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May 22, 2020

The Honorable Donovan M. Dela Cruz, Chair
and Members of the Senate Special Committee on COVID-19
Hawaii State Capitol
415 South Beretania Street, Room 208
Honolulu, Hawaii 96813

Dear Chair Dela Cruz and Senate Special Committee Members:

I am writing to you regarding Senate Resolution 198, which establishes the Senate Special Investigating Committee on COVID-19. The committee is given broad authority to investigate the State's response to the COVID-19 pandemic, and is assigned tasks including the following:

- (3) Review and assess current state and county department plans and procedures;
- (4) Review and assess whether state and county departmental plans and procedures are properly and timely implemented to safeguard public health and safety; and
- (5) Review, assess, and monitor the State's expenditure of federal and state COVID-19 relief funds.

The committee is also given the power to adopt rules, issue subpoenas for documents and witnesses, administer oaths, record hearings, and certify instances of contempt on the part of witnesses.

I fully appreciate the Senate's desire to examine the State's response to the present pandemic, which has created unprecedented challenges and required a coordinated response from multiple agencies. I also understand that SR 198 was passed to facilitate the Senate's ability to obtain information in a manner it feels appropriate. But I am writing to express concerns that, whatever its intent, SR 198 creates substantial legal conflicts that I must address as the attorney for both the executive and legislative branches of State government.

All attorneys in the Department of the Attorney General are ethically bound to follow the Hawaii Rules of Professional Responsibility. Those rules limit our ability to represent clients having conflicting legal interests. Our responsibilities include maintaining the confidences of clients, not revealing privileged information, and not favoring one client at the expense of another. The Department regularly creates internal “conflict walls” which prohibit the sharing of client confidences and prevent us from acting out of divided loyalties. During the pandemic response, we have used such walls where appropriate and have been able to advise multiple clients. Thus, prior to the passage of SR 198, the Department was able to give legal counsel to the Senate Committee on COVID-19, and respond to legislative requests for information from Governor Ige’s administration. During a public hearing in April, I advised the committee that, if an investigative committee were established, it would create ethical conflicts. Unfortunately, the establishment of an investigative committee makes it difficult for us to rely upon conflict walls in the representation of both the administration and the committee. As written, the investigating committee is empowered to use compulsory process to secure the attendance of witnesses and the production of documents from many of my Department’s clients. A response will require an evaluation of whether the subpoenas are unduly burdensome, or whether the materials sought are subject to any legal privileges. The committee’s inquiry also covers all of the administration’s plans and procedures related to the COVID-19 crisis. As members of the administration, both I and First Deputy Dana Viola are integrally involved with the very plans and procedures being investigated. It would be ethically impossible for us simultaneously to advise the Senate on the scope of that investigation, and the executive on how to respond, particularly where the committee has authority to hold witnesses in contempt. Even if we could establish some conflict walls, the Department’s ability to participate in a coordinated response to the emergency would be significantly compromised.

In view of the conflicts created by SR 198, my Department no longer believes it may provide legal advice to the committee. The administration intends to continue cooperating fully with the Senate on the State’s response to the COVID-19 crisis. But state employees are concerned that they are now being investigated for their efforts to respond to the crisis. Accordingly, we will provide representation to state employees and volunteers who are called to testify or from whom documents are requested concerning the State’s COVID-19 plans and procedures.

For these reasons, at the May 26, 2020 hearing requesting an update on the State’s plans, I will appear in two capacities. I will appear (1) personally as the Attorney General, and (2) as the attorney representing Chief of Staff Linda Chu Takayama, Director of Hawaii Emergency Management Kenneth Hara, and Doctors Bruce Anderson and Sarah Park of the Department of Health. I will be prepared to address the committee’s concerns, but am duty bound to adhere to ethical constraints placed on all attorneys in this new, investigatory environment.

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We support the Senate's vital participation in protecting the health and economy of our community. We regret that the creation of an investigative committee has created ethical limits on our ability to represent both you and the administration. If you would like to discuss alternatives that could eliminate the conflicts, I would be pleased to facilitate a meeting between Senate Leadership and Governor Ige's administration.

Respectfully,

A handwritten signature in blue ink, consisting of a large, stylized loop that starts on the left, goes up and over, then down and back to the left, ending with a long horizontal stroke extending to the right.

Clare E. Connors
Attorney General

cc: The Honorable Ronald D. Kouchi, Senate President