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December 20, 2017

Honorable Troy Heinert
State Senator
500 E. Capitol Ave.
Pierre, SD 57501

OFFICIAL OPINION NO. 17-06

Re: **The Subpoena Authority of the State-Tribal Relations Committee of the Legislature**

Dear Senator Heinert:

In your role as State Senator and Chairman of the State Tribal Relations Committee, you have requested an Official Opinion from the Office of Attorney General based on the following questions:

QUESTIONS:

1. Does the State-Tribal Relations Committee, established pursuant to SDCL 2-6-20 et. seq., possess subpoena power?
2. Is the State-Tribal Relations Committee a statutory committee or an interim committee?

ANSWER:

1. The State-Tribal Relations Committee is a statutory committee without authority to issue subpoenas absent further action from the Legislature.
2. Based on the analysis below, the answer to question two is part and parcel of question one.

FACTS:

The State-Tribal Relations Committee met on October 23, 2017. During that meeting, a motion was made to issue subpoenas for various individuals. As Chairman, you ruled that motion out-of-order because you believed the State-Tribal Committee was without statutory authority to issue the subpoenas. In order to clarify this issue, you requested this Official Opinion.

IN RE QUESTION 1:

In order for the Legislature to effectively legislate, it must have the ability to obtain information regarding the intended effects or possible outcomes of proposed legislation or gather information in furtherance of other constitutional obligations. To this end, courts have generally recognized that a legislative body is inherently “vested with all investigative power necessary to exercise its function properly.” *Chesek v. Jones*, 959 A.2d 795, 802-03 (Md. 2008); *see also Matter of Shain*, 457 A.2d 828, 831 (N.J. 1983) (investigative power of legislature has long been recognized); *Morss v. Forbes*, 132 A.2d 1, 8 (N.J. 1957) (legislature’s ability to investigate consistently espoused). In meeting its obligations, it may become necessary for the Legislature to summon and examine witnesses, or require the production of books, records, and papers by compelled process. *Chesek*, 959 A.2d at 803. As a means of effecting these productions, the Legislature may issue subpoenas to the custodians of such records who may then be subject to contempt or criminal charges for non-compliance. *Shain*, 457 A.2d at 832; SDCL 2-4-14 and 2-4-15; SDCL 2-6-5 and 2-6-6.

Committees may be created to aid in the legislative function. As such, committees may be delegated “some portion of the investigatory power which the Legislature enjoys as a whole.” *Morss*, 132 A.2d at 8. The committee, however, may not act on mere “whims and caprices” of its members. *Id.* The extent of a committee’s investigative power is limited by “the act or resolution to which it owes its existence.” *Id.* (citation omitted). Because a committee’s power may be limited, the ability of a committee to compel the attendance of witnesses or the production of documents must either be explicitly stated in the act or resolution creating that committee, or the power must be fairly implied as necessary to carry out the committee’s directive. *Shain*, A.2d 828 at 832; AGO 76-11, 1976WL352056.

This limitation on committee authority is reflected in the statutory means to compel attendance. For instance, SDCL 2-6-5 provides the punishment of a Class 2 misdemeanor for any person who, without lawful excuse, fails to comply with a summons to appear “before either house of the Legislature or *any committee thereof authorized to summon or subpoena witnesses.*” (emphasis added). The statute assumes the inherent authority of either house to compel

production. At the same time, the statute recognizes that a “committee thereof” must be “authorized” to summon or subpoena witnesses. *See also* SDCL 2-6-6 (using similar language). Accordingly, in order to determine whether a committee possesses the authority to compel the attendance of witness or the production of documents, the grant of authority creating that committee must be examined.

Committees may be created directly by legislative act. If these committees are codified in state statute, they become known as “statutory committees.” Other committees may be of limited duration and thus not subject to codification. For example, the Legislature created the Governmental Accountability Task Force by passage of Senate Bill 171, 92nd Session, 2017. By the terms of the Bill, the Act creating the Task Force will be repealed on December 31, 2017. Because the Act creating the committee will be repealed prior the next legislative session, its existence will not be codified and therefore it will not be considered a statutory committee. Conversely, the South Dakota Retirement Laws Committee - a statutory committee codified in SDCL 2-6-8 et seq. - will continue until the Legislature repeals the statutory authority for its existence. In either case, however, the authority of a committee created directly by the Legislature will be limited by terms of the legislative act creating that committee.

The Legislature may also grant, to another body, the authority to create committees. The Legislature, through the passage of SDCL 2-9-2 et seq., created the Executive Board of the Legislative Research Counsel (Executive Board). The Executive Board was granted authority to appoint and name committees to aid in the legislative function. SDCL 2-9-4(6). In order to meet its statutory obligations, the Legislature specifically delegated to the Executive Board, and the committees duly appointed thereunder, certain investigative powers including the ability to issue subpoenas. SDCL 2-9-6.

The Executive Board, in furtherance of its statutory duties, was also given authority to make its own rules and regulations. These rules implemented by the Executive Board now appear in a document entitled “Interim Committee Rules.” SDCL 2-9-5. A board, however, is limited in its authority by the parameters given in state law. *O’Toole v. Bd. of Trustees of S. Dakota Ret. Sys.*, 2002 S.D. 77, ¶ 15, 648 N.W.2d 342, 346. The committees created by the Executive Board are likewise limited in purpose and scope to the grant of authority issued by the Executive Board. Accordingly, an Executive Board committee may only exercise the power granted to it by an official act of the Executive Board and in conformance with the Interim Committee Rules. The authority of a committee created by the Executive Board will be governed by the Interim Committee rules and as further limited by the motion or resolution creating that committee.

The State-Tribal Relations Committee is a statutory committee established by SDCL 2-6-20 et seq. The State-Tribal Relations Committee was not established by the Executive Board and may not, therefore, utilize the Executive Board's subpoena powers granted by statute or as provided in the Interim Committee Rules. As outlined above, the Interim Committee Rules only apply to committees established by the Executive Board. Rather than granting additional authority, the State-Tribal Relations Committee's designation as an "Interim Committee" simply means that the committee meets in the interval between regular legislative sessions. No additional power is granted to the committee by this designation and the committee's authority to act remains constrained by statute.

In comparing grants of statutory authority, the Government Operations and Audit Committee is clearly provided investigative ability. This authority specifically includes the ability to "summon witnesses." SDCL 2-6-4. In contrast, the State-Tribal Relations Committee was not so empowered. Had the Legislature intended to give the State-Tribal Relations Committee similar authority to summon witnesses or secure documentation through compulsory process, it could have. *State v. Young*, 2001 S.D. 76, ¶12, 630 N.W.2d 85, 89 (The Legislature "knows how to exempt or include items in its statutes"). The Legislature did not, but it certainly can, if it is so inclined.

Furthermore, a review of the statutes governing the State-Tribal Relations Committee itself indicate that it was established primarily as a forum for the "discussion of issues of mutual concern to the state and the tribes" rather than as an investigative body. See SDCL 2-6-23. It cannot, therefore, be fairly implied from the State-Tribal Relations Committee's statutory authority that subpoena power is necessary to carry out the committee's function.

CONCLUSION:

State-Tribal Relations Committee is a statutory committee granted only the authority provided to it by statute. It does not currently possess the power to summon or subpoena witnesses absent further action by the Legislature.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/RMW