



DEPARTMENT OF THE ATTORNEY GENERAL

News Release

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News Release 2008-43

HYDROGEN INVESTMENT CAPITAL MANAGEMENT CONTRACT AWARD

HONOLULU – Attorney General Mark Bennett has referred the "Report of the Special Investigative Committee on the Hydrogen Investment Capital Management Contract Award" to the Prosecuting Attorney of the City and County of Honolulu to make a determination as to whether or not criminal charges are warranted with regard to the matters described in the Report.

The Attorney General stated that this referral should not be taken as an indication that the Department of the Attorney General has made a determination or believes that criminal charges are warranted.

The Report asked the Department of the Attorney General to make a determination as to whether or not to initiate criminal charges against certain named individuals, but also requested that the Department of the Attorney General make no substantive determinations at all, and instead appoint "independent legal counsel" to determine whether or not to initiate a criminal prosecution. Because the Department of the Attorney General provided legal advice, represented witnesses who appeared before the Committee, represented some of those named in the Report, and wrote to the Committee and/or the Senate President that the Committee was not legally constituted and was conducting certain of its proceedings in a manner contrary to law, the Attorney General believes it would be inappropriate for the Department of the Attorney General to conduct a criminal investigation in this matter.

As the Attorney General wrote in a letter to Senate President Colleen Hanabusa, while he has the authority to select and appoint a Special Deputy Attorney General who "serves at the pleasure of the attorney general," such "an appointment is not likely what the Report contemplated, nor [would] such an appointment remove conflict of interest questions in this matter." The Attorney General also noted in that letter: "Indeed, were I to make such an appointment, and were the person appointed to make a final determination with which the authors of the Report disagreed, they might well claim that appointment process itself was flawed or biased in some way, or that the person appointed was unqualified or an otherwise inappropriate choice."

The Attorney General also stated that prosecutors in Hawai`i, including the Attorney General, refer matters involving actual or potential conflicts of interest to other prosecutors.

"The Honolulu Prosecuting Attorney's office is the largest prosecuting attorney's office in Hawai`i, with unquestioned independence, honesty, integrity, and skill," the Attorney General said. "I am confident that referring this matter to that office for an independent determination of whether or not criminal charges are warranted with regard to the matters described in the Special Committee Report is appropriate."

The Report requested that the Senate be informed of any determination as to independent legal counsel. The Attorney General informed the Senate President of the referral in a letter today, which is attached.

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LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

November 5, 2008

The Honorable Colleen Hanabusa
President, Twenty-Fourth Legislature
State Capitol, Room 409
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senate President Hanabusa

As I know you are aware, the "Report of the Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award," (the Report) states, among things: "14. It is the belief of the Special Investigative Committee that there was a knowing and intentional violation of the State procurement process, laws, and rules by the Director and his top management team." The recommendation section of the Report states, in its entirety:

"It is the recommendation of your Special Investigative Committee that this report of its findings and conclusions be submitted to the Department of the Attorney General for a determination whether the Director, ASO, and evaluation committee members Maurice Kaya and John Tantlinger, violated applicable procurement laws and rules, and for further appropriate action as provided in section 103D-106, Hawaii Revised Statutes.

Your Special Investigative Committee believes that there is a conflict of interest created with regard to the Attorney General as a result of these hearings. Among other reasons, the conflict exists as a result of the Attorney General being requested to investigate potential criminal violations alleged against persons who were

represented over the course of these proceedings by the Office of the Attorney General. Not only were these persons represented by the Office of the Attorney General in the hearings, the representation also included responding to subpoenas of records and advising of witnesses, and now includes the review and response to the report of the Special Investigation Committee.

As a result of this conflict of interest, it is requested that the Attorney General and the Department of the Attorney General be recused from the review of the findings and conclusions of the Special Investigative Committee for the purpose of determining whether or what sanctions and/or penalties are warranted against the Director and other DBEDT employees. Therefore, the Special Investigative Committee formally requests that the Attorney General, within thirty days from the filing of this Special Investigative Committee report with the Senate Clerk's office, initiate the process required to appoint independent legal counsel to carry out the recommendations made by this report and provide the Senate with a written report on the status of the appointment process.

It is further recommended that the independent counsel appointed by the Attorney General be required to provide the Senate with a written report, no later than twenty days prior to the convening of the Regular Session of the 2009 Legislature on the status of its compliance with and enforcement of the recommendations of your Committee.

In addition, it is recommended that this report of your Special Investigative Committee be submitted to the State Ethics Commission for a determination of whether

the actions taken by DBEDT's Director, ASO, and evaluation committee members, Maurice Kaya and John Tantlinger, rise to the level of being a violation of the provisions of chapter 84 of the Hawaii Revised Statutes.

It is also the recommendation of your Special Investigative Committee that DBEDT be required to adopt administrative rules requiring the ASO to certify that each procurement made pursuant to the RFP process or competitive sealed bid process has been conducted in compliance with all applicable provisions of the procurement code and rules. Such certification by the ASO shall include that all parties involved in the negotiation, performance, or administration of the applicable contract have acted in good faith, consistent with the requirements of section 103D-101, Hawaii Revised Statutes.

Additionally, it is recommended that each procurement that requires the foregoing certification by the ASO be subject to the mandatory review and oversight of the State Procurement Office to further ensure compliance with all applicable provisions of the procurement code and rules.

Your Special Investigative Committee also recommends that DBEDT be required to adopt a comprehensive standardized set of procedures and forms which are in compliance with all applicable provisions of the procurement code and rules. Furthermore, upon completion of a draft of such procedures and forms, that DBEDT submit them to the State Procurement Office for its approval and acceptance.

Finally, it is the recommendation of your Special Investigative Committee that DBEDT and the State Procurement Office be required to provide the Senate with a written report,

no later than twenty days prior to the adjournment sine die of the Regular Session of the 2009 Legislature on the status of DBEDT's compliance with the recommendations of your Committee as set forth in this report."

Thus, the Report makes several requests of the Department of the Attorney General, including:

1. That the Department of the Attorney should make a determination of "whether the [DBEDT] Director, [the DBEDT] ASO, and evaluation committee members Maurice Kaya and John Tantlinger, violated applicable procurement laws and rules, [and should then take] further appropriate action as provided in Haw. Rev. Stat. § 103D-106"¹;

2. "As a result of this conflict of interest [of the Department of the Attorney General], it is requested that the Attorney General and the Department of the Attorney General be recused from the review of the findings and conclusions of the Special Investigative Committee for the purpose of determining whether or what sanctions and/or penalties are warranted against the Director and other DBEDT employees;" and

¹ Haw. Rev. Stat. § 103D-106(a) is a penal statute, setting out the elements of a crime, and the punishment for that crime, and reads, in its entirety, as follows: "Any person who intentionally violates this chapter or any rules adopted pursuant to this chapter shall be guilty of a misdemeanor and shall be:

- (1) Subject to removal from office;
- (2) Liable to the State or the appropriate county for any sum paid by it in connection with the violation, and that sum, together with interest and costs, shall be recoverable by the State or county; and
- (3) Subject to imposition of an administrative fine under subsection (b)."

3. "[T]he Special Investigative Committee formally requests that the Attorney General, within thirty days from the filing of this Special Investigative Committee report with the Senate Clerk's office, initiate the process required to appoint independent legal counsel to carry out the recommendations made by this report and provide the Senate with a written report on the status of the appointment process."

It thus appears that the Report essentially requests that the Department of the Attorney General make a determination as to whether or not to initiate criminal charges against the named individuals, but requests also that because of a conflict of interest, the Department of the Attorney General should make no substantive determinations at all, and should instead appoint "independent legal counsel" to determine whether or not to initiate criminal prosecution of the named individuals.

The Report has concluded that it would present conflicts of interest for the Department of the Attorney General to determine whether or not to initiate criminal prosecutions in this matter.² I accept that it would, in this particular circumstance, present, at the least, the appearance of a conflict of interest were the Department of the Attorney General to make a determination as to whether or not to initiate a criminal prosecution based on the matters set out in the Report. In addition to the reasons cited in the Report, the Department of the Attorney General wrote that the Special Investigative Committee was not legally constituted and was conducting certain of its proceedings in a manner contrary to law. In these circumstances, I believe it would be inappropriate for the Department of the Attorney General to make a substantive determination of whether or not criminal charges are appropriate or warranted.

² As noted, the Report listed "among other reasons" that the "potential criminal violations [are] alleged against persons who were represented over the course of these proceedings by the Office of the Attorney General [and] [n]ot only were these persons represented by the Office of the Attorney General in the hearings, the representation also included responding to subpoenas of records and advising of witnesses, and now includes the review and response to the report of the Special Investigation Committee."

It is unclear to me precisely what process the Report contemplates when it requests that I "initiate the process required to appoint independent legal counsel." While the attorney general has the undoubted statutory power to appoint special deputy attorneys general who "shall serve at the pleasure of the attorney general,"³ such an appointment is not likely what the Report contemplated, nor do I believe such an appointment would remove conflict of interest questions in this matter. Indeed, were I to make such an appointment, and were the person appointed to make a final determination with which the authors of the Report disagreed, they might well claim that appointment process itself was flawed or biased in some way, or that the person appointed was unqualified or an otherwise inappropriate choice.

Fortunately, there is a solution that I believe will clearly result in a determination by "independent legal counsel" as to whether criminal charges are appropriate in this matter. I have referred the matter of whether or not to initiate a criminal prosecution as to the matters described in the Report to the Prosecuting Attorney for the City and County of Honolulu.⁴ While the Prosecuting Attorney's Office derives its inherent authority to prosecute from the Attorney General, *see Amemiya v. Sapienza*, 63 Haw. 424, 629 P.2d 1126 (1981), that office is independent of the attorney general. *See generally id.* The Prosecuting Attorney does not take direction from the Attorney General in individual cases, is not supervised by the Attorney General, and is not subject to removal by the Attorney General. I note also that the office of the Prosecuting Attorney for the City and County of Honolulu is in fact the largest prosecutor's office in the State, with vast experience in prosecuting complex cases, as well as unquestioned honesty, integrity, and skill. In short, the office of the Prosecuting Attorney for the City and County of Honolulu is unquestionably "independent legal counsel" with the full authority to determine whether or not the criminal laws have been violated in the manner suggested by the Report.

³ See Haw. Rev. Stat. § 28-8.

⁴ I note that all of the matters complained of in the Report took place within the City and County of Honolulu, which is the jurisdiction of the Prosecuting Attorney for the City and County of Honolulu.

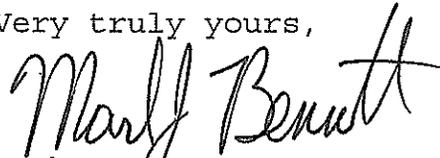
The Honorable Colleen Hanabusa

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I attach a copy of my letter of referral of this matter to the Prosecuting Attorney for the City and County of Honolulu. I am fully confident that this referral will result in an appropriate and independent determination of whether or not criminal charges are warranted in this matter.

Very truly yours,

A handwritten signature in black ink that reads "Mark J. Bennett". The signature is written in a cursive, flowing style.

Mark J. Bennett
Attorney General

cc: Committee Members
Senator Fred Hemmings
The Honorable Peter Carlisle
The Honorable Linda Lingle

LINDA LINGLE
GOVERNOR



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LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

November 5, 2008

The Honorable Peter B. Carlisle
Prosecuting Attorney
Department of the Prosecuting Attorney
1060 Richards Street
Honolulu, Hawaii 96813

Dear Mr. Carlisle:

As you may be aware, on October 14, 2008, the Hawaii Senate Special Investigative Committee on the Hydrogen Investment Capital Special Management Contract Award, adopted a Report.

The Report is enclosed herewith and contains certain findings set forth therein. As I also write in a letter to Senate President Colleen Hanabusa (enclosed):

It thus appears that the Report essentially requests that the Department of the Attorney General make a determination as to whether or not to initiate criminal charges against the named individuals, but requests also that because of a conflict of interest, the Department of the Attorney General should make no substantive determinations at all, and should instead appoint "independent legal counsel" to determine whether or not to initiate criminal prosecution of the named individuals.

For the reasons stated in my letter to Senate President Hanabusa, I am respectfully referring to you and your office this matter, for an independent determination as to whether or not to initiate criminal charges with regard to the matters described in the Report. As I wrote to the Senate President, I have full confidence in the independence, honesty, integrity, and skill of your office:

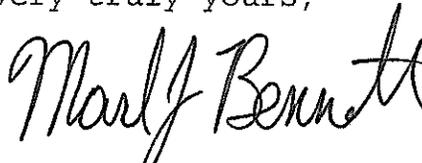
The Honorable Peter B. Carlisle
November 5, 2008
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[T]he office of the Prosecuting Attorney for the City and County of Honolulu is in fact the largest prosecutor's office in the State, with vast experience in prosecuting complex cases, as well as unquestioned honesty, integrity, and skill. In short, the office of the Prosecuting Attorney for the City and County of Honolulu is unquestionably "independent legal counsel" with the full authority to determine whether or not the criminal laws have been violated in the manner suggested by the Report.

In addition to the enclosed a copy of the Report that was forwarded to me, please note that additional materials may be on the Legislature's website at: <http://www.capitol.hawaii.gov/site1/studies/commhic.asp>

Thank you for your attention to this matter.

Very truly yours,



Mark J. Bennett
Attorney General

Enclosure

cc: The Honorable Colleen Hanabusa (w/o enc.)
Committee Members (w/o enc.)
Senator Fred Hemmings (w/o enc.)
The Honorable Linda Lingle (w/enc.)