

October 5, 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)
The Honorable David A. Tarnas, Member	(reptarnas@capitol.hawaii.gov)
The Honorable Kyle T. Yamashita, Member	(repyamashita@capitol.hawaii.gov)

House Investigative Committee
Hawai'i State Capitol
Honolulu, Hawai'i 96813

Re: Request for Additional Time to Respond to Subpoena Duces Tecum dated September 29, 2021

Dear Members:

We require additional time to respond to the subpoena duces tecum dated September 29, 2021 issued by the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01. The subpoena duces tecum presents me with an impossible choice – either comply with the subpoena, thereby committing an illegal and unethical act, or not comply and risk a criminal contempt charge.

As the Committee already knows, our audit working papers are confidential by law.¹ The State Ethics Code also prohibits me (and other employees of the office as well as former employees) from disclosing the information contained in those working papers.² Notwithstanding those unambiguous statutory provisions, the subpoena duces tecum orders the production of documents by October 13, 2021, which are unrelated to the Committee's stated – and therefore legal – purpose and include confidential working papers. And, under the Committee's rules, I am at risk for being charged with *criminal* contempt for complying with the State Ethics Code and other state law.

The Committee's tactic – clearly meant to pressure me and others – is legally and ethically unacceptable, more so in light of the purpose and scope of the investigation stated in House Resolution No. 164. Given the Hobson's choice we are presented by the Committee – and especially with the possibility of criminal prosecution – we are compelled to retain legal counsel to represent me and other employees, if subpoenaed to testify. We have started the process to procure those services in accordance with the State Procurement Code and request additional

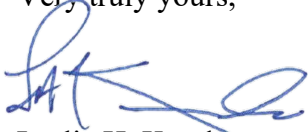
¹ Section 23-9.5, Hawai'i Revised Statutes.

² Sections 84-12 and 84-18(a), Hawai'i Revised Statutes.

time to respond to the subpoena duces tecum until we retain counsel.³ If the Committee intends to subpoena current and former employees of the Office of the Auditor to testify, we also request that those witnesses be postponed until we have retained legal counsel. The current employees are entitled to legal representation. Through our counsel, we also will consider legal options to protect the confidential information obtained by former employees in the course of their employment and which the State Ethics Code prohibits them from disclosing.

To be clear, we are not asking the Committee to stop or otherwise delay its legitimate work to follow up on the audits of the Department of Land and Natural Resources' Special Land and Development Fund and the Agribusiness Development Corporation. Now that the Committee is demanding that we act in violation of state law or risk being charged with *criminal* contempt, we simply must exercise our right to be represented by legal counsel and are asking that the Committee allow us to do so. We intend to retain legal counsel as expeditiously as allowed under the State Procurement Code and expect to be able to do so within 30 days.

Very truly yours,



Leslie H. Kondo
State Auditor

cc: Members of the Senate
Members of the House of Representatives

³ Under the Committee's rules, the Attorney General is responsible for prosecuting any criminal contempt charge against me and other employees. The Attorney General and her office cannot serve as prosecutor while simultaneously defending us in any criminal contempt proceeding. The Attorney General and her office are legally conflicted from representing me and other employees.