

SUNSHINE LAW MEETING



HAWAI'I STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

NOTICE OF MEETING OF THE HAWAI'I STATE ETHICS COMMISSION

Commissioners:

Wesley Fong, Chair
Beverley Tobias, Vice-Chair • Robert Hong • Cynthia Thielen

Date: May 15, 2024

Time: 9:00 a.m.

Location: Zoom Videoconference or Phone:

Videoconference: [Join Zoom Meeting](https://us06web.zoom.us/j/85656525664?pwd=8vkSqhv6GRKG2MfhV7mOwFcvmXHI3y.1)
<https://us06web.zoom.us/j/85656525664?pwd=8vkSqhv6GRKG2MfhV7mOwFcvmXHI3y.1>

Phone: +1 (669) 444-9171 or +1 (669) 900-6833
Phone passcode: 023042
Meeting ID: 856 5652 5664
Passcode: 1CuR2S

Public Meeting Location:

Hawai'i State Ethics Commission Conference Room
1001 Bishop Street
American Savings Bank Tower, Suite 970
Honolulu, Hawai'i 96813

Pursuant to Hawai'i Revised Statutes section 92-3.7, the State Ethics Commission will meet remotely using interactive conference technology. The public may either attend the meeting in person, at the public meeting location above, or participate remotely by using the above Zoom meeting information. If participating remotely, please mute your phone/device except while testifying. If the Commission's videoconference connection is lost during the meeting, please go to the Commission's website (www.ethics.hawaii.gov) for more information, including reconnection information.

Public meeting materials for this meeting are available on the Commission's website at: www.ethics.hawaii.gov.

A G E N D A

CALL TO ORDER

I. Consideration and Approval of the Minutes of the April 17, 2024 Meeting

*Attachment 1: Sunshine Law Meeting Minutes of the April 17, 2024
Hawai'i State Ethics Commission Meeting*

II. Directors' Report

1. Education / Training Report

Attachment 1: 2024 Training Schedule

Attachment 2: Online Training Completions by Department and Board

2. Guidance and Assignment Statistics – April 2024

Attachment 3: 2024 Guidance and Assignment Statistics / Website Traffic

3. Miscellaneous Office Projects / Updates

III. Discussion of Media Reports Concerning Ethics or the Ethics Commission
Since the Last Meeting

IV. 2024 Legislative Matters

Bills of interest are described briefly below. The blue house or senate bill number is a clickable hyperlink that goes directly to the bill language online. If the hyperlink does not work, bills can be looked up at "capitol.hawaii.gov" and the bill number can be looked up in a box in the upper right-hand corner.

- **New Law:**

- [HB 2520](#) (Commission budget). Act 002 (3/14/2024).
- [HB 1881 HD1 SD1](#) (Increasing the Commission's maximum administrative fine). Act 015 (5/3/2024).

- **Before Governor Josh Green:**

- [HB 1915 HD1 SD1 CD1](#) (Prohibits, upon written request, making certain information public about certain public servants). Transmitted to Governor 5/2/2024.
- [HB 2374 HD1 SD2 CD2](#) (Makes emergency appropriations for public employment cost adjustments for, among other entities, the Commission). Transmitted to Governor on 5/3/2024.
- [SB 2216 SD1 HD1 CD1](#) (Advice & investigation procedures). Enrolled to Governor on 5/2/2024.
- [SB 2217 HD1 CD1](#) (Fiscal reporting periods). Enrolled to Governor on 5/2/2024.
- [SB 3191 SD1 HD2 CD1](#) (Eliminates sunset provision of the technology transfer exemption). Enrolled to Governor on 5/2/2024.

- **Bills Worth Revisiting:**

- [HB 1884](#) (Requiring legislators to disclose financial ties to lobbying organizations).
- [HB 1885](#) (Expanding the definition of “lobbying” to include procurement interactions with high level members of the executive branch).

V. Discussion of Civil Beat/The New York Time’s “Inside the Late-Night Parties Where Hawai’i Politicians Raked in Money” Article

Attachment 1: Inside the Late-Night Parties Where Hawaii Politicians Raked in Money, downloaded from
<https://www.civilbeat.org/2024/04/inside-the-late-night-parties-where-hawaii-politicians-raked-in-money/> (May 8, 2024)

Attachment 2: Discussion Presentation

VI. Discussion of Ethics Oversight over the Judicial Branch

VII. Akana v. Hawai’i State Ethics Commission and Daniel Gluck, Civil No. 18-1-1019-06 (JHA); Akana v. Hawai’i State Ethics Commission, Civil No. 19-1-0379-03 (JHA); State of Hawai’i, Ethics Commission v. Rowena Akana, Civil No. 20-1-0453 (BIA)

Discussion of case status.

The Hawai'i State Ethics Commission may convene an executive session pursuant to Hawai'i Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys and/or the Department of the Attorney General on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

VIII. Adjournment

Public Testimony

Anyone wishing to testify may do so during the meeting or may submit written testimony in advance of the meeting by email (info.ethics@hawaii.gov), facsimile (fax) (808-587-0470), or U.S. postal mail (State Ethics Commission, 1001 Bishop Street, American Savngs Bank Tower, Suite 970, Honolulu, Hawai'i 96813). Public testimony must be related to an item that is on the agenda and the testifier must identify the agenda item to be addressed by the testimony. Pursuant to Hawai'i Revised Statutes section 92-3 and Hawai'i Administrative Rules section 21-1-6(c), oral testimony is limited to three minutes per testifier per agenda item, subject to the reasonable discretion of the Chair.

Auxiliary Aid or Accommodation Due to a Disability

If you require an auxiliary aid or accommodation due to a disability, please contact the State Ethics Commission at (808) 587-0460 or email the Commission at info.ethics@hawaii.gov as soon as possible, preferably at least 48 hours prior to the meeting. Last-minute requests will be accepted but may be impossible to fill.

Upon request, this notice is available in alternate/accessible formats.

SUNSHINE LAW MEETING
AGENDA ITEM I

CONSIDERATION AND APPROVAL OF THE MINUTES OF THE
APRIL 17, 2024 MEETING

Attachment 1: Sunshine Law Meeting Minutes of the April 17, 2024
 Hawai'i State Ethics Commission Meeting

SUNSHINE LAW MEETING
MINUTES OF THE HAWAII STATE ETHICS COMMISSION

STATE OF HAWAII

Date: April 17, 2024

Time: 9:00 a.m.

Location: Held via Zoom video and audio conference

Link: Recorded video available at
https://ethics.hawaii.gov/category/commissionmeetings/comm_videos/

Public Meeting Location

Hawaii State Ethics Commission Conference Room
1001 Bishop Street
American Savings Bank Tower, Suite 970
Honolulu, Hawaii 96813

Present: State Ethics Commission Members

Wesley F. Fong, Chair (present in conference room)
Beverley Tobias, Vice Chair (via video conference)
Robert Hong, Commissioner (via video conference)
Cynthia Thielen, Commissioner (via video conference)

State Ethics Commission Staff

Robert D. Harris, Executive Director (present in conference room)
Kee M. Campbell, Enforcement Director (via video conference)
Bonita Y.M. Chang, Compliance Director (via video conference)
Nancy C. Neuffer, Staff Attorney (via video conference)
Jennifer M. Yamanuha, Staff Attorney (via video conference)
Jodi L. K. Yi, Staff Attorney (via video conference)
Jared Elster, Investigator (via video conference)
Barbara Gash, Investigatory Analyst (via video conference)
Lynnette Santiago, Secretary (via video conference)

Members of the Public

Chad Blair
Blaze Lovell

1 **CALL TO ORDER (0:00)**

2
3 Chair Fong called the meeting to order at 9:01 a.m. Chair Fong, Vice Chair
4 Tobias, Commissioner Thielen, Commissioner Hong, and Commission staff were
5 present. All commissioners and staff participating via video or audio conference
6 confirmed no one was in the room with them at their respective remote locations.
7

8
9 **Agenda Item No. I: Consideration and Approval of the Minutes of the March 20,**
10 **2024 Meeting (3:00)**

11
12 Commissioner Thielen made, and Vice Chair Tobias seconded, a motion to
13 approve the minutes of the March 20, 2024 meeting. The motion carried (Fong, Tobias,
14 Hong, and Thielen voting in the affirmative).
15

16
17 **Agenda Item No. II: Directors' Report (3:43)**

18
19 Compliance Director Bonita Chang reported that staff has met with DOE officials
20 regarding their new Learning Management System rollout. Staff is working to ensure
21 that the ethics training modules are included.
22

23 Director Chang noted that agencies are providing updated training statistics
24 along with financial disclosure updates. Annual financial disclosures for current
25 employee and board filers are due at the end of May, and new board filers are due at
26 the end of July after their terms begin. Director Chang also noted that staff are also
27 processing candidate financial disclosures.
28

29 Chair Fong asked for an update on the 85% goal. Director Chang replied that
30 staff are still in the process of getting updated information from the agencies. She noted
31 that several agencies have undergone major re-organizations for example, the
32 Department of Public Safety was split into the Department of Law Enforcement and the
33 Department of Corrections and Rehabilitation.
34

35 Enforcement Director Kee Campbell reported that 39 complaints were opened
36 and 26 closed complaints in March. He noted that a significant number came in at the
37 end of the month and the closing number will most likely increase for April's report.
38

39 Chair Fong asked what the increase is attributed to. Director Campbell said he
40 was unsure. Chair Fong asked if there were 39 different complaints. Director Campbell
41 replied that each complaint was related to a different issue.
42

43 Executive Director Robert Harris reported on quarterly financial report. Some of
44 the expenses were attributable to the office renovation and move. The Commission is
45 still under budget and most likely will return funds to the state at the end of the year.
46

1 Chair Fong asked what happens to any returned funds. Director Harris noted that
2 funds go back to the state general fund. Recognizing the state's fiscal outlook, staff
3 continues to focus on minimizing expenses and spending only what the Commission
4 needs.

5
6 Chair Fong noted that the Commission's public artwork should be installed by the
7 next meeting.
8
9

10 **Agenda Item No. III: Discussion of Media Reports Concerning Ethics or the Ethics**
11 **Commission Since the Last Meeting (10:13)**
12

13 Executive Director Harris reported that Commissioner Thielen had flagged a
14 recent article from Civil Beat/New York Times.
15

16 Commissioner Thielen reported that there is an article in the Civil Beat regarding
17 an after-hours meeting hosted by a government employee where monies were allegedly
18 distributed. She urged commissioners to read this article and suggested that action be
19 taken. She wondered if additional reporting requirements would shed additional light on
20 these types of activities.
21

22 Chair Fong asked that a copy of the article be sent to the commissioners and
23 staff.
24

25 Vice Chair Tobias asked what the money was being used for. Commissioner
26 Thielen noted that it appeared that the monies were political contributions. She further
27 noted that the monies were reported by the individual recipients. Director Harris noted
28 that the article focused on contractors in Hawai'i giving contributions. He noted that
29 contracting companies are barred from giving contributions, but owners of these
30 companies could give individually. Director Harris reported that legislation was proposed
31 that would have included officers and employees under the existing prohibition on
32 contributions. A second proposal would have required legislators to disclose interactions
33 with lobbyists in more detail.
34

35 Commissioner Hong suggested that staff investigate what/how the Commission
36 could respond. Chair Fong asked that this matter be added to the May agenda.
37
38

39 **Agenda Item No. IV: 2024 Legislative Matters (18:13)**
40

41 Executive Director Harris reported the legislature is heading into a conference
42 committee phase. The Commission's budget was signed into law by the governor.
43

44 The House is reconsidering HB 1881 which proposes increasing the maximum
45 administrative fines to \$5,000. Director Harris is hopeful this will lead to its passage.
46

1 Chair Fong asked if any bills required additional public testimony. Director Harris
2 replied that at this phase of the process, the conference committees traditionally do not
3 accept testimony from the public.
4

5
6 **Agenda Item No. V: Discussion of Ethics Oversight over the Judicial Branch**
7 **(20:49)**
8

9 Executive Director Harris reported that dialogue continues between the
10 Commission and the Judiciary. He noted that the Judiciary has asked to pause the
11 discussion until the close of the legislative session. Additionally, holding public meetings
12 was also discussed.
13

14
15 **Agenda Item No. VI: Akana v. Hawaii State Ethics Commission and Daniel Gluck,**
16 **Civil No. 18-1-1019-06 (JHA); Akana v. Hawaii State Ethics Commission, Civil No.**
17 **19-1-0379-03 (JHA); State of Hawaii, Ethics Commission v. Rowena Akana,**
18 **Civil No. 20-1-0453 (BIA) (22:58)**
19

20 Executive Director Harris reported that Akana did file a Writ of Certiorari with the
21 Supreme Court. He suggested that the Commission go into executive session to
22 discuss this matter.
23

24
25 **RECESS OF SUNSHINE LAW MEETING AND CONVENING OF EXECUTIVE**
26 **SESSION**
27

28 At 9:24 a.m., Vice Chair Tobias made, and Commissioner Hong seconded, a
29 motion to recess the public meeting and convene an executive session pursuant to
30 Hawai'i Revised Statutes section 92-5(a)(4) to discuss with the Commission's attorneys
31 the Commission's powers, duties, privileges, immunities, and liabilities.
32

33 The motion carried (Fong, Tobias, Hong, and Thielen voting in the affirmative).
34

35 Members of the public were excused. The Commissioners and staff met in
36 executive session.
37

38 At approximately 9:42 a.m., the Commission recessed the executive session and
39 re-convened the Sunshine Law Meeting.
40

41 Chair Fong summarized the executive session. The Commission had discussed
42 the Akana matter and agreed to let the Attorney General continue litigation efforts as
43 necessary.
44

1
2 **Agenda Item No. VII: Adjournment of Sunshine Law Meeting (25:56)**
3

4 At approximately 9:43 a.m., Commissioner Hong made, and Vice Chair Tobias
5 seconded, a motion to adjourn the meeting. The motion carried (Fong, Tobias, Hong,
6 and Thielen voting in the affirmative).
7

8 The meeting was adjourned at 9:45 a.m.
9

10 Minutes approved on _____.

DRAFT

SUNSHINE MEETING
AGENDA ITEM II

EXECUTIVE DIRECTOR'S REPORT
May 15, 2024

1. Education / Training Report

Attachment 1: 2024 Training Schedule

Attachment 2: Online Training Completions by Department and Board

2. Guidance and Assignment Statistics – April 2024

Attachment 3: 2024 Guidance and Assignment Statistics / Website Traffic

3. Miscellaneous Office Projects / Updates

HAWAII STATE ETHICS COMMISSION 2024 EDUCATION PROGRAM (Ethics Workshops and Presentations)			
DATE	PRESENTATIONS	IN PERSON PARTICIPANTS	WEBINAR PARTICIPANTS
1/4/2024	WEBINAR: Lobbyists Law Training	0	50
1/10/2024	WEBINAR: Lobbyists Law Training	0	48
1/18/2024	WEBINAR: General Ethics Training	0	8
1/19/2024	IN PERSON: Training Refresher, Capitol, House Members	51	0
2/6/2024	WEBINAR: Training Refresher, DOH, Kauai	0	13
2/8/2024	WEBINAR: Ethics for Board and Commission Members (CANCELLED)	0	0
3/6/2024	WEBINAR: General Ethics Training	0	7
4/16/2024	WEBINAR: General Ethics Training, Charter Schools	0	64
5/2/2024	WEBINAR: General Ethics Training	0	8
5/13/2024	WEBINAR: Training Refresher, FESTPAC		
6/20/2024	WEBINAR: Training Refresher, Agribusiness Development Corporation		
6/24/2024	IN PERSON: Ethics for Board and Commission Members, Hawai'i Workforce Development Council		
7/24/2024	WEBINAR: General Ethics Training		
8/8/2024	WEBINAR: Ethics for Board and Commission Members		
9/26/2024	WEBINAR: General Ethics Training		
10/23/2024	WEBINAR: Ethics for Board and Commission Members		
11/7/2024	WEBINAR: General Ethics Training		
TOTAL	17 Presentations	51 participants	198 participants

State Employees

	# of Current	%
Department/Agency	Employees*	Completed
Department of Accounting and General Services (DAGS)	642	61%
Department of Agriculture (DOA)	249	96%
Department of Budget and Finance (B&F)	334	86%
Department of Business, Economic Development and Tourism (DBED)	335	90%
Department of Commerce and Consumer Affairs (DCCA)	452	95%
Department of Defense (DOD)	404	94%
Department of Education (DOE)	22,369	60%
Department of Hawaiian Home Lands (DHHL)	134	95%
Department of Health (DOH)	2,481	82%
Department of Human Resources Development (DHRD)	90	91%
Department of Human Services (DHS)	1,700	87%
Department of Labor and Industrial Relations (DLIR)	541	59%
Department of Land and Natural Resources (DLNR)	800	94%
Former Dept: Department of Public Safety (DPS)		
Department of Corrections and Rehabilitation (DCR)	1,882	14%
Department of Law Enforcement (DLE)	395	25%
Department of Taxation (TAX)	318	96%
Department of the Attorney General (ATG)	621	97%
Department of Transportation (DOT)	654	17%
Hawai'i Health Systems Corporation (HHSC)	3,206	97%
Hawai'i State Ethics Commission (HSEC)	12	100%
Hawai'i State Public Library System (HSPLS)	654	66%
House of Representatives (REP)	166	100%
Judiciary (JUD)	1,731	96%
Legislative Reference Bureau (LRB)	33	100%
Office of Hawaiian Affairs (OHA)	119	87%
Office of the Auditor (AUD)	25	100%
Office of the Governor (GOV)	51	100%
Office of the Lieutenant Governor (LTG)	15	100%
Office of the Ombudsman (OMB)	10	100%
Public Charter School (SPCSC)	2,941	TBD
Research Corporation of the University of Hawai'i (RCUH)	2,742	71%
Senate (SEN)	104	100%
University of Hawai'i (aggregate)	9,352	86%
University of Hawai'i-Community Colleges (UOHC)	2,614	
University of Hawai'i-Hilo (UOHH)	890	
University of Hawai'i-Manoa (UOHM)	4,938	
University of Hawai'i-System (UOH)	506	
University of Hawai'i-West Oahu (UOHW)	404	
Total Employees Training Completed	55,562	

**Reorg eff. 1/1/24- Agency is reconciling data. Employees formerly with DPS have been transferred to DCR and DLE.

Based HSEC's data

includes indiv. charter school staff

*Based on annual financial disclosure updates from departments collected in March/April 2024
Total training completions from January 1, 2020 to May 5, 2024

State Boards and Commissions

	No. of	%
Board/Commission	Members*	Completed**
Agribusiness Development Corporation	8	150%
Board of Acupuncture	5	100%
Board of Agriculture	10	100%
Board of Barbering and Cosmetology	7	86%
Board of Certification of Operating Personnel in Wastewater Treatment Plants	9	100%
Board of Chiropractic Examiners	5	80%
Board of Dentistry	12	108%
Board of Education	11	191%
Board of Electricians and Plumbers	7	157%
Board of Land and Natural Resources	7	186%
Board of Massage Therapy	5	120%
Board of Naturopathic Medicine	4	100%
Board of Nursing	9	100%
Board of Pharmacy	7	100%
Board of Physical Therapy	7	100%
Board of Private Detectives and Guards	7	71%
Board of Professional Engineers, etal	13	92%
Board of Psychology	5	100%
Board of Public Accountancy	9	122%
Board of Registration	8	75%
Board of Speech Pathology and Audiology	7	100%
Board on Geographic Names	7	114%
Boxing Commission	4	75%
Campaign Spending Commission	5	100%
Civil Rights Commission	5	100%
Commission on Status of Women	5	180%
Commission on Water Resource Management	7	129%
Contractors License Board	13	92%
Correctional System Oversight Commission	5	100%
Council on Revenues	7	114%
Crime Victim Compensation Commission	3	100%
Defender Council	3	67%
Deferred Compensation Plan Board of Trustees	7	100%
Disability and Communication Access Board	17	118%
Early Learning Board	12	67%
Elections Commission	9	100%
Elevator Mechanics Licensing Board	7	71%
Employees' Retirement System Board of Trustees	8	175%
Enhanced 911 Board	13	92%
Environmental Advisory Council	15	87%
Festival of the Pacific Arts & Culture	9	78%
Hawai'i Board of Optometry	7	86%
Hawai'i Board of Veterinary Medicine	5	100%
Hawai'i Climate Change Mitigation and Adaptation Commission	20	60%

State Boards and Commissions

	No. of	%
Board/Commission	Members*	Completed**
Hawai'i Community Development Authority	13	100%
Hawai'i Employer-Union Health Benefits Trust Fund	10	100%
Hawai'i Green Infrastructure Authority	5	100%
Hawai'i Health Systems Corporation-Corporation	15	73%
Hawai'i Health Systems Corporation-East Hawai'i	11	100%
Hawai'i Health Systems Corporation-Kauai	8	63%
Hawai'i Health Systems Corporation-Maui	6	50%
Hawai'i Health Systems Corporation-Oahu	8	125%
Hawai'i Health Systems Corporation-West Hawai'i	9	56%
Hawai'i Historic Places Review Board	5	100%
Hawai'i Housing Finance and Development Corporation	9	78%
Hawai'i Law Enforcement Standards Board	14	71%
Hawai'i Medical Board	11	182%
Hawai'i Paroling Authority	5	100%
Hawai'i Public Housing Authority	10	180%
Hawai'i Retirement Savings Board	8	100%
Hawai'i State Emergency Response Commission	11	82%
Hawai'i State Ethics Commission	5	120%
Hawai'i State Fire Council	4	150%
Hawai'i Teacher Standards Board	17	88%
Hawai'i Technology Development Corporation	8	100%
Hawai'i Tourism Authority	12	92%
Hawaiian Homes Commission	9	122%
Hoisting Machine Operators Advisory Board	5	80%
Island Burial Council - Hawai'i	5	60%
Island Burial Council - Kauai/Niihau	6	50%
Island Burial Council - Maui/Lanai	6	33%
Island Burial Council - Molokai	1	100%
Island Burial Council - Oahu	8	63%
Kaho'olawe Island Reserve Commission	4	100%
King Kamehameha Celebration Commission	15	107%
Land Use Commission	9	189%
Legacy Land Conservation Commission	8	100%
Mauna Kea Stewardship and Oversight Authority	12	83%
Medical Education Council	12	92%
Merit Appeals Board	3	100%
Motor Vehicle Industry Licensing Board	7	100%
Motor Vehicle Repair Industry Board	2	50%
National and Community Service, Hawai'i Commission for	15	73%
Natural Area Reserves System Commission	9	100%
Natural Energy Laboratory of Hawai'i	10	90%
Oahu Metropolitan Planning Organization	14	64%
Pacific International Space Center for Exploration Systems	4	100%
Pest Control Board	9	78%

State Boards and Commissions

	No. of	%
Board/Commission	Members*	Completed**
Public Water System Operators, Board of Certification of	3	100%
Radiologic Technology Board	5	60%
RCUH-Board of Directors	6	100%
Real Estate Commission	9	144%
School Facilities Authority Board	3	100%
Soil and Water Conservation District Boards	84	82%
Stadium Authority Commission	8	150%
State Council on Developmental Disabilities	28	71%
State Foundation on Culture and the Arts	7	186%
State Public Charter School Commission	9	189%
Statewide Health Coordinating Council	9	122%
University of Hawai'i Board of Regents	11	200%
Total Board/Commission Members Training Completed	914	97%

*Membership number is based on full membership and may include vacant positions

**Total training completions from January 1, 2020 to May 5, 2024

Results are based aggregated data, and reflects both current and past board members

2024	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Year to date
Training statistics													
# of In-Person Trainings	1	0	0	0									1
# of People Trained In Person	51	0	0	0									51
# of On-Line Trainings (Self-Directed)	958	707	487	450									2,602
# of Lobbyists Law Trainings	186	52	29	17									284
# of Training Webinars	3	1	1	1									6
# of Participants in Training Webinars	106	13	7	64									190
Attorney of the Day													
	118	89	94	97									398
New assignments													
Advisory Opinion	0	0	0	0									0
Complaint	67	25	39	25									156
Gifts/Invitations/Travel	21	24	30	24									99
Guidance	2	0	2	1									5
Judicial Selection Comm'n	6	0	5	4									15
Training Request	0	0	0	0									0
Record Request	1	1	0	0									2
Project/Other	6	1	1	4									12
Total	103	51	77	58	0	0	0	0	0	0	0	0	289
Closed Assignments													
Advisory Opinion	0	0	0	1									1
Complaint	67	26	26	33									152
Gifts/Invitations/Travel	21	22	35	24									102
Guidance	1	3	0	0									4
Judicial Selection Comm'n	7	0	4	5									16
Training Request	0	0	0	0									0
Record Request	1	1	0	0									2
Project/Other	2	2	2	2									8
Total	99	54	67	65	0	0	0	0	0	0	0	0	285
Anti-Fraud													
	2	5	5	3									15

SUNSHINE LAW MEETING
AGENDA ITEM III

DISCUSSION OF MEDIA REPORTS CONCERNING ETHICS OR THE ETHICS
COMMISSION SINCE THE LAST MEETING

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM IV

LEGISLATIVE MATTERS

No attachments

SUNSHINE LAW MEETING
AGENDA ITEM V

DISCUSSION OF CIVIL BEAT/THE NEW YORK TIME'S "INSIDE THE LATE-NIGHT
PARTIES WHERE HAWAI'I POLITICIANS RAKED IN MONEY" ARTICLE

Attachment 1: Inside the Late-Night Parties Where Hawaii Politicians Raked in Money, downloaded from <https://www.civilbeat.org/2024/04/inside-the-late-night-parties-where-hawaii-politicians-raked-in-money/> (May 8, 2024)

Attachment 2: Discussion Presentation

HAWAII

Inside the Late-Night Parties Where Hawaii Politicians Raked In Money

After the state passed a law barring government contractors from donating to politicians, fund-raising parties showed just how completely the reform effort failed.

By Blaze Lovell ✉, Eric Sagara, Irene Casado Sánchez / April 17, 2024



Since 2006, when reforms went into place, people tied to government contractors have contributed more than \$24 million to Hawaii politicians.
(Phillip Jung/The New York Times)

The reporters examined campaign contributions and government contracts for this article, part of a series about loopholes in Hawaii's pay-to-play laws, for The New York Times's [Local Investigations Fellowship](#).

For the better part of a decade, some of Hawaii's most powerful people huddled together at late-night parties in a cramped second-floor office where lobbyists and executives seeking government contracts lined up to drop cash and checks into a metal lockbox.

That was the entry fee for these extraordinary political fund-raisers. Inside the office, just a short walk from the State Capitol in downtown Honolulu, dozens of guests were served sushi prepared by professional chefs and unlimited beer and liquor.

At the end of the night, Wesley Yonamine, the host and a high-ranking airport official, would, together with the politicians, pop open the box and dole out campaign contributions according to a list of pledges obtained before each event.

As described by attendees, a typical party could bring in thousands of dollars in donations, giving some elected officials almost half their annual campaign haul in a single night.

It was not supposed to work this way. In 2005, in response to a series of scandals, Hawaii passed a law that barred government contractors from giving money to politicians. It was billed as one of the nation's most ambitious efforts to end pay-to-play in contracting and designed to fundamentally change the political culture of a state steeped in corruption.

But legislators wrote a loophole into the law, effectively gutting it: The ban would apply only to donations from the actual corporate entities that got contracts, but not to their owners, employees or any related businesses.

Mr. Yonamine's parties illustrated just how completely the reform effort failed.



Wesley Yonamine, an airport official who hosted the events, at a University of Hawaii football game in 2012. (University of Hawaii Manoa)

Today, Hawaii is reeling from its latest government corruption scandal, with state officials accused of taking bribes from Milton Choy, a prominent businessman who wore a wire for at least a year as part of a deal with the federal government.

But that is just one glimpse of the role money plays in politics here.

An examination of Hawaii's contracting system by The New York Times and Honolulu Civil Beat offers a detailed look at the workings of a state known for favoritism and patronage, a culture where big companies with ties to politicians have historically dominated.

"Pay-to-play is woven into the DNA of the statehood of Hawaii," said

Camron Hurt, director of Common Cause Hawaii, a watchdog group. He pointed to the 1893 overthrow of the

Hawaiian Kingdom that led to an “oligarchy” of businessmen, sugar barons and large landowners lasting decades. The industries involved had close ties to the ruling political parties well into the 1960s and 1970s, when Hawaii’s campaign finance regulations were written.

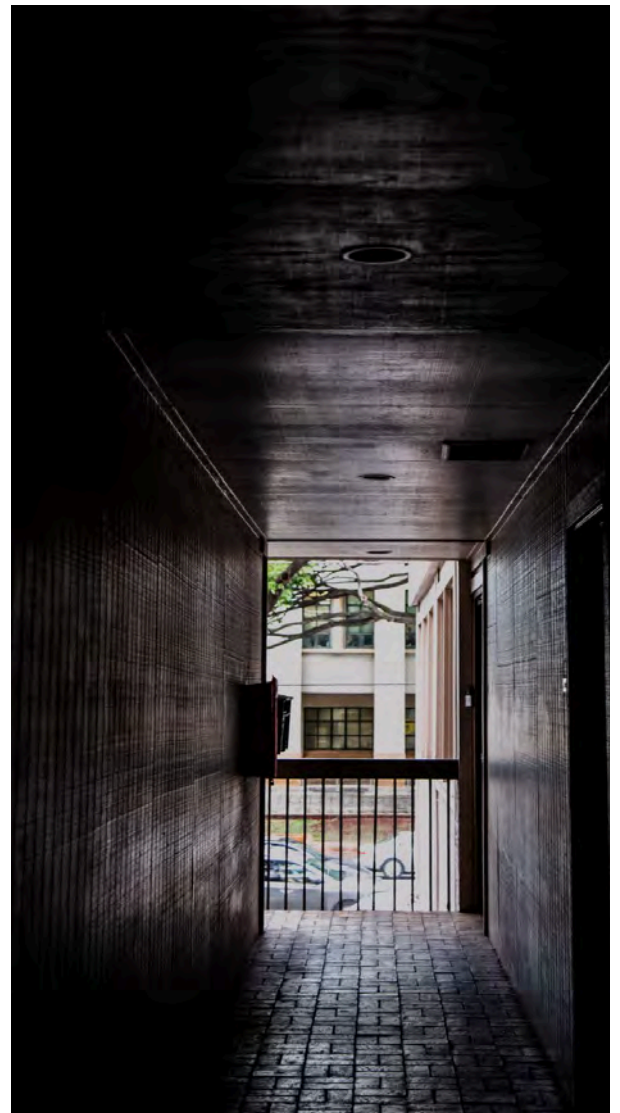
Related Stories



Hawaii Bribery Scandal Casts A Shadow Over Lahaina’s Ruins

OCTOBER 25, 2023

A Times and Civil Beat analysis of campaign donations and contracts found that since 2006 — the year the pay-to-play law went into place — people tied to government contractors have provided a remarkable percentage of the money fueling state and local politics. They have given state and local Hawaii politicians more than \$24 million: about one-fifth of all donations made. Of that total, \$6 million has come from people tied to just 15 companies.



Most donors rarely mentioned their employers in public records designed to bring transparency to political donations. But The Times and Civil Beat, reviewing hundreds of thousands of campaign records, linked more than 28,000 of the donations to contractors.

The analysis almost certainly captured only some contributions, in part because the state could not provide a full list of contractors. In fact, record keeping is so poor that some vendor information is collected only on paper, while electronic records are riddled with errors. Several of the state's biggest agencies did not respond to repeated requests for financial records or said they could not find them.

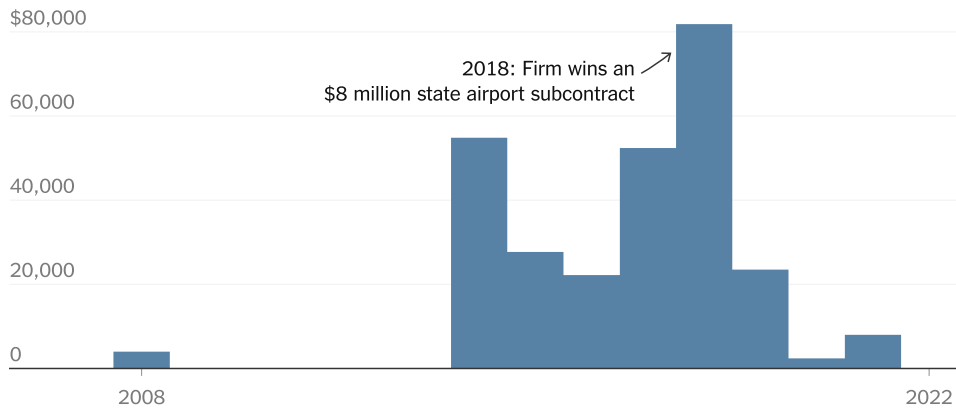
The examination found more than a dozen examples over the past six years of people tied to contractors donating to political campaigns in the months before key decisions led to deals.

Well-timed donations from people linked to contractors

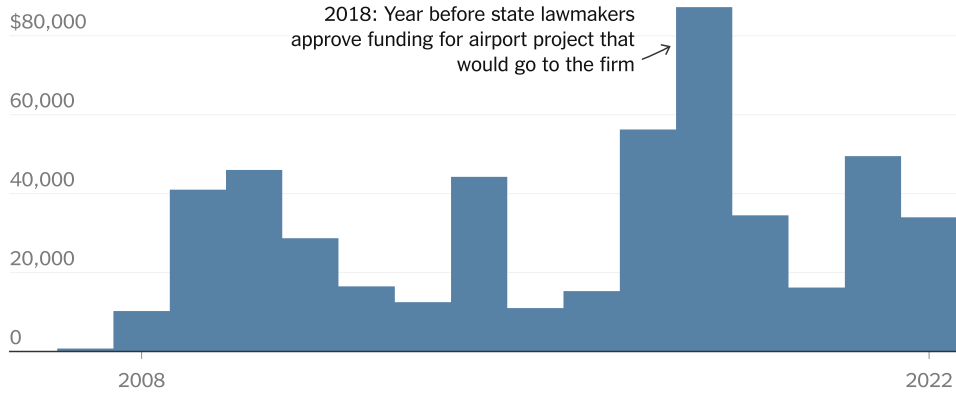
When some companies were on the verge of winning big government contracts, people connected to them donated larger amounts of money to the relevant officials.

Donations linked to company

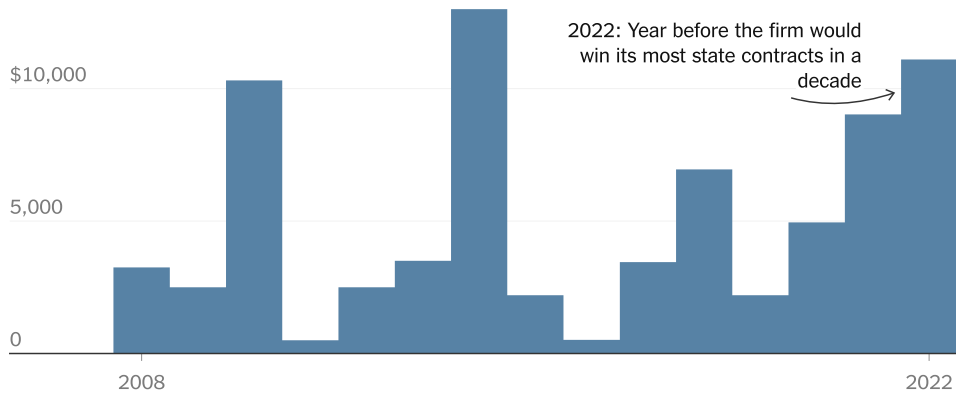
H2O Process Systems (to state officials)



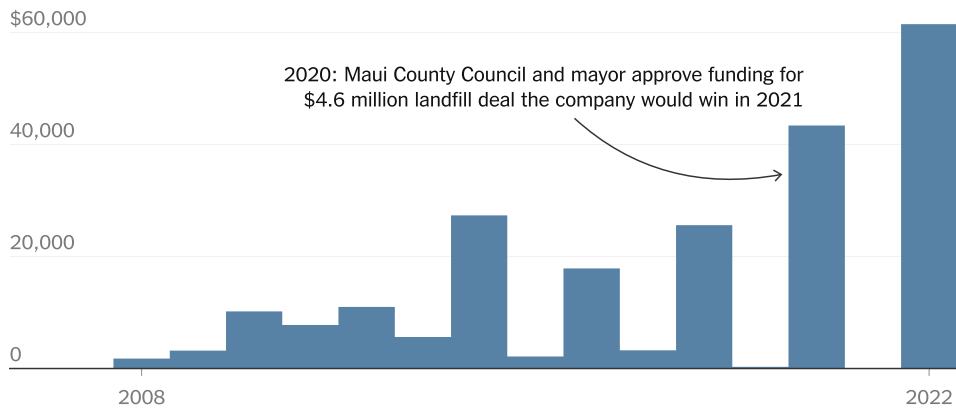
R.M. Towill Corporation (to state officials)



Starn O'Toole Marcus & Fisher (to state officials)



Goodfellow Bros. (to Maui officials)



Source: New York Times and Civil Beat analysis of data from the Hawaii Procurement Office and Hawaii Campaign Spending Commission • By The New York Times

Some of the elected officials who could crack down on favoritism are themselves benefiting from the lack of oversight. At least a dozen legislators have worked for or co-owned companies that won state contracts, some profiting in ways that have not been previously reported.

The Times contacted every politician and campaign donor named in this article. Most of those who responded said there was no link between campaign donations and the contracts they won.

Mr. Yonamine acknowledged hosting the fund-raisers but declined requests for a detailed interview. In a brief statement, he denied influencing any contract awards and said he was “raised to give back to the community.”

“It’s what drove me to work in public service for 36 years,” he said. “Helping those seeking elected office by supporting their fund-raisers is an extension of these values and an important aspect of civic engagement afforded citizens under the law.”



Milton Choy at court with his lawyer, Michael Green, left. Mr. Choy and his associates donated about \$28,000 to political campaigns around the time of the parties. (Phillip Jung/The New York Times)

Political donations are regulated by the Hawaii Campaign Spending Commission, which has a staff of just five people who are responsible for tracking tens of millions of dollars in campaign contributions.

Gary Kam, the commission's general counsel, acknowledged that the law restricted only a small portion of donations. Executives can give freely, and if bundled together, in greater amounts than if their company donated on its own. Expanding the law to cover those people is the "key to it all," he said.

Many people charged with campaign finance violations have been allowed to keep giving — and to keep getting contracts, The Times and Civil Beat found.

Michael Matsumoto, president of the engineering firm SSFM International, pleaded no contest to money laundering involving campaign funds in 2003. He has since contributed \$130,000 to a range of politicians, and the company continues to win public work. He declined to comment.

People with ties to another major contributor are on trial for corruption. In 2022, federal prosecutors accused the chief executive of the engineering firm Mitsunaga & Associates and four of its employees of bribing Keith Kaneshiro, who was the top prosecutor in Honolulu, with campaign contributions to pursue a criminal case against a former employee. The defendants have pleaded not guilty.

Dennis Mitsunaga, the chief executive, encouraged others, including family members and people with ties to his company, to donate to candidates, his lawyers said in court. People linked to the firm have donated heavily to a range of politicians, and the firm has won at least \$49 million in state contracts since 2011.

All contracts awarded to the firm "were based on merit," said Nina Marino, a lawyer for Mr. Mitsunaga.

Mr. Kaneshiro's lawyer argued that campaign contributions made to gain access to politicians were "perfectly legal."



Lawmakers who control large sums of government money have been among the largest recipients of the campaign contributions. (Marie Eriel Hobro/The New York Times)

Other states have been more successful in curbing big campaign contributions from companies seeking government work. In Connecticut, for example, a ban on donations from corporate officers with contracts has wiped out a large swath of campaign funds, according to Joshua Foley, a lawyer for the State Elections Enforcement Commission.

While contractors in Hawaii account for about 20 percent of campaign donations, in Connecticut “the percentage is zero,” Mr. Foley said.

Following recent corruption scandals, the Hawaii Legislature convened a watchdog panel to recommend new laws to improve government transparency. But lawmakers have so far refused to adopt some of the panel’s most meaningful corrective measures.

Notably, bills that would have closed the loophole in the law by prohibiting campaign contributions from company owners, officers and their immediate family members have failed year after year, including in the current legislative session.

Government contractors linked to the most campaign donations

Since 2006, more than \$6 million of the campaign money for state and local races in Hawaii has come from people associated with just 15 contractors.

Company	Associated donations
---------	----------------------

Company	Associated donations
R.M. Towill Corporation Civil engineering firm	\$1,073,400.00
Mitsunaga & Associates Architecture and engineering firm	\$795,382.14
Alexander & Baldwin Parent company of a road construction firm	\$794,911.44
Goodfellow Bros. Construction firm	\$488,925.98
Imanaka Asato Law firm	\$444,576.62
Bowers + Kubota Engineering and consulting firm	\$403,742.84
Kobayashi Sugita & Goda Law firm	\$400,163.99
H2O Process Systems Environmental engineering firm	\$390,145.00
Nan Inc. Construction firm	\$350,645.00
Stanford Carr Development Developer	\$339,071.60
SSFM International Engineering and consulting firm	\$244,509.57
Royal Contracting Co. Construction	\$216,400.00
PVT Land Company Waste management firm	\$188,515.00
Navatek Military contractor	\$142,720.98
Starn O'Toole Marcus & Fisher Law firm	\$137,122.15

Source: New York Times and Civil Beat analysis of Hawaii Campaign Spending Commission data • By The New York Times

Timely Donations

People tied to big contractors gave more than \$1,000 on average — nearly twice as much as political donors who had no obvious government connections, the analysis found. They were also twice as likely to give the maximum for some offices.

Often, their campaign contributions seemed to go to the right people at the right time.

Take R.M. Towill Corporation, a large engineering firm where employees in 2003 were fined for illegal campaign contributions. In the months leading up to the 2022 legislative session, R.M. Towill executives donated to the campaigns of only two state senators — Stanley Chang and Donovan Dela Cruz. Later that year,

the two senators were among the co-sponsors of a law that ultimately led to R.M. Towill getting a \$500,000 surveying contract.

Mr. Chang said in a recent interview that, besides general discussions of policy, he never talked about legislation or contracts with employees of R.M. Towill. Mr. Dela Cruz did not respond to repeated requests for comment.



From left, Senate President Ron Kouchi and Senators Donovan Dela Cruz and Stanley Chang in March. (Phillip Jung/The New York Times)

In a statement, R.M. Towill's president, Greg Hiyakumoto, said that company employees supported candidates who pushed for new infrastructure and sustainable development, both of which were part of its mission.

A handful of powerful lawmakers who control vast sums of government money have been among the largest recipients of campaign donations from executives tied to big contractors and their families. Leaders of the influential House Finance and Senate Ways and Means committees, who direct billions of dollars in public works projects every year, have received more than \$482,000 in such donations since 2018.

Representative Kyle Yamashita, the current finance chairman, who spent years overseeing the House's capital improvements budget, has received more than \$44,000 in political contributions from people tied to big contractors. Lt. Gov. Sylvia Luke, who previously led the House Finance Committee, received more than \$107,000, while former Representative Ty Cullen, the vice chairman until 2022, got \$22,100.

Mr. Dela Cruz has received more than \$239,000 in campaign donations from people tied to big contractors since he became Ways and Means chairman in 2018. Former Senator Gil Keith-Agaran, vice chairman until October, got \$70,000 during the same time period.

Politicians who raised the most money from people tied to contractors

Some powerful politicians in Hawaii drew a fourth or more of their state and local campaign donations since 2006 from people with ties to government contractors.

Candidate	Donations linked to contractors	Pct. of money raised
Kirk Caldwell Former mayor, Honolulu	\$2,497,085.11	33%
Neil Abercrombie Former governor	\$2,211,911.50	24%
Mufi Hannemann Former mayor, Honolulu	\$1,352,811.92	24%
David Ige Former governor	\$1,289,028.81	26%
Josh Green Governor	\$958,675.78	16%
Colleen Hanabusa Former U.S. rep., ran for governor	\$796,378.57	26%
Keith Amemiya Ran for Lt. gov. and Honolulu mayor	\$695,867.20	27%
Rick Blangiardi Honolulu mayor	\$619,392.00	23%
Sylvia Luke Lt. Gov.	\$532,156.33	23%
Shan Tsutsui Former Lt. gov.	\$528,181.00	35%
James Aiona Former Lt. gov.	\$528,169.38	11%
Brian Schatz U.S. Senator, former Lt. gov.	\$392,801.60	28%
Donovan Dela Cruz State senator	\$358,814.54	22%
Ron Kouchi Senate president	\$306,045.00	31%
Ikaika Anderson Former Honolulu councilman	\$298,462.92	26%

Note: Does not include contributions to federal races. • Source: New York Times and Civil Beat analysis of Hawaii Campaign Spending Commission data • By The New York Times

In April 2023, the Senate Ways and Means Committee, led by Mr. Dela Cruz, budgeted for the purchase of a Maui hotel to convert into affordable housing and a school. That created a windfall for the law firm Starn O’Toole Marcus & Fisher, which got a \$450,000 contract to do legal work on the deal. Two of the firm’s directors had recently donated a combined \$3,000 to Mr. Dela Cruz and Gov. Josh Green’s campaigns.

One of the directors, Ivan M. Lui-Kwan, contributed another \$2,000 to the governor’s campaign as the bill awaited his signature, and another \$1,000 after he approved the budget. Mr. Lui-Kwan and Duane Fisher, a partner at the firm, each donated \$1,000 to his campaign about two weeks before the contract was awarded.

Mr. Lui-Kwan said donations made by him and his colleagues had no bearing on state contracts. He said they made it a point to never bring up such work at political fund-raisers.

The governor said staff members involved with procurement didn't communicate with him. "We adopted this approach to avoid any potential conflicts or concerns," Mr. Green said in a statement.

People tied to big contractors have targeted local races, too.

In December 2021, Goodfellow Bros., one of Maui's largest building firms, won a \$4.6 million contract to expand a local landfill. It was the lowest bidder. The project was approved for funding in 2020 by the mayor at the time, Michael Victorino, and the County Council.

Afterward, executives and their family members gave around \$34,000 in campaign contributions to the mayor and to council members, making them among the biggest donors in Maui County.

Goodfellow Bros. said in a statement that its employees could donate to campaigns so long as they did not give in the company's name.

Alice Lee, chairwoman of the County Council, said that Maui-based companies like Goodfellow Bros. "generally support candidates who support a stable economy, public health and safety and affordable housing."



Inside the State Legislature in March. (Phillip Jung/The New York Times)

Doing Double Duty

In Hawaii, legislators serve part time and can hold outside jobs, which can increase the risk that they will face conflicts of interest. Nevertheless, they are among the highest-paid part-time lawmakers in the country, earning an annual state salary of about \$72,000.

An examination of their financial interests found that a dozen of them were employees, directors or co-owners of companies that had won contracts. Since 2006, those companies have gotten at least \$56 million in state deals, according to Hawaii's contract database.

Disclosure records show that Senate President Ron Kouchi earns between \$50,000 and \$100,000 annually working for his brother's disposal company on Kauai, which is the only provider of trash services to agencies on that island.

Representative David Alcos III works as a subcontractor on state projects. Representative Micah Aiu is a lawyer at Nan Inc., one of the state's biggest contractors, which won at least \$39 million in projects last year. They have said they are not directly involved in their companies' contracts.

Mr. Dela Cruz, the Ways and Means chairman, seems to have actually done hands-on work for a state contract: He was the project manager for a \$224,000 State Health Department contract with DTL, a communications firm where he was co-owner and vice president.

The State Health Department, which awarded the contract in 2018 for work on a vaccine campaign, said it did not know Mr. Dela Cruz was an owner.

Jason Antonio, a principal at DTL, said in an email that Mr. Dela Cruz was not a project manager and was not involved in the immunization project. But in its proposal, which was submitted to the Health Department in 2017, DTL listed Mr. Dela Cruz as the project manager who would oversee the work on behalf of the firm.

Ronald Balajadia, the department's immunization chief, said he mostly worked with two other DTL employees and did not recall interacting with Mr. Dela Cruz.

DTL was the only firm to bid on the contract. After selling his ownership interest in the company in late 2020, Mr. Dela Cruz continued receiving money from the firm for consulting services, according to his 2022 financial disclosure.



In 2019, the fund-raising parties moved to a rooftop balcony at the Pagoda Hotel in Honolulu. They continued there until at least 2020. (Marie Eriel Hobro/The New York Times)

A Box Full of Campaign Donations

The clearest example of how contractors and politicians regularly circumvented the reforms were the parties hosted by Mr. Yonamine, the former head of visitor information for Hawaii's airports.

Mr. Yonamine wasn't directly involved in awarding contracts, but his gatherings provided a casual setting where executives could be introduced to lawmakers and state employees who selected winners, according to attendees.

The parties started as early as 2014 at Mr. Yonamine's private office in Honolulu, according to campaign finance records, which lists dates and locations where political fund-raisers are held. They moved to the Pagoda Hotel there in 2019 and continued until at least 2020.

Lawmakers who benefited from the parties said Mr. Yonamine provided the venues while campaigns sometimes invited guests.

Attendees would stand chatting along the walls of the office, or later, on a spacious rooftop balcony at the hotel. The guests, sometimes more than 100 at the hotel, said they would discuss legislation, as well as contracts at the airports. Businesses seeking airport work frequently donated to a range of politicians around

the time of those fund-raisers. They described the parties on the condition of anonymity because they work for the state or have business relationships with contractors they don't want to jeopardize. No one, including Mr. Yonamine, denies they took place.

One of the most prominent guests was Mr. Choy, a major political donor and government contractor who would later be sentenced to more than three years in prison for bribing officials. He and his associates donated more than \$28,000 to political campaigns around the time of the parties.

By 2020, Mr. Choy was wearing a wire and actively recording meetings to aid federal investigators.

No evidence has emerged that Mr. Choy's contributions at the parties were illegal or connected to his bribery scheme.



Milton Choy wore a wire for at least a year as part of a deal with the federal government. (Phillip Jung for The New York Times)

Many guests did work at the airports, a constant source of multimillion dollar contracts.

At least 59 companies competed for airport contracts between 2014 and 2020. But nearly half the airports' 153 professional services contracts went to just 14 companies. Executives from those firms all donated around the

time of Mr. Yonamine's parties.

Current and former heads of the division overseeing most of the airport design and engineering contracts did not respond to requests for comment.

The contracts were worth a combined total of more than \$131 million, according to the state's Department of Transportation.

These professional services contracts are for design or consulting jobs, and winners are selected based on their qualifications or proposals rather than just their price. The rules tend to give public officials more leeway to choose a company based on favoritism.

Executives at firms that won airport contracts donated a combined \$101,000 around the time of the parties, according to campaign finance records, which show when checks were cashed and not when they were given. Candidates raised a total of more than \$470,000.



Honolulu International Airport, a major source of contracting money. (Marie Eriel Hobro/The New York Times)

When presented with The Times and Civil Beat's findings, Ford Fuchigami, then transportation director and now head of the Airports Division, said he could not comment on the awarding of contracts because he was not in charge of selecting the winners. Mr. Fuchigami said he did not recall attending the parties, though records

show he donated around the time of a party in 2019. He said he did not know what the state's rules were for employees like Mr. Yonamine who were politically active or for officials who attended political gatherings.

"What you do on your personal time is what you do on your personal time," he said.

The fund-raising parties do not appear to have violated the state's ethics laws.

Robert Harris, director of the Hawaii State Ethics Commission, said there were generally no prohibitions on political activity during off-hours as long as state employees did not use any state resources.

Other lawmakers who received campaign money around the time of Mr. Yonamine's parties were Ms. Luke, the lieutenant governor; former Gov. David Ige; Mr. Kouchi, the Hawaii Senate president; and former Mayor Kirk Caldwell of Honolulu, according to fund-raising documents.

Mr. Caldwell and Mr. Kouchi did not respond to repeated requests for comment.

Mr. Ige said he mostly remembered seeing Transportation Department employees at Mr. Yonamine's office but did not recall recognizing contractors.

Mr. Yonamine — who has a certain renown because his uncle Wally Yonamine was a famous athlete — is a figure in local sports. In 2018, one year after he was named varsity baseball coach at Pearl City High School, state lawmakers, some of whom received campaign contributions from his parties, approved \$3 million in funding to convert the field from grass to artificial turf.

As Mr. Yonamine spoke from the refurbished field at an opening ceremony in 2022, a Hawaiian priest sprinkled rainwater on home plate.

"Thank you to all who helped make our dreams come true," Mr. Yonamine said.

This article was reported in partnership with [Big Local News](#) at Stanford University.

How the Numbers Were Calculated

The Times and Civil Beat examined hundreds of thousands of campaign contributions and more than 70,000 state contracts to draw connections between vendors and their donations to political races. The analysis revealed that nearly 20 percent of all campaign contributions since 2006 have come from people tied to companies doing business with the state and local governments.

This number is likely an underestimate because the data is incomplete. Records were obtained from the Hawaii Awards & Notices Data System, which tracks who won state contracts, but a 2021 audit found that only 40 percent of all state contracts awarded that year were posted. It's not clear if the problem applies to other years.

Reporters requested and reviewed check registers to verify the total payments to vendors from departments. Some departments did not respond to public records requests, including those with large numbers of high-value contracts, such as the Education and Transportation Departments.

The gaps in state and county contracting data and check registers made it difficult to determine just how much money vendors actually received. Published amounts were confirmed with source documents or contracting departments.

Comments

Join the conversation

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Aloha, Civil Beat readers. We appreciate your thoughtful comments. But in order to make commenting an engaging experience for as many readers as possible, a few rules: Please limit the number of times you comment per story so everyone has a chance to participate without feeling like they are in the middle of an argument between just a few people. Don't repeat the same comment over and over. Be civil and respectful of others even if you disagree. Language and words are important so please avoid snark and put-downs. Name calling and mocking of people's names is specifically prohibited; so are personal attacks, including on Civil Beat and our reporters and contributors. General nastiness and stereotyping also will be rejected. DO NOT WRITE IN ALL CAPS; that comes across as yelling, don't you think? Stay on the topic of the story, please, and not turn everything into a screed on Trump or Biden. Misinformation and disinformation will be rejected. In general, not every comment may get posted. We may suspend or ban commenters who overstep at our sole discretion.

Note: Different people may use the same username. For instance, there are at least six different commenters who go by Malia. There are at least five Ricks and four Daves. Usernames that are clearly intended to ridicule someone else are not allowed.

No links, please.

Be patient. We read every comment but we also need to sleep, spend time with our families and do our other work so there may sometimes be a considerable lag between when you write your comment and when it appears on the story. Weekends and evenings in particular.

Click on "Sign In". Your old account should still work. If you don't already have an account you need to create one (click on "Register").

Need help? Email membership@civilbeat.org.

Comments are now closed on this story. Mahalo!

All Comments 125

Sort by Newest

— wailani1961 2 weeks ago

Great article and you know that it will never change, not in my life time, maybe not in yours. It's Hawaii government, and possibly some other states too, but we are pretty unique because of the very connection we all revel amongst our population. It also breeds the same corruption we loath because everyone's related or friends as if they where family, or so tight that they just can't say no and escape the network.

With more public knowledge, social media and technology in general, at least we can learn more and understand, but change is glacial and Hawaii will always be a who you know political environment ripe with corruption. Only the Feds seem to make any progress in weeding some of it out.

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Pay to Play Solutions

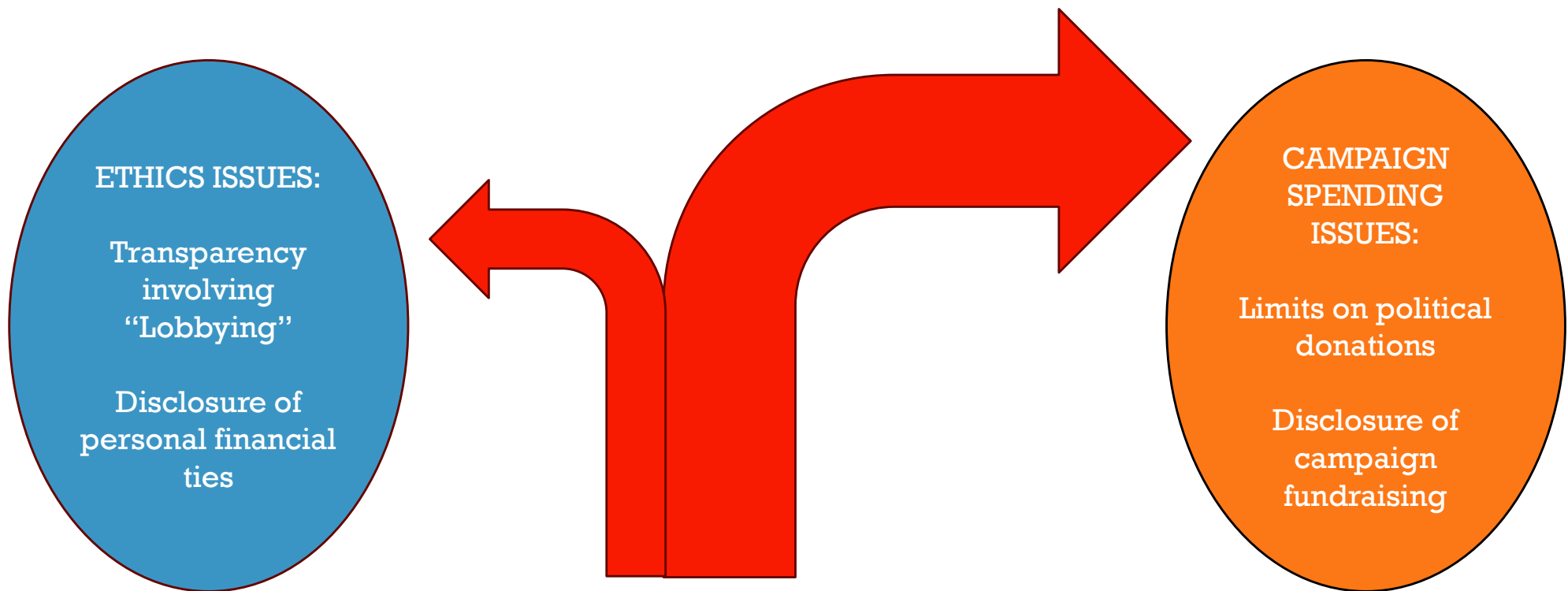
Addressing the Civil Beat/New York Times Article “Inside the Late-Night Parties
Where Hawaii Politicians Raked in Money”

Staff Analysis – May 9, 2024

Hawai'i State Ethics Commission – May 9, 2024

Primary Issues

- Government contractors have given state and local Hawaii politicians more than \$24 million: about one-fifth of all donations made. Of that total, \$6 million has come from people tied to just 15 companies.
- At least a dozen legislators have worked for or co-owned companies that won state contracts, some profiting in ways that have not been previously reported.
- State employees engaging in political activity during off-hours & coordinating contacts between contractors and candidates



\$ From Government Contractors



Campaign Spending Concepts

- Proposed expansion of the government contractor ban to include owners, officers, and immediate family of government contractors (Haw. Rev. Stat. § 11-355).
- Ongoing dialogue regarding data sharing and transparency



Ethics Concepts

- Proposed expansion of lobbying definition to capture interactions between contractors and high-level executive employees. Such an expansion would ensure disclosure and transparency.
- Adoption of policy regulating inaugural events.
- Consider supporting a prohibition on legislator outside employment (and likely treating the legislator position as full-time).

SUNSHINE LAW MEETING
AGENDA ITEM VI

DISCUSSION OF ETHICS OVERSIGHT OVER THE JUDICIAL BRANCH

No attachments.

SUNSHINE LAW MEETING
AGENDA ITEM VI

AKANA v. HAWAII STATE ETHICS COMMISSION AND DANIEL GLUCK,
CIVIL NO. 18-1-1019-06 (JHA); AKANA v. HAWAII STATE ETHICS COMMISSION,
CIVIL NO. 19-1-0379-03 (JHA); STATE OF HAWAII, ETHICS COMMISSION v.
ROWENA AKANA, CIVIL NO. 20-1-0453 (BIA)

Discussion of case status.

The Hawai'i State Ethics Commission may convene an executive session pursuant to Hawai'i Revised Statutes section 92-5(a)(4) to consult with the Commission's attorneys on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.

- Attachment 1: Notice V. Devins possible conflict, filed May 6, 2024
- Attachment 2: HSEC Response to OHA Motion for Leave to File, filed April 23, 2024
- Attachment 3: OHA Motion for Leave to File Amicus Brief, filed April 21, 2024
- Attachment 4: Plaintiff-Appellant's Application for Writ of Certiorari to the Hawai'i Supreme Court, filed April 19, 2024

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SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,
Petitioner/Respondent-Appellant-Appellant,

vs.

HAWAI‘I STATE ETHICS COMMISSION,
Respondent/Complainant-Appellee-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000668; CASE NO. 1CC191000379)

NOTICE
(By: Devens, J.)

This notice is to inform all parties that while with my former law firm (now known as Alapa & Otake, LLC), I served as co-counsel on a case with James Bickerton, Esq., and his law firm, Bickerton Law Group LLP, until my departure from my firm at the end of December 2023.

I believe that I can be fair and impartial in deciding the case. However, any party who has any concern about my participation in this matter may object to my participation by

May 13, 2024. The failure to object as set forth shall be deemed a waiver of any objection to my participation in this matter.

DATED: Honolulu, Hawai'i, May 6, 2024.

/s/ Vladimir P. Devens

Associate Justice



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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ROWENA AKANA,

Petitioner-Appellant,

v.

HAWAI'I STATE ETHICS COMMISSION,

Respondent-Appellee.

CIVIL NO. 19-1-0379-03 JHA
(Agency Appeal)

APPEAL FROM:

A) FINAL JUDGMENT, filed September 24, 2019;

B) ORDER AFFIRMING THE HAWAI'I STATE ETHICS COMMISSION'S 1) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED FEBRUARY 5, 2019, AND 2) ORDER REGARDING JURISDICTIONAL AND CONSTITUTIONAL ISSUES RAISED BY RESPONDENT, DATED OCTOBER 16, 2018, filed September 24, 2019;

C) ORDER DENYING APPELLANT'S MOTION FOR ADDITIONAL EVIDENCE TO BE TAKEN, filed June 18, 2019; and

D) ORDER DENYING APPELLANT'S MOTION TO STAY ENFORCEMENT OF AGENCY ORDER; CERTIFICATE OF SERVICE, filed 29-Apr-19

FIRST CIRCUIT COURT

HONORABLE JAMES H. ASHFORD

**HAWAI'I STATE ETHICS COMMISSION'S RESPONSE TO OFFICE OF
HAWAIIAN AFFAIRS' MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

CERTIFICATE OF SERVICE

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**HAWAI'I STATE ETHICS COMMISSION'S RESPONSE TO OFFICE OF
HAWAIIAN AFFAIRS' MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

The Office of Hawaiian Affairs (“OHA”) acknowledges that its motion for leave to file an amicus curiae brief may fairly appear “premature.” Dkt. 3 at PDF 5 n.1 (“OHA acknowledges that this Motion may seem premature. Generally, a motion for leave to file a brief of *amicus curiae* would be filed after a petition for writ of certiorari has been accepted.”). Respondent-Appellee Hawai‘i State Ethics Commission (the “Commission”) agrees; OHA has jumped the gun, and its motion should be denied.

OHA states that “given the nature of the issues raised in the Petition” and “there being no clear timeline for filing such motions set forth in the Hawaii Rules of Appellate Procedure,” it has “elect[ed] to submit [its] Motion now[.]” *Id.* But all signs in the Hawai‘i Rules of Appellate Procedure (“HRAP”) point to the motion’s prematurity. Rule 28(g) is nested within the HRAP provision on “briefs” that covers only briefs on the merits; applications for writs of certiorari and related filings are covered in an entirely separate rule, which, unlike Rule 28, is notably silent regarding the filing of amicus curiae briefs. *See* HRAP Rule 40.1. Rule 28(g) also specifically states that “[a]ll *amicus curiae* briefs shall comply with the applicable provisions of subsection (b) of this Rule[.]” the provision governing *opening briefs*—an odd reference if the Rule contemplated the filing of amicus briefs in support of or in opposition to applications for writs of certiorari under Rule 40.1, where there are separate content requirements, *see* HRAP Rule 40.1(d). Rule 28(g) also provides: “The attorney general may file an *amicus curiae* brief without order of the court in all cases where the constitutionality of any statute of the State of Hawai‘i is drawn into question, *provided that the attorney general shall file the brief within 30 days after the filing of the answering brief, or within 30 days after notice was received pursuant to Rule 44*

of these Rules, whichever period last expires.” (emphasis added). This again contemplates amicus briefs *on the merits*.

OHA’s premature request should therefore be rejected. A contrary result would likely create practical difficulties for proceedings under Rule 40.1, given the limited time periods for responding to certiorari applications and for the Court to act upon those applications. *See* HRAP Rule 40.1(e), (g). Denial here by no means shuts OHA out from expressing its views—at least as they currently stand.¹ OHA had the opportunity to seek leave to file amicus briefs before the circuit court and the Intermediate Court of Appeals. It chose not to at both stages. And, importantly, OHA would have the opportunity to seek leave to file its amicus brief should this Court accept certiorari, as the HRAP contemplates and OHA itself appears to acknowledge to be the general rule.

For these reasons, the Commission respectfully requests that the Court deny OHA’s motion.

¹ OHA’s motion previews a position that appears inconsistent with evidence from OHA in the record in this case. *See, e.g.*, ICC191000379, Dkt. 8 at PDF 12, 25 (OHA’s Board of Trustees Executive Policy Manual, as revised February 2012, providing that “[a]ll Trustees shall abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawai‘i Revised Statutes . . . and shall attend ethics training as required by law”); *id.* at PDF 82-84, 117-20 (materials regarding 2013 OHA “Trustee workshop presented by Ka Pouhana Dr. Kamana‘opono Crabbe, OHA-Administration, OHA Counsel Anna Elento-Sneed, Esq., Corporation Counsel Ernest Kimoto, Esq., and Board Counsel Robert Klein, Esq. regarding OHA operations and the roles and responsibilities of Trustees and staff” that included the State Ethics Code); ICC191000379, Dkt. 9 at PDF 217-20 (materials regarding 2015 “[p]resentation to the [Board of Trustees] by the Hawai‘i State Ethics Commission re: State Ethics Code,” with minutes on the presentation stating, among other things, that the Ethics Code “standards apply to both elected Trustees and line employees” and are “mandated” by “the law”); *see also* ICC191000379, Dkt. 12 at PDF 397-98 (Tr. 392:19-393:3) (OHA’s former corporate counsel, when asked during the contested case hearing about whether the State Ethics Code applies to OHA Trustees, testifying that “starting with Article 14 of the Constitution, and Chapter 84, we felt that it was totally applicable to office trustees who, by statute and otherwise, were defined as public officers and officials of state government”).

DATED: Honolulu, Hawai‘i, April 23, 2024.

/s/ Ewan C. Rayner

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NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,

Petitioner-Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Respondent-Appellee.

CIVIL NO. 19-1-0379-03 JHA
(Agency Appeal)

APPEAL FROM THE:

(1) FINAL JUDGMENT, FILED
SEPTEMBER 24, 2019;

(2) ORDER AFFIRMING THE HAWAI‘I
STATE ETHICS COMMISSION’S (1)
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER,
DATED FEBRUARY 5, 2019, AND (2)
ORDER REGARDING JURISDICTIONAL
AND CONSTITUTIONAL ISSUES RAISED
BY RESPONDENT, DATED OCTOBER 16,
2018, FILED SEPTEMBER 24, 2019;

(3) ORDER DENYING APPELLANT’S
MOTION FOR ADDITIONAL EVIDENCE
TO BE TAKEN, FILED JUNE 18, 2019;

(4) ORDER DENYING APPELLANT’S
MOTION TO STAY ENFORCEMENT OF
AGENCY ORDER, FILED APRIL 29, 2019;
AND

[Caption Continued on Next Page]

[Caption Continued from Last Page]

(5) THE DISPOSITION OF ALL POST-
JUDGMENT MOTIONS

**THE OFFICE OF HAWAIIAN AFFAIRS’
MOTION FOR LEAVE TO FILE BRIEF
OF *AMICUS CURIAE*; MEMORANDUM
IN SUPPORT OF MOTION;
CERTIFICATE OF SERVICE**

Circuit Court of the First Circuit
Judge: Hon. James H. Ashford

**THE OFFICE OF HAWAIIAN AFFAIRS' MOTION
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE***

MEMORANDUM IN SUPPORT OF MOTION

CERTIFICATE OF SERVICE

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**THE OFFICE OF HAWAIIAN AFFAIRS' MOTION
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE***

THE OFFICE OF HAWAIIAN AFFAIRS, by and through its attorneys, Klein Law Group, LLC, hereby respectfully submits its Motion for Leave to file a brief of *Amicus Curiae* (“**Motion**”) in the above-captioned matter and urges the Court to accept Petitioner-Appellant Rowena Akana’s Petition for Writ of Certiorari.

This Motion is made pursuant to Rules 27 and 28 of the Hawai‘i Rules of Appellate Procedure. The Motion is based on the attached Memorandum in Support of Motion, the pleadings and papers filed herein, and on such further evidence and argument as may be presented at any future hearing.

DATED: Honolulu, Hawai‘i, April 21, 2024.

/s/ Robert G. Klein

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Movant the Office of Hawaiian Affairs (“OHA”) seeks leave to respond to Petitioner-Appellant Rowena Akana’s (“**Petitioner-Appellant**”) petition for writ of certiorari (“**Petition**”) in the form of a brief of *amicus curiae*.¹ OHA believes the Petition raises critical questions about the jurisdiction and authority of the Hawai‘i State Ethics Commission (“**Commission**”) over OHA trustees. OHA’s interests in this proceeding include (1) whether the Intermediate Court of Appeals of the State of Hawai‘i (“**ICA**”) properly interpreted and applied *Kealoha v. Machado*, 131 Hawai‘i 62, 315 P.3d 213 (2013) in its Memorandum Opinion dated January 22, 2024, *see* CAAP-19-0000668, Dkt. 77 at 8, 9, 18 (stating that *nothing* in *Machado* constrains the Commission); (2) whether the Hawai‘i State Ethics Commission (“**Commission**”) has jurisdiction and/or authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA’s trustees; and (3) whether there exists a conflict between Hawaii Revised Statutes (“**HRS**”), Chapter 84 (“**State Ethics Code**”) and the fiduciary obligations imposed on OHA trustees pursuant to HRS, Chapter 10. Implicit in this inquiry is whether the Commission has authority to shape how OHA trustees use proceeds from the ceded lands. *See* Haw. Const. art. XII, § 4; Haw. Rev. Stat. § 10-1 *et seq.* Based on OHA’s review of related case law, this appears to be a matter of first impression.

¹ OHA acknowledges that this Motion may seem premature. Generally, a motion for leave to file a brief of *amicus curiae* would be filed after a petition for writ of certiorari has been accepted. However, given the nature of the issues raised in the Petition, and there being no clear timeline for filing such motions set forth in the Hawaii Rules of Appellate Procedure, OHA elects to submit the Motion now for the Court’s consideration. While OHA has its own perspective on the issues addressed in the underlying appeal, it generally supports the Petition and welcomes the opportunity to brief the issues important to OHA.

II. RELEVANT FACTUAL BACKGROUND

OHA was established by article XII, section 5 of the Hawai‘i Constitution. *See Arakaki v. Hawaii*, 314 F.3d 1091, 1093 (9th Cir. 2002). OHA was created by Hawaii Revised Statutes (“HRS”) § 10-4 (1979). It is governed by a nine-member board of trustees, elected by qualified voters in the state. *Arakaki*, 314 F.3d at 1093. As restated by the Supreme Court of the United States in *Rice v. Cayetano*, delegates to the 1978 constitutional convention explained the position of OHA in the state structure as follows:

The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor’s cabinet. The status of the Office of Hawaiian Affairs is to be unique and special The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury.

528 U.S. 495, 521 (2000) (quoting 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645).

Petitioner-Appellant was an elected member of OHA’s board of trustees. Petitioner-Appellant served as an OHA trustee for approximately 28 years. Her service as an OHA trustee ended in 2018.

On April 19, 2018, the Commission charged Petitioner-Appellant with violating HRS §§ 84-11, -11.5, and -13. On October 16, 2018, the Commission issued an Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent [Akana]

(“**Jurisdictional Ruling**”). [ROA. 7, App. A at 391-97.]² The Jurisdictional Ruling determined the Commission had authority and jurisdiction to prosecute Petitioner-Appellant under the Ethics Code for conduct as an OHA trustee. *See id.*

Between October 22 and 26, 2018, the Commission held a contested case hearing. On February 5, 2019, the Commission entered its Findings of Fact, Conclusions of Law, and Decision and Order (“**Order**”). [ROA. 11; App. B at 1582-1670.]

Petitioner-Appellant appealed both the Jurisdictional Ruling and Order to the circuit court on March 9, 2019. On September 24, 2019, the circuit court affirmed the Jurisdictional Ruling and the Order and entered final judgment. [ROA. 29, 30; Apps. E, F.] On October 1, 2019, Petitioner-Appellant filed her Notice of Appeal. [ROA. 32]. On October 2, 2019, the Commission filed its Motion to Amend Judgment. [ROA. 33]. The Motion to Amend Judgment was granted by minute order (without a hearing) on October 30, 2019. [ROA. 43]. The Record on Appeal was filed in CAAP-19-668 on November 15, 2019. [ROA. 52]. On November 27, 2019, the circuit court entered its Amended Final judgment. [ROA. 54].

Petitioner-Appellant then appealed to the ICA. On January 22, 2024, the ICA issued its memorandum opinion affirming the circuit court’s amended final judgment and the Commission’s Order. [Dkt. 77]. On February 16, 2024, the ICA entered its Judgment on Appeal. [Dkt. 79].

III. OHA HAS A SIGNIFICANTLY PROTECTABLE INTEREST AT STAKE

OHA was established by article XII, section 5 of the Hawai‘i Constitution. *See*, 314 F.3d at 1093. OHA was created by HRS § 10-4. Its purpose is to better the conditions of Native

² Citations to the Record on Appeal reference the Docket number in the underlying appeal to the Circuit Court, *Akana v. Hawai‘i State Ethics Commission*, 1CC191000379.

Hawaiians. HRS § 10-3(1). It is governed by a nine-member board of trustees, elected by qualified voters in the state. *Arakaki*, 314 F.3d at 1093. The board is vested with certain powers and duties, including, but not limited to,

- managing, investing, and administering “the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3”, HRS § 10-5(1);
- collecting, receiving, depositing, withdrawing, and investing “money and property on behalf of the office”, HRS § 10-5(3);
- “[f]ormulat[ing] policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under article XII, section 4, of the state Constitution”, HRS § 10-5(4);
- “the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means”, HRS § 10-4.5(a);
- “the power to deposit any of its moneys in any banking institution within or outside the State, to the extent necessary to implement subsection (a)”, HRS § 10-4.5(b); and
- To expend “[t]wenty per cent of all funds derived from the public land trust for purposes of [HRS Chapter 10]”, HRS § 10-13.5.

See Kealoha v. Machado, 131 Haw. 62, 67 (“Among the powers and duties the legislature granted to the OHA board of trustees is the power to ‘[m]anage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3[.]’”). “Under the duty of loyalty, a ‘trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust.’” *Id.* at 77 (quoting Restatement (Third) of Trusts § 78 cmt. f.).

Based on the foregoing, OHA asserts an interest in the public trust and management of its moneys, including, but not limited to dispersals of such moneys via discretionary funds provided for the trustees to use towards the betterment of the conditions of native Hawaiians. The Commission claims jurisdiction and authority to prosecute OHA trustees based on their use of the aforementioned funds. Additionally, if the Commission indeed has the authority to initiate, receive, and consider charges concerning alleged violations of ethical requirements governing OHA's trustees, the Commission could, intentionally or not, influence trustees to act in a way that is in accordance with the Commission's expectations but in breach of the trustees' duty of loyalty to OHA's beneficiaries: native Hawaiians. Thus, there is a 'relationship' between OHA's legally protected interests and the Commission's claims against Petitioner-Appellant.

The outcome of this appeal will have ramifications well beyond Petitioner-Appellant's rights, which may impact or impede OHA and its trustees from fulfilling their duties. In addition to the Commission's position discussed above (affirmed by the circuit court and the ICA), the ICA's memorandum opinion has potentially severe impacts on the prospective application of *Machado* and OHA's semi-autonomous status as established by article XII, § 5, of the Hawai'i Constitution. *See Rice*, 528 U.S. at 521. The ICA's memorandum opinion discusses in some detail HRS, Chapter 10, and OHA's power with regard to the use of proceeds from the ceded lands. *See* Dkt. 77 § IV.A (at 6-11).

In its opinion, the ICA states:

[Petitioner-Appellant] argues that the circuit court improperly interfered by affirming the Decision and Order because neither the Commission nor the circuit court found that she abused her discretionary power. **But neither the Commission nor the circuit court were tasked with determining whether Akana breached her fiduciary duty to OHA beneficiaries.** They reviewed whether Akana met her obligations under the Code of Ethics, not whether she breached her fiduciary duty as an OHA trustee. ***Nothing in***

***Machado* constrains the Commission from investigating alleged violations of the Code of Ethics, or from taking appropriate action on violations.**

Id. at 9 (emphases added). OHA disagrees.

Contrary to the ICA’s opinion, there is most certainly “something” in *Machado* that constrains the Commission, *e.g.*, a trustee’s fiduciary duty. That neither the Commission nor the circuit court considered whether Petitioner-Appellant’s duties as trustee required or even permitted her conduct is precisely what is at odds in *Machado*. *See Machado*, 131 Haw. 62, 78 (stating “OHA trustees’ expenditures are to be reviewed for abuse of discretion, which occurs when a trustee ‘has acted unreasonably - that is, beyond the bounds of a reasonable judgment’”).

V. CONCLUSION

For the foregoing reasons and authorities, OHA respectfully requests that the Motion be granted so that it may submit a brief of *amicus curiae* and fully brief the foregoing issues.

DATED: Honolulu, Hawai‘i, April 21, 2024.

/s/ Robert G. Klein

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NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

ROWENA AKANA,

Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Appellee.

CIVIL NO. 19-1-0379-03 JHA
(Agency Appeal)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy of the foregoing document was duly served upon the following parties electronically through the Judiciary Electronic Filing System (“**JEFS**”), or via U.S. Mail, postage prepaid, as set forth below:

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NO. SCWC-19-0000668

IN THE SUPREME COURT OF THE STATE OF HAWAII

ROWENA AKANA

Appellant,

vs.

THE HAWAII STATE ETHICS
COMMISSION,

Appellee.

CIVIL NO. 19-1-0379-03 JHA
(Agency Appeal)

APPEAL FROM THE:

(1) FINAL JUDGMENT, FILED
SEPTEMBER 24, 2019;

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FINDINGS OF FACT, CONCLUSIONS OF
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MOTION TO STAY ENFORCEMENT OF
AGENCY ORDER, FILED APRIL 29, 2019;
AND

(5) THE DISPOSITION OF ALL POST-
JUDGMENT MOTIONS.

FIRST CIRCUIT COURT

HONORABLE JAMES H. ASHFORD

**PLAINTIFF-APPELLANT'S APPLICATION FOR
WRIT OF CERTIORARI TO THE HAWAII SUPREME COURT**

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I. INTRODUCTION

Petitioner-Appellant Rowena Akana (“Appellant” or “Ms. Akana”), by and through her undersigned attorneys, Bickerton Law Group, LLLP, submits her petition for certiorari review of the Intermediate Court of Appeals’ (“ICA”) January 22, 2024 Memorandum Opinion.

This appeal is fundamentally about the power and rights of the Office of Hawaiian Affairs (“OHA”) to administer and police itself as an independent, self-governing arm of Hawai‘i. The appeal arose from the unlawful prosecution of Ms. Akana by Appellee Hawai‘i State Ethics Commission (“the Commission”) for alleged violations of Hawai‘i Revised Statutes (“HRS”), Chapter 84 (the “State Ethics Code”), premised on Ms. Akana’s discretionary conduct as an OHA Trustee-at-Large (“Trustee”) in expending OHA trust funds specifically allocated by OHA to Trustees to aid them in carrying out their unique fiduciary duties.

In upholding the Commission’s authority to prosecute Ms. Akana, *the ICA gravely erred*. Under the ICA’s ruling, the Commission has jurisdiction over OHA and the power to investigate and prosecute trustees for actions it deems in violation of the State Ethics Code. This ruling is contrary to the Hawai‘i Constitution, which makes OHA a separate political subdivision outside the purview of the Commission, with its own purse, elected officials, and independent fiduciary duties owed to a subset of the population (OHA beneficiaries), which are in conflict with the requirements of a State Ethics Code designed to apply to non-fiduciary employees of the State.

The violation is not a harmless one. It will negatively impact OHA trustees’ abilities to carry out their independent fiduciary functions, which are unlike those of any other “employee” of the State. Under the ICA’s opinion, OHA trustees will now be subjected to conflicting standards of conduct as they try to balance, on the one hand, their obligations and duties as trustees, and on the other hand, compliance with the State Ethics Code. They will be judged by a Commission intended by the Constitution to oversee the State and its employees, but not separate political subdivisions of the State. This will result in situations where a Trustee is unable to act for the benefit of OHA beneficiaries - as their fiduciary duties obligate them to do - because to do so would result in a violation of the State Ethics Code and prosecution by the Commission, rather than OHA’s own ethics commission. If the ICA’s decision is upheld, it will result in chilling effects on OHA Trustees’ behaviors and actions, and on the actions of OHA itself, which can act only through its Trustees.

This Court has previously declined to extend the jurisdiction of the Commission and State Ethics Code to persons who were subject to conflicting duties under other laws. *See Boyd v. Hawai‘i State Ethics Commission*, 138 Hawai‘i 218, 226, 378 P.3d 934, 942 (2016) (“charter schools ... had discretion and autonomy to operate independently and separately from the Department of Education

and Board of Education”). The facts here are even more compelling than in *Boyd*, as OHA is a separate political subdivision, created by Article XII, Section 5 of the Hawai‘i Constitution, run by its own set of elected officials with its own funding and statutory provisions (such as HRS §§10-4, 10-4.5, 10-5, 10-6 and 10-16) that regulate how and when trustees must spend funds, carry out fiduciary duties and face civil liability to beneficiaries. In giving short shrift to this point and summarily concluding without analysis, in a single sentence, that “nothing” in the OHA statutes “is contrary to, or inconsistent with” the State Ethics Code, and that the Commission may enforce the Code against OHA trustees notwithstanding the limits on the Commission’s own purview set out expressly in Article XIV (and at least impliedly by Article XII), the ICA gravely erred.

II. QUESTIONS PRESENTED

1. Whether the ICA gravely erred in concluding that the Commission acted within its jurisdiction in prosecuting Appellant under the State Ethics Code (1) when OHA is a separate political subdivision that must be regulated by its own separate ethics commission under Article XIV, (2) when the Commission is not empowered under Article XIV to enforce OHA’s own ethics code, and/or (3) in a manner that resulted in conflicting and inconsistent application of state laws to Ms. Akana’s discretionary conduct as an OHA Trustee.

2. Whether the ICA gravely erred in its application of the Gifts Law, HRS § 84-11, and Gifts Reporting Law, HRS § 84-11.5, to Appellant’s acceptance of paid legal fees in a case which she filed and defended in her capacity as an OHA trustee to further the interests of Hawaiians, and in affirming the Commission’s finding that this constituted an improper *personal* benefit.

III. STATEMENT OF PRIOR PROCEEDINGS

A. The Commission’s Charges Against Ms. Akana

On April 19, 2018, the Commission issued charges against Ms. Akana for violations of the State Ethics Code, arising from her actions as an OHA Trustee. ICC191000379 (hereinafter “R.”), Dkt. 6 at 1-21. The charges alleged that Ms. Akana had violated: (1) HRS § 84-11, the Gifts Law; (2) HRS § 84-11.5, the Gifts Reporting Law; and (3) HRS § 84-13, the Fair Treatment Law. *Id.* On May 23, 2018, Ms. Akana answered the charges, raising significant constitutional and jurisdictional issues, and demanded a contested case hearing. R. Dkt. 6 at 22-29.

On October 16, 2018, the Commission *sua sponte* issued an *Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent*, on October 16, 2018 (hereinafter “Jurisdictional Ruling”) concluding that it had jurisdiction over Ms. Akana’s alleged violations of the State Ethics Code. R. Dkt. 7. A contested case hearing on the merits was held before the Commission on October

22, 24-26, 2018. On February 5, 2019, the Commission issued its *Findings of Fact, Conclusions of Law, and Decision and Order* (“FOFCOL”). R. Dkt. 11.

B. Ms. Akana’s Appeal to the Circuit Court

Ms. Akana appealed both the Jurisdictional Ruling and the FOFCOL to the circuit court by filing a *Notice of Appeal* on March 7, 2019, in Civ. No. 19-1-0379-03 (“Agency Appeal”). R. Dkt. 1. On September 6, 2019, oral arguments on the Agency Appeal took place. On September 24, 2019, an *Order Affirming the Hawai‘i State Ethics Commission’s (1) Findings of Fact, Conclusions of Law, and Decision and Order, Dated February 5, 2019, and (2) Order Regarding Jurisdictional and Constitutional Issues Raised by Respondent, Dated October 16, 2018* (“Order Affirming FOFCOL and Jurisdictional Ruling”) and a *Final Judgment* were entered. R. Dkts. 29 and 30.

C. Ms. Akana’s Appeal to the ICA and the Timeliness of This Writ

On October 1, 2019, Appellant filed a *Notice of Appeal* to the Intermediate Court of Appeals. CAAP-19-0000668 Dkt. 1.

An application to transfer was filed in SCAP-19-0000668, and was denied in a 3-2 opinion (Justices McKenna and Wilson dissenting) on July 24, 2020. Thereafter, the ICA rendered its decision on January 22, 2024 in a “not for publication” Memorandum Opinion and entered its Judgment on Appeal on February 16, 2024. The ICA Opinion affirmed the circuit court’s Amended Final Judgment and the Commission’s Findings of Fact, Conclusions of Law, and Decision and Order. This Application was otherwise due on March 17, 2024. On February 23, Ms. Akana requested a 30-day extension of time to file this Application pursuant to HRAP 40.1(a). An extension to April 16, 2024 was granted; thus, this writ is timely.

IV. STATEMENT OF THE CASE

Ms. Akana was an OHA trustee for twenty-eight years, and was previously its Chairwoman from 1998 to 2000 and again from December 2016 to February 2017. Ms. Akana sat on OHA’s Board of Directors for much of the time she served as an OHA trustee. Ms. Akana’s tenure ended in November 2018 (she lost her re-election effort which took place while the charges were pending and receiving wide publicity). OHA, which is not a party hereto, was founded in 1978 and describes itself as a Hawai‘i “public agency with a high degree of autonomy... responsible for improving the well-being of Native Hawaiians,” as governed by its Board of Trustees.

Throughout her tenure with OHA, Ms. Akana was known as an activist for transparency and the provision of information to OHA beneficiaries – whose interests she was obligated as a trustee to put first – and for public access to OHA’s decision-making process, decisions and records. She never hesitated to publicly criticize OHA and/or certain of its trustees and Board members for

decisions that she believed in good faith were not in the best interests of OHA beneficiaries. In doing so, she accumulated a fair number of political supporters, as well as opponents and critics.

Appellee the Commission is an agency of the State of Hawai‘i, authorized by Article XIV of the Hawai‘i Constitution, and created under and governed by Hawai‘i Administrative Rules (“HAR”), Title 21, put in effect to carry out the provisions of State Ethics Code.

The Commission’s Executive Director brought charges against Ms. Akana for her expenditures of allowances granted to her as an OHA Trustee to enable her to carry out her duties as a Trustee, including her fiduciary duties (which expenditures included purchasing lunches and refreshments for staff gatherings and telecommunications services she needed in order to communicate with her constituents, OHA beneficiaries, and to keep herself informed of the business of OHA). The Commission contends that whether or not these were appropriate fiduciary expenditures, they violate the State Ethics Code that governs the conduct of State employees, and which has been adopted by its own ethics code by OHA.

The Commission’s Executive Director also charged Ms. Akana with having permitted a third party (Princess Abigail Kawananakoa) with having paid for legal fees that Ms. Akana incurred in prosecuting an action brought in her official capacity under applicable “sunshine” principles to obtain information that Ms. Akana believed should be public. The Commission found against Ms. Akana on virtually all counts and charges, and awarded substantial fines against her.

V. ARGUMENT

In creating OHA, “[t]he clear intent of the Con-Con delegates and, thus, still the intent behind the creation of the agency, was to create an *independent* body that would be able to *maximize self-determination* for Native Hawaiians by Native Hawaiians.” Troy J.H. Andrade, *Changing Tides, A Political and Legal History of the Office of Hawaiian Affairs* (May 2016) (Ph. D. Dissertation, University of Hawai‘i) at 52. OHA was created to be “independent from the executive branch and all other branches of government” and “with power to govern itself through a board of trustees,” in a manner “so that the office could have maximum control over its budget, assets, and personnel.” 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645 (emphasis added).

No other agency in the State stands in such a unique position, and to rule that the Commission has jurisdiction and power to prosecute OHA trustees for alleged violations of the State Ethics Code would completely undermine OHA’s foundational underpinnings of a self-determining and independent agency. On July 24, 2020 in SCAP-19-0000668, Justice McKenna, dissenting in the Court’s 3 to 2 decision not to accept transfer and joined by Justice Wilson, noted that: “This case

raises fundamental and imperative questions regarding the OHA's self-governance under the Hawai'i Constitution and statutes." SCAP-19-0000668, Dkt. 11 at 2.

Justice McKenna concluded that: "As the issues presented in this case will almost invariably again be raised to this court, I believe justice is promoted by a more expeditious final determination of the legal issues raised." That view did not carry the day on the transfer application, but the day predicted by Justice McKenna is now here, and her observation about the "fundamental and imperative" nature of the questions the case presents remain true.

A. The Commission Exceeded its Authority and Jurisdiction by Prosecuting Appellant Under the State Ethics Code for Her Discretionary Conduct as a Trustee.

The Commission exceeded its jurisdiction by proceeding against Ms. Akana and applying the State Ethics Code in a manner that conflicts with, limits, regulates, and effectively nullifies an OHA trustee's independent and discretionary powers and duties.

- i. OHA, as a political subdivision, is mandated by the Constitution to create its own ethics review commission, and the Constitution limits the State Ethics Commission to Jurisdiction Only Over the State and the Constitutional Convention, and Not Over Political Subdivisions of the State.*

Article XIV of the Hawai'i Constitution states that "each political subdivision and the constitutional convention shall adopt a code of ethics which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies." Haw. Const. Art. XIV, § 1 (emphasis added). However, the Constitution places an additional requirement on each such subdivision – each code of ethics must have its own "separate" ethics commission:

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission. The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.

Haw. Const. Art. XIV, § 1 (emphasis added). It is for this reason that each County in the State has its own County Ethics Commission, and the county ethics codes are not administered or enforced by the State Ethics Commission. *See, e.g.*, Revised Ordinances of Honolulu ("ROH"), Chapter 3, Article 6, Section 3-6.3 (Ethics Commission of the City & County of Honolulu).

Here, of consequence, although OHA adopted the State Ethics Code as its own ethics code (*see* Record on Appeal vol. 1f at p. 1585-86, Feb. 5, 2019 Findings of Fact, Conclusions of Law and

Decision and Order of the Commission, at ¶7),¹ it has not established its own separate ethics commission, so there is no “separate” ethics commission to administer the ethics code adopted by OHA. If OHA was automatically subject to the existing State Ethics Code, there would have been no need to “adopt” it. Yet OHA never took the second, necessary step of creating a separate ethics commission to enforce its adopted code, and appears to have simply assumed that its adopted ethics code would be enforced by the State Ethics Commission, perhaps because its code shares its text with the State Ethics Code that the Commission enforces against State employees. This is plainly contrary to the language of the Constitution.

This unconstitutionality – having the Commission enforce the ethics code of another political subdivision, contrary to the plain text of Article XIV – is unavoidable if OHA is a “political subdivision.” No Hawai‘i appellate case has considered the latter question. Although not defined by our Constitution, the term is readily understandable in its ordinary meaning. Thus,

Courts have held that [political subdivision] includes those entities that are either “(1) created directly by the State, so as to constitute a department or administrative arm of the government or (2) . . . administered by individuals responsible to public officials or the general electorate.”

NLRB v. Princeton Mem’l Hosp., 939 F.2d 174, 177 (4th Cir. 1991).

OHA easily meets these criteria, or any other reasonable definition of “political subdivision.” Looking first to the original creation of OHA, it was established in the Hawai‘i Constitution, Article XII, Section 5, with the following relevant provision:

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law.

(Emphasis added); *see also* HRS Chapters 10 and 13D. Applying the test stated in *NLRB v. Princeton Mem’l Hosp.*, *supra*, first, OHA was directly created by the State of Hawai‘i, enshrined in a constitutional provision, and constitutes a department or administrative arm of the government with its own administration and funding and discretionary power over same, which is not subject to the legislature’s power of the purse. Second, OHA is administered by Trustees who are elected to office. Thus, under Article XIV of the Constitution, OHA, as a political subdivision, must adopt its own code of ethics and use its own ethics commission, requirements that divest the Commission of

¹¶7 states that: “Section 1.3.o of OHA’s Executive Policy Manual (Feb. 2012) provides in relevant part that “[a]ll Trustees shall abide by the Standards of Conduct of the State of Hawai‘i, Chapter 84, Hawaii Revised Statutes, as amended, and shall attend ethics training as required by law.”

any jurisdiction to prosecute OHA trustees for alleged violations of the State Ethics Code. This is particularly important with respect to an independent arm of the government as OHA, which was created with the idea of self-determination and self-regulation in mind.

This point, that under Article XIV of the Hawai‘i Constitution, the Commission lacks jurisdiction over OHA’s separate ethics code notwithstanding the textual similarity of the two codes, was not raised in precisely this form before the Commission or the ICA. Instead, Akana argued lack of jurisdiction based on Article XII’s conferral of separate rights and powers on OHA to spend its own money and regulate its own conduct. Thus, the Commission may argue in reply that, despite the *de novo* review afforded by the appellate process on questions of law, this point has been waived. However, any such argument by the Commission runs into the unequivocal rule that:

[I]t is well established that “lack of subject matter jurisdiction can never be waived by any party at any time.” *Chun v. Employees’ Ret. Sys.*, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (citation omitted); *see also Mathewson v. Aloha Airlines, Inc.*, 82 Hawai‘i 57, 69, 919 P.2d 969, 981 (1996). Accordingly, the plaintiffs’ contention and reliance upon case law from other jurisdictions are unavailing inasmuch as this court has held that the jurisdictional question can never be waived by any party at any time and that “[s]uch a question is in order at any stage of the case[.]” *In re Application of Rice*, 68 Haw. 334, 335, 713 P.2d 426, 427 (1986).

Yamane v. Pohlson, 111 Haw. 74, 83, 137 P.3d 980, 989 (2006). Because Ms. Akana challenges the Commission’s subject matter jurisdiction, her challenge cannot be waived. And, even if the point is not addressed now, the following points make clear that Article XII and the applicable statutes governing OHA also take OHA and its Trustees outside the jurisdiction of the Commission.

ii. An employee cannot be punished for her conduct under the State Ethics Code when her conduct is subject to a separate comprehensive legislative scheme, and application of multiple standards results in inconsistency and conflict.

In *Boyd v. Hawai‘i State Ethics Commission*, this Court held that the Hawai‘i State Ethics Commission lacks the jurisdiction and authority to prosecute a state employee for alleged violations of the State Ethics Code under circumstances where doing so would result in the state employee being subjected to multiple legislative regimes and inconsistency in application of state laws. 138 Hawai‘i 218, 378 P.3d 934 (2016). Where a state employee’s conduct is subject to a separate and comprehensive legislative regime, and where “that same employee could have been subject to punishment under one set of standards [the State Ethics Code], but not the other, for the same conduct,” a conflict is said to exist and the Commission exceeds its jurisdiction in prosecuting the employee under the State Ethics Code. *Id.* at 228, 378 P.3d at 944.

In *Boyd*, the employee-appellant had been an employee of a charter school that was governed by HRS Chapter 302B, a comprehensive legislative regime granting independent authority to charter

schools for internal governance. *Id.* at 219, 378 P.3d at 935. That independent authority extended to the authority of a charter school's Board in creating internal policies for use of state funds in procuring school supplies, purchasing school lunches, and more. *Id.* at 220, 378 P.3d at 936. Mr. Boyd, made purchases with State funds and involved his own personal business enterprise in contracting with the school; these purchases and contracting were consistent with and authorized by the Board and the internal policies of the charter school in issue, but were nevertheless alleged to have been in violation of the State Ethics Code. *Id.* at 220-21, 378 P.3d at 936-37.

In reviewing the Commission's prosecution, the Hawai'i Supreme Court determined that the comprehensive legislation was designed to regulate charter schools and exempted the charter school from conflicting state laws. *Id.* at 227, 378 P.3d at 943. Because Mr. Boyd was able to comply with Chapter 302B while at the same time apparently violating the State Ethics Code, a conflict existed meaning the Commission had no authority to prosecute Mr. Boyd. *Id.* at 228, 378 P.3d at 944.

iii. The Office of Hawaiian Affairs is subject to a comprehensive legislative regime that created standards separate and distinct from the State Ethics Code, which Ms. Akana was subject to as an OHA trustee.

As in *Boyd*, OHA is subject to a comprehensive legislative regime with separate and distinct standards for Ms. Akana's conduct as an OHA trustee. *See id.* OHA was established by the Constitutional Convention of 1978 under Article XII of the Hawai'i Constitution and in accordance with the federal Admission Act of 1959, Public Law 86-3, § 5(f). OHA was granted authority to "hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians," and power "to manage and administer the proceeds from the sale or other dispositions of the lands... [and] formulate policy relating to affairs of native Hawaiians and Hawaiians." Const. Art. 12 §§ 5-6.

In accordance with this backdrop, the Legislature enacted a comprehensive statutory regime for OHA, set forth at HRS § 10-1, *et seq.* The overarching goal of OHA is to work towards the betterment of native Hawaiians and Hawaiians. HRS § 10-3. In carrying out this goal, OHA was granted independent authority to manage its own affairs. Through the board of trustees, the office was directed to "adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties;" "to acquire in any lawful manner any property... to hold, maintain, use, and operate the same... in such a manner and to the extent necessary or appropriate to carry out its purpose;" "to determine the character of and necessity for its obligations and expenditures;" "to enter into and perform such contract... or other transactions... as may be necessary in the conduct of its business and upon such terms as it may deem appropriate;" and "to

take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.” HRS § 10-4(1-4), and (9). In matters of trust monies, “notwithstanding any other law to the contrary, the office shall have and exercise the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means.” HRS § 10-4.5(a). Thus, OHA was given *exclusive authority* over such matters.

The comprehensive legislative scheme establishing OHA extended authority for OHA trustees to act with fiduciary duties to OHA beneficiaries, and extended authority to OHA to create internal governance procedures for its own affairs. By establishing OHA trustees as fiduciaries and by providing authority for OHA to govern itself, the legislative regime surrounding OHA created standards for Ms. Akana’s conduct that were separate and distinct from the State Ethics Code.

iv. The Commission’s prosecution of Ms. Akana under the State Ethics Code applied standards that conflict with standards applied to Ms. Akana as a trustee under the legislative regime for OHA.

Ms. Akana has been punished under the State Ethics Code despite having acted appropriately at all times in accordance with her fiduciary duties and capacity as trustee. No breach of fiduciary duty action or claims have ever been brought against Ms. Akana and she has never been found to have abused her discretion. A fiduciary is bound to follow what he or she believes is his fiduciary duty. Despite this, the Commission has punished Ms. Akana for violations of the State Ethics Code, regardless of whether she properly concluded that she was required by her fiduciary duty to make those expenditures (and could have been sued under HRS § 10-16 for breaching her fiduciary duty by not spending the funds as she deemed appropriate), leading to absurd and conflicting results.

The legislative scheme to which Ms. Akana is subject firmly establishes that she is a trustee with a fiduciary capacity. As such, Ms. Akana owed fiduciary duties to manage and administer public trust funds, *inter alia*, for OHA beneficiaries, *i.e.*, Native Hawaiians and Hawaiians. In examining this fiduciary capacity, the Court stated unequivocally that a trustee’s conduct can be reviewed only for abuse of discretion. *Kealoha v. Machado*, 131 Hawaii 62, 77–78, 315 P.3d 213, 228–29 (2013) (“Thus, the OHA trustees’ expenditures are to be reviewed for abuse of discretion, which occurs when a trustee “has acted unreasonably—that is, beyond the bounds of a reasonable judgment.”) (footnote omitted). A court, therefore, cannot interfere with an OHA trustee’s exercise of discretionary power without first finding a breach of fiduciary duty. Furthermore, the Legislature gave exclusive authority on these matters to OHA beneficiaries, as follows: “[i]n matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject

to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private counsel.” HRS § 10-16(c).

It is highly doubtful that the Legislature intended for the Commission to prosecute OHA trustees for misapplication of funds in circumstances where the use of those funds was deemed by the trustee to be in furtherance of his or her fiduciary duties, and for the Commission to apply a code used to regulate non-fiduciary employees spending state funds or engaging in non-fiduciary activity. An inherent conflict between the State Ethics Code and the legislative framework surrounding OHA plainly exists in these circumstances. As with its attempt to regulate an OHA trustee’s discretionary spending, so too the Commission’s attempt to regulate how Ms. Akana conducts herself for the betterment of OHA beneficiaries exceeds the Commission’s jurisdiction and authority.

v. The Commission punished Ms. Akana under the State Ethics Code for conduct which she was authorized to perform by OHA, resulting in inconsistent and conflicting standards being applied.

The Commission’s prosecution must be overturned because Ms. Akana was punished under the State Ethics Code despite compliance with OHA’s policies and procedures. The majority of the Commission’s prosecution was premised on expenditures made by Ms. Akana from her Trustee Allowance fund. But all of Ms. Akana’s expenditures went through OHA’s approval process and were either authorized or disallowed and reimbursed by Ms. Akana in accordance with OHA policy. To punish Ms. Akana for relying on OHA’s policies and procedures, and after her expenditures were authorized by OHA (and in some cases disallowed and thus reimbursed), is akin to double jeopardy.

The independent authority granted OHA by HRS § 10-1, *et seq.* extended to the establishment of rules and procedures regarding disbursement of trust monies. Thus, the OHA administration created a Trustee Sponsorship and Annual Allowance Fund (“Trustee Allowance”). *See* Trustee Sponsorship and Annual Allowance Fund Internal Guidelines and Procedures (“TSAAF Handbook”), R. Dkt. 8 at 634-653. The Trustee Allowance is essentially a check cut to each OHA trustee at the start of each year to be used for various trustee duty expenses. R. Dkt. 8 at 636.²

² According to testimony Gloria Li, OHA Controller, at the contested case hearing, the Trustee Allowance check would normally be deposited by the trustees into individual bank accounts, including personal accounts. R. Dkt. 12 at Tr. Vol. 1, 42:4-10. OHA expenditures were then made at the trustees’ discretion, and that discretion was subject to quarterly audit by OHA. R. Dkt. 12 at Tr. Vol. 1, 43:1-6, 61:4-13. For certain types of expenditures, such as donations or food purchases, forms created by OHA were required to be filled out with certain details. The quarterly reports, along with a certification by the trustee, would be reviewed for compliance with internal OHA policies. According to former OHA Controller Jon Kim, Ms. Akana submitted quarterly reports and certifications for all expenditures. *See* R. Dkt. 12 at Tr. Vol. 2, 336:10-20.

Aside from some specific provisions, use of Trustee Allowance funds was to be directed by the trustee's discretion for the betterment of the conditions of Native Hawaiians and Hawaiians. R. Dkt. 8 at 636-37. To ensure that Trustee Allowance funds were spent in accordance with OHA policies and principles, trustees were required to reconcile their accounts at the end of each year. If any portion of the allowance was unused, the trustee would cut a check in that amount back to OHA. By the very nature of co-mingling these Trustee Allowance funds with personal funds, and according to Ms. Li, Trustee Allowance expenditures that were disallowed were effectively never made with trust funds, but with personal funds. R. Dkt. 12 at Tr. Vol. 1, 45:4-7.

According to the testimony of Ms. Iona, Ms. Akana's account was always reconciled. R. Dkt. 12 at Tr. Vol. 1, 281:6-25. Ms. Akana relied on OHA in conducting herself with respect to her Trustee Allowance, and that reliance has now worked to the detriment of Ms. Akana. The Commission's prosecution subjects Ms. Akana to multiple inconsistent and conflicting standards and encroaches upon the independence of OHA, and therefore, the ICA's opinion must be overruled.

B. The Findings of Fact and Conclusions of Law Regarding Acceptance of a Paid Legal Defense Are Affected by Error of Law and Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence on the Whole.

i. Appellant's acceptance of a legal defense was an appropriate exercise of power.

Just as with expenditures of trust monies, a central problem with applying the State Ethics Code to other OHA discretionary conduct is that the Commission lacks appropriate standards to judge such conduct and is not the best arbiter thereof. The Gifts law is HRS § 84-11 *et seq.* What defines "gift" is difficult to determine when dealing with an entity empowered by the constitutional convention and Legislature to specifically accept and manage funds from any source. The Constitution gives OHA trustees full power "to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians." Art. XII, § 6 (emphasis added). As a trustee, Ms. Akana could "collect, receive, deposit, withdraw, and invest money and property on behalf of the office." HRS § 10-5.

Even assuming the Commission had authority to prosecute an OHA trustee for discretionary exercises of power, which it lacks, the Commission would at least have to determine that the acceptance of legal fees to subsidize a suit brought in her official capacity to obtain information for the benefit of her beneficiaries constituted a "gift" as opposed to an appropriate exercise of her power to accept, manage, and exercise control over property and carry out her fiduciary duties.

Here, the Commission found that Ms. Akana brought a lawsuit seeking declaratory and injunctive relief with respect to OHA's practices and procedures for providing trustees and

beneficiaries with access to various records. R. Dkt. 11 at 1586, ¶ 10. The Commission found that after Ms. Akana initiated the suit, she was contacted by Ms. Abigail Kawananaokoa through her then-attorney, who told Ms. Akana that Ms. Kawananaokoa believed there were very important issues in the lawsuit and that the Princess wanted to pay for Ms. Akana’s legal fees. *Id.* at 1587, ¶¶ 15, 18-19. The Commission found that as an OHA beneficiary, Ms. Kawananaokoa had interests that may have been affected by official action or inaction on the part of Ms. Akana. *Id.* at 1588, ¶ 21. That is, the Commission expressly found that Ms. Kawananaokoa’s donation of legal fees to Ms. Akana arose out of and in the course of Ms. Akana’s conduct as an OHA trustee and Ms. Kawananaokoa’s role as a beneficiary and supporter of beneficiary rights. The Commission found that Ms. Akana accepted this paid legal defense by Ms. Kawananaokoa as an OHA trustee and for a lawsuit brought to forward issues related to OHA beneficiaries. These findings are directly consistent with OHA powers, duties, and responsibilities, whether or not they can be characterized as “gifts.”

If the Court allows the State Ethics Code to be applied to OHA Trustees’ discretionary conduct, then the standard that should be applied must be the same standard that the Court would apply in any breach of fiduciary duty case (abuse of discretion). *See Kealoha v. Machado*, 131 Hawai‘i 62, 77–78, 315 P.3d 213, 228–29 (2013). Applying the correct standard, it cannot be said that Ms. Akana entered into the transaction, *i.e.*, accepted this payment of legal fees, for a purpose other than that of native Hawaiians and the trust – and the Commission has not found otherwise.

ii. Under the Commission’s own rulings, Ms. Akana’s acceptance of a legal defense is not improper.

This case was not the first where the Commission looked at acceptance of legal fees by a public official and if such was an improper gift. In Advisory Opinion No. 2018-2, issued on June 21, 2018, the Commission ruled that the payment of legal fees on a public official’s behalf is a “gift,” and that three factors are used to determine whether such a gift is prohibited. R. Dkt. 11 at 1649, ¶ 88. On this record, it was not possible to conclude that all the factors were satisfied, so it was a grievous error for the ICA to affirm the Commission’s decision.

VI. CONCLUSION

For the reasons set forth, Ms. Akana respectfully requests that certiorari be granted and the ICA’s decision be reversed.

DATED: Honolulu, Hawai‘i, April 16, 2024.

/s/ James J. Bickerton
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NO. CAAP-19-0000668

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

ROWENA AKANA

Appellant,

vs.

THE HAWAI‘I STATE ETHICS
COMMISSION,

Appellee.

CIVIL NO. 19-1-0379-03 JHA
(Agency Appeal)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the following parties listed below on April 16, 2024, via Electronic Filing (JEFS):

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