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1 **FOR PUBLICATION**

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**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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**COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)**

CRIMINAL CASE NO. 14-0070

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Plaintiff,

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v.

**ORDER GRANTING
MOTION TO DISMISS
WITHOUT PREJUDICE**

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ROSE DLG MONDALA,

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Defendant.

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I. INTRODUCTION

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THIS MATTER came before the Court on August 28, 2014 at 1:30 p.m. in Courtroom 205A on Defendant’s Motion to Dismiss Information filed by the Office of the Public Auditor. The Commonwealth of the Northern Mariana Islands (“Commonwealth”) was represented by George L. Hasselback, Legal Counsel for the Office of the Public Auditor and specially appointed Assistant Attorney General in this case. Defendant Rose DLG Mondala (“Defendant”) was represented by Assistant Public Defender Eden Schwartz.

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II. BACKGROUND

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On July 14, 2014, an Information was filed charging Defendant with twenty-two counts of forgery in violation of 6 CMC § 1701(b), six counts of misconduct in public office in violation of 6 CMC § 3202, eight counts of use of public supplies, time, and personnel for campaign activities in

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1 violation of 6 CMC § 8534(b), two counts of use of public position to obtain benefits for business
2 or social acquaintances in violation of 6 CMC § 7847, one count of theft of services in violation of
3 6 CMC § 1607(b), one count of theft in violation of 6 CMC § 1601(a), and one count of use of
4 office, staff, or employees of a public office for personal benefit in violation of 6 CMC § 8531(b).
5 All counts relate to a period of time between June 15, 2009 and December 10, 2010 while
6 Defendant worked as the Director of the Office of Aging, a government agency.

7 On July 29, 2014 the Defendant filed a Motion to Dismiss the Information filed by the
8 Office of the Public Auditor (“OPA”) pursuant to Article III §§ 11 and 12 of the Commonwealth
9 Constitution, 1 CMC § 7847(b), and Rule 12(b)(1) of the Commonwealth Rules of Criminal
10 Procedure for lack of subject matter jurisdiction, claiming that the OPA lacks statutory and
11 constitutional authority to prosecute her.

12 Defendant contends that the OPA has limited authority to investigate and prosecute criminal
13 cases. According to the Defendant, the Commonwealth Constitution does not afford the Public
14 Auditor with any generalized authority to prosecute criminal cases. Rather, the Constitution vests
15 powers to the OPA as “other duties provided by law”. NMI Const. art. III, § 12. Hence, all
16 prosecutorial powers afforded to the OPA are those created by the legislature. The legislature
17 created law that requires the OPA to report violations of criminal law to the Attorney General
18 (“AG”). 1 CMC § 7847(a). Thereafter, the AG – not the OPA – may institute further proceedings.
19 *Id.* Under 1 CMC § 7847(b), the OPA may institute criminal proceedings against the governor or
20 the AG for violations of federal or Commonwealth law. Defendant has never served as the
21 Commonwealth’s governor or AG. Accordingly, the OPA lacks statutory authority to prosecute her.

22 In Opposition, the Commonwealth states that the Motion should be dismissed because it is
23 based on the incorrect belief that the OPA is prosecuting this case when, in fact, Defendant is being
24 prosecuted by the Office of the Attorney General (“OAG”). This case is a result of an OPA

1 investigation presented to a Joint Task Force, comprised of the OAG, OPA, and DPS. The case was
2 brought before the Chief Prosecutor and approved by him for prosecution. OPA attorney George L.
3 Hasselback was appointed by the AG as a Special Assistant Attorney General (“SAAG”) to
4 prosecute this case.

5 In reply, Defendant states that the motion should be granted and the Information dismissed
6 because there is no lawful basis for the OPA legal counsel to act as a SAAG in this case. According
7 to Defendant, (1) the Joint Task Force designation of OPA legal counsel as a SAAG violates Article
8 III § 11 of the Commonwealth’s Constitution because the AG has the exclusive power to prosecute
9 crimes and cannot designate that duty to attorneys outside of his office, (2) the Joint Task Force
10 designation of OPA legal counsel as a SAAG violates Article III § 12 of the Commonwealth’s
11 Constitution because the OPA’s defined powers do not authorize general prosecutorial powers to it,
12 (3) the use of the OPA’s resources to prosecute this case is an unconstitutional re-appropriation of
13 designated funds, and (4) the designation of the OPA legal counsel as the SAAG in this case
14 violates the separation of powers.

15 On August 7, 2014, the Court ordered additional briefing so that the Commonwealth could
16 respond to Defendant’s claims in writing.

17 In response, the Commonwealth states that (1) the OAG has the inherent power to appoint a
18 SAAG when needed, (2) the authority to prosecute this case is derived from the OAG, (3) the
19 Public Auditor is the final programming authority for the OPA, and his decision to program
20 resources to the Joint Task Force is based upon the statutorily-mandated requirements of his office,
21 and (4) the appointment of a SAAG does not violate the separation of powers.

22 Finally, Defendant asserts that this case should be dismissed because (1) the AG has no
23 inherent authority to appoint a SAAG under Commonwealth law, (2) the OPA’s prosecution of this
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1 case exceeds the constitutional and statutory mandate of the OPA, and (3) this prosecution directly
2 interferes with vested legislative authority in violation of the separation of powers.

3 **III. DISCUSSION**

4 “Any defense, objection, or request which is capable of determination without the trial of
5 the general issues” and that is “based on defects in the institution of the prosecution” may be raised
6 before the trial. NMI R. Crim. P. 12(b)(1). This motion alleges various defects in the institution of
7 the case against Defendant but does not address the charges contained within the Information. It is,
8 therefore, properly brought before the Court under NMI R. 12(b)(1).

9 **I. The Information was filed by the OAG**

10 Defendant argues that the Information was brought against her by the OPA and as such has
11 no lawful basis. Mot. at 1. In support of this contention, she asserts that (1) the prosecuting attorney,
12 George L. Hasselback, is the OPA’s legal counsel, (2) Mr. Hasselback works on this case from his
13 office at the OPA, (3) Mr. Hasselback’s salary comes entirely from the funds designated to the
14 OPA, (4) the OPA’s resources are being used to prosecute this case, (5) all documents filed by the
15 OPA in this case have been addressed from the Legal Counsel of the OPA, with the OPA’s
16 corresponding address and telephone number listed, (6) defense counsel serves documents to the
17 OPA’s legal counsel, not to the OAG, and (7) none of the filed documents are signed by, nor do
18 they contain the name of the acting AG. Reply at 2.

19 The Commonwealth, on the other hand, states that this case was instituted by the OAG and
20 remains an OAG case. According to the Commonwealth, Defendant was originally investigated by
21 the OPA. Opp’n. at 1. At some point thereafter, the OAG, OPA, and DPS formed a Joint Task
22 Force to investigate and prosecute public corruption. *Id.* at 1-2. *See also* Memorandum of
23 Agreement for a Joint Multi-Agency White Collar Crime, Government Corruption and Financial
24 Crimes Task Force, May 13, 2013 (“MOA”). On May 22, 2013, Attorney Hasselback was

1 appointed by the AG as the SAAG and Managing Prosecutor in connection with the Joint Task
2 Force. *See* Memorandum re: Designation of SAAG, May 22, 2013 (“Memo re: Designation”). This
3 particular matter was presented as a potential case to the Joint Task Force. Opp’n. at 2. It was
4 subsequently presented to the Commonwealth’s Chief Prosecutor, who approved the case for
5 prosecution. *Id.* Hence, this case was instituted by the OAG, and it is being prosecuted by the OAG.

6 The Court agrees with the Commonwealth. The Information, while containing the OPA’s
7 address and telephone number, clearly defines Attorney Hasselback as the “Attorney for the
8 Commonwealth” immediately following the OPA’s contact details. Further, Attorney Hasselback
9 listed himself as “Assistant Attorney General” following his signature on the final page of the
10 Information. Both he and co-counsel, Ashley Kost¹, have consistently signed their names to
11 pleadings designating themselves as “Assistant Attorney General” and not “OPA Legal Counsel”.
12 The MOA and Memos re: Designation make clear that Attorneys Hasselback and Kost have been
13 appointed by the AG to serve as Assistant Attorneys General (“AAG”) for the purposes of
14 prosecuting cases handled by the Joint Task Force.

15 This particular case was investigated and then brought before the OAG’s Chief Prosecutor,
16 who reviewed the case and approved it for prosecution. This is the same procedure that would take
17 place in any other criminal prosecution in the Commonwealth. Thereafter, an Information was filed
18 with the Court. The SAAGs are working under the authority granted to them by the AG. They are
19 acting in the capacity of AAGs, not as legal counsel for the OPA. Accordingly, this case has been
20 instituted by the OAG.

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24 ¹ Attorney Kost has similarly been appointed as a SAAG for cases handled by the Joint Task Force. *See* Memorandum re: Designation of SAAG, May 23, 2013

1 **II. The AG has the lawful authority to appoint SAAGs**

2 The AG is tasked with various duties, one of which is “prosecuting violations of
3 Commonwealth law.” NMI. Const. art III, § 11. The OAG is the exclusive government
4 representative in the Commonwealth. Accordingly, the AG has the power to appoint AAGs as he
5 deems necessary and as his budget allows to effectively represent the government and its interests.
6 1 CMC § 2154. Specifically, he “may employ staff, including one or more assistant attorneys
7 general, as required to assist in performing the duties of the Attorney General, subject to budgetary
8 appropriation.” *Id.*

9 The statute provides the AG with the ability to hire AAGs but does not detail any
10 restrictions in the hiring process, apart from the particular constraints of the appropriated budget.
11 For instance, the statute does not require that AAGs be full-time staff members, that they be paid
12 employees, or that their source of income be derived solely by the OAG. Further, there is no
13 statutory provision prohibiting the appointment of a SAAG, nor is there any prohibition on the
14 appointment of an AAG for one particular case or for a particular type of case. See *Sprick v. Regents*
15 *of University of Mich.*, 43 Mich. App. 178, 183-84 (1972). Again, the only prescribed hiring
16 limitation is that of budgetary constraints. The OAG has previously gotten around this particular
17 limitation by allowing government agencies to pay, at least in part, AAG salaries. The statute,
18 therefore, gives the AG wide latitude in hiring AAGs. That latitude extends to the appointment of a
19 SAAG.

20 The appointment of SAAGs is a recognized practice within the United States. Indeed,
21 several United States jurisdictions have specifically granted the AG authority to appoint SAAGs
22 through legislation. See, e.g. *Philip Morris Inc. v. Glendening*, 349 Md. 660 (Md. 1998) (in
23 accordance with Md. Code. Ann., State Gov’t § 6-105(b)(1997)); *Pursue Energy Corp. v. State Tax*
24 *Comm’n*, 816 So. 2d 385, 388 (Miss. 2002) (in accordance with Miss. Code Ann. § 7-5-7 (Rev.

1 1991)); *AG v. PSC*, 243 Mich. App. 487, 490-91 (Mich. Ct. App. 2000) (formal recognition of this
2 authority in Mich. Comp. Laws § 333.16237(2)).

3 However, even in the absence of explicit statutory or constitutional authority, some
4 jurisdictions have concluded that SAAGs may be appointed in order to handle political or
5 controversial prosecutions that would otherwise not be conducted due to their political or
6 controversial nature. See, e.g. *State v. Naranjo* 94 NM 407 (N.M. 1980) (AG had the right to
7 appoint a special prosecutor where both the district attorney and the AG were disqualified from
8 investigating and prosecuting); *Advisory Opinion to Governor*, 152 Fla 119 (Fla., 1942) (The court
9 found that the governor could assign a county solicitor from another county to prosecute cases in
10 which attorneys in the district were unwilling to become involved. This power exists, despite the
11 lack of statutory authority, because the governor has a duty to ensure that the state laws are
12 faithfully executed under Florida’s Constitution). Similarly here, the AG has a constitutional duty to
13 prosecute violations of Commonwealth law. NMI Const. art III, §11. There is no caveat attached to
14 that constitutional provision saying that he may choose to ignore certain types of cases.²

15 In the Commonwealth, the fear of government corruption crimes going un-prosecuted is not
16 only warranted but has proven an accurate reflection of the situation. Until recently, these cases
17 have gone un-prosecuted because AGs, who have historically been appointed by the governor and
18 served their terms at his pleasure, have feared for the security of their jobs. Further, there has been a
19 general lack of political will and resources dedicated to prosecuting these types of crimes. Despite
20 these problems, the AG has an affirmative duty to prosecute corruption cases, just as he has an

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23 ² In January 2015 the Commonwealth’s first elected AG will take office. For the first time the AG will not be appointed
24 by the Governor and confirmed by the Senate but will be elected by the voters of the CNNI. Hopefully the AG will no longer have to sign off on sweetheart contracts or special interest public land giveaways because his “boss” expects him to and keeping his job depends on it. Additionally, his responsibility to the people who elected him will require him to prosecute government corruption cases even if those in power do not like it.

1 affirmative duty to prosecute other crimes taking place in the Commonwealth. The appointment of
2 SAAGs may be an effective way to assure the future prosecution of these cases.

3 Our Supreme Court has found that the Court may appoint a SAAG even though there is no
4 explicit statutory or constitutional authority to do so. *In re San Nicolas*, 2013 MP 8. This Court
5 finds that such power should also be extended to the Commonwealth's AG, particularly given the
6 wide latitude provided to him in staffing his Office. It is the AG who is in the best position to
7 understand the needs and abilities of his Office, and it is the AG who ultimately understands how
8 best to staff his Office in order to fulfill the duties required of him by the Constitution.

9 **III. The use of OPA's resources toward the Joint Task Force does not violate the Constitution**

10 Defendant argues that the prosecution of this case by the OPA legal counsel is illegal
11 because it re-appropriates resources constitutionally designated to the OPA. Reply at 6. In making
12 her argument, Defendant relies on Article III, section 12 of the Commonwealth Constitution, which
13 states: "The Public Auditor shall be guaranteed an annual budget of at least \$500,000. The
14 budgetary appropriation may not be reprogrammed for any other purposes, and any unencumbered
15 fund balance in a fiscal year shall be available for general appropriation."

16 However, this directive is made to the legislature, not to the OPA. It does not purport to tell
17 the OPA how it must use the funds provided to it. Rather, this mandate requires that at least
18 \$500,000 per year be designated to the OPA from the Commonwealth's annual budget. It is the
19 legislative branch that appropriates the funds provided to the various government agencies. Thus,
20 this clause within the Constitutional provision assures that the legislative branch does not re-
21 appropriate or reprogram money contained within the budget that is specifically designated for the
22 OPA, thereby ensuring that the OPA has funding each year to fulfill its duties.

23 The above interpretation of the Constitutional provision is supported by the statutory
24 authority given to the Public Auditor to manage his budget. The OPA is an independent government

1 agency with the power to “administer its own procurement function.” See 1 CMC §§ 2301, 2303(d).
2 Thus, the Public Auditor is statutorily authorized to determine how best to use the OPA’s funds in
3 order to fulfill its obligations.

4 The goals of the Joint Task Force are in line with those of the OPA. The OPA is tasked,
5 amongst other duties, with preventing and detecting fraud, waste, and abuse in the collection and
6 expenditure of public funds. 1 CMC § 2304(a). In accordance with these tasks, the Public Auditor
7 is statutorily authorized to conduct audits and investigations, suggest legislation and regulations,
8 and work with agencies to assist them in complying with the law. 1 CMC § 2304(b). The OPA is
9 also statutorily authorized to prosecute the governor and the AG. 1 CMC § 7847(a). Finally, our
10 Supreme Court has stated that the OPA is to act “as a sentinel against government malfeasance.” *In*
11 *re San Nicolas*, 2013 MP 8 ¶ 13. It is clear that the OPA’s funds will necessarily be used for more
12 than merely conducting audits.

13 The Joint Task Force was created to “respond to and investigate violations of white collar,
14 government corruption, consumer protection related and financial crimes.” MOA at 2. These types
15 of crimes fall squarely within the OPA’s mandate. The Public Auditor has discretion to apportion
16 the funds provided to his Office in any manner he sees fit, so long as those funds are used to fulfill
17 the OPA’s duties. 1 CMC § 2303(d). Participation in a Joint Task Force that investigates and
18 prosecutes the very crimes for which the OPA was created to discover and prevent clearly falls
19 within the Public Auditor’s mandate. Consequently, the use of the OPA’s funds toward the Joint
20 Task Force does not violate the Constitution.

21 **IV. The appointment of the OPA legal counsel as SAAGs violates the separation of powers**

22 Finally, Defendant argues that the actions taken by the OAG, OPA, and DPS in creating the
23 Joint Task Force, without legislative authority or an executive order from the governor, violate the
24 separation of powers doctrine. According to the Defendant, the Joint Task Force has given

1 prosecutorial authority to the OPA that the legislature did not authorize. In the absence of an
2 executive order or legislative enactment, this grant of authority to the OPA’s legal counsel violates
3 the separation of powers. Reply at 8-9.

4 The Commonwealth, on the other hand, believes there is no violation. First, it states that that
5 AG has the inherent power to appoint a SAAG. Opp’n to Mot. to Dismiss - Add’l Briefing at 9-10.
6 Second, it argues that there is no violation of the separation of powers when the appointing power
7 and the local prosecutor’s office are under the same branch of government.³ *Id.* at 10. Finally, the
8 OPA argues that the AG has merely substituted the SAAG for an AAG, which is a permissible
9 staffing decision, requiring no additional legislation. *Id.* at 10-11.

10 **A. Legal standard**

11 The separation of powers doctrine describes the Commonwealth’s governing system, in
12 which the executive, legislative, and judicial branches of government co-exist with separate and
13 distinct powers. Generally, law-making powers are governed by the legislative branch, tasks dealing
14 with the enforcement of law are governed by the executive branch, and legal interpretation is
15 governed by the judicial branch. *Marine Revitalization Corp. v. Dep’t of Land & Natural Res.*, 2010
16 MP 18 ¶ 12 (citations omitted). This governmental structure “forbids one branch of government
17 from exercising the powers properly belonging to another branch.” *Id.*

18 **B. The OPA is an autonomous agency**

19 The Commonwealth seemingly argued in its additional briefing that the OPA falls within the
20 executive branch of government and that no violation of the separation of powers occurred because
21 both the OPA and the OAG operate under the executive branch. Opp’n to Mot. to Dismiss - Add’l

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24 ³ One of the cases cited in addressing this issue deals with a governor’s appointment of a special prosecutor, in which a statute exists allowing such appointment. This case is, therefore, not entirely analogous but does lead the Court to believe that the OPA is claiming that it falls within the executive branch. It argues no violation of separation of powers exists because both the OPA and the OAG are in the executive branch. *See* Opp’n to Mot. to Dismiss – Add’l Briefing at 10, fn. 25, citing *State ex rel. Moore v. Farnham*, 114 Or 32 (1925).

1 Briefing at 10. Similarly, Defendant argued in her briefing that absent an executive order or
2 legislation, the appointment of the OPA legal counsel as a SAAG was a violation of the separation
3 of powers. Reply at 8-9. At oral argument, however, the Commonwealth suggested that the OPA
4 does not fit precisely within the executive branch and is, instead, a separate agency outside of the
5 three branches of government. The Court agrees with this latter interpretation.

6 The OPA falls under the executive branch sections in both the Commonwealth Constitution
7 and the Commonwealth Code. However, the OPA does not fit squarely within the executive branch.
8 Rather, it is an autonomous agency created by the Commonwealth Constitution with its own
9 constitutionally guaranteed budget. NMI Const. art III, § 12. The Public Auditor must be approved
10 by both the House of Representatives and the Senate, and he can be removed from Office only for
11 cause and by the affirmative vote of two-thirds of the members of each legislative house. *Id.* These
12 conditions do not exist for any other executive branch agency. On the contrary, other heads of
13 executive agencies are appointed by the governor and require only the approval of the senate. NMI
14 Const. art III, § 14. Further, these agency heads are under the governor’s supervision, may be
15 removed by the governor, and have no constitutionally guaranteed budget. *Id.*

16 Moreover, the OPA’s mandate requires that it audit all branches of the Commonwealth
17 Government, including the executive, and agencies falling within each governmental branch. Const.
18 art III, § 12. It cannot, then, be properly considered to fall under any governmental branch.
19 Accordingly, the Court finds that the OPA does not belong to the executive branch. Rather, it is an
20 autonomous government agency. Given that the OPA is not an executive branch agency, it does not
21 enjoy the same protections against violations of separation of powers that may be applicable to
22 other agencies falling within one particular branch of government.

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1 **C. The Legislature limited the OPA’s prosecutorial powers**

2 The OPA is a government agency created and governed by the Commonwealth Constitution,
3 which dictates its role as one that “audit[s] the receipt, possession and disbursement of public funds
4 by the executive, legislative and judicial branches of the government, an instrumentality of the
5 Commonwealth or an agency of local government and...perform[s] other duties provided by law.”
6 NMI Const. art. III, § 12. The phrase “provided by law” “normally refers to legislatively-created
7 statutes” and those laws created in other ways, “such as by executive order.” *Torres*, 2009 MP at ¶
8 20. To date, the OPA has not been granted any general prosecutorial duties. Instead, it has been
9 granted the limited authority to prosecute the governor and the AG. 1 CMC § 7847(b). The lack of
10 any general prosecutorial authority is confirmed in 1 CMC § 7847(a), which states that the “Public
11 Auditor shall report to the Attorney General whenever the Public Auditor has reasonable grounds to
12 believe there has [*sic*] been violations of either federal or Commonwealth criminal law. The
13 Attorney General may institute further proceedings.” This statutory provision clearly indicates that
14 the legislature did not grant the OPA generalized prosecutorial powers. Instead, it opted to keep that
15 exclusive authority vested with the AG, with the limited exception of prosecutions of the governor
16 and the AG.

17 The AG has the authority to choose his own staff. He does not, however, have the authority
18 to grant powers to government agencies above and beyond those granted to that agency by law. The
19 OPA’s powers are clear. It must report criminal activity to the AG. 1 CMC § 7847(a). Thereafter
20 the AG may institute proceedings. *Id.* The OPA legal counsel may prosecute the governor or the

1 AG. 1 CMC § 7847(b). Hence, the AG violated the separation of powers by delegating general
2 prosecutorial powers to members of an agency with no such legislatively created authority.⁴

3 **D. OPA’s mandate does not allow for prosecutions beyond those designated by law**

4 Attorney Hasselback suggested at the hearing that the OPA’s mandate, which states that the
5 OPA is required to *prevent* and detect fraud, should be read to allow the OPA legal counsel to act as
6 SAAGs because prosecuting government corruption will act as a preventative measure.

7 The Court agrees that the prosecution of these crimes will have a deterrent effect. However,
8 one need only read the statute to understand that prosecution was not what the legislature had in
9 mind as a preventative action granted to the OPA. The statute in question, 1 CMC 2304(a), states
10 that the “the Public Auditor shall specifically act to prevent and detect fraud, waste and abuse in the
11 collection and expenditure of all public funds.” The very next line of this provision states that “[t]he
12 Public Auditor may *audit* any transaction involving the procurement of supplies or the procurement
13 of any construction by agencies of the Commonwealth, and the procurement of any supplies and
14 services in connection with such construction.” *Id.* (emphasis added). The following section of the
15 statute, 1 CMC 2304(b), allows the Public Auditor to conduct audits and investigations, review
16 legislation and regulations, and make recommendations on legislation, regulations, and policies. No
17 where in the statute is there any indication that the legislature intended to give the OPA legal
18 counsel any generalized prosecutorial authority. The interpretation as proposed by Attorney
19 Hasselback is overly broad and is not warranted given the plain language contained in the statutes.
20 *See* 1 CMC §§ 2304, 7847.

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22 ⁴ In the absence of legislative action, the AG has no authority to delegate his prosecutorial powers to personnel in other
23 agencies, particularly when so doing impermissibly expands that agency’s constitutional and statutory authority. The
24 legislature must clarify the OPA’s prosecutorial authority if it wants the OPA’s legal counsel to be more involved in
criminal proceedings against government employees involved in corruption. The Joint Task Force’s purpose can be
accomplished if the legislature works closely with the OPA to increase the OPA’s ability to prosecute these types of
cases.

