

June 8, 2023

Rep. Dade Phelan
Rep. Andrew Murr
Rep. Ann Johnson
Rusty Hardin
Dick DeGuerin

via email and certified mail

Re: Cease and Desist Improper Contact with Potential Witnesses

Representatives and Counsel:

It has come to our attention that you and your agents have been contacting potential witnesses, including employees of the Office of the Attorney General, regarding the House’s meritless impeachment of Attorney General Ken Paxton. Presumably this is an after-the-fact attempt to gather facts to support your sham investigation, which has made a mockery of all Texans who believe in justice and the constitution. But whatever the reason for your refusal to conduct your investigation in public, it must stop.

When the House debased itself and stained Texas’s history by voting to impeach the third-term Attorney General mere months after his overwhelming electoral victory, all jurisdiction over this matter was transferred to the Texas Senate. Tex. Const. art. XV, § 2. Never before in Texas history has a House attempted to continue its impeachment investigation—much less in secret—after it approved articles and delivered them to the Senate. Indeed, once the House presented its articles, it lost all the powers that have been conferred on it to conduct impeachment proceedings. *See* Tex. Gov’t Code § 665.005 (providing for broad investigative powers by House only “[w]hen conducting an impeaching proceeding”); *id.* § 665.001 (defining “impeachment proceedings”).

You have no authority to request documents, approach witnesses, or do *anything else* regarding this matter until the Senate establishes the rules for this proceeding. *See* Tex. Gov’t Code § 665.024. Indeed, as you are well aware, any action that you undertake without express legal authority could potentially subject you to liability. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (subjecting lawless public officials to lawsuits in order to “reassert the control of the state” when those officers “act[] without legal authority”).

To the extent that you are relying on the Public Information Act in obtaining information from any public agency or employee, you have two choices. First, you can submit requests in your individual capacity. If you choose to submit requests in this manner, you are acting in your capacity as an ordinary citizen, and you have no right to obtain confidential or privileged information. *See, e.g., Tex. Gov’t Code § 552.101 et seq.* Second, you can submit requests in your legislative capacity. Tex. Gov’t Code § 552.008. But you can only use such information for “legislative purposes,” *id.* § 552.008(a)—not for purposes of exercising any judicial power such as impeachment, *Ferguson v. Maddox*, 263 S.W. 888, 890 (Tex. 1924) (describing the impeachment powers of the House as “judicial in character”)—and any production of such information “does not waive or affect the confidentiality of the information” and may be subject to additional confidentiality requirements, *id.* § 552.008(b).

Furthermore, while Attorney General Paxton may be temporarily suspended from office, he remains the duly elected constitutional officer. The Office of the Attorney General is a statutory creation that solely exists to assist the Attorney General in the discharge of his constitutional duties. Tex. Gov't Code § 402.001 *et seq.* The constitution does not discuss the Office of the Attorney General at all. *See* Tex. Const. art. IV, § 22. While it is true that Attorney General Paxton is suspended from “exercising the duties of [his] office,” he has not been removed from office, and the Governor’s provisionally appointed temporary officer is just that—temporary. Tex. Const. art. XV, § 5. Accordingly, to the extent that you seek to obtain any purported waiver of any privilege or protections from the Office of the Attorney General in order to speak with its employees or obtain its documents, know that the Office has no authority whatsoever to waive any privilege that attaches to the duly elected constitutional officer, including attorney-client, work product, and executive privileges.

In light of the foregoing, there can be no doubt that your efforts to have *ex parte* contact with witnesses are wholly improper. Your clandestine fact-gathering without the opportunity for the Attorney General’s participation means that the Senate’s rules and process are being undermined before they have even been written. And as you know, Texas law provides strong protections to witnesses from wrongdoers who seek to meddle in judicial processes. *See, e.g.*, Tex. Penal Code § 36.04 (Improper Influence); *id.* § 36.05 (Tampering with Witness); *id.* § 36.06 (Obstruction or Retaliation).

But let us be direct. Despite your public statements to the contrary, you know that your investigation and impeachment were concocted behind closed doors and without any public scrutiny, due process, or presentation of evidence that would in any way detract from your Machiavellian political objective. You have chosen to wield the awesome power of impeachment—and you purport to override the will of the voters—by means of a process that is repugnant to the principles of justice and fairness and that makes an anti-democratic mockery of our State.

Even as you hide behind these cowardly tactics, you are repeatedly claiming to the public that you believe in a transparent process that affords the Attorney General an opportunity to defend himself.

Prove it.

Regards,

/s/ Christopher D. Hilton

Judd E. Stone II

Christopher D. Hilton

STONE | HILTON PLLC

judd.e.stone@proton.me

christopher.d.hilton@proton.me

Counsel for the Attorney General

CC: Tony Buzbee
Dan Cogdell
Forrest Brumbaugh
Austin Kinghorn

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