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Texas State Representative
22nd Legislative District

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RQ-1197-6A

April 25, 2014

The Honorable Greg Abbott
Attorney General for the State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

Dear General Abbott:

I write to request a legal opinion from the Office of the Attorney General on a matter of state-wide concern.

Factual Background

In June 2013, Texas Governor Rick Perry stated that he would veto funding for the Public Integrity Unit ("Unit") of the Travis County District Attorney's Office, if the district attorney did not resign her position. The district attorney, who holds elected office, pleaded guilty to a misdemeanor charge of drunken driving. However, she did not resign her position.

Governor Perry then used his line-item veto power to cut \$7.5 million of funding for the Unit. The Governor stated reason for cutting the funding was neither due to the ineffective or inefficient operation of the Unit or budgetary priorities brought on by a shortfall of funds elsewhere. Rather, Governor Perry's stated reason for his veto was "the person charged with ultimate responsibility for that Unit ha[d] lost the public's confidence."

The Public Integrity Unit is a state-funded division that investigates public corruption, insurance fraud, and motor fuels tax fraud state-wide. In addition, the Travis County District Attorney's Office likewise has statewide authority to enforce the government and election code. Although the Travis County Commissioners' Court subsequently provided some funding for the Unit to continue operating, the Governor's actions resulted in employee reductions within the Unit from 35 to around 22.

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There now is an investigation into whether Governor Perry's actions in threatening to use funding cuts to remove the district attorney, and then in making those cuts, violated state criminal laws. A grand jury has been empaneled by Special State District Judge Robert Richardson. In addition, a special prosecutor, Michael McCrum, has been named.

In response to the criminal investigation, Governor Perry has employed private and outside counsel. The Dallas Morning News has reported the lawyer is charging \$450 an hour. His outside counsel has already appeared at the grand jury selection, according to the Texas Tribune. According to the Governor's spokeswoman, the Governor's private counsel will "ensure the special prosecutor receives the facts in this matter."

Legal References

The criminal investigation of actions taken by a sitting governor, arguably in his official capacity, is unprecedented in the state. There is legal authority, however, suggesting who is charged with handling his representation. The constitution, in Article IV, Section 22, addresses the responsibilities of the attorney general:

The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party He shall, whenever sufficient cause exists, seek a judicial forfeiture of such [private corporation] charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

Tex. Const. art. IV, §22.

Article V, Section 21 of the constitution addresses the responsibilities of the county and district attorneys. It states, in pertinent part, the following:

The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. . . .

Tex. Const. art. V, §21.

As stated in an Attorney General opinion, "The courts have interpreted the constitution to confer upon the attorney general and the county or district attorney the exclusive authority to represent the state." Tex. Att'y Gen. Opinion No. JM-791 (1987) (emphasis added) (citing *Maud v. Terrell*, 200 S.W. 375 (Tex. 1918)). The opinion further states: "would be unconstitutional if [a statute] allowed any other attorney to represent the state, except in subordination to the attorney designated by the relevant constitutional provision." *Id.*

Moreover, in cases involving constitutional officers or simply agencies named in the constitution, the attorney general's office appears to have the stronger claim and duty to represent them and the interests of the state. For example, when the comptroller of public

accounts desired to dismiss an appeal by the state, the court acknowledged that the attorney general's authority, as the state's attorney, to direct the course of the litigation was paramount. See *Bullock v. Texas Skating Ass'n*, 583 S.W.2d 888, 894 (Tex. Civ. App. Austin 1979). Furthermore, contracts to employ outside counsel must be approved by the attorney general. See Tex. Att'y Gen. Opinion LO-96-124 (1996) (holding that "the General Land Office, with the approval of the attorney general acting under his constitutional power to exercise control of all litigation in which the state is an interested party, may enter into contracts with private law firms for the provision of legal services."); cf. Tex. Att'y Gen. Opinion No. GA-848 at n.2 (citing Tex. Gov't Code Ann. §402.0212(a), for the attorney general's authority to approve "any contract [by the State Board of Education] to utilize outside counsel.").

As for payment of attorney's fees in a criminal action, Chapter 104 of the Civil Practice and Remedies Code addresses, inter alia, state liability with regard to criminal actions. It sets forth when an employee or officer of a "state agency" shall be indemnified for reasonable attorney's fees in defense of a criminal prosecution. See Tex. Civ. Prac. & Rem. Code Ann. §104.001 - .002, and -.0035. Notably, that chapter clearly states, "The attorney general shall defend a public servant or estate listed in Section 104.001 in a cause of action covered by this chapter." *Id.* at §104.004.

Finally, with regard to any potential conflict of interest issues, the attorney general's office already found the legislature can enact statutes that result in placing the attorney general on different sides of the same litigation. See Tex. Atty' Gen. Opinion No. JM-28 (1983). In such instances, an assistant attorney general can be assigned to each side, or outside counsel with general supervision from the attorney general can be utilized. *Id.* An attorney general's opinion has noted, "[W]hile the attorney general defends an individual for actions undertaken within the scope of his state office or employment, he may at the same time sue that person . . ." *Id.*; cf. Tex. Civ. Prac. & Rem. Code Ann. §104.004(c) (stating, "It is not a conflict of interest for the attorney general to defend a person under this chapter and also to prosecute a legal action against that person . . . if different assistant attorneys general are assigned the responsibility for each action.").

Questions

With the above-referenced factual background for context, and the legal references as points of information, I hereby request an opinion from you. In the event the ongoing events or revelations lead the Governor to withdraw his intention to use taxpayer money to fund his criminal defense, the issues involved in this request remain of paramount importance and I would respectfully request a formal opinion without regard to the Governor's declared intentions on the following issues:

1. Does the constitution require that only the attorney general, a county attorney, or a district attorney, and not outside counsel without express consent from one of the aforementioned officials, is authorized to represent a constitutional officer, like the governor, as a defendant in a criminal matter arising out of actions taken in an official capacity?
2. Does the constitution, Civil Practice and Remedies Code chapter 104, any other statutory provisions, or the common law require that only the attorney general defend a

constitutional officer, like the governor, in a criminal matter arising out of actions taken in an official capacity that intentionally affect a governmental unit with state-wide authority?¹

3. If the attorney general, or a county or district attorney, is required to defend the governor in a criminal action, under what authority can the governor decline such representation and engage outside counsel to make all strategic and legal decisions on behalf of the state?
4. Is a constitutional officer, like the governor, an employee or officer of a "state agency" under Civil Practice and Remedies Code Section 104.001, such that Section 104.0035 applies, which addresses indemnification for reasonable attorney's fees in defense of a criminal action, after the case has concluded, applies?
5. If the attorney general has a duty to defend the governor in a criminal action arising out of actions taken in the governor's official capacity, and the prosecutor requests the attorney general's assistance, can the attorney general's office both defend the governor and assist in prosecuting him?
6. Under what constitutional or statutory authority is the Office of the Attorney General authorized to either obligate or expend taxpayer funds in defense of a criminal matter for a constitutional officer of the executive branch, and prior to resolution of the matter?
7. If any actions by a governor that may constitute criminal offenses—such as bribery, official oppression, or coercion—are found to have been taken beyond his official capacity, under what authority, if any, can the attorney general indemnify attorney's fees incurred defending those actions?
8. If any actions by a governor that may constitute criminal offenses —such as bribery, official oppression, or coercion—come under investigation by a grand jury or other such investigatory authority and appear to not have been taken in an official capacity, under what authority, if any, can the attorney general authorize hiring private counsel for the governor? If authority to hire private counsel exist, how would the Attorney General authorize payment for such private counsel?

Given the significant and immediate importance of this matter, I ask that you give this request the highest priority. If you have any questions, please feel free to contact me.

Sincerely,



Joseph D. Deshotel
State Representative
22nd Legislative District

¹ Compare Tex. Civ. Prac. & Rem. Code. Ann. §104.004 with Tex. Loc. Gov't Code Ann. §157.901(c) (stating, "A county official or employee is not required to accept the legal counsel in this section.")