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May 4, 2015
Via Hand Delivery

The Honorable Ken Paxton
Attorney General of Texas
300 W. 15th Street
Austin, Texas 78701

Re: RQ-0020-KP

Dear General Paxton:

Please accept the following as the brief of The University of Texas System (U.T. System) in regard to the questions posed in a request ("request") for an opinion from attorney Bill Aleshire. The request is identified by your office as RQ-0020-KP. In regard to the questions presented in the request, this brief represents the position of the Chancellor of The University of Texas System and the position of the Board of Regents of The University of Texas System as evidenced by a unanimous vote of the Board this day, with Regent Hall abstaining.

The request presents two questions:

1. Does the University of Texas System Board of Regents have authority to prohibit, by rule or otherwise, a regent from obtaining access to and copies of records in the possession of the University that the regent believes are necessary to review to fulfill his duties as a regent?

2. Regardless of whether UT System Board of Regents' Rule 10801(5.4.5) is legally enforceable, after a Board meeting pursuant to that Rule in which two or more regents approved the regent's records request, does the Chancellor have authority to prohibit the regent from having access to or obtaining copies of records that the regent believes are necessary to review to fulfill his duties as a regent?

In response to the request, we respectfully suggest that the Attorney General consider the following, which are further argued, with authorities, in this brief:

A. The request is not properly presented for formal advice from the Attorney General. An individual Regent is not authorized to seek an opinion of the Attorney

General in his official capacity without the consent of the Board, nor may an individual Regent be represented in his official capacity by private counsel. In addition, the Attorney General generally declines fact-finding and answering hypothetical questions, both of which would be required in answering the questions presented.

B. The Regents' Rules may reasonably regulate a Regent's access to records. An individual Regent's right to information is not "unfettered," but rather is subject to limitations, including limitations relating to privacy interests.

C. Question No. 2 presupposes a factual premise and is fact-dependent, but as chief executive of the U. T. System, the Chancellor has the authority to enforce the law and Regents' Rules and policy, including law, rules, and policy limiting a Regent's access to information.

A. The request is not properly presented for formal advice from the Attorney General.

1. An individual Regent is not authorized to seek an opinion of the Attorney General in his official capacity without the consent of the Board.

The Attorney General has previously determined that a request for an opinion from a single member of a multi-member board "should reflect that *the board* desires the opinion."[1] (Emphasis added.) This is further recognized in the Attorney General's opinion request procedures: it has long been the policy of the Attorney General's office to accept requests submitted by the secretary, the executive director, or the executive secretary of a board on behalf of the particular board, but the request should reflect that the board desires the opinion.[2]

The bulk of Mr. Aleshire's arguments are based on comparisons to the powers and duties of a corporate director. Accordingly, we note that the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* (1994, database updated 2015) (hereafter *Principles of Corporate Governance*) takes the position that the authority of a director to obtain outside counsel is dependent on the board, acting as a body by majority vote, authorizing the outside counsel.[3] As explained in the comment:

> Normally, these directors should look to general counsel, corporate staff, or regular outside counsel for such assistance, but in some cases it may be necessary to look to others. Under the provisions of § 3.04, these directors would be entitled, *acting as a body*, to retain experts to advise them on problems arising in the exercise of their functions and powers, at the corporation's expense, if (a) payment of such expense is authorized by the full board or (b) the board, following a request, declined to authorize the payment of such expense, and the relevant directors reasonably believed that retention of an outside expert was required for the proper performance of their functions and powers, that the amount involved was reasonable in relation to both the importance of the problem and the corporation's assets and income, and that assistance by general counsel, corporate staff, or regular outside counsel was inappropriate or inadequate.[4] (Emphasis added.)

[1] Opinion No. JM-149 (1984).
[2] See Opinion Request Procedures published in the Digest of Opinions of the Attorney General of Texas (1970-1981).
[3] *Principles of Corporate Governance,* Section 3.04.
[4] *Principles of Corporate Governance,* Section 3.04, Comment c: Rationale and operation.

Beyond this general rule, state law was not intended to authorize a single Regent to request and receive an opinion of the Attorney General. Despite the seemingly plain wording of Section 402.042(b), Government Code ("An opinion may be requested by: ...(6) a regent or trustee of a state educational institution;..."), nothing in the legislative history suggests that the legislature intended the statute to authorize an individual Regent to seek an opinion independent of the Board of which the Regent is a member. Prior to 1987, Article 4399, Vernon's Texas Civil Statutes, provided that an opinion may be requested by "the heads and boards" of various institutions, including "(6) regents and trustees of State educational institutions." In 1987, Article 4399 was codified in its current form as part of the enactment of Title 4, Government Code, a nonsubstantive recodification that carried this statement: "Legislative Intent. This Act is enacted pursuant to Article III, Section 43, of the Texas Constitution. This Act is intended as a recodification only, and no substantive change in law is intended by this Act."[5]

In other words, despite the apparent authority of "a regent" to request and receive an opinion of the Attorney General, the legislature intended the "regents" to have that authority, and the statement of the Attorney General in JM-149 remains valid: such a request "should reflect that the board desires the opinion." In this case, the Board of Regents of The University of Texas System has not sought the opinion of the Attorney General on the questions presented, and neither the Board nor the Chancellor were informed that an opinion would be sought.

2. An individual Regent may not be represented in the Regent's official capacity by private counsel.

State law has long regulated the persons to whom the Attorney General may provide formal written opinions. Section 402.042, Government Code, provides an exclusive list of persons to whom the Attorney General has a *duty* to issue opinions ("...the attorney general *shall* issue a written opinion...") (emphasis added), and Section 402.045, Government Code, prohibits the Attorney General from giving either legal advice or a written opinion to other persons.

This request is submitted by a private attorney, Bill Aleshire, on the representation that a client of his firm, Regent Wallace Hall, is the person requesting the opinion. While a request made by an attorney on behalf of a client may not technically comply with the statute, we do not question the representations of Mr. Aleshire. However, we do question whether a private attorney may present for formal opinion a question asked by a state officer in his official capacity.

Just as state law expressly limits the authority of the Attorney General in regard to whom the Attorney General may offer legal advice or issue a written opinion, state law expressly limits who may represent a state officer in his official capacity. Section 402.0212, Government Code, effectively requires that legal services for a state officer be provided by either a full-time employee of the agency or by the Attorney General, who has sole authority to approve any contracts for outside counsel.[6] Neither the Board of Regents, nor the General Counsel to the Board of Regents,[7] nor the

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[5] Section 7, Chapter 147, Acts of the 70th Legislature, Regular Session, 1987.

[6] "(a) Except as authorized by other law, a contract for legal services between an attorney, other than a full-time employee of the agency, and a state agency in the executive department, other than an agency established by the Texas Constitution, must be approved by the attorney general to be valid. The attorney general shall provide legal services for a state agency for which the attorney general determines those legal services are appropriate and for which the attorney general denies approval for a contract for those services under this subsection."

[7] Regents' Rule 10201: "The General Counsel to the Board of Regents is the principal officer to the Board in the administration of the responsibilities of the Office of the Board of Regents and the principal staff officer to each member of the Board of Regents in the discharge of his or her responsibilities."

Attorney General approved Mr. Aleshire to represent Regent Hall in his official capacity, and it is only in his official capacity that Regent Hall may seek an opinion of the Attorney General.

3. The Attorney General declines fact-finding and answering hypothetical questions.

Although Mr. Aleshire purports to describe the factual context for his questions, the answer to both questions is largely fact-dependent, and questions of fact cannot be resolved in the opinions process.[8] In addition, Question No. 2 presumes that two or more Regents approved a request and that the Chancellor refused to comply with that action, both of which are questions of fact.

In Opinion No. GA-334 (2005), cited by Mr. Aleshire, the Attorney General was asked whether a board member may be excluded from an executive session. In background, the requestor stated that the board had called an executive session and that a board member affected by the subject of the executive session intended to attend. Based on knowledge that the board member in fact did not attend, the Attorney General determined that the question was rendered hypothetical and declined to answer the question. Although acknowledging that the question "raises important policy issues concerning the powers and duties of elected and appointed board members," the Attorney General determined that the issues "cannot be satisfactorily addressed in the context of the district's narrow hypothetical question." See also Opinion No. JM-1142 (1990) (the question "would necessarily require us to answer hypothetical questions and engage in fact-finding, neither of which is permitted in the opinion process."); JM-802 (1987) ("In advance of a particular case, we cannot provide a definitive resolution of any hypothetical question.")

Without accepting as fact the presumed facts of the second question, the question becomes merely hypothetical. Although we acknowledge that the questions may be important, in this context the questions cannot be satisfactorily addressed in an opinion.

B. The Regents' Rules may reasonably regulate a Regent's access to records.

1. A Regent's access to information is not "unfettered."

Given the potential volume of a request for information by an individual member of the Board and the impact on workload priorities, it is inherently reasonable that the Regents' Rules provide checks and balances. A simple hypothetical displays the reasonableness of such a rule.

Suppose a Regent were interested in looking into compliance with U. T. System policy governing the extent to which employees use U. T. System email for personal use. For that purpose, the Regent requests to see, and perhaps print copies of, all employee emails for the last month. The University of Texas System employs more than 90,000 persons. If the typical email user sends and receives 100 emails a day on workdays (an amount less than some published statistics[9]), this seemingly simple request for a valid purpose would produce 180 million emails in response. Even at 25 emails a day per employee, the request would produce 45 million responsive emails. Rules providing reasonable checks on such a request would be eminently reasonable.

Chavco Inv. Co., Inc. v. Pybus, 613 S.W.2d 806 (Tex. Civ. App.—Houston, 14th Dist, 1981, writ ref'd n.r.e.), is cited by Mr. Aleshire for the proposition that a Regent, like a director of a

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[8] Opinion Nos. GA-0334 (2005); GA-0139 (2004); JC-0328 (2000).

[9] See *Email Statistics Report, 2014-2018*, The Radicati Group, Inc., Palo Alto, CA (April, 2014), which states "Business users send and receive on average 121 emails a day in 2014, and this is expected to grow to 140 emails a day by 2018."

corporation, has an "absolute" right of inspection. However, at the same time the court makes that broad statement, the court expressly recognizes that such a right may be exercised at "reasonable times," affirming the right of the corporation to a degree of reasonable regulation in regard to the request. 613 S.W.2d at 810. Similarly, Opinion No. JC-120 (1999), cited by Mr. Aleshire, states that "A governmental body may adopt a procedure for reviewing the materials...."

That a Board member's right to information is not truly "unfettered," to use the term employed by Mr. Aleshire, is seen in the discussion of the subject in Section 3.03 of the *Principles of Corporate Governance*. While affirming a corporate director's rights to information (and citing *Chavco*), Section 3.03 notes that a judicial order enforcing that right is subject to several exceptions, including a consideration of whether "the information to be obtained by the exercise of the right is not reasonably related to the performance of directorial functions and duties, or that the director or the director's agent is likely to use the information in a manner that would violate the director's fiduciary obligation to the corporation."[10]

Of particular relevance here is that the *Principles of Corporate Governance* also states that a judicial order enforcing the director's informational rights "may contain provisions protecting the corporation from undue burden and expense."[11] As explained in the comment under this section:

> Second, a court may, in its order, limit the ambit of the inspection when necessary to protect the corporation from undue burden or expense—for example, when complying with the director's request would be so expensive and time-consuming as to seriously disrupt the ongoing conduct of business.[12]

Such provisions of a court order serve the same purpose as served by the Regents' Rules requirement that the Board Chairman and the Chancellor review a request that would demand "compilation of significant quantities of information or data"—to protect the System or an institution from expensive and time-consuming disruption.

Similarly, *The Principles of the Law of Nonprofit Organizations* (American Law Institute, 2007) makes very clear that, while each member of the governing board must have appropriate access to information necessary or helpful in carrying out fiduciary duties, that right is subject to reasonable regulation:

> Requests by board members for information should ordinarily be channeled through the chief executive, or as otherwise provided by board policy. The provision of additional information by management or others is subject to reasonable limits on time, place, and manner of production, inspection, and copying.[13]

Protecting an institution or system administration from an undue burden or expense in responding to a request for information is not merely an exception to the general rule, but a *duty* of the requesting Regent, who has the statutory duty of "a fiduciary in the management of funds under

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[10] *Principles of Corporate Governance,* Section 3.03(b)(1).
[11] *Principles of Corporate Governance,* Section 3.03(b)(3).
[12] *Principles of Corporate Governance,* Section 3.03, Comment c.
[13] *Principles of the Law of Nonprofit Organizations*, Sec. 340, Comment a: Right to information. While the comment states that inspection rights may be exercised personally or through an attorney, that principle has no application here, where state law expressly restricts the representation of a public board member in his official capacity.

the control of institutions subject to the board's control and management,"[14] in addition to a duty to administer the institutions "in such a way as will achieve the maximum operating efficiency."[15]

Reasonable rules governing access to information are not incompatible with a general principle that a Regent is entitled to the information necessary to the exercise of the Regent's fiduciary duties. Rather, such rules represent good governance by the entire Board in the collective exercise of their individual and collective fiduciary duties.

2. A Regent's right to information is subject to limitations relating to privacy interests.

In addition to the qualifications described above related to requests for information that do not reasonably relate to the performance of a Board member's duties, or the likelihood that a Board member would use the information in a manner that would violate the Board member's fiduciary duties, there are clear examples where state or federal law restricts an individual Regent's access to confidential information, including laws mentioned by Mr. Aleshire.

The proper handling and use of confidential information are important and raise particular issues when considered in light of an individual Regent's informational rights. As explained in *Principles of the Law of Nonprofit Organizations:*

> Maintaining the confidentiality of information is important to charity governance for the same reasons it is important to governance in the business and government sectors: Robust, candid discussion leads to sounder decisionmaking. Neither board members nor those providing them with information (including senior management) will be as frank in the absence of this trust. If one or more board members use selective or even public "leaks" as a weapon to control the agenda or the outcome, the board could find itself split into rival factions that are unwilling to engage in full and open information-gathering and debate.[16]

The Reporter's Notes on this principle further explain the legitimate concerns of a nonprofit enterprise about the use of confidential information:

> ... even responsible management and board leaders acting in good faith may be tempted to conceal difficult issues from all but the most loyal board members if they cannot rely on disgruntled board members to keep information confidential to the extent appropriate.[17]

As discussed in the *Principles of Corporate Governance*, in the for-profit world there are similar circumstances in which the director's right to information is subject to other considerations:

> First, the right is not to be enforced if the corporation establishes that the information to be obtained by exercise of the right is not reasonably related to the performance of directorial functions and duties... [and] a director's right to information is not to be enforced when the corporation establishes that the director is likely to use the information in a manner that would violate the director's fiduciary obligation to the corporation.... In addition to the

[14] Section 51.352(e), Tex. Education Code.
[15] Section 65.11, Tex. Education Code.
[16] *Principles of the Law of Nonprofit Organizations*, Section 340, Comment c.
[17] Id., Reporter's Note 6, quoting Gail Aidinoff Scovell, "Disclosure of Confidential Information by Directors: Is There a Duty of Confidentiality and Should There Be?" (paper presented at The Nonprofit Forum, New York City, Dec. 20, 2006).

> limits imposed under fiduciary principles...the [director's right to information] ... would be overridden by a state or federal law that provides a specific reason outside corporate law for denying information.[18]

In regard to this opinion request, The University of Texas System and the Board of Regents have legitimate concerns over the use of confidential information and specifically the types of information mentioned by Mr. Aleshire, such as information to which access is restricted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Mr. Aleshire suggests, without citing any direct authority, that a Regent has an inherent right of access to even FERPA protected information. With respect, that is simply not the case.

Regardless of Regent Hall's status as a member of the Board, without prior written consent on behalf of a student, FERPA information is available only to persons—including school officials—who have a legitimate educational interest in the information. Without that consent, a school may disclose personally identifiable information from education records to a "school official" only if the school has first determined that the official has a "legitimate educational interest" in obtaining access to the information from the school.[19]

The strictness of this FERPA rule is seen in the Attorney General's determination, based on counsel from the U.S. Department of Education Family Policy Compliance Office, that without such consent student identifiable information may not even be disclosed to the Office of the Attorney General for the purpose of a review of records in the open records ruling process.[20] Rather, "[s]uch determinations under FERPA must be made by the educational authority."[21]

In making the case for an "unfettered" right of a Board member to access to agency records, in addition to FERPA, Mr. Aleshire also references the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. 104–191 (HIPAA), as another example of information to which the restricted public right of access is in contrast to a purported superior right of access of a Board member. Again, Mr. Aleshire greatly overstates the case.

HIPAA restricts the release by an entity subject to HIPAA of an individual's protected health information. HIPAA and Chapter 181, Texas Health & Safety Code, both define functions that are performed by U.T. System institutions and offices that must be done in compliance with the privacy standards adopted under HIPAA. Both HIPAA and Section 181.103, Health & Safety Code, provide exceptions to that restriction, based on either consent of the patient or that the release is made to a public health authority or to a state agency in conjunction with a health benefit program. In the absence of the applicability of such an exception, neither of which applies here, it is extremely doubtful that an individual Regent is entitled to view protected health information.

This proposition is seen in *The Principles of the Law of Nonprofit Organizations,* which considers the privacy of health information to be a limit on a nonprofit board member's right to information, stating the director's "right of access does not override recognized claims of privilege," and illustrating the limitation with the example of a hospital Board member who, while entitled to

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[18] *Principles of Corporate Governance*, Section 3.03, Comment c.
[19] 20 U.S.C. § 1232g(b)(1)(A).
[20] See Informal Letter Ruling No. OR2015-06918 (April 10, 2015).
[21] Id.

information about the number of procedures of a particular kind a department has performed, would not be entitled to information that would infringe an individual patient's privacy rights.[22]

As a result, it is evident that the concerns of the Chairman of the Board of Regents and of the Chancellor (as recognized in Section 5.4.5, Regents' Rule 10801) are legitimate and that, particularly in light of those concerns, there is no absolute right of access on the part of an individual Regent. Accordingly, it is appropriate that Board policy include considerations of whether a Regent has a legitimate educational interest in FERPA information, or whether an exception under state law applies to a request that would include protected health information. As the chief executive officer of the System, it is also appropriate that the U. T. System Chancellor make those determinations in implementing Board policy and assuring compliance with applicable law.

C. Question No. 2 presupposes a factual premise and is fact-dependent, but the Chancellor has the responsibility to enforce the law and Regents' Rules and policy limiting a Regent's right to information.

1. Question No. 2 presupposes facts on which the answer to the question depends.

The statement of Question No. 2 presupposes that two or more Regents approved a request for information and that the Chancellor refused to comply with that action, both of which are questions of fact.

Employing that presupposition, in the text of the brief presenting arguments in regard to the second question Mr. Aleshire quotes Opinion No. JM-119 (1983) and asserts that the opinion is "now advanced by the UT Chancellor." It is not clear in what context the Chancellor is purported to have advanced that opinion or why. The opinion considers circumstances in which the chancellor of a community college district denied a request for information by a member of the board of trustees, with the chancellor arguing that "he may decline to furnish any requestor, including a district trustee, records maintained by the community college district when he concludes that those records are within an exception in the Open Records Act." We agree that neither the U. T. System Chancellor nor any other custodian of records has the general right asserted by the community college executive. However, there are situations in which an executive such as the Chancellor may deny access to information, pending a Board decision otherwise.

2. As chief executive of the U. T. System, the Chancellor has the responsibility to enforce compliance with the law and Regents' Rules and policy.

Under Regents' Rule 20101, the Chancellor's role is broadly but clearly expressed:

> Sec. 1. Role. The Chancellor is the chief executive officer of The University of Texas System. The Chancellor reports to and is responsible to the Board of Regents. The Chancellor heads the System Administration, which is used by the Board to exercise its powers and authorities in the governance of the U. T. System. The Chancellor has direct line responsibility for all aspects of the U. T. System's operations.
>
> Sec. 3. Primary Duties and Responsibilities. The Chancellor, by delegation from the Board of Regents, is authorized to exercise the powers and authorities of the Board in the governance of the U. T. System.....

[22] *Principles of the Law of Nonprofit Organizations*, Section 340, Comment b.

> 3.1 Counseling, Implementing, and Representing. Counseling the Board with respect to the policies, purposes, and goals of the System; acting as executive agent of the Board in implementing Board policies, purposes, and goals and a system of internal controls; representing the U. T. System in all other respects as deemed appropriate to carry out such policies, purposes, and goals....

Accordingly, the Chancellor has the expressly delegated authority to exercise the power and authority of the Board in carrying out Regents' Rules and Board policy and ensuring compliance with the law,[23] including the Regents' Rules and the law in regard to requests for information made by an individual Regent. Assuming the facts to be as presented—that the Chancellor prohibited a Regent from having access to information—it is clear that the Chancellor had that authority to the extent necessary to execute Regents' Rules and the law. Whether the Chancellor executed that authority properly is a fact question.

As noted above, the law does not provide an individual Regent with "unfettered" access to information. In the case of FERPA-protected information, for example, the U. T. System Chancellor would be responsible, in the first instance, for determining whether a Regent had a legitimate educational interest in the information requested. On the other hand, we would not question that, should the Board acting as a body make a different determination, the Chancellor would be bound by that determination.

D. Conclusion.

In accordance with the reasons articulated, we respectfully suggest that the Attorney General should decline to answer the questions presented in this opinion request. In the alternative, we respectfully suggest that the opinion of the Attorney General affirm that (1) the Board of Regents of The University of Texas System may, and does, reasonably regulate in accordance with law an individual Regent's access to information, and (2) the Chancellor of The University of Texas System, as chief executive officer, has authority to enforce law and Regents' Rules and policy and to bring matters of concern to the attention of the Board for determination.

Respectfully submitted,

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The University of Texas System

Francie A. Frederick, J.D.
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The University of Texas System

[23] Regents' Rule 10801 expressly requires compliance "with applicable law and policy."