

October 13, 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 Authorized by H.R. No. 164
Hawai'i State Capitol
Honolulu, Hawai'i 96813

Re: Subpoena duces tecum dated September 29, 2021 and right to legal counsel

Dear Members:

We acknowledge receipt of the letter from Chair Della Au Belatti dated October 12, 2021, refusing to allow us sufficient time to retain legal counsel of our choosing to represent me and other employees of the Office of the Auditor, should they be subpoenaed to testify. However, I will not waive my right to legal counsel, and I will not respond to the subpoena duces tecum dated September 29, 2021 without the benefit of legal representation. As the process of obtaining counsel is proceeding with all deliberate speed, but is not yet complete, you should construe this letter as a statement of objection to the subpoena. We reserve all other arguments, rights, and causes of action.

1. The Committee's violations of Chapter 21, Hawai'i Revised Statutes (HRS), require me to retain counsel.

As explained in my letter to you dated October 5, 2021, the subpoena duces tecum dated September 29, 2021 issued by the Committee – which demands that I act in violation of state law or risk being charged with *criminal* contempt – requires me to exercise my right to be represented by legal counsel. Prior to the Committee's subpoena duces tecum, I would not have contemplated that a legislative committee operating in good faith and “in a fair and impartial manner”¹ would have put me in the position of either breaking the law or being held in criminal contempt. Until then, I was comfortable testifying without the assistance of legal counsel. But because that subpoena unmistakably may put me in the untenable position of either violating the confidentiality of our working papers and the State Ethics Code or being exposed to criminal

¹ Chapter 21, HRS – which both the Senate Committee on Judiciary and House Committee on Judiciary referred to as “a code of fair procedures” – establishes procedures to ensure legislative investigative committees conduct their work “in a fair and impartial manner, consistent with protection of the constitutional rights of persons called to testify at such hearings and preservation of the public good.” Section 21-1, HRS; Stand. Com. Rep. No. 48, 1969 House Journal at 629; Stand. Com. Rep. No. 800, 1969 Senate Journal at 1178.

contempt charges, I am no longer comfortable either testifying or responding to the subpoena duces tecum without the assistance of counsel.

Under both Chapter 21, HRS, and the Committee's own rules, I am entitled to legal counsel of my "own choosing." In addition, the right of witnesses appearing before the Committee to legal counsel is also guaranteed under both the Hawai'i and U.S. Constitutions. While you offer many of your opinions why I must provide the documents by 4:30 p.m. today, suffice it to say I disagree. Your analysis is legally unsound and riddled with inaccuracies. More importantly, *you are not my attorney; you are not a court*. I will not waive my right to legal counsel of my own choosing.

2. The Committee is operating far beyond the powers specifically delegated to it.

The Committee continues to deliberately disregard Chapter 21, HRS, and its own rules. Chapter 21, HRS – which both the Senate Committee on Judiciary and House Committee on Judiciary referred to as "a code of fair procedures" – requires this Committee conduct its hearings "in a fair and impartial manner[.]"² However, it is neither fair nor impartial – nor consistent with my Constitutional right to counsel and due process³ – for this Committee to deny me reasonable time to retain legal counsel. It simply demonstrates, once again, that the Committee's "investigation" is vitiated by unfairness and partiality.

In addition, the Committee continues to abuse its power by "investigating" matters well-outside of and unrelated to its legitimate purpose and scope. As the U.S. Supreme Court has noted, a resolution authorizing a legislative investigative committee "is the controlling charter of the committee's powers."⁴ An investigative committee's "right to exact testimony and to call for the production of documents must be found in this language."⁵ Put another way, the committee does not have the legal capacity or authority to expand its investigatory powers on its own. The limits of an investigative committee's powers to investigate – and "to exact testimony and to call for the production of documents" – must be found in the resolution itself.⁶ The resolution, in turn, must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter."⁷

² Section 23-1, HRS.

³ See Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (stating that the "touchstone of due process is protection of the individual against arbitrary action of government").

⁴ United States v. Rumely, 345 U.S. 41, 44 (1953).

⁵ 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.").

⁶ 1 Sutherland Statutory Construction § 12:14 (7th ed.) ("The investigative power of a legislative committee is restricted by . . . the powers granted by the statute or resolution creating it").

⁷ Watkins v. United States, 354 U.S. 178, 201 (1957); Id. at 206 ("investigating committees are restricted to the missions delegated to them" (emphasis added)). "No witness can be compelled to make disclosures on matters outside that area." Id.

Chapter 21, HRS, contains the same essential requirement in different words – that a legislative authorization to the committee must delegate and designate with “sufficient particularity”⁸ the scope and limits of the committee’s power to investigate. The resolution establishing an investigative committee must specifically state “*the subject matter and scope of its investigative authority.*”⁹

The resolution establishing this Committee’s authority and purpose follows this requirement of specific scope and investigative authority.¹⁰ Under it, this Committee’s purpose and scope is 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), and their associated recommendations, for the purpose of “improving the operations and management of these agencies.”¹¹ Nothing in the authorizing resolution even remotely suggests 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.¹²

Of greater concern is the Committee’s attempt to “validate” its illegitimate efforts to find fault with my office by apparently deliberately and materially misstating the scope of its authority. In a setting fraught with the possibility of criminal contempt, such a maneuver is nothing short of unconscionable.

⁸ Section 21-3(a) (referring to the “single house resolution . . . from which it [the committee] derives its investigatory powers”); Section 21-3(b) (requiring that the “single house resolution . . . establishing an investigating committee shall state the committee’s purposes, powers, duties and duration, the subject matter and scope of its investigatory authority” (emphasis added)); Stand. Com. Rep. No. 48, 1969 House Journal, 629 (referring to “the proper delegation of investigative authority to interim committees” (emphasis added); *id.* (explaining that “the issue of concern is the proper method by which investigative authority is delegated” to a committee) (emphasis added); *id.* (noting that under chapter 21 investigative committees may “have investigative authority delegated by a single house resolution” (emphasis added); *id.* (noting that when the standards of § 21-3 are met, “the committee’s authorization should be specific enough to constitutionally support the general line of questioning”); *id.* (“In addition to protecting witnesses, the section [21-3] causes a maximum of legislative judgment to be brought to bear on each proposal for investigation and thus aids the committee in deciding what the legislature expects of it.”).

⁹ Section 23-3(b), HRS (emphasis added).

¹⁰ House Resolution No. 164 (2021 Regular Session).

¹¹ House Resolution No. 164 is specific and unambiguous.

[T]he purpose and duties of the investigating committee and the subject matter and scope of its investigative authority shall be:

- (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[.]

¹² The Committee has even refused to publicly state what it is “investigating” with respect to my office and why it is trying to find fault with our work.

The Committee has quietly – and frankly deceitfully – unilaterally amended the scope of its authority to include our work. The Notice to Witness portion of the subpoena duces tecum states:

The Investigative Committee is authorized to follow up on the Audit of the Department of Land and Natural Resources' Special Land and Development Fund, Report No. 19-12, and Audit of the Agribusiness Development Corporation, Report No. 21-01, and to examine the recommendations made in those audits, *for the purposes of improving operations and management of state agencies, their funds, and any other matters.*

Emphasis added. That is *not* the scope of the Committee's investigation as stated in House Resolution No. 164. The resolution, in relevant part, defines the Committee's investigative authority to be 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, to examine the recommendations made in those audits, and "*for purposes of improving the operations and management of these state agencies, their funds, and any other matters.*"¹³

The deleted language enormously expanded the scope of the investigative authority – or rather, purported to do so. By dropping the word "these" before the phrase "state agencies," the Committee has tried to create the appearance that its authorized investigation is for the purpose of improving the operations and management of state agencies in general, which would therefore include the Office of the Auditor. However, the Committee cannot on its own initiative enlarge the scope and purpose delegated to it by the House. The antecedent for the word "these" can only refer to the two agencies mentioned, DLNR and ADC. In other words, House Resolution No. 164's purpose and scope language clearly *excludes* an investigation into management and operations of my office.¹⁴ It authorizes only an investigation into the management and operations of DLNR and ADC.¹⁵

¹³ While Chair Belatti may want to believe that the phrase "and other matters" gives this Committee *carte blanche* to investigate anything they want, without limitations, that is not how specific delegations of legislative authority work, as the U.S. Supreme Court noted in Rumely and Watkins. And that is not how legal language is interpreted. Under a standard canon of legal construction, "where general words follow specific words in a statute, those general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Asato v. Procurement Policy Bd., 322 P.3d 228, 247 (Haw. 2014) (explaining the canon of *eiusdem generis*) (citation omitted). In other words, the specific words preceding "and any other matters" are words referring to "the operations and management of these state agencies."

In addition, even if you granted Chair Belatti's contention for the sake of argument, such a broad and vague basis cannot possibly serve as a legal or constitutional ground for contempt proceedings; an investigation based on the phrase "other matters" would be void for vagueness under the due process clause.

¹⁴ 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."

¹⁵ This conclusion is supported by the "express mention, implied exclusion" canon of statutory construction.

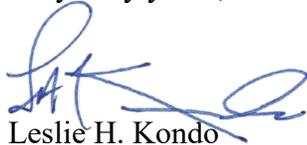
Perhaps the deletion or omission was accidental, in which case it may be on a par with an element in the civil cause of action for negligent misrepresentation.¹⁶ On the other hand, if the deletion or omission was deliberate, the Committee's material misrepresentation is likely more akin to a fraudulent misrepresentation.

In any event, whether deliberately or not, the Committee's statement of the scope of its investigative authority is profoundly misleading and continues a clear pattern of abuse.

Even the refusal to allow me sufficient time to retain legal counsel – which your letter asserts is the Committee's decision – does not comport with Chapter 21, HRS, or the Committee's rules. Those provisions require the Committee to act only by a majority vote.¹⁷ Yet, no such vote was taken at yesterday's hearing on whether to allow me time to retain counsel of my choosing. In fact, it appeared that members were unaware of "the Committee's position" until told of that position by Chair Belatti during the Committee's meeting on October 12, 2021. Chair Belatti is, once again, acting outside the scope of her legitimate authority.

As is abundantly clear, the Committee's "investigation" has been anything but fair and impartial. The Committee's refusal to allow me sufficient time to retain legal counsel – which Chair Belatti has repeatedly informed me is my right – is just another clear example of how the Committee – or at least some of its members – have an agenda. In its efforts to continue the Speaker's attack against my office under the guise of an investigation of DLNR and ADC, the Committee's disservice is that it is ignoring our audit findings and recommendations regarding two state agencies in need of reform and the importance of independent, impartial, and objective audits in this state.

Very truly yours,



Leslie H. Kondo
State Auditor

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

¹⁶ See Zanakis-Pico v. Cutter Dodge, Inc., 98 Haw. 309, 321, 47 P.3d 1222 (2002) (noting that one of elements of the tort of negligent misrepresentation is that "false information is supplied as a result of the failure to exercise reasonable care or competence in communicating the information" (citation and brackets omitted)).

¹⁷ Section 21-6(c), HRS.