



## SENATOR KIM ELTON

September 17, 2008

Talis Colberg, Attorney General  
Department of Law  
P.O. Box 110300  
Juneau, AK 99811-0300

Dear Attorney General:

This is a response to your letter dated yesterday and received by my office via email at 3:27 p.m.

I want to remind you of previous correspondence from your office to me in my capacity as chair of Legislative Council. On September 9, Senior Assistant Attorney General Michael Barnhill signed a letter for you that made a substantive offer. That offer was:

“(T)he Department of law wishes to confirm that the Legislative Council agrees with the department’s reading of the law. If we cannot reach agreement on the proper interpretation of the State Personnel Act, the Department of Law is prepared to seek declaratory judgment in court on this issue. But if the Legislative Council will acknowledge in writing its agreement with the Department of Law’s interpretation the Department of Law will drop its objections and the depositions may proceed without subpoenas.”

That offer is clear—acknowledge in writing and depositions may proceed without the need for subpoenas. On September 12, as chair of the Legislative Council and on behalf of the Council, I noted in writing that, after consultation with the legal staff at Legislative Affairs, Legislative Council agreed with the legal analysis put forward by you in your capacity as attorney general. My precise response to the offer made by the Department of Law was:

“I stipulate in my role as chair of the Legislative Council and on behalf of the Council, that your interpretation of the law is correct.”

I further noted:

“Given our agreement on this important point, and given your offer on page 4 of your letter to drop your objections and allow the depositions to

proceed 'if the Legislative Council will acknowledge in writing its agreement with the Department of Law's interpretation,' I'd appreciate it if you would contact Mr. Branchflower so that depositions may proceed in a timely manner."

Mr. Barnhill, after receipt of the letter and after the Senate Judiciary Committee issued subpoenas, on the same day contacted Mr. Branchflower so that depositions from the state employees could be scheduled. I was grateful for the breakthrough

Your letter yesterday quite clearly breaks that deal. Bluntly, I feel like Charlie Brown after Lucy moved the football.

Not only was the letter of September 9 explicit in its offer, it had further strength given the public pronouncements by the governor, including:

"We would never prohibit, or be less than enthusiastic about any kind of investigation. Let's deal with the facts and you do that via an investigation;" and

"I'm happy to comply, to cooperate. I have absolutely nothing to hide. No problem with an independent investigation."

Further, staff and others speaking for the governor said: the governor will fully cooperate and her staff will cooperate also (Leighow, July 29); the governor "has directed all her staff to cooperate fully with Branchflower" (press release, August 13); Frank Bailey will fully cooperate with the investigation (McAllister, August 19); that with Frank Bailey still a state employee the governor "can direct him to assist Mr. Branchflower, thereby fulfilling her pledge to Alaskans to cooperate fully with the investigation" (Leighow, August 20); and the governor's office welcomes the inquiry and will cooperate (the governor's private attorney, September 2).

Despite your previous offer, explicitly stated and accepted, and despite repeated assertions of cooperation, you now are not allowing state employees encouraged to cooperate to do so. In four paragraphs, you've broken a deal that was accepted by your office and received by Mr. Branchflower after the Senate Judiciary Committee issued subpoenas. Further, your brand new position eviscerates weeks of comments on the record by several parties, including the governor.

I'd note, also, that while subpoenas have been requested, the only witnesses served with subpoenas are witnesses not employed by the executive branch. I understood the legislature's investigator did not feel the need to serve them following his conversation with Mr. Barnhill. A decision to not serve the subpoenas made sense given the fact it was: not necessary; and, since it was unnecessary, could give the appearance of confrontation where none was apparent.

Given the statements of cooperation by you on September 9, by the governor, and by spokespeople for the governor, it may help me to understand when and where the governor, as you note in your letter, "so strongly stated that the subpoenas issued by (the Senate Judiciary Committee) are of questionable validity." If you have so advised the governor before she made a statement I don't recall, I'd appreciate it if you could make that advice part of the public record so that we can understand the rationale behind the statement.

Sincerely,  
  
Sen. Kim Elton

cc: Legislative Council members  
Sen. Hollis French