STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

May 26, 2016

Opinion No. 16-20

Authority of the Tennessee Attorney General to Conduct an Investigation of a Member of the Tennessee General Assembly

Question 1

What constitutional, statutory or other authority exists to authorize the Attorney General of the State of Tennessee to conduct an investigation of a member of the Tennessee General Assembly? To the extent that no express delegation of investigative authority exists, what precedent exists to support the existence of such authority? To the extent that such authority exists, what is the scope of such investigative authority?

Opinion 1

Article II, section 12, of the Tennessee Constitution gives each House of the General Assembly the power to "determine the rules of its proceedings" and to "punish its members for disorderly behavior." The investigation that gives rise to Question 1 was expressly authorized by resolution of a committee of the Tennessee House of Representatives pursuant to article II, section 12. The resolution narrowly defines the scope of the investigation and specifies that the authorization to investigate may be modified or revoked at the discretion of the committee.

Question 2

What authority exists to authorize the Attorney General of the State of Tennessee to investigate alleged ethical violations by a member of the Tennessee General Assembly?

Opinion 2

See Opinion 1.

Question 3

If the Attorney General of the State of Tennessee engages in an investigation of a member of the Tennessee General Assembly at the request of one or more members of the Tennessee General Assembly, do all members of the Tennessee General Assembly have a right to obtain copies of any investigative updates or reports?

Opinion 3

Whether all members of the Tennessee General Assembly have a right to obtain copies of "any investigative updates or reports" is an internal matter to be determined by the legislature as part of the rules of its proceedings.

Question 4

If it is believed that the Attorney General of the State of Tennessee has engaged in unethical, *ultra vires*, or other inappropriate conduct, who has the standing and legal authority to investigate the Attorney General of the State of Tennessee or his staff?

Opinion 4

The committee has full discretion to revoke the authority vested in the Office of the Attorney General at any time. Thus, if it is believed that the Attorney General has acted outside the scope of that authority, the committee may revoke the authority.

ANALYSIS

It is a matter of public knowledge that these questions have been asked in the context of an investigation into allegations of disorderly and inappropriate behavior on the part of Representative Jeremy Durham.[1] The Attorney General was appointed and designated to conduct the investigation by a Resolution (copy attached), adopted on February 8, 2016, by the Article II, Section 12 Ad Hoc Select Committee of the Tennessee House of Representatives. Thus, the Office of the Attorney General is currently conducting that investigation pursuant to an express authorization from the Tennessee House of Representatives.

Article II, section 12, of the Tennessee Constitution gives each House of the General Assembly the power to "determine the rules of its proceedings" and to "punish its members for disorderly behavior." Pursuant to article II, section 12, of the Tennessee Constitution and the statutory provisions cited in the Resolution, the House of Representatives specifically authorized the Attorney General to conduct the Durham investigation. The authorization is explicitly subject to amendment and even revocation at any time at the discretion of the House Select Committee.

The terms, conditions, and scope of that authorization are delineated in the Resolution. Since the Committee has the right to revoke the authorization at any time in its discretion, it follows that, if it is believed that the Attorney General has acted outside the scope of the authority vested in the Attorney General, the Committee has the standing and power to revoke the authority.

The Resolution requires that the Attorney General report the findings of the investigation to the Select Committee at the conclusion of the investigation. Whether all members of the Tennessee General Assembly have a right to obtain copies of "any investigative updates or reports"

[1] *See, e.g.*, "Durham probe is a 'witch hunt,'" *The Tennessean*, Sunday, May 22, 2016, p. 6A ("On Tuesday, Rep. Rick Womick, R-Rockvale, sent a letter to Attorney General Herbert Slatery's office asking for an 'immediate opinion' on what authority Slatery has to investigate Durham, R-Franklin.")

is purely an internal matter to be determined by the legislature as part of the rules of its proceedings.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

Requested by:

The Honorable Rick Womick
State Representative
G29 War Memorial Building
Nashville, Tennessee 37243-0134

Attachment:

Resolution adopted by the Article II, Section 12 Ad Hoc Select Committee of the Tennessee House of Representatives on February 8, 2016.

ARTICLE II, SECTION 12 AD HOC SELECT COMMITTEE
HOUSE OF REPRESENTATIVES
109th GENERAL ASSEMBLY

A RESOLUTION to authorize the Article II, Section 12 Ad Hoc Select Committee to designate the Attorney General and Reporter as counsel and investigator for the Committee to investigate and to advise the Committee with respect to allegations of disorderly and inappropriate behavior and misconduct by Jeremy Durham, Representative for House District 65, acting pursuant to Article II, Section 12 of the Tennessee Constitution and Tennessee Code Annotated, Title 3, Chapters 3 and 4.

WHEREAS, Jeremy Durham is the duly elected Representative for House District 65; and

WHEREAS, there have been a number of allegations of disorderly and inappropriate behavior concerning Representative Durham; and

WHEREAS, Tennessee Code Annotated § 3-4-102(d) provides that any standing committee or select committee of the General Assembly investigating any manner of state business shall have the powers granted to investigating committees in Title 3, Chapter 3; and

WHEREAS, Tennessee Code Annotated § 3-4-101 further provides that any standing committee or select committee of the General Assembly shall have the power to issue subpoenas, including subpoenas duces tecum, and to enforce the attendance of witnesses and the production of records, documents, papers, or other items of evidence, and that the provisions of Tennessee Code Annotated §§ 3-3-108 - 3-3-121 are applicable to the exercise of such power; and

WHEREAS, pursuant to Tennessee Code Annotated § 3-4-102(d), the Article II, Section 12 Ad Hoc Select Committee is authorized to employ or designate any necessary or proper legal counsel and investigators to attend upon the work of the

Committee and provide the Committee the necessary and proper aid and assistance in the performance of its duties, as ordered and directed by the Committee; and

WHEREAS, the Committee has determined that it is necessary and appropriate to conduct an investigation of the allegations of disorderly and inappropriate behavior and misconduct by Representative Durham; and

WHEREAS, the Committee has determined that it is necessary and proper to obtain legal counsel and investigators to provide necessary and proper aid and assistance to the Committee in the conduct of such an investigation; and

WHEREAS, the Committee has determined that the Office of the Attorney General and Reporter for the State of Tennessee has the requisite knowledge, skills, and expertise to provide the necessary aid and assistance to the Committee; and

WHEREAS, the Committee has determined that the Attorney General, and such other attorneys within his Office and any additional staff as determined by the Attorney General, should be designated for the purpose of investigating the allegations of disorderly and inappropriate behavior and misconduct by Representative Durham; and

WHEREAS, upon conclusion of the investigation, the Attorney General shall prepare a report of the findings of the investigation to the Article II, Section 12 Ad Hoc Select Committee; now therefore,

BE IT RESOLVED BY THE ARTICLE II, SECTION 12 AD HOC SELECT COMMITTEE OF THE HOUSE OF REPRESENTATIVES, that the Committee appoints and designates the Attorney General and Reporter of the State of Tennessee, and such other attorneys within the Office of the Attorney General and Reporter and any additional staff as determined by the Attorney General, to conduct a full, fair, and thorough investigation of the allegations of disorderly and inappropriate behavior and misconduct by Representative Durham; that the power to issue subpoenas, including subpoenas duces tecum, to enforce the attendance of witnesses and the production of any records,

documents, papers, or other items of evidence as set forth in Tennessee Code Annotated §§ 3-3-108 - 3-3-121 is necessary to conduct a full, fair, and thorough investigation; and that upon conclusion of the investigation, the Attorney General shall prepare a report of the findings of the investigation to the Article II, Section 12 Ad Hoc Select Committee. The Committee reserves the right to amend, or even revoke, the authority granted herein at its discretion.

ADOPTED: February 8, 2016

Representative Steve McDaniel, Chair