



## GEORGIA DEPARTMENT OF LAW

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### OFFICIAL OPINION

John Fervier  
Chairman  
State Election Board  
2 Martin Luther King, Jr. Drive  
Suite 802, Floyd West Tower  
Atlanta, Georgia 30334

Re: The Attorney General serves as the sole legal counsel to the Executive Branch of state government, does not have a legal conflict in doing so and further is not required to engage other counsel at the direction of a client. The State Election Board is not empowered to direct the Attorney General to conduct an investigation under Title 21 whether on his own or through outside investigators. The Election Code does not empower the Attorney General to act on his own as an investigator beyond the limited context of a referral of a case to the Attorney General for potential criminal prosecution as referenced in O.C.G.A. § 21-2-31(5).

Dear Chairman Fervier:

While this Office has not received a written request, we have become aware of requests directed to this Office by action of the State Election Board ("SEB") at its meeting held on August 7, 2024. This opinion is written to officially address the law related to two of those requests.<sup>1</sup>

First, the action of the SEB made certain requests related to this Office and the engagement of outside counsel. The SEB directed this Office "to seek advice of conflicts counsel to determine who should represent the State Election Board in investigating this matter."<sup>2</sup> The SEB further directed that this Office provide a report regarding such advice and report to the SEB such that the SEB "may hire outside legal counsel and investigators."

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<sup>1</sup> Some of the Issues raised by the SEB's action arise with some frequency and necessitate an official opinion.

<sup>2</sup> The "matter" is an administrative case involving a particular Georgia county that has been the subject of prior SEB action in the form of a public reprimand under O.C.G.A. § 21-2-33.1(a)(3).

The authority to determine whether to engage and to engage outside counsel rests exclusively with the Attorney General. This Office is not required to engage outside counsel at the direction of a client. Nor is a client of this Office entitled to engage legal counsel on its own without the express approval of the Attorney General.

Under the Georgia Constitution:

*“The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.”*

Ga. Const. Art. V, § III, Para. IV (emphasis added). Thus, the Attorney General acts as the sole legal advisor of the Executive Branch of state government. Statutes support this as well. O.C.G.A. § 45-15-30 creates the Department of Law “with the Attorney General at the head thereof.” O.C.G.A. § 45-15-34 provides that:

*The Department of Law is vested with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government and every department, office, institution, commission, committee, board, and other agency thereof. Every department, office, institution, commission, committee, board, and other agency of the state government is prohibited from employing counsel in any manner whatsoever unless otherwise specifically authorized by law.*

(emphasis added). Because the Constitution and statutes provide for a single legal representative for the Executive Branch, the Attorney General alone is statutorily vested with the power to select and engage private counsel to provide legal services for entities of the Executive Branch of state government. O.C.G.A. § 45-15-4. O.C.G.A. § 45-15-34 expressly prohibits the employment of legal counsel otherwise. See 1995 Op. Att’y Gen. 95-1 (Recognizing the lack of attorney-client privilege between persons with legal training employed by agencies and their employing agencies).

Related to the action of the SEB, there appears to be a concern that the Attorney General has a conflict of some sort simply as the result of providing representation to the Secretary of State and the State Election Board. As discussed above, the Attorney General serves as the exclusive legal advisor to the Executive Branch of state government and in such capacity represents the entities of the Executive Branch. As discussed in a 1976 Opinion of the Attorney General declining to appoint legal counsel for one agency to bring an action against another agency, “the Law Department acts as legal advisor for the entire Executive Branch of the State Government” and “a proper role of the Law Department is to advise units of the Executive Branch whose interests may be in conflict as to proper statutory interpretations as they affect their legal rights....” 1976 Op. Att’y Gen. 76-93. Thus, the Georgia Constitution and statutes contemplate an executive branch that is represented by a single legal counsel, the Attorney General.<sup>3</sup> The Attorney General does not have a conflict by carrying out the representation of the Executive Branch as directed by the Constitution and statutes of this State.

Second, the action of the SEB directed the Attorney General to investigate certain matters related to the conduct of the 2020 election in a Georgia county and to conduct such investigation with outside investigators.

The authority to investigate potential violations of the election laws rests with the SEB and not with the Attorney General. This Office is not required to conduct an investigation on its own or with outside personnel at the direction of a client agency.

Among the express duties of the State Election Board is the duty:

*[t]o investigate, or authorize the Secretary of State to investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution.*

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<sup>3</sup> The Governor has the power to appoint counsel to represent the State and state officials in defense of certain matters where the Attorney General does not provide representation. See *i.e.* O.C.G.A. § 45-15-70.

O.C.G.A. § 21-2-31(5) (emphasis added). Thus, the duty to investigate is vested in the SEB or it may authorize the Secretary of State to investigate. There is no grant of authority to the SEB to direct the Attorney General to investigate. Nor does the Election Code empower the Attorney General to act on his own as an investigator beyond the limited context of a referral of a case to the Attorney General for potential criminal prosecution as referenced in O.C.G.A. § 21-2-31(5).<sup>4</sup>

The SEB's powers are defined by statute. In Georgia, agencies of the State like the SEB have only such powers as they are expressly granted in the law and those that are necessarily implied from the powers that are expressly granted. *Bentley v. Board of Medical Examiners*, 152 Ga. 836, 838 (1922).<sup>5</sup> As noted above, the power to investigate rests with the State Election Board itself or the State Election board can authorize the Secretary of State to investigate.

In light of the foregoing, it is my official opinion that the Attorney General serves as the sole legal counsel to the Executive Branch of state government, does not have a legal conflict in doing so and further is not required to engage other counsel at the direction of a client. The State Election Board is not empowered to direct the Attorney General to conduct an investigation under Title 21 whether on his own or through outside investigators. The Election Code does not empower the Attorney General to act on his own as an investigator beyond the limited context of a referral of a case to the Attorney General for potential criminal prosecution as referenced in O.C.G.A. § 21-2-31(5).

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<sup>4</sup> There are a number of statutes that grant to the Attorney General the power to employ peace officers for the purpose of conducting particular criminal investigations. See *i.e.* O.C.G.A. §§ 16-5-46, 16-15-4, 45-15-17 & 49-4-146.1. There is no such grant of power to the Attorney General related to the Election Code.

<sup>5</sup> O.C.G.A. § 45-15-18 is an example of an express statutory grant of the authority to direct the Attorney General to conduct an investigation into certain matters.

John Fervier  
Chairman  
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CHRISTOPHER M. CARR  
Attorney General

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