked to, or otherwise communicated with, any current or former employee about disclosure of confidential information potentially violating the State Ethics Code. He only discussed the application of the State Ethics Code with the then-executive director of the State Ethics Commission. He then subsequently expressed his concern by letter *to the investigative committee* about whether the committee itself was adequately apprising current or former employees about the dilemma it was placing them in by asking them to testify (under a threat of contempt for not answering) about materials confidential by law. In other words, the committee itself was potentially putting our employees, who are just trying to do their jobs, with an impossible choice between answering questions seeking confidential information, and not answering and being held in criminal contempt.

If the committee had bothered to ask the Auditor, he would have confirmed that. It did not.

As for the recommendation itself, there is nothing to respond to. There is no legislation or specific action proposed.

[37] Unlike the other post-employment provisions, there is no time limit involved in section 84-18(a), HRS.

Undue Influence Threats

GOVERNMENT AUDITING STANDARDS promulgated by the U.S. Comptroller General and published by the U.S. Government Accountability Office require that we maintain our objectivity and independence – both of mind and appearance – including independence from undue political or other external influences or pressures that may affect an auditor's ability to make objective judgments.

We cannot disregard or otherwise compromise the *Government Auditing Standards* that are the foundation of our performance audits. We must preserve auditor independence and objectivity. Auditors are independent and objective when they perform their work with an attitude that is impartial, fact-based, nonpartisan, and nonideological with regard to audited entities and users of the audit reports. Objectivity includes independence of mind and appearance, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest. An auditor's credibility is paramount, and credibility emanates from independence and objectivity. Independence impairments, such as undue influence threats, affect auditors' objectivity. Therefore, it is critical that we eliminate any actual or perceived undue influence threats to our independence or reduce them to an acceptable level.

Actions by the committee pose an undue influence threat to the Auditor's and the Office of the Auditor's ability to make objective judgments in contravention of *Government Auditing Standards*.

Paragraph 3.42 of the 2018 revision of *Government Auditing Standards* provides examples of circumstances that create undue influence threats for an auditor or audit organization:

1. External interference or influence that could improperly limit or modify the scope of an engagement or threaten to do so, including exerting pressure to inappropriately reduce the extent of work performed in order to reduce costs or fees.

2. External interference with the selection or application of engagement procedures or in the selection of transactions to be examined.

3. Unreasonable restrictions on the time allowed to complete an engagement or issue the report.

4. External interference over assignment, appointment, compensation, and promotion.

5. Restrictions on funds or other resources provided to the audit organization that adversely affect the audit organization's ability to carry out its responsibilities.

6. Authority to overrule or to inappropriately influence the auditors' judgment as to the appropriate content of the report.

7. Threat of replacing the auditor or the audit organization based on a disagreement with the contents of an audit report, the auditors' conclusions, or the application of an accounting principle or other criteria.

8. Influences that jeopardize the auditors' continued employment for reasons other than incompetence, misconduct, or the audited entity's need for GAGAS [generally accepted government auditing standards, i.e., the Yellow Book] engagements.

Working Paper Confidentiality – Protected by Statute, Affirmed by the Court

THE COMMITTEE'S REPORT makes various mistaken assertions regarding the confidentiality statute which protects the working papers of the Office of the Auditor, HRS § 23-9.5. The report then uses those mistaken assertions to claim the Auditor was improperly uncooperative with the committee. The committee's position seems to be that resistance to an improper committee subpoena is somehow a culpable form of failure to cooperate, perhaps even deserving of a referral to the Attorney General on a theory that laws have been broken. (Report, pp. 67-68; *id.*, p. 89, recommendation 9.) The committee's position is difficult to understand and even more difficult to defend.

The Auditor confidentiality statute says unambiguously, "The auditor shall not be required to disclose any working papers." HRS § 23-9.5. It defines "working papers" comprehensively. *Id.* The committee issued a subpoena for working papers that were unambiguously protected by the confidentiality statute. That is why, in circuit court, the Auditor successfully quashed that subpoena as to the committee's demands for working papers, based on the confidentiality statute.

Although the committee admits the Auditor's motion to quash the committee's subpoena was granted in part and denied in part (Report, p. 68), the committee's report does not bother to mention that the court affirmed the confidentiality of working papers as a matter of law and ordered the Auditor to produce only documents he had already agreed to produce. That leaves the question, exactly which materials is the committee saying the Auditor wrongly failed to produce to it? The ones he had already agreed to produce, and did produce? Or the ones the court agreed were exempt from disclosure and therefore quashed the committee's demand for them?

In effect, the committee is saying the Auditor failed to cooperate with the committee regarding the disclosure of documents that the circuit court agreed were exempt from disclosure under HRS § 23-9.5.[1] What the committee was attempting to do was illegal; the committee was attempting to force disclosure[2] of documents that the Legislature itself had protected as confidential in HRS § 23-9.5. In other words, the statute clearly prohibited exactly what the committee was trying to do through its subpoena duces tecum. The Auditor properly resisted an illegal act, and this the committee claims was somehow a culpable failure to cooperate with the committee.

The committee asserts that HRS § 23-9.5 was established to exempt the Auditor's working papers from the Uniform Information Practices Act (UIPA), and in the next breath faults the Auditor for not complying with a provision of the UIPA, one that, according to the committee, requires "the mandatory disclosure of government records, including those requested pursuant to a subpoena from either house of the state legislature, *notwithstanding any provision to the contrary*." (Report, p. 67, n. 223, emphasis in original). Once again, the committee mischaracterizes the law in order to falsely paint the Auditor as uncooperative.

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[1] "Order Granting in Part … Petitioners' Motion … to Quash … Subpoena Duces Tecum," First Circuit, 1CSP-21-0000278, order dated December 9, 2021, p. 2 ("Documents responsive to SDT categories 3 through 5 constitute 'working papers,' which pursuant to HRS section 23-9.5, the Auditor 'shall not be required to disclose.' The Motion to Quash is therefore granted in part with respect to SDT categories 3 through 5.")

[2] The committee suggests that the Auditor could have voluntarily agreed to provide access to the Office's working papers, despite the confidentiality statute, essentially by waiving the statute's protections. Report, p. 67. It is also true that the committee could voluntarily waive the protections of HRS § 92F-13(5) and provide the Auditor's Office with all copies of the committee's internal work product, with all emails and communications between the committee's members, and with copies of all legal advice the committee received, if the Auditor's Office made a UIPA request for such materials. It is unlikely the committee would voluntarily comply with such a request, and it is even more unlikely the committee would consider itself culpably uncooperative if it declined to waive the protections in HRS § 92F-13(5).

First, the Auditor confidentiality statute, titled "Confidentiality," is a state law whose provisions unambiguously state that the Auditor "shall not be required to disclose any working papers." HRS § 23-9.5. The UIPA, in turn, incorporates such exemptions from disclosure in statutes other than the UIPA by reference. HRS § 92F-13(4) ("This part shall not require disclosure of … Government records which, pursuant to state or federal law … are protected from disclosure.") If the phrase "any provision to the contrary notwithstanding" in HRS § 92F-12(b) applied to such other statutes, as the committee claims, it would mean that each agency must disclose material specifically protected as confidential under other state statutes and even federal statutes. HRS § 92F-13(4) (exempting from disclosure government records which "pursuant to *state or federal* law … are protected from disclosure" (emphasis added)). Such an interpretation would mean, for example, that attorney-client privileged materials, protected by Hawai'i Rules of Evidence, Rule 503(b), would be disclosable under the UIPA. But that is mistaken. *Honolulu Civil Beat Inc. v. Dep't of the Attorney Gen*., Hawai'i, 463 P.3d 942, 951 (2020) (holding that attorney-client privileged materials are protected from disclosure under HRS § 92F-13(4)). Such an interpretation would also yield an absurd result, since it would imply that federal laws protecting documents from disclosure would be pre-empted by state law.

Second, the provision in the UIPA regarding "records pursuant to a subpoena from either house of the state legislature" (HRS § 92F-12(b)(5)) parallels the provision in the federal Freedom of Information Act (FOIA). 5 U.S.C. § 552a(b)(9) (authorizing disclosure of a federal record "to either House of Congress, or, *to the extent of matter within its jurisdiction*, any committee or subcommittee thereof[.]" (emphasis added)). As the parallel federal statute emphasizes, disclosure of otherwise protected records to a house committee is authorized only if the matter is "within its jurisdiction." *Id.* The committee's attempt to "audit the auditor" under the guise of investigating two agencies' compliance with the recommendations in two audits went far beyond the jurisdiction granted to the committee by the specific and limited grant of investigatory power in House Resolution No. 164. In addition, the subpoena provision is in the UIPA, and the committee itself admits that the Auditor confidentiality statute, HRS § 23-9.5, was designed precisely to exempt the Auditor's working papers from the UIPA.

Third, a similar analysis applies to the committee's claim that the committee is empowered by statute to issue binding subpoenas "in any matter pending" before a committee. HRS § 21-8(b). As we explained to the circuit court, that argument commits the logical fallacy of "begging the question," that is, assuming as a premise the very conclusion to be proved. "Any matter" before an investigative committee has first to be a matter within "the scope of authority" delineated in the authorizing resolution. Nothing in the resolution's scope of authority section includes an authorization to investigate or "audit" the Auditor's Office.

An analogy makes the point unmistakably clear. The Auditor has the power of subpoena, both to compel testimony and to compel the production of documents. HRS § 23-5(c)(1)-(2). But that power is not unlimited. He must reasonably believe that the compelled testimony "may be able to provide information relating to any audit or other investigation undertaken pursuant to this chapter[.]" HRS § 23-5(c)(1). If the Auditor decided to compel testimony from members of the investigative committee regarding its investigation on the excuse that the testimony "may be able to provide information relating to any audit," namely the two audits specified in House Resolution No. 164, the committee would undoubtedly resist the subpoena. It would undoubtedly say such a subpoena was beyond the authorized power of the Auditor. The legal merits of that proposition might be debated either way, but it would be unfair and unreasonable to pretend that the committee somehow culpably failed to cooperate by virtue of having resisted

an unauthorized subpoena. And it would be both disingenuous and profoundly misleading for the Auditor to exclaim in such a situation, "At the outset the Auditor expected cooperation from the Committee."[3]

We descend into these minutia not to bore the reader with detailed legal analysis but to emphasize just how much, and how willfully, the committee's report seems, in the words of committee member Representative Dale Kobayashi, "designed to cast a negative light on the Office of the Auditor."[4] The committee goes out of its way to claim that the Auditor's resistance to the committee's operating beyond its legitimate power and legal authority was somehow illegitimate.

It is, to say the least, disingenuous for the committee to imply the Auditor should be investigated by the Attorney General for some kind of culpable failure to cooperate with the committee because the Auditor resisted an illegal subpoena from the committee. HRS § 21-1 requires the committee to conduct its proceedings in "a fair and impartial manner." That is one of the committee's explicit statutory "duties." *Id.* With respect to the Auditor, at least, this proceeding – and the report that resulted – were very far from "fair and impartial."

The idea that the Auditor should be referred to the Attorney General for resisting an unlawful subpoena is just one aspect – although a very revealing aspect – of a far larger pattern of unfairness and partiality by the committee. The statute governing investigative committees in Hawai'i actually envisions such a possibility, and it includes an explicit remedy. HRS § 21-15(b) ("If any investigating committee fails in any material respect to comply with the requirements of this chapter, … the failure shall be *a complete defense in any proceeding against the person for contempt or other punishment*." (emphases added))

The committee apparently resents the Auditor's attempt to resist its transparently illegitimate attempt to "audit the auditor" under the guise of a narrowly focused, specific, and limited authorizing resolution that does not even mention the Office of the Auditor. But the committee has no more grounds for resenting the Auditor's resistance to the illegal aspects of the committee's investigation than it would if the shoe were on the other foot.

For the committee to take the position that resistance to an improper subpoena somehow rises to the level of a legally culpable failure to cooperate with the committee is unreasonable. For the committee to take the position that such resistance rises to the level of deserving a referral to the Attorney General is unconscionable. The only apparent purpose of such a referral, or the threat of such a referral, in this context, is to intimidate the Auditor, who was himself a witness before the committee.

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[3] See Report, p. 68 ("At the outset, the Committee expected cooperation from the Auditor.")

[4] https://www.civilbeat.org/2022/01/house-may-ask-ag-to-probe-alleged-criminal-conduct-by-state-auditor/

Questioning the validity of the work product

We are a professional office staffed by professionals in the accountability profession. Our auditors must complete a minimum of 80 hours of continuing professional education in every 2-year period, 56 hours of which must directly enhance auditors' professional expertise. As the Auditor repeatedly explained to the committee in his testimony, we are subject to regular professional peer reviews by independent, external accountability professionals. Those accountability professionals are government auditors from other jurisdictions, and those reviews are thorough and exacting. They must be conducted by independent reviewers who have experience in conducting government performance audits. The National Conference of State Legislatures' 2019 peer review of our office examined samples of our reports, as well as the processes that underlie the reports, to determine whether they met five criteria: (1) Work is professional, independent, and objectively designed and executed. (2) Evidence is competent and reliable. (3) Conclusions are supported. (4) Products are fair and balanced. (5) Staff is competent to perform work required.

The peer reviews conducted during the current Auditor's tenure have been uniformly positive. The results are publicly accessible through the Office of the Auditor's website, and are starkly at odds with the dark narrative painted by the committee concerning the professionalism of both the Auditor and the Office of the Auditor. Our 2016 peer review concluded, "The Hawaii Office of the Auditor conducts its performance audits in accordance with the generally accepted government auditing standards for performance audits contained in the *Government Auditing Standards* (2011 Revision), internal operating guidelines and professional best practices." The 2019 peer review arrived at the same conclusion.

As noted, those professional assessments – both thorough and positive – are not compatible with the pattern of insinuation and innuendo concocted by some members of the committee and presented so luridly in the committee's report.[38] In its draft report, for reasons known only to it, the committee mentioned none of these thorough and positive peer reviews. After we pointed out that conspicuous pattern of omission, the committee changed its narrative in its final report. Now the committee grudgingly acknowledges we received uniformly positive peer reviews but says we only received the rating "pass," (Report, p. 77) without mentioning that "pass" is the highest

[38] For example, the report includes inflammatory material from an anonymous email sent to an unspecified member of the committee. Report, pp. 283-84. The email is a tissue of innuendos, non-sequiturs, and defamatory statements. The committee, or its chair, apparently believes this constitutes appropriate "evidence." It does not. In addition, the committee published the material, in violation of the statute governing investigative committees. HRS § 21-12(h) ("All information of a defamatory or highly prejudicial nature received by or for the committee other than in an open or closed hearing shall be deemed to be confidential.")

rating.[39] In its final report, the committee complains that "these reviews are not as thorough as a performance audit." (Report, p. 77.) It is not clear what the committee means by this statement.

The professional peer reviews to which we are subject are also known as "a quality control review or quality assessment review."[40] The reviews test whether a state auditor's "system of quality control is suitably designed," as well as whether the office "complies with that system, resulting in products that conform to applicable professional standards," in our case, *Government Auditing Standards* promulgated by the Comptroller General of the United States.

These reviews are thorough. They involve on-site visits by independent, third-party professional auditors; those independent professionals review us against the criteria of *Government Auditing Standards*; they utilize extensive sampling of working papers from different audit reports; they assess whether Office of the Auditor personnel receive adequate and appropriate training.

Without identifying any deficiencies or any lack of thoroughness in these reviews, the committee nonetheless recommends – for reasons it does not explain – an additional third-party reviewer, who will conduct a more "thorough" performance review. The committee claims to be particularly concerned "with regard to Auditor Kondo's independence and compliance with *Government Auditing Standards*." (Report, p. 77) Given that we are assessed for our compliance with *Government Auditing Standards* in regular peer review assessments – including an upcoming one in 2022 – and given that we have passed those independent and professional reviews with flying colors, it is difficult to take this alleged committee "concern" seriously.

The committee's concern seems more like a fig leaf to justify continual politically based intrusions into the process of auditing state agencies in the future. Which brings us to the committee's stated concern about the Auditor's "independence." Our professional peer reviews assess our compliance with *Government Auditing Standards*, which themselves include standards governing auditor independence. (See sidebar at page 59, "Undue Influence Threats.") If the committee were truly concerned about the Auditor's independence, it would not be glossing over that fact. It would also not be making recommendations that would have the conspicuous effect of undermining the Auditor's independence and subjecting the Auditor to endless political interference and political punishment.

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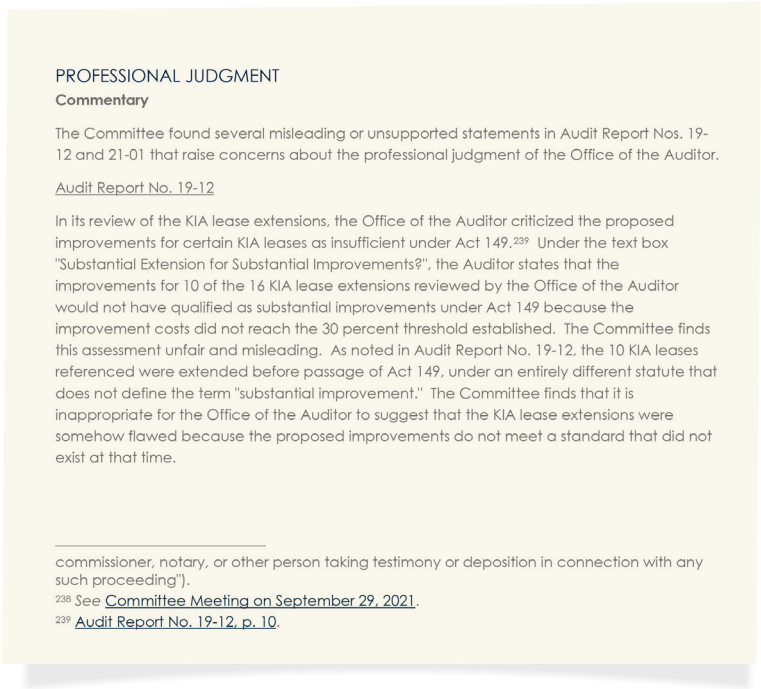
[39] U.S. Government Accountability Office, *Government Auditing Standards: Guidance for Understanding the New Peer Review Ratings* (2014), p. 1.

[40] National Legislative Program Evaluation Society, *Peer Review Program* (2008), p. 1.



PROFESSIONAL JUDGMENT

Commentary

The Committee found several misleading or unsupported statements in Audit Report Nos. 19-12 and 21-01 that raise concerns about the professional judgment of the Office of the Auditor.

Audit Report No. 19-12

In its review of the KIA lease extensions, the Office of the Auditor criticized the proposed improvements for certain KIA leases as insufficient under Act 149.[239] Under the text box "Substantial Extension for Substantial Improvements?", the Auditor states that the improvements for 10 of the 16 KIA lease extensions reviewed by the Office of the Auditor would not have qualified as substantial improvements under Act 149 because the improvement costs did not reach the 30 percent threshold established. The Committee finds this assessment unfair and misleading. As noted in Audit Report No. 19-12, the 10 KIA leases referenced were extended before passage of Act 149, under an entirely different statute that does not define the term "substantial improvement." The Committee finds that it is inappropriate for the Office of the Auditor to suggest that the KIA lease extensions were somehow flawed because the proposed improvements do not meet a standard that did not exist at that time.

commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding").

[238] *See* Committee Meeting on September 29, 2021.

[239] Audit Report No. 19-12, p. 10.

The Issue

The professional judgment of the Office of the Auditor.

The Committee Claims That…

It found several misleading or unsupported statements in Audit Report Nos. 19-12 and 21-01 that raise concerns. For example, in Report No. 19-12, the committee claims it was inappropriate for the Office of the Auditor to suggest that the Kanoelehua Industrial Area lease extensions were somehow flawed because the proposed improvements do not meet a standard that did not exist at that time. The committee also "finds" that language used in Audit Report No. 19-12 stating that DLNR hired a consultant to assist in "cleaning up" its accounting records to be "misleading." The committee also claims that the discussion on ceded lands is "inadequate."

In regard to Report No. 21-01, the committee claims that our reference to allegations made in a lawsuit in our report on ADC was "inappropriate, misleading, and irresponsible" and may have compromised the State's position in ongoing litigation.

The Facts That the Committee Either Ignores or Distorts

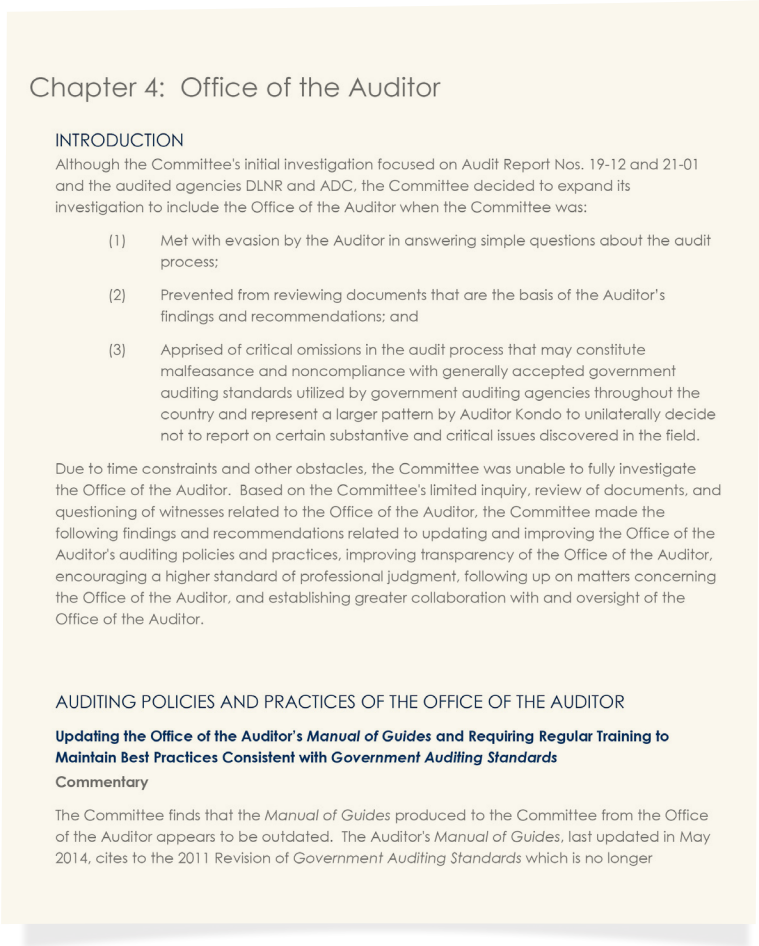
The statement or implication that concerns the Auditor's independence, integrity, credibility, or professional judgment is false, misleading, and defamatory. The "examples" cited in the report demonstrate, at minimum, the committee's reckless disregard for the facts and lack of basic reading comprehension skills.

A "finding" should summarize the evidence gathered and developed during an audit in response to the objectives, and should be the factual basis for conclusions and recommendations. There should be sufficient and appropriate evidence to ensure adequate understanding of the matters reported.

The alleged "false and misleading statements" cited in the report reflect either a failure to read our reports carefully enough, or deliberate distortion. For instance, the committee cites our use of Act 149 in reference to the Kanoelehua Industrial Area leases in our Special Land and Development Fund report as "unfair" and "misleading" because the leases were extended before the Act was passed. The committee misses the point. Our report used Act 149 to illustrate that the type of improvements that Land Division was allowing to justify lease extensions was below the amount the Legislature subsequently set. We fail to see what is unfair and misleading. Also, DLNR apparently understood the reference to Act 149. DLNR did not appear to think the reference was unfair or misleading. If it had, DLNR would have so said in its response to the report – and it did not.

The committee raises our alleged "conflating" of the public trust land doctrine, the public land trust law, and ceded land revenues in the DLNR audit. Anyone reading our report should see that we did not criticize DLNR on this point. We raised questions and suggested that DLNR seek guidance from the Legislature about the ceded land revenue issues. With respect to the public land trust, we noted Board of Land and Natural Resources members have a responsibility to manage those public lands in the best interest of the public and to generate revenue from those revenue generating lands.

Finally, the committee cited our reference to allegations made in a lawsuit in our report on ADC as "inappropriate, misleading, and irresponsible." The committee's commentary is misleading. Our report represented allegations as allegations and used documents provided by ADC to verify information – including the letter from attorney Michael Green, ADC board submittals, and correspondence between ADC and the plaintiff, 'Ohana Best. The fact that ADC was being sued for not supplying water, declining to issue a lease instead of a license, and issues related to criminal trespassing was relevant to our findings. Reporting information contained in public documents is not inappropriate. We were careful to make clear that we were not agreeing with or supporting the plaintiff's arguments. But the arguments about the inability to secure financing is exactly the point. While the committee wants local farmers and ADC to license its lands, the committee is either unconcerned or uninformed about the need to fund those operations and the inability of farmers to use the licenses to secure loans.



Chapter 4: Office of the Auditor

INTRODUCTION

Although the Committee's initial investigation focused on Audit Report Nos. 19-12 and 21-01 and the audited agencies DLNR and ADC, the Committee decided to expand its investigation to include the Office of the Auditor when the Committee was:

(1) Met with evasion by the Auditor in answering simple questions about the audit process;

(2) Prevented from reviewing documents that are the basis of the Auditor's findings and recommendations; and

(3) Apprised of critical omissions in the audit process that may constitute malfeasance and noncompliance with generally accepted government auditing standards utilized by government auditing agencies throughout the country and represent a larger pattern by Auditor Kondo to unilaterally decide not to report on certain substantive and critical issues discovered in the field.

Due to time constraints and other obstacles, the Committee was unable to fully investigate the Office of the Auditor. Based on the Committee's limited inquiry, review of documents, and questioning of witnesses related to the Office of the Auditor, the Committee made the following findings and recommendations related to updating and improving the Office of the Auditor's auditing policies and practices, improving transparency of the Office of the Auditor, encouraging a higher standard of professional judgment, following up on matters concerning the Office of the Auditor, and establishing greater collaboration with and oversight of the Office of the Auditor.

AUDITING POLICIES AND PRACTICES OF THE OFFICE OF THE AUDITOR

Updating the Office of the Auditor's *Manual of Guides* and Requiring Regular Training to Maintain Best Practices Consistent with *Government Auditing Standards*

Commentary

The Committee finds that the *Manual of Guides* produced to the Committee from the Office of the Auditor appears to be outdated. The Auditor's *Manual of Guides*, last updated in May 2014, cites to the 2011 Revision of *Government Auditing Standards* which is no longer

Questioning Policies, Procedures, and Training

The Issue

The Office of the Auditor's *Manual of Guides* should be updated to be consistent with the most current version of the *Government Auditing Standards* issued by the U.S. Comptroller. The updated manual should be published on the office's website and provided to contractors. The office should also require regular training to maintain best practices consistent with *Government Auditing Standards.*

The Committee Claims That…

The Office of the Auditor's *Manual of Guides*, published in 2014, has not been updated since the 2018 revision to *Government Auditing Standards.* The commentary acknowledges that this work is in progress and recommends it be completed by June 30, 2022, and updated regularly thereafter. The committee also states that the manual should be posted on the office website and provided to contractors to improve understanding of the standards that govern the Office of the Auditor's audit work. The committee also acknowledges that audit staff are required to complete 80 hours of continuing professional education every two years, commending the Office of the Auditor

for arranging training on *Government Auditing Standards* from the U.S. Government Accountability Office and the U.S. Comptroller General's Advisory Council on Government Auditing Standards in 2017, 2018, and 2019. While subject matter training is not part of the recommendation, the commentary notes that it is unclear whether staff receive training on subject matters unique to Hawai'i's government environment, such as Hawai'i's procurement code, the State's open meetings law, the Public Land Trust, Hawai'i's Public Trust Doctrine, and case law related to traditional and customary Native Hawaiian rights.

The Facts That the Committee Either Ignores, Distorts, or is Unaware Of

The implication that we are somehow deficient in our auditing processes, qualifications, and training is unfair and unsupported. It simply is untrue, as is the suggestion that any of our employees are unfamiliar with the *Government Auditing Standards*. As we noted, professional auditors from other states have confirmed our staff's competence and compliance with *Government Auditing Standards* in both peer reviews during the Auditor's tenure.

As the committee acknowledges, an update to the *Manual of Guides* is already in progress, and staff are already required to complete 80 hours of training every two years in compliance with the *Government Auditing Standards* cited by the committee. Had the committee asked for clarification about continuing professional education specific to Hawai'i government, it would have learned that staff have had opportunities to participate in training offered by the Legislative Reference Bureau, the Office of Information Practices, the Advancing Government Accountability (formerly the Association of Government Accountants) Hawai'i Chapter, the Hawai'i Economic Association, the State Ethics Commission, and other local organizations.

The committee's criticism of the Auditor's hiring practices ignores that the two employees who formerly worked for DLNR's Land Division brought expertise in public land management to the office. Other hires have come from the Department of Commerce and Consumer Affairs, the University of Hawai'i, the Office of Hawaiian Affairs, and the Department of Taxation. Prior to his current appointment, the Auditor was executive director and general counsel of the State Ethics Commission. He also served on the Public Utilities Commission and served as the director of the Office of Information Practices.

issued by the Comptroller General of the United States; (2) publish its most updated *Manual of Guides* to the Office's website; (3) provide all contractors with a copy of the Office's *Manual of Guides;* and (4) ensure that all employees of the Office of the Auditor receive regular training to maintain best practices consistent with the *Government Auditing Standards* and require that new employees, especially those with limited government auditing experience, be trained in accordance with these *Standards*.

Draft Audit Report Requirements

Commentary

When the Office of the Auditor submitted its draft audit reports to DLNR and ADC, it did not include the Office's proposed recommendations, contrary to past practice.[211] When asked why the proposed recommendations were not included in the draft audit report, Auditor Kondo indicated that the audit recommendations are not necessary for a department to consider or comment on when it looks at a draft audit report because recommendations are just suggestions as to how to fix what the audit report found. Auditor Kondo also stated that the Committee and departments should focus on the audit report findings, not recommendations.

The Committee was surprised that the Auditor downplayed the importance of audit recommendations. After an audit is completed, audited entities are required to provide updates on their progress in implementing the recommendations made by the Auditor.[212] These status updates are then supposed to be relayed to the Legislature in the Auditor's annual report.[213] Furthermore, *Government Auditing Standards*, which are mandatory when conducting audits, indicate that auditors "should obtain and report the views of responsible officials of the audited entity concerning the findings, conclusions, and **recommendations** in the audit report, as well as any planned corrective actions"[214]

The Office of the Auditor explicitly acknowledges this requirement in its 2014 *Manual of Guides*: "[t]he GAGAS standards require reports to include the views of responsible officials of

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[211] *See* Audit Report No. 19-12, p. 54; Audit Report No. 21-01, p. 50.
[212] HRS §23-4.
[213] HRS §23-7.5.
[214] Paragraph 9.50 of the 2018 Revision of Government Auditing Standards (the language of this standard is nearly identical to paragraph 7.32 of the 2011 Revision of the Government Auditing Standards, which was used by the Auditor during Audit Report Nos. 19-12 and 21-01) (emphasis added).

Questioning Draft Audit Report Requirements

The Issue

The Office of the Auditor should provide audited entities with a draft audit report that includes findings and recommendations at least 30 days before the exit interview with the auditee.

The Committee Claims That…

The committee expressed surprise that the Auditor "downplayed" the importance of recommendations, since the progress of audited agencies is measured against the recommendations in the report. The committee also believes that auditees should be given 30 days to review and respond to the draft audit report, stating that ADC had difficulty getting input from its volunteer board because it is subject to Hawai'i's public meetings law.

The committee also cited select sections of *Government Auditing Standards* to argue that recommendations must be included in the draft audit report provided to agencies.

The Facts That the Committee Either Ignores or Distorts

The committee supports its contention that draft reports provided to agencies for comment should include both findings and recommendations by citing certain requirements from *Government Auditing Standards*. Had the committee members taken time to read the application guidance for those requirements, they would have reached a different conclusion:

> Application Guidance: Obtaining and Reporting the Views of Responsible Officials
>
> 7.33 Providing a draft report with findings for review and comment by responsible officials of the audited entity and others helps the auditors develop a report that is fair, complete, and objective. Including the views of responsible officials results in a report that presents not only the auditors' findings, conclusions, and recommendations, but also the perspectives of the responsible officials of the audited entity and the corrective actions they plan to take. Obtaining the comments in writing is preferred, but oral comments are acceptable.

Any implication that our office is improperly "sandbagging" auditees or violating applicable standards is unfair and unsupported. The Auditor in no way "downplayed" the importance of audit recommendations; that is the committee's mischaracterization of his explanation of why auditees should focus on the fact-based findings in their responses. While we do follow up and report on the implementation status of recommendations in prior audits, it is to ensure that audited entities are working to fix problems identified in our findings. When audited entities demonstrate that they have addressed findings without implementing the related recommendations, we readily and regularly reclassify those recommendations as no longer applicable.

As for the timeframe for responding to our draft reports, as the committee notes, we have much work to do and much of it is time sensitive. We try to give auditees sufficient time to respond to our drafts, and if more time is needed, we always consider those requests and have been very accommodating on giving more time. Any implication that our office puts undue time pressure on auditees is unfair and unsupported. It is also misleading to suggest that ADC staff wanted to involve the ADC board but were unable to because of the timing of its response. The ADC board declined an invitation to discuss the audit process at the beginning of the audit, and staff

did not indicate any intent to include the ADC board in its response. Moreover, we have offered on numerous occasions, including directly to the board and through ADC staff, an individual ADC board member, and Representative Amy Perruso, to participate in a meeting with the board to discuss the audit findings. We have never received any response to those offers.

V. Conclusion

We welcome the committee's interest in, and efforts at, remedying the significant problems in two state agencies disclosed by the audits that were the subject of House Resolution No. 164. We also welcome honest, thoughtful, and independent review and feedback. We are subject to a regular, nationally recognized, peer-review process, conducted by independent professionals proficient in performance audits, and we have passed with flying colors every time.

Of course, while we welcome the committee's work in addressing and remedying the problems we discovered in the two state agencies, we cannot welcome the effort by some to use the opportunity provided by the resolution to conjure up evidence of some sort of misconduct by the Auditor. That effort is mistaken, inappropriate, and counterproductive. That effort also exceeds the authority delegated to the committee from the broader House in the resolution, which was specific, limited, and narrowly confined to two specific audits of two specific agencies. The authorizing resolution is the source of both the power the committee can exercise and the limits to that power. In other words, delegated authority is all the authority the committee has. It does not possess the inherent powers possessed by the broader Legislature. It cannot simply pick and choose what it wishes to investigate.

An investigation conducted beyond the boundaries of legitimate legal authority is not just a legal issue. It is also an ethical issue, and it contributes to the public perception – justified or not – of political shenanigans in state government. If it is intentional, then acting beyond the legal and authorized boundaries of a specific grant of investigative authority may even itself be potential evidence of misconduct. It also smacks of political interference in matters that should be above political interference. The task of being a public "watchdog" in Hawai‘i is hard enough without being treated like a fire hydrant.

As shown in great detail in the body of our response, the committee's report is defective in many ways. For example, though it is subtitled "findings and recommendations," the report is devoid of any specifically identified or enumerated findings. The report also suffers from significant and recurrent inaccuracies, also detailed above, even apart from the absence of any findings.

Finally, the committee has repeatedly failed to live up to its statutory obligation to be "fair and impartial." Minor departures from that obligatory statutory norm might be understandable. But the departures we have laid out are not minor. They infect the whole tone and tenor of the report and all of the proceedings that led up to it. A legislative committee tasked with conducting itself in a "fair and impartial manner" should never allow itself to become the vehicle for what has all the hallmarks of a political "hit job."