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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'ohē Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

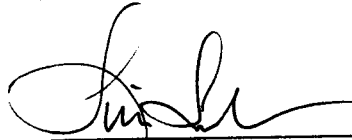
THE UNIVERSITY OF HAWAI'I AT
HILO'S MOTION TO QUASH FLORES-
CASE 'OHANA'S REQUEST FOR
SUBPOENA FOR SAMUEL LEMMO-
ADMINISTRATOR, OFFICE OF
CONSERVATION AND COASTAL
LANDS, DLNR, STATE OF HAWAI'I,
FILED JANUARY 12, 2017;
MEMORANDUM IN SUPPORT OF
MOTION; CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S
MOTION TO QUASH FLORES-CASE 'OHANA'S REQUEST FOR SUBPOENA
FOR SAMUEL LEMMO-ADMINISTRATOR, OFFICE OF CONSERVATION
AND COASTAL LANDS, DLNR, STATE OF HAWAI'I, FILED JANUARY 12, 2017**

The University of Hawai'i at Hilo (the "University"), by and through its counsel
Carlsmith Ball LLP, hereby submits its Motion to Quash the Flores-Case 'Ohana's Request for
Subpoena for Samuel Lemmo-Administrator, Office of Conservation and Coastal Lands, DLNR,
State of Hawai'i, filed January 12, 2017 ("Motion"). The University moves the Hearing Officer

for an order quashing the subpoena requested by the Flores-Case 'Ohana. This Motion is made pursuant to Hawai'i Rules of Civil Procedure Rule 45 and Hawai'i Administrative Rules ("HAR") §§ 13-1-32(c), 33, and 34, and is based on the supporting memorandum, and the record and files herein.

DATED: Honolulu, Hawai'i, January 19, 2017.



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MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On January 12, 2017, the Flores-Case 'Ohana ("**Flores-Case 'Ohana**") filed a Request for Subpoena for Samuel Lemmo-Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawai'i, filed January 12, 2017 ("**Request**") to compel Samuel Lemmo, Administrator of the Department of Land and Natural Resources' ("**DLNR**") Office of Conservation and Coastal Lands ("**OCCL**") to appear as a witness in this contested case hearing. No attempt to offer good cause is made by the Flores-Case 'Ohana for this request. The only justification to subpoena Mr. Lemmo is that the Request is "submitted in part because evidentiary discovery was not permitted in this contested case hearing."

Because the Request lacks good cause and makes no attempt to show that the testimony sought will yield relevant or material information, the University respectfully requests that the Hearing Officer issue an order quashing the Request.

II. LEGAL STANDARD

Under Hawai'i Administrative Rules ("**HAR**") § 13-1-33(a)(1), a request for issuance of a subpoena must "state the reasons why the testimony of the witness is believed to be *material*

and relevant to the issues involved.” (Emphasis added). Implicit in that requirement is that the Hearing Officer must decline to issue a subpoena where the anticipated testimony is not material or relevant to the issues involved.

As the Hawai‘i Supreme Court has made clear, “contested case hearing[s] afford . . . parties *extensive procedural protections similar to those afforded parties in a civil bench trial before a judge.*” *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 136 Haw. 376, 391, 363 P.3d 224, 239 (2015) (emphasis added). In civil trials, parties are protected from subpoenas that are “unreasonable and oppressive.” Haw. R. Civ. P. (“HRCP”) Rule 45; *Powers v. Shaw*, 1 Haw.App. 374, 376, 619 P.2d 1098, 1101 (1980) (“Rule 45(b), Hawai‘i Rules of Civil Procedure, provides that a motion to quash a *subpoena duces tecum* may be granted if it is unreasonable and oppressive.”). Under HRCP 45, a court may quash a subpoena if the requesting party fails to show that the information sought is relevant or material. *See, e.g., Bank of Hawaii v. Shaw*, 83 Haw. 50, 64, 924 P.2d 544, 558 (App. 1996) (holding that an order quashing a *subpoena duces tecum* that was not served by defendant until one day prior to start of trial on a witness who had no personal knowledge of facts of case, was not an abuse of discretion, where defendant made no offer to show how the witness’ testimony was specifically material to case). Based on the reasoning articulated in *Mauna Kea*, the protections of HRCP 45 similarly apply to contested case hearings to protect parties from “unreasonable and oppressive” subpoenas.

III. DISCUSSION

A. THE REQUEST MAKES NO ATTEMPT TO ESTABLISH THAT MR. LEMMO’S TESTIMONY IS MATERIAL AND RELEVANT

As discussed, HAR § 13-1-33(a)(1) requires a request for issuance of a subpoena to “state the reasons why the testimony of the witness is believed to be *material and relevant* to the issues

involved.” (Emphasis added). The Request here does not do that – it wholly lacks any showing of good cause for the subpoena of Mr. Lemmo. The Request—*in its entirety*—simply states:

Petitioner, E. KALANI FLORES, pro se, representing the FLORES-CASE ‘OHANA, respectfully submits this Request for a Witness Subpoena for Samuel Lemmo, Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii.

This request is also being submitted in part because evidentiary discovery was not permitted in this contested case hearing.

The Request does not bother to disclose the subject matter and scope of Mr. Lemmo’s testimony, much less explain how that testimony would be material or relevant to the proceedings. Nor does the Request allege any good cause to compel Mr. Lemmo’s testimony. Therefore, the Request is deficient on its face and should be denied. *See Bank of Hawaii*, 83 Haw. at 64, 924 P.2d at 558.

B. THE REQUEST IMPROPERLY SEEKS TO PERFORM UNPERMITTED DISCOVERY

The Request asserts that it was made “in part” because evidentiary discovery was not ordered in this case. As an initial matter, it is unclear what the phrase “in part” refers to, given the Request offers no other grounds to justify the subpoena. Moreover, whether or not evidentiary discovery is ordered in a proceeding has no bearing on whether Mr. Lemmo’s testimony would be material and relevant to the issues in this contested case proceeding. Also, the subpoena process should not be used as an end-run around the Hearing Officer’s decision not to allow discovery between the parties.

IV. CONCLUSION

For the reasons stated above, the University submits that the Flores-Case ‘Ohana has not met its burden under HAR § 13-1-33(a)(1) to show that Mr. Lemmo’s testimony is relevant and material to the issues set forth in this contested case proceeding. Therefore, the University

respectfully submits that the Hearing Officer should therefore deny the Request and grant this Motion to Quash the Request.

DATED: Honolulu, Hawai'i, January 19, 2017.



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Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

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The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

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