



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Revenue

COMMISSIONER'S OFFICE

State Office Building
333 Willoughby Avenue, 11th Floor
P.O. Box 110400
Juneau, Alaska 99811-0400
Main: 907.465.2300
Fax: 907.465.2389

May 8, 2025

The Honorable Louise Stutes
Chair, House Rules Committee
Alaska State Capitol, Room 216
Juneau, AK 99801

Dear Chair Stutes,

The Department of Revenue (DOR) appreciates the opportunity to provide testimony on Senate Bill 183 (SB 183). DOR recognizes the role that Division of Legislative Audit (DLA) plays in ensuring transparency and accountability, and DOR supports their efforts to the best of the Department's ability. However, DOR has some concerns about what was said on the record and the potential impacts of SB 183 on the Department's workload and resources.

SB 183 would give the DLA permission to force other state agencies to create specific work products for them. DOR understands the importance of collaboration and transparency; however, this effectively shifts some of DLA's workload to the agencies, contrary to the good governance objectives in the underlying audit purposes. The DOR Tax Division's Oil and Gas Production Tax group (OGP) has always been transparent with DLA and provides all existing financial information requested during both the annual fiscal year audits and the special audits.

During every fiscal audit, the DLA auditors are given full access to the tax system. This includes OGP assessments, audit workpapers, transactions and supporting documentation. This ensures transparency and preserves DLA's ability to verify the Tax Division's processes.

Additionally, DLA also receives the following Excel reports from OGP:

- A report of all completed audits, which includes the taxpayer names, periods, assessment amounts, and other identifying information.
- A report detailing all transfers to the Constitutional Budget Reserve Fund (CBRF) including payments made on OGP assessments. This report also includes taxpayer names, periods, payment amounts, and other key identifying information.
- A list of every OGP audit that is appealed by taxpayer name and period.
- A list of every appeal that is closed, with Informal Conference Decisions and closing agreements provided to DLA upon request.
- Multiple other reports as requested (10 reports for the special audit and 11 during the most recent fiscal year audit).

Background and context on the “Tax Tables” requested by DLA of the Tax Division:

- During the 2014 Special Audit of OGP, DLA created a version of the Tax Tables by manually pulling every OGP Audit Assessment and recoding the information in a table.
- In 2017 and 2018, DLA inserted additional information into the tables and directed DOR staff to add information from audits in a format DLA’s tables would accept.
- In 2018 and 2019, the Tax Division spent hundreds of hours trying to plug information into the DLA tables that do not mechanically align with how the Department’s tax system compiles and maintains its data.
- Given this history, Tax Division management determined that
 - there currently exists more efficient ways to report on the data that better reflect the reality of how the information is tracked and maintained in the system,
 - the requested format was not only duplicative, but overly burdensome to compile the data in the form and format requested by the DLA, and
 - by producing these tables on a regular basis, DOR could not maintain taxpayer confidentiality.

It should be noted that most of these reports contain sensitive taxpayer information, which is shared with DLA in a manner according to the Department’s requirements under law protecting certain confidential parts while maximizing transparency.

If enacted, SB 183 would represent a significant shift in work burden from DLA to all other state agencies, including DOR. In 2024 alone, OGP spent over 100 hours for DLA running reports, meeting with their auditors, and going over information with them. OGP has provided every existing report requested by DLA, including reports that contain some of the same information in the “Tax Tables.” OGP has also ensured that DLA could follow every report, could trace all numbers in the tax system, and DLA understood how to find all source documentation.

To be clear, the Department has cooperated and provided with all audits with DLA. During every fiscal audit, auditors are given full access to the tax system and all necessary documentation. This ensures transparency and preserves DLA’s ability to verify the Tax Division’s processes, which DOR respects and appreciates.

Additionally, please see the attached letter from the Attorney General to Legislative Audit dated May 12, 2020, on this same issue of providing additional documentation.

Please let me know if I can be of further assistance.



Adam Crum
Commissioner

Enclosure: AG Response to Legislative Audit dated May 12, 2020

cc: Jordan Shilling, Director, Governor’s Legislative Office



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GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Main: 907-269-6389
Fax: 907-276-3697

May 12, 2020

Via Email

Kris Curtis, Director
Division of Legislative Audit
P.O. Box 113300
Juneau, AK 99811
Email: legaudit@akleg.gov

Re: Provision of Documents to the Legislative Auditor for Financial Audits

Dear Ms. Curtis:

I am writing in response to your recent press coverage¹ about the statewide financial audit for fiscal year 2019 (FY 19) and the Department of Revenue's correspondence with you about the FY 20 audit. Specifically, I am providing you the analysis that my office gave to the Department of Revenue in advising that it is not required to disclose privileged documents and settlement communications to the legislative auditor.

I. The FY 19 audit and Revenue's response.

On multiple occasions, your office has attempted to direct state agencies to follow your legal advice rather than that of the Department of Law.² For this reason, prior to the FY 19 audit Revenue modified the terms of engagement between the Division of Legislative Audit and Revenue to include the following language: "For purposes of determining whether there is a 'reasonable assurance' of legal compliance under the auditing standards, any action taken upon the legal advice provided by the Department of Law constitutes a 'reasonable assurance' that the agency has complied with the law." Although we appreciate the role of the legislative auditor and recognize that a certain amount of skepticism is appropriate in an independent auditor, the Division of Legislative Audit's now-common practice of disregarding the Attorney General's legal opinions and statutory role in advising state agencies is highly improper. When your office has

¹ <https://www.adn.com/politics/2020/04/09/auditor-says-alaska-is-concealing-oil-tax-credit-records-but-state-officials-disagree/>

² See, Attorney General letter to Kris Curtis, April 29, 2020.

questioned the legal advice that we provided to an agency, my office has tried to explain our legal analysis without disclosing privileged attorney-client communications. This brings us to the specific disclosure issue raised in the FY 19 audit.

The FY 19 audit included a finding that Revenue denied legislative auditors access to requested oil and gas production tax settlement and appeals files.³ Revenue disagreed with this finding and noted in the corrective action plan that (1) Revenue provided closing agreements signed by the Commissioner of Revenue and the Attorney General as required by statutes; (2) Revenue would have made additional closing agreements available had the auditors requested them earlier; (3) the auditors did not need the requested documents—some of which were privileged—for reasonable assurance of compliance; and (4) in the future, Revenue would provide additional non-privileged files if requested in a reasonable time.⁴ In response to Revenue’s comments in the corrective action plan, the Division of Legislative Audit asserted that “without access to the full appeal/settlement files we are unable to independently confirm [Revenue’s] compliance with State law.”⁵

Your office then issued a qualified opinion on the basis that Revenue was not providing sufficient access to records. Your press coverage unnecessarily exacerbated the issue. You chose to speak outside of the legislative budget and audit committee process in a manner that may harm the State’s financial standing in these already troubling times. This casts doubt on your ability to act professionally and in the best interests of the State. We hope that your future conduct will reflect the higher standards of professionalism and demeanor befitting the position of legislative auditor.

The analysis underlying our advice to Revenue is explained below.

II. Production tax appeal files are voluminous and contain many privileged documents.

Because the production tax regime is complex, files of the Appeals Unit of the Tax Division at Revenue commonly contain a large amount of privileged documents such as attorney-client communications and privileged work product prepared in anticipation of

³ FY 19 Statewide Single Audit, I-3, <http://legaudit.akleg.gov/docs/audits/single/statewide/SWSA-19-Final-WEB.pdf>.

⁴ *Id.* at IV 14-15.

⁵ *Id.* at IV 103-104.

litigation and for consideration of potential settlements.⁶ These documents include emails, draft work papers, draft decisions, draft discovery responses, and draft settlement agreements. Sometimes settlement negotiations continue for years while a case is under administrative appeal before Revenue or the Office of Administrative Hearings. The files for a production tax appeal may contain large volumes of documents that are a mix of confidential taxpayer information⁷ and information subject to various other privileges. Until the final days of the FY 19 audit process, we understand that legislative auditors had never before made such a broad request for *all* appeals and settlement files. Revenue therefore had no reason to change its regular document management process and instead segregate all its files into various privileged and non-privileged (but still taxpayer confidential) documents.

III. Privileged documents are not “other records” for a financial audit by the Division of Legislative Audit.

The Attorney General has broad authority on litigation strategy and settlement of litigation.⁸ The purpose of a financial audit is to evaluate actual financial transactions that the State undertook. The auditor’s consideration of privileged legal communications and settlement negotiations is not part of the auditor’s role and would bring conjecture into the audit.

These distinct roles are the backdrop for interpreting the audit statutes. The legislative auditor is to audit the Department of Administration’s annual financial report “in accordance with generally accepted audit standards with comments and supplementary data that the Department of Administration considers necessary.”⁹ Alaska Statute 24.20.271 provides in pertinent part that “[T]he legislative audit division shall...have access at all times to the books, accounts, reports, or other records, whether confidential or not, of every state agency.”

⁶ AK Evid. R. 503 (Lawyer-Client Privilege); *see, Griswold v. Homer City Council*, 428 P.3d 180, 187-88 (Alaska 2018) (noting that “the common law has long recognized the privileged nature of attorney-client communications and attorney work-product. And it is clearly in the public interest for a governmental agency to be able to receive confidential advice from its attorneys.”) (internal citations omitted).

⁷ AS 40.25.100(a) & AS 43.05.230.

⁸ AS 44.23.020.

⁹ AS 37.05.210(a)(1).

Statutes must be construed according to their purpose.¹⁰ In the context of a financial audit, the purpose of AS 24.20.271 is to grant the legislative auditor access to financial and transactional records of state agencies. Likewise, the purpose of that statute's reference to "other records" is to give the auditor access to additional records relevant to the purpose of the audit at hand.¹¹ The State's FY 19 audit was a *financial* audit and therefore the reference to "other records" meant financial records. Financial records may vary by agency. For Revenue's Tax Division, financial records would include demands for tax payments, final audit narratives supporting those demands, tax returns, tax payment records, final informal conference decisions, and final closing agreements.

In AS 24.20.271, "other records" is a catch-all provision that is informed by the more specific terms preceding it, "books, accounts, reports."¹² Revenue provided your office with copies of the final signed closing agreements,¹³ which are final binding tax settlements between the State and the taxpayer. Closing agreements may require a taxpayer to pay additional tax or Revenue to pay a refund. Thus, closing agreements are appropriately "other records" under AS 24.20.271 for a financial audit. But discussions between the Attorney General and/or lawyers in the Department of Law and Revenue about litigation strategies and approaches to settlement negotiation are not of the same class of documents as books, accounts, and reports,¹⁴ because they are not final transactional agreements and they are privileged.

In sum, the legislative auditor in a financial audit can have no legitimate audit purpose to review privileged documents and settlement discussions that might reflect paths that litigation might have gone, instead of reflecting how litigation was actually

¹⁰ *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 992 (Alaska 2019).

¹¹ We do not address what categories of documents might be considered "other records" for a performance audit.

¹² *Id.* at 995-96 (applying *ejusdem generis* to a catch-all provision and holding that the inclusion of the catch-all provision did not expand the scope of the statute.).

¹³ AS 43.05.060 & AS 43.05.070. The Commissioner of Revenue and the Attorney General sign closing agreements.

¹⁴ AS 24.20 does not define "records". Elsewhere in AS 24, related to the Legislature, Alaska Statute 24.55.330(3) defines "records" for the purposes of the Office of the Ombudsman. The definition of records excludes attorney-client privileged communications.

settled. It is not the Legislative Auditors role or authority to second guess the legal advice of the Attorney General and the Department of Law or Revenue's settlement decisions made in reliance on that legal advice.

IV. Disclosure of privileged documents is inconsistent with auditing standards.

Given that the legislative auditor must be a certified public accountant and that AS 37.05.210(a)(1) directs the use of auditing standards, auditing standards may inform the determination of "other records" required for disclosure under AS 24.20.271 in a financial audit. The engagement letter for the FY 19 audit indicated that the legislative auditors would perform the audit according to "accounting standards generally accepted in the United States" and that the auditors would request written representations from the Attorney General's Office. Notably, the engagement letter would not need to indicate that the auditors "would be *requesting*" written representations from the Attorney General's Office if AS 24.20.271 mandated disclosure of privileged attorney-client communications and work product to the auditors. This suggests that the common audit standard is for auditors to make inquiries to attorneys, not for attorneys or agencies to automatically disclose privileged documents. The American Institute of Certified Public Accountants published guidance for auditors that supports this interpretation. In response to the question of whether an auditor's review of documents should include documents subject to attorney-client privilege the guidance states:

No. Although ordinarily an auditor would consider the inability to review information that could have a significant bearing on his audit as a scope of restriction, in recognition of the public interest in protecting the confidentiality of lawyer-client communications (*see* section 337 paragraph .13), section 337 paragraph .05(c) is not intended to require an auditor to examine documents that the client identifies as subject to the lawyer-client privilege.¹⁵

The guidance also includes a policy statement from the American Bar Association.¹⁶ This policy statement provides that "the objective of fair disclosure in financial statements is

¹⁵ AICPA, Standards at AU §9337.08-09, <https://www.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-00337-9.pdf>. These auditing guidelines at §9337.24-27 also suggest that in-house counsel's opinion may form corroboration contrary the legislative auditor's assertions about the Attorney General's ability to provide reasonable assurance of legal compliance.

¹⁶ *Id.* at §9337.30.

more likely to be better served by maintaining the integrity of the confidential relationship between lawyer and client, thereby strengthening corporate management's confidence in counsel and to act in accordance with counsel's advice."¹⁷ The policy statement also noted the potential for destruction of the attorney-client privilege on a subject in other contexts that could follow from disclosure to auditors. Thus, the Attorney General's advice to Revenue to not disclose privileged documents is consistent with professional standards and client expectations for accountants and attorneys.¹⁸

V. Even if privileged documents could be “other records,” the requirement to provide access to confidential records would not include privileged documents.

Alaska Statute 24.20.271 states that “the legislative audit division shall ...have access at all times to the books, accounts, reports, or other records, *whether confidential or not*, of every state agency.” This statute allows the Division of Legislative Audit to access documents within state agencies that are confidential by statute. This makes sense in the context of a statewide audit because otherwise the legislative auditors would be precluded from auditing financial and performance records of many different agencies. For example, if legislative auditors could not access confidential records, they would be unable to get taxpayer information that is confidential under AS 40.25.100 and AS 43.05.230 and therefore would be unable to audit the Tax Division at all. But as noted above, privileged information is a different class of information than the general confidential records of state agencies.

Nothing in the plain language of AS 24.20.271 supports the conclusion that privileged documents are to be included within the term “confidential” as used in that statute and statutory framework.¹⁹ In other Alaska statutes, the legislature has expressly indicated when privileged information might be included with disclosure of confidential

¹⁷ *Id.*

¹⁸ See AK R. Prof'l Conduct 1.6 (prohibiting lawyers from revealing clients' confidences, including information protected by attorney-client privilege, without clients' consent).

¹⁹ See, *Louisiana, Dep't of Ins. v. Theriot*, 64 So.3d 854 (La. App. 1 Cir. 5/03/2011) (holding that the phrase “confidential or otherwise” in a legislative audit statute did not include privileged documents.).

information and has explained how the privilege would be protected.²⁰ But the legislature did not include privileged information with confidential information in AS 24.20.271 and did not provide protections for disclosures of privileged information. This supports the conclusion that the legislature did not consider privileged information to be within the ambit of the disclosure of confidential information under AS 24.20.271.

While confidentiality statutes might protect sensitive personal or business information held by state agencies, privileges and evidentiary exclusions exist for additional important purposes. In Revenue's case, as noted by the American Bar Association policy statement above, disclosure of attorney-client privileged information might discourage the legal compliance and good government functions that the audits seek to encourage.²¹ This result would be inconsistent with the purposes of a legislative audit and thus not intended by legislative audit statutes. Similarly, disclosure of settlement communications would hamper the open communication and frankness that successful negotiations require, discourage settlements, and upset taxpayers' reasonable expectations of confidentiality of these communications, in light of the taxpayer confidentiality statutes and Alaska Evidence Rule 408.²² Therefore, the legislative auditor's access to confidential agency records does not include documents subject to

²⁰ AS 47.12.320(a)(allowing disclosure of "confidential or privileged information" about minors to a select list of executive branch and legislative branch officials when used in their official duties.); AS 47.10.092 (also relating to minors); *see* AS 24.55.160(c) (noting that *if* an agency disclosed privileged communications that the disclosure is not a waiver and providing for limited circumstances when the ombudsman might disclose the information.).

²¹ *See, In re Mendel*, 897 P.2d 68, 73 (Alaska 1995) (purpose of attorney-client privilege is to "'promote the freedom of consultation of legal advisors by clients by removing the apprehension of compelled disclosure by the legal advisors.'") (quoting *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974)). *See also, Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

²² In *State, Department of Revenue v. Oliver*, the Court concluded "that the Department of Revenue, in its information-gathering activities, must demonstrate a due regard for individuals' privacy rights." 636 P.2d 1156, 1168 (Alaska 1981); AK Const. art. I, sec. 22.

Ms. Kris Curtis, Legislative Auditor

May 12, 2020

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privileges and evidentiary exclusions. Disclosing these documents would undermine the good governance purposes of legislative audit statutes.

Your notion that you are entitled to second-guess and question the Department of Law's legal advice to state agencies, including Revenue, is seriously misguided. Your attempts to pierce the State's attorney-client privileges is beyond improper. And, your airing of your foundationless frustrations in public reflects a concerning degree of unprofessionalism that threatens to harm the State. You need to cease and desist.

Sincerely,



Kevin G. Clarkson
Attorney General

cc: Senate President Cathy Giessel
Speaker of the House Bryce Edgmon
Representative Chris Tuck, Chair, Legislative Budget & Audit
Senator Click Bishop, Vice Chair, Legislative Budget & Audit
Commissioner Lucinda Mahoney, Department of Revenue