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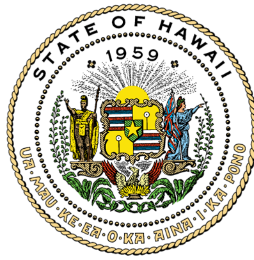

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September 28, 2021

VIA EMAIL

The Honorable Della Au Belatti, Chair (repbelatti@capitol.hawaii.gov)
The Honorable Linda Ichiyama, Vice Chair (repichiyama@capitol.hawaii.gov)
The Honorable Mark J. Hashem, Member (rephashem@capitol.hawaii.gov)
The Honorable Dale T. Kobayashi, Member (repdkobayashi@capitol.hawaii.gov)
The Honorable Val Okimoto, Member (repokimoto@capitol.hawaii.gov)
The Honorable Amy A. Perruso, Member (repperruso@capitol.hawaii.gov)
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The Honorable Kyle T. Yamashita, Member (repyamashita@capitol.hawaii.gov)

House Investigative Committee
Hawaiʻi State Capitol
Honolulu, Hawaiʻi 96813

Re: House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01

Dear Members:

The recent hearings have made it clear that this committee's "investigation" is not, as its authorizing resolution says, an inquiry into our audit findings and recommendations regarding two agencies in need of reform. Instead, under the guise of that otherwise legitimate investigation, I have been subjected to improper questioning by some members into details about our process and our workpapers, which are confidential by law. Some members have gone as far as to misrepresent our work in their attempts to continue the Speaker's attack against me and my office.

The hearing notice for Wednesday, September 29, 2021, and the letter from Chair Belatti dated September 27, 2021, suggest the committee intends to continue with its improper investigation by issuing subpoenas for our documents. The committee may also be considering requiring our current and former employees and contractors to testify before the committee. I am compelled to inform you that this harassment, attempt to intimidate, and improper intrusion into the operations of the Office of the Auditor – an independent office established by the Hawaiʻi Constitution – is wholly outside the scope of the resolution authorizing the committee and is therefore illegitimate.

While the legislature has the power to conduct investigative hearings, that power is not unfettered. And, for the committee to go beyond those limits is an abuse of its power. The statutory provisions that establish procedures governing investigative committees formed by the Legislature require that the resolution establishing an investigative committee state "*the subject matter and scope of its*

investigative authority." Section 21-3(b), HRS (emphasis added). In the case of this committee, House Resolution No. 164 (Regular Session 2021) specifically and unambiguously states:

> the purpose and duties of the investigating committee and the subject matter and scope of its investigative authority shall be:
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> (1) To follow up on the audits of the Department of Land and Natural Resources' Special Land and Development Fund, Report No. 19-12, and Agribusiness Development Corporation, Report No. 21-01;
>
> (2) To examine the recommendations made in those audits; and
>
> (3) For purposes of improving the operations and management of these state agencies, their funds, and any other matters[.]

The clear language of the resolution identifies "the subject matter and scope of its investigative authority": to follow-up on the audits of Department of Land and Natural Resources' Special Land and Development Fund (DLNR) and the Agribusiness Development Corporation (ADC). It is equally clear there is nothing in the authorizing resolution that even remotely supports the suggestion that the committee was established for the purpose of investigating the Office of the Auditor, or even to gather information relating to improving its operations and management. That simply is beyond this committee's legal authority.[1] See State v. Abihai, 146 Haw. 398, 406, 463 P.3d 1055, 1063 (2020) (where language is plain and unambiguous, a court's "sole duty is to give effect to its plain and obvious meaning.").

The United States Supreme Court has held that a resolution authorizing a legislative investigative committee "is the controlling charter of the committee's powers." United States v. Rumely, 345 U.S. 41, 44 (1953). An investigative committee's "right to exact testimony and to call for the production of documents must be found in this language." Id.; see also Gojack v. United States, 384 U.S. 702, 708 (1966) (in the context of a legislative resolution authorizing an investigation, noting that where a committee rule authorizes a major inquiry only by a majority vote, the committee rule "must be strictly observed."). While that opinion relates to an investigative committee of the United States Congress (which Chair Belatti has said she is modeling), Hawai‘i law compels the identical conclusion. See Section 21-3(b), HRS (expressly mandating that a house resolution establishing an investigating committee explicitly state the scope of the committee's investigatory authority); Section 21-3(a), HRS (noting, inter alia, that an investigative legislative committee "derives its investigatory powers" from a "concurrent or single house resolution or statute"). House Resolution No. 164 contains no reference to an investigation of the Office of the Auditor, including the process that we followed in our audits of DLNR and ADC.

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[1] Even assuming *arguendo* the resolution's scope included some ambiguity, any ambiguity must be resolved by "the last antecedent" rule of statutory construction. The resolution uses the phrase "these agencies." The word "these" is a demonstrative adjective. Under the "last antecedent" canon of construction, a "demonstrative adjective refers to the nearest reasonable antecedent." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012). "These state agencies" can only refer to DLNR and ADC, the only agencies named and therefore the nearest reasonable antecedent to "these agencies."

I have questioned the purpose and scope of the committee's investigation both during informal meetings as well as during the public hearings. I have asked the committee to publicly state what it is investigating with respect to my office and why some members continue to demand details about our processes on these audits and our confidential workpapers. That would only be fair. One of the fundamental principles of due process – frankly, any *fair* process – is notice, and there has been none. In fact, the committee has ignored my requests to be transparent, to say what the committee is investigating regarding the Office of the Auditor; instead, Chair Belatti has responded that the committee has some undefined broad authority to investigate other matters, making no attempt to be transparent about the committee's true purpose. However, the committee has no such legal authority to expand its investigation beyond and outside of the purpose for which it was established in House Resolution No. 164.

Audit Workpapers Are Confidential

Our working papers are confidential by statute. Section 23-9.5, HRS, unambiguously states, "The auditor shall not be required to disclose any working papers."[2] Nevertheless, some members of the committee have repeatedly demanded access to our working papers, including the identity of audit project staff and the staff member who served as the independent quality control reviewer. The request for working papers, including schedules prepared by the certified public accounting firm contracted by our office, as outlined in Chair Belatti's letter dated September 27, 2021, continues those relentless efforts to access documents unrelated to and outside of the investigative committee's authorized purpose, namely an investigation of our work. It is indefensible for the committee to demand access to information that Hawai'i law very clearly protects, even going as far as to mischaracterize my responses as refusals to answer questions. Section 23-9.5, HRS.

To be clear, we consider all project evidence collected and developed by our analysts, including audio recordings and summaries of interviews, to be confidential working papers. As we have explained to the committee, we provide assurance to agency management as well as every person we interview that, by law, only our staff has access to the information and evidence that we obtain for purposes of the audit. We rely on the candor and openness of the agencies that we audit. Oftentimes, employees and third-party witnesses are more comfortable providing unfiltered information to us because we are able to offer some degree of anonymity and confidentiality. The Legislature recognized the need to protect the working papers: "the scope and nature of the duties and responsibilities imposed upon the Auditor under chapters 23 and 26H, Hawaii Revised Statutes, are of such critical importance to the state, that the Auditor's working papers should be kept confidential" and "that subjecting the Auditor's working papers to disclosure requirements would seriously impair the Auditor's ability to fulfill mandated responsibilities and to discharge statutory duties." S. Journal, 18th Leg., S.C. Rep. 2730 (Haw. 1996).

Removing the confidentiality of our working papers would indeed "seriously impair" our ability to discharge our statutory duties. Yet, despite that destructive effect, the committee may believe that Section 21-8, HRS, authorizes it to access the confidential working papers. That argument is legally unsound. Our confidentiality statute is very specific. The other statute is very general. It is well-settled that, where there is a conflict between a general provision like Section 21-8, HRS, and a

[2] "'[W]orking papers' means the notes, internal memoranda, and records of work performed by the auditor on audits and other investigations undertaken pursuant to this chapter, including any and all project evidence collected and developed by the auditor." Section 23-9.5, HRS.

specific one, like the confidentiality provision in Chapter 23, HRS, the specific statute prevails. See, e.g., Kinkaid v. Bd. of Rev. of City & Cty. of Honolulu, 106 Haw. 318, 323, 104 P.3d 905, 910 (2004), as amended (Nov. 10, 2004) ("When faced with a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, this court invariably favors the specific." (internal quotation marks omitted)). In addition, the auditor's confidentiality statute was passed in 1996; the committee's statute was passed in 1969. Where there is a conflict between an earlier and a later statute, the later-enacted statute prevails. Chung Mi Ahn v. Liberty Mut. Fire Ins. Co., 126 Haw. 1, 9, 265 P.3d 470, 478 (2011) ("In general, when a conflict between two laws is irreconcilable, the later enactment governs.").

The State Ethics Code Prohibits Current and Former Employees from Divulging Confidential Material

The State Ethics Code prohibits current and former employees from disclosing information that, by law or practice, is not available to the public and which the employee acquired through the course of the employee's official duties. Section 84-12, HRS ("No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties[.]"); Section 84-18(a), HRS.

Notwithstanding that clear legal bar, the committee – at least some members – have apparently encouraged and, through the issuance of subpoenas, may attempt to compel current and former employees to violate the State Ethics Code provisions that prohibit them from disclosing information that was acquired in the course of their work on the audits of DLNR and ADC. I was informed by Chair Belatti during an informal meeting with select members of the committee that the committee had spoken to some former employees, and during the public hearings, Chair Belatti and other members have demanded the identities of audit project team members and the independent quality control reviewer. That information constitutes project evidence that is confidential under Section 23-9.5, HRS.

It is unreasonable – frankly, unimaginable – for legislators to put someone in the impossible position of refusing to answer the committee's questions, likely under the threat of being prosecuted for criminal contempt, or violating state law by disclosing confidential information. And, it is so much greater of an abuse when the information sought from those current and former employees is well-outside of and irrelevant to the investigative committee's legitimate purpose and scope. We assume that the committee (a) has advised those former employees from whom it has obtained information about the State Ethics Code provision; (b) has not encouraged them to unknowingly violate the statute; and (c) has suggested that they consult with legal counsel given the Hobson's choice with which they are presented by the committee.

Undue Intrusion into Independence

Our job is to provide objective, independent, and non-partisan analyses of agency programs, to assess whether those programs are performing effectively, efficiently, and ethically. We work to hold agencies accountable for their use public resources and to improve state government. However, one of the foundational requirements of our work is that we be objective and independent, both in fact and appearance.

We have repeatedly cautioned that the Speaker's efforts to undermine and control the Office of the Auditor through the Auditor Working Group and bills he introduced to cut our budget risk impairing our ability to effectively perform out job. We cannot be subject to undue political or other external influences or pressures that affect our ability to make objective assessments. Some members of this investigative committee have shown that their primary purpose is to continue the Speaker's campaign to control this office. Although the Speaker ignored our concerns, I am compelled to restate them to the committee in the hope that some members will consider that this political attack is harming an important public resource – one essential to "the preservation of the public good" which is precisely what the statutory procedures governing legislative committees is intended to protect. Section 21-1, HRS. Rather than protecting and defending an office established in the State Constitution – which every legislator has sworn an oath to do – the committee's actions pose a real undue threat to our independence by unfairly and unjustly intruding into our process.[3]

As I have repeatedly explained, our work is not unchecked. Our audits are performed in accordance with Government Auditing Standards promulgated by the Comptroller General of the United States, which require us to, among other things, undergo regular peer reviews that are conducted by auditors from other states and serve to ensure the quality of our audit work. We have passed both peer reviews during my tenure as the Auditor, receiving the highest rating allowed under Government Auditing Standards.

In closing, I reiterate my concern about what appears to be the committee's intent to continue attempting to bully and harass the office by issuing subpoenas for confidential working papers and to compel employees to testify before the committee. The committee's purpose and the scope of the committee's authority – as clearly stated in the enabling resolution – is to follow-up on the audits of DLNR and ADC. Our working papers and any information the committee intends to solicit from my staff, including former staff, is outside of that stated purpose. In addition, as noted above, working papers – as well as information which by law or practice is not available to the public – are confidential by statute. For that reason, any attempt to obtain that information is illegitimate. I ask the committee to consider my comments before issuing subpoenas for our confidential documents or to compel testimony of staff, including former staff, or our contractors.

While we do not want to pursue legal action to protect the Office of the Auditor and staff from the committee's improper and illegitimate demands or to address unfounded allegations of criminal contempt, we are confident that the clear language of the statute and legal authorities do not support this committee's attempt to expand the purpose and scope of its investigation. We are also aware that the committee's failure to comply in any material respect with the requirements of Chapter 21, HRS – which we have described above – "shall be a complete defense in any proceeding against the person for contempt or other punishment." Section 21-15(b), HRS; see also HRS § 21-1 (requiring investigative committees under chapter 21 to conduct their hearings "in a fair and impartial manner").

We intend to fully participate in the committee's hearings to hold DLNR and ADC accountable, to improve their operations, and to answer questions about our audit findings. We have cooperated with

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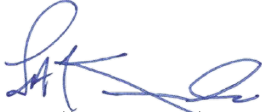
[3] Government Auditing Standards promulgated by the Comptroller General of the United States include as examples of "undue influence threats for an auditor or audit organization" a variety of external interferences or influences.

the committee in its investigation to follow-up on the audits of DLNR and ADC and will continue doing so.

I am available to discuss my concerns with the committee or any of its members. It is my hope that my concerns can be resolved without the need to unnecessarily proceed through the legal process. As I have stated many times previously, this office should be a valuable resource to this committee in its investigation of DLNR and ADC, specifically in understanding the audit findings. We continue to be available to help the committee in its follow-up of those audits.

Very truly yours,



Leslie H. Kondo
State Auditor

cc: Senate Members
House of Representative Members