

Meeting No. 1,135

THE MINUTES OF THE BOARD OF REGENTS  
OF  
THE UNIVERSITY OF TEXAS SYSTEM

Pages 1 - 22

May 4, 2015

Austin, Texas

MEETING NO. 1,135

MONDAY, MAY 4, 2015.--The members of the Board of Regents of The University of Texas System convened in a special called meeting via telephone conference call at 8:04 a.m. on Monday, May 4, 2015, in the Chairman's Office, Ninth Floor, Ashbel Smith Hall, 201 West Seventh Street, Austin, Texas, with the following participation:

ATTENDANCE.--

Present

Chairman Foster  
Vice Chairman Hicks  
Regent Aliseda  
Regent Beck  
Regent Cranberg  
Regent Hall  
Regent Hildebrand  
Regent Pejovich  
Regent Tucker (in person)  
Regent Richards, Student Regent, nonvoting

In accordance with a notice being duly posted with the Secretary of State and there being a quorum present, Chairman Foster called the meeting to order in open session.

RECESS TO EXECUTIVE SESSION.--At 8:05 a.m., the Board recessed to convene in Executive Session pursuant to *Texas Government Code* Sections 551.071 and 551.074 to consider the matters listed on the Executive Session agenda.

RECONVENE IN OPEN SESSION.--At 10:01 a.m., the Board reconvened in open session for action on matters discussed in Executive Session and to consider the following agenda items.

1a. U. T. System Board of Regents: Discussion with Counsel on pending legal issues

No action was taken on this item.

1b. U. T. System Board of Regents: Discussion and appropriate action regarding legal issues related to request for Attorney General's Opinion (RQ-0020-KP)

No action was taken on this item. See related Open Session action under Item 1 on the next page.

- 1c. U. T. System Board of Regents: Discussion and appropriate action concerning legal issues associated with matters related to March 9, 2015, request for information by Regent Hall

No action was taken on this item.

2. U. T. System: Discussion and appropriate action regarding individual personnel matters relating to appointment, employment, evaluation, compensation, assignment, and duties of presidents (academic and health institutions), U. T. System Administration officers (Executive Vice Chancellors and Vice Chancellors), other officers reporting directly to the Board (Chancellor, General Counsel to the Board, and Chief Audit Executive), and U. T. System and institutional employees

No action was taken on this item.

## AGENDA ITEMS

1. U. T. System Board of Regents: Approval for U. T. System staff to file a brief with the Attorney General regarding request for Attorney General's Opinion (RQ-0020-KP)

Chairman Foster stated that Item 1 concerns the request for Attorney General's Opinion (RQ-0020-KP) filed by attorney Bill Aleshire at the request of Regent Hall. A copy of the request dated April 20, 2015, follows on Pages 4 - 8.

(Note: A revised submission made on May 6, 2015 also follows on Pages 9 - 13.)

Chairman Foster opened the floor to any comments or discussion, and Regent Cranberg provided the following comments:

### Comments by Regent Cranberg

I wish to point out that the response to a determination that the Regent not have completely unfettered access to data and reasonably makes the point that federal law encumbers Regents' access to data, for example, relating to FERPA (Family Educational Rights and Privacy Act) such that other determinations need to be made; and I certainly agree that if anyone is asking for, in effect for the System to violate the federal law, that that should not be allowed to occur.

But, beyond that, I certainly feel it is very important that we express the need for individual Regents to have instant capacity to ask hard questions, oftentimes even if the majority of the Board may feel uncomfortable. But, I

don't think this response suggests that individual Regents should not have that capacity under required reasons; merely, that there may be some limits placed on what a Regent may reasonably ask for.

Chairman Foster then asked if there was a motion that the Board direct The University of Texas System staff to file a brief with the Attorney General, on behalf of the Board and The University of Texas System, in a form that substantially incorporates the legal reasoning summarized by legal counsel in Executive Session. Vice Chairman Hicks responded that he would so move. Regent Tucker seconded the motion, and Chairman Foster called for a roll call vote, which was administered by General Counsel Frederick as follows:

Vice Chairman Hicks - aye  
Regent Aliseda - aye  
Regent Beck - aye  
Regent Cranberg - aye  
Regent Hall - abstained  
Regent Hildebrand - aye  
Regent Pejovich - aye  
Regent Tucker - aye  
Chairman Foster asked that his vote be recorded as aye.

(Note: A copy of the brief subsequently filed with the Attorney General is set forth on Pages 14 - 22.)

2. U. T. System Board of Regents: Discussion and appropriate action regarding matters associated with March 9, 2015, request for information by Regent Hall

Chairman Foster said that Item 2 concerned matters related to Regent Hall's March 9, 2015 request for information, and that he did not believe there was a motion before the Board on this item.

ADJOURNMENT.--At 10:05 a.m., there being no further business, the meeting was adjourned.

/s/ Carol A. Felkel  
Secretary to the Board of Regents

May 6, 2015

**RECEIVED**

APR 20 2015

**OPINION COMMITTEE**

**ALESHIRELAW**  
A PROFESSIONAL CORPORATION  
700 LAVACA STREET, SUITE 1400  
AUSTIN, TEXAS 78701

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512 320-9155 (call) 512 320-9156 (fax)

FILE # ML-047723-15

I.D. # 047723

**RQ-0020-KP**

April 20, 2015

VIA Email: [Opinion.Committee@texasattorneygeneral.gov](mailto:Opinion.Committee@texasattorneygeneral.gov)

Hon. Ken Paxton  
Attorney General of Texas  
Attention: Opinion Committee  
300 W. 15th Street  
Austin, TX 78701

RE: Request for Attorney General Opinion

Dear Attorney General Paxton,

This is a request for an Opinion by this firm's client, Wallace Hall, as a Regent of the University of Texas System. Mr. Hall's request is made pursuant to Tex. Gov't Code § 402.042(a), (b)(6).

Regent Hall respectfully asks the following 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?

#### Background

Regent Wallace Hall has concerns about corrupted processes at the University of Texas at Austin, most recently regarding student admissions practices. The former Chancellor of the University of Texas commissioned an investigation of the admissions process which resulted in a report referred to as the Kroll Report. On March 9, 2015, in his official capacity as a regent and

Hall Request for Opinion  
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in an effort to protect and enhance the mission and statutory charge of the Board of Regents *vis a vis* the admissions process, Regent Hall requested access to all of the evidentiary records and work papers of the Kroll investigation. Regent Hall did not request that any information or records be created for him, merely that he be given complete access to all of the Kroll records. The Chairman of the University System Board of Regents and the Chancellor had “concerns” about Regent Hall’s request and refused to provide the requested records pending a special called meeting of the Board of Regents on April 8, 2015 pursuant to the Board’s Rule 10801.

Rule 10801 (attached), section 5.4.1, purports not to be intended or implemented to prevent access by a regent to information the regent deems is necessary to fulfill his or her official duties and responsibilities. However, in stark contradiction to that part of the rule, section 5.4.5 permits withholding records from the regent unless, at a meeting of the Board, two or more regents vote to support the regent’s request, whereupon, the rule says “the request will be filled without delay.”

At the April 8<sup>th</sup> Board meeting, 3 regents voted to support Regent Hall’s request for the Kroll records. However, after the vote, the Chancellor and the General Counsel notified Regent Hall in writing that he would not be given access to the requested records unless the Board, by majority vote, authorized Regent Hall to see the records. <sup>1</sup> The Chancellor asserted that giving Regent Hall access to the Kroll records constituted reopening the investigation of student admissions practices or involved FERPA-protected student records, and the Chancellor decided that Regent Hall did not have an “educational purpose” for reviewing the Kroll records that was sufficient in the Chancellor’s opinion. So, as of the date of this request, none of the records Regent Hall requested on March 9<sup>th</sup> have been provided to him. <sup>2</sup>

### Authorities & Argument

#### Question 1: Restricting a Regents Access to University Records

##### The Regents’ Authority & Duties

The University of Texas System Board of Regents is vested with the duty to act as the “government of the university system.” Tex. Educ. Code § 65.11; 51.352. As the governing body, the Board is also specifically required to “set campus admission standards...” Tex. Educ. Code § 51.352(d)(4).

“Each member of a governing board has the legal responsibilities of a fiduciary in the management of funds under the control of institutions subject to the board’s control and management.” Tex. Educ. Code § 51.352(e). The duty of a university regent is akin to that of a public stock corporation director. A regent is not a mere figurehead, passive servant of corporate management.

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<sup>1</sup> The Kroll records are also the subject of public information requests by members of the general public pursuant to the Texas Public Information Act. The Chancellor informed Regent Hall that the Board would be provided copies of any information provided to the TPIA requestors.

<sup>2</sup> Recently, the Chancellor selectively disclosed one Kroll interview document to all of the Regents.

The office of a corporation director or officer is more than nominal, and those assuming the duties and responsibilities of such offices are not justified in neglecting every precaution or investigation; it is their minimal duty and responsibility to protect the corporation against acts adverse to the interest of the corporation, whether perpetuated by fellow directors or by strangers.

*Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 580 (Tex. 1963).

The Board has statutory authority to promulgate and enforce rules and regulations for the operation, control, and management of the system and its institutions. Tex. Educ. Code § 65.31(c). The Attorney General has held:

Valid rules and regulations of universities exercising delegated power do have the force of law, but rules and regulations that constitute a clear abuse of discretion or a violation of law do not.

Op. Tex. Att'y Gen. JM-255 at 3 (1984); GA-438 at 2-3 (2006) (noting that agency rule's validity may be challenged on constitutional and statutory grounds and must be consistent with state law).(citations omitted).

Prior Attorney General Opinions Recognize the Unfettered Right of Board Member  
Access to Agency Records

Prior opinions from the Attorney General's Office make it clear that a regent may obtain information in either his capacity as a regent or as member of the public under the Texas Public Information Act (TPIA). Op. Tex. Att'y Gen. JC-120 (1999); JM-119 (1983). Requests from the public are subject to the confidentiality provisions of the TPIA, which precludes disclosure of, *inter alia*, information protected by FERPA and HIPAA.

On the other hand, information requests from a regent in his official capacity—as occurred here—are not subject to the confidentiality provisions of the TPIA. JM-119 at 2 (1983) (noting that the TPIA cannot control the right of access of a member of a governmental body to agency records, and that “a member of that board has an inherent right of access to such records” when requested in his official capacity). In JC-120, the Attorney General opined that a governmental body could not prohibit a member from reviewing an executive session recording or certified agenda. “In our view, access to the records is a necessary part of the member's fulfillment of his or her duties. A governmental body cannot adopt a policy that prevents a member of the body from performing the duties of office.” JC-120 at 2 (1999); *see also*, Tex. Att'y Gen. Op. GA-334 at \*10 (2005) (citing *Gabrilson v. Flynn*, 554 N.W.2d 267, 274 (Iowa 1996) (“school board members generally should be allowed access to both public and private records necessary for the proper discharge of their duties.”)).

While, as noted in JC-120 at 3-4, no Texas court has directly addressed the issue of a public officer's right of access to the records of his office, there is Texas case law regarding directors of corporations that is consistent with prior rulings by the Attorney General. In *Chavco Inv. Co. v. Pybus*, the Court held that the right of a director of a corporation to inspect the corporate books and records “is absolute.” *Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 810 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1981). The reasoning in *Pybus* is applicable here:

In this case, appellee was also a director of the corporation. The Texas Business Corporation Act does not specifically confer upon directors the right to inspect the corporate books. However, the Act does charge directors with managing the business and affairs of the corporation (Art. 2.31) and imposes liability upon them under various circumstances (Art. 2.41). One commentator has stated:

It would seem to be axiomatic that the individual director cannot make his full contribution to the management of the corporate business unless given access to the corporation's books and records. The information therein contained is ordinarily requisite to the exercise of the judgment required of directors in the performance of their fiduciary duty so much so that the directors' right of inspection has been termed absolute, during their continuance in office at all reasonable times.

Fletcher, *Cyclopedia of the Law of Private Corporations* s 2235 at 771 (rev. perm. ed. 1976). *We hold that the right of a director of a corporation to inspect the corporate books and records is absolute.* When the corporation refuses to comply with the director's demand for inspection, the director need only show (in a mandamus action to compel the inspection) that (1) he is a director, (2) that he demanded to inspect the corporate books and records, and (3) the right to inspection was refused by the corporation. The unqualified right of appellee as director to inspect the books of the corporation must be distinguished from the right of shareholders, which is not absolute and is statutorily granted by the Texas Business Corporation Act.

*Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 810 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1981) (emphasis added).

Other opinions of the Attorney General also demonstrate that a regent's inherent right of access to the agency records is not subject to the judgment of other board members (or of the Chancellor) as to whether they think the regent "needs" that information. Notably in Tex. Att'y Gen. Op. LO-93-69 at \*3 (1993) this office held that a member of the Texas Board of Medical Examiners "has an inherent right of access to agency personnel *and investigative files.*" (emphasis added). The opinion said, "A majority of the Board by rule may not restrict a member's right of access to these records absent express statutory authority to do so." *Id.*

*See* Tex. Att'y Gen. Op. H-1319 at 2 (1978) (holding that the decision of whether a board member has a personal or private interest that would preclude his participation in disciplinary proceedings before the board is that board member's decision, "and the remainder of the board may not unilaterally prohibit his participation if it disagrees with his determination that no personal or private interest exists."); Tex. Att'y Gen. Op. GA-138 (an individual county commissioner is entitled to access employee medical insurance records as necessary to effectively perform his duties, subject to re-disclosure privacy constraints); Tex. Att'y Gen. Op. ORD 666 (2000) (holding that disclosing otherwise confidential information to members of an appointed citizen advisory board does not constitute release of the information to the public); Tex. Att'y Gen. Op. JC-283 at\*4 (2000) (holding that the chief executive and governing body of a municipality "have an inherent right, in their official capacities, to examine records [contained in police/fire personnel file made confidential by TPIA section 143.089(g)]").

Question 2: Chancellor's Authority to Limit a Regent's Access to Records

The Chancellor, as chief executive officer of the UT System, is responsible for the general management of the university system, but that is "subject to the power and authority of the board" and only "within the policies of the board." Tex. Educ. Code § 65.16(c). We are unable to find anything in the laws of the State of Texas that empowers the Chancellor to tell the Regents, or to tell any one regent, what information the regent can or cannot see in the discharge of the regent's duties.

In JM-119, your office addressed the notion, now advanced by the UT Chancellor, that an employee of the institution could bar a board member from obtaining information the board member deemed necessary to review:

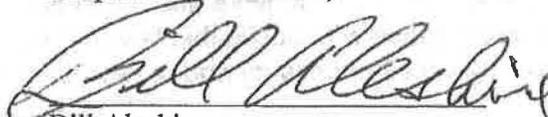
Without complete access to district records, such trustee could not effectively perform his duties. We do not believe that those who drafted the Open Records Act intended to allow an employee of a governmental body to invoke the Act to keep a member of the body from obtaining information in the governmental body's possession.

JM-119 at 2 (1983).

Conclusion

At the April 9<sup>th</sup> Board of Regents meeting, some Board members expressed a desire to change Rule 10801 at the next scheduled Board meeting on May 13, 2015 to require a majority vote by the Board to permit a regent to have access to any university records when the Board Chair or Chancellor has "concerns" about the regent's request. Consistent with the prior opinions of your office, Regent Hall maintains that the Board lacks authority, as does the Chancellor, to interfere in a regent's access to university records that the regent deems necessary to fulfill his official duties. Therefore, Regent Hall respectfully asks the Attorney General to expedite issuance of the opinion prior to the scheduled Board meeting.

Respectfully submitted,



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Cc: Wallace Hall

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OPINION COMMITTEE

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FILE # RQ-0020-KP  
I.D. # 47729

May 6, 2015

Hon. Ken Paxton  
Attorney General of Texas  
Attention: Opinion Committee  
300 W. 15th Street  
Austin, TX 78701

VIA Email: [Opinion.Committee@texasattorneygeneral.gov](mailto:Opinion.Committee@texasattorneygeneral.gov)

RE: Request for Attorney General Opinion

Dear Attorney General Paxton,

In light of the response by the University of Texas System to my request for an Opinion dated April 20, 2015, I, Wallace Hall, as a Regent of the University of Texas System, resubmit my request made pursuant to Tex. Gov't Code § 402.042(a), (b)(6).

I respectfully ask the following 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?

#### Background

Regent Wallace Hall has concerns about corrupted processes at the University of Texas at Austin, most recently regarding student admissions practices. The former Chancellor of the University of Texas commissioned an investigation of the admissions process, which resulted in a report referred to as the Kroll Report. On March 9, 2015, in his official capacity as a regent and in an effort to protect and enhance the mission and statutory charge of the Board of Regents *vis a vis* the admissions process, Regent Hall requested access to all of the evidentiary records and work papers of the Kroll investigation. Regent Hall did not request that any information or records be created for him, merely that he be given complete access to all of the Kroll records. The Chairman of the University System Board of Regents and the Chancellor had "concerns" about Regent Hall's request and refused to provide the requested records pending a special called meeting of the Board of Regents on April 8, 2015 pursuant to the Board's Rule 10801.

Rule 10801 (attached), section 5.4.1, purports not to be intended or implemented to prevent access by a regent to information the regent deems is necessary to fulfill his or her official duties and responsibilities. However, in stark contradiction to that part of the rule, section 5.4.5 permits withholding records from the regent unless, at a meeting of the Board, two or more regents vote to support the regent's request, whereupon, the rule says "the request will be filled without delay."

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### Authorities & Argument

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The office of a corporation director or officer is more than nominal, and those assuming the duties and responsibilities of such offices are not justified in neglecting every precaution or investigation; it is their minimal duty and responsibility to protect the corporation against acts adverse to the interest of the corporation, whether perpetuated by fellow directors or by strangers.

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**Prior Attorney General Opinions Recognize the Unfettered Right of Board Member  
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On the other hand, information requests from a regent in his official capacity—as occurred here—are not subject to the confidentiality provisions of the TPIA. JM-119 at 2 (1983) (noting that the TPIA cannot control the right of access of a member of a governmental body to agency records, and that “a member of that board has an inherent right of access to such records” when requested in his official capacity). In JC-120, the Attorney General opined that a governmental body could not prohibit a member from reviewing an executive session recording or certified agenda. “In our view, access to the records is a necessary part of the member’s fulfillment of his or her duties. A governmental body cannot adopt a policy that prevents a member of the body from performing the duties of office.” JC-120 at 2 (1999); *see also*, Tex. Att’y Gen. Op. GA-334 at \*10 (2005) (citing *Gabrilson v. Flynn*, 554 N.W.2d 267, 274 (Iowa 1996) (“school board members generally should be allowed access to both public and private records necessary for the proper discharge of their duties.”)).

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In this case, appellee was also a director of the corporation. The Texas Business Corporation Act does not specifically confer upon directors the right to inspect the corporate books. However, the Act does charge directors with managing the business and affairs of the corporation (Art. 2.31) and imposes liability upon them under various circumstances (Art. 2.41). One commentator has stated:

It would seem to be axiomatic that the individual director cannot make his full contribution to the management of the corporate business unless given access to the corporation's books and records. The information therein contained is ordinarily requisite to the exercise of the judgment required of directors in the performance of their fiduciary duty so much so that the directors' right of inspection has been termed absolute, during their continuance in office at all reasonable times.

Fletcher, *Cyclopedia of the Law of Private Corporations* s 2235 at 771 (rev. perm. ed. 1976). ***We hold that the right of a director of a corporation to inspect the corporate books and records is absolute.*** When the corporation refuses to comply with the director's demand for inspection, the director need only show (in a mandamus action to compel the inspection) that (1) he is a director, (2) that he demanded to inspect the corporate books and records, and (3) the right to inspection was refused by the corporation. The unqualified right of appellee as director to inspect the books of the corporation must be distinguished from the right of shareholders, which is not absolute and is statutorily granted by the Texas Business Corporation Act.

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Other opinions of the Attorney General also demonstrate that a regent's inherent right of access to the agency records is not subject to the judgment of other board members (or of the Chancellor) as to whether they think the regent "needs" that information. Notably in Tex. Att'y Gen. Op. LO-93-69 at \*3 (1993) this office held that a member of the Texas Board of Medical Examiners "has an inherent right of access to agency personnel *and investigative files.*" (emphasis added). The opinion said, "A majority of the Board by rule may not restrict a member's right of access to these records absent express statutory authority to do so." *Id.*

See Tex. Att'y Gen. Op. H-1319 at 2 (1978) (holding that the decision of whether a board member has a personal or private interest that would preclude his participation in disciplinary proceedings before the board is that board member's decision, "and the remainder of the board may not unilaterally prohibit his participation if it disagrees with his determination that no personal or private interest exists."); Tex. Att'y Gen. Op. GA-138 (an individual county commissioner is entitled to access employee medical insurance records as necessary to effectively perform his duties, subject to re-disclosure privacy constraints); Tex. Att'y Gen. Op. ORD 666 (2000) (holding that disclosing otherwise confidential information to members of an appointed citizen advisory board does not constitute release of the information to the public); Tex. Att'y Gen. Op. JC-283 at\*4 (2000) (holding that the chief executive and governing body of a municipality "have an inherent right, in their official capacities, to examine records [contained in police/fire personnel file made confidential by TPIA section 143.089(g)]").

Question 2: Chancellor's Authority to Limit a Regent's Access to Records

The Chancellor, as chief executive officer of the UT System, is responsible for the general management of the university system, but that is "subject to the power and authority of the board" and only "within the policies of the board." Tex. Educ. Code § 65.16(c). We are unable to find anything in the laws of the State of Texas that empowers the Chancellor to tell the Regents, or to

tell any one regent, what information the regent can or cannot see in the discharge of the regent's duties.

In JM-119, your office addressed the notion, now advanced by the UT Chancellor, that an employee of the institution could bar a board member from obtaining information the board member deemed necessary to review:

Without complete access to district records, such trustee could not effectively perform his duties. We do not believe that those who drafted the Open Records Act intended to allow an employee of a governmental body to invoke the Act to keep a member of the body from obtaining information in the governmental body's possession.

JM-119 at 2 (1983).

#### Conclusion

At the April 9<sup>th</sup> Board of Regents meeting, some Board members expressed a desire to change Rule 10801 at the next scheduled Board meeting on May 13, 2015 to require a majority vote by the Board to permit a regent to have access to any university records when the Board Chair or Chancellor has "concerns" about the regent's request. Consistent with the prior opinions of your office, Regent Hall maintains that the Board lacks authority, as does the Chancellor, to interfere in a regent's access to university records that the regent deems necessary to fulfill his official duties. Therefore, Regent Hall respectfully asks the Attorney General to expedite issuance of the opinion prior to the scheduled Board meeting.

Respectfully submitted,



Wallace Hall

**Attachment:** *University of Texas System, Regents Rule 10801/Policy of Transparency, Accountability, and Access to Information*



**The University of Texas System**  
Nine Universities. Six Health Institutions. Unlimited Possibilities.

**Daniel H. Sharporn, J.D.**  
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Austin, Texas 78701  
Phone: (512) 499-4462

**Francie A. Frederick, J.D.**  
U. T. System Board of Regents  
201 West Seventh Street, Suite 820  
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Phone: (512) 499-4402

The University of Texas at Arlington  
The University of Texas at Austin  
The University of Texas at Brownsville  
The University of Texas at Dallas  
The University of Texas at El Paso  
The University of Texas –Pan American  
The University of Texas  
of the Permian Basin  
The University of Texas at San Antonio  
The University of Texas at Tyler

The University of Texas  
Southwestern Medical Center  
The University of Texas  
Medical Branch at Galveston  
The University of Texas  
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May 4, 2015  
Via Hand Delivery

The Honorable Ken Paxton  
Attorney General of Texas  
300 W. 15<sup>th</sup> 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."<sup>1</sup> (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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> (Emphasis added.)

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<sup>1</sup> Opinion No. JM-149 (1984).

<sup>2</sup> See Opinion Request Procedures published in the Digest of Opinions of the Attorney General of Texas (1970-1981).

<sup>3</sup> *Principles of Corporate Governance*, Section 3.04.

<sup>4</sup> *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.”<sup>5</sup>

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.<sup>6</sup> Neither the Board of Regents, nor the General Counsel to the Board of Regents,<sup>7</sup> nor the

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<sup>5</sup> Section 7, Chapter 147, Acts of the 70<sup>th</sup> Legislature, Regular Session, 1987.

<sup>6</sup> “(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.”

<sup>7</sup> 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.<sup>8</sup> 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<sup>9</sup>), 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, 14<sup>th</sup> 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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<sup>8</sup> Opinion Nos. GA-0334 (2005); GA-0139 (2004); JC-0328 (2000).

<sup>9</sup> 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 *Chawco*), 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.”<sup>10</sup>

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.”<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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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<sup>10</sup> *Principles of Corporate Governance*, Section 3.03(b)(1).

<sup>11</sup> *Principles of Corporate Governance*, Section 3.03(b)(3).

<sup>12</sup> *Principles of Corporate Governance*, Section 3.03, Comment c.

<sup>13</sup> *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,"<sup>14</sup> in addition to a duty to administer the institutions "in such a way as will achieve the maximum operating efficiency."<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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

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<sup>14</sup> Section 51.352(e), Tex. Education Code.

<sup>15</sup> Section 65.11, Tex. Education Code.

<sup>16</sup> *Principles of the Law of Nonprofit Organizations*, Section 340, Comment c.

<sup>17</sup> *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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> Rather, "[s]uch determinations under FERPA must be made by the educational authority."<sup>21</sup>

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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<sup>18</sup> *Principles of Corporate Governance*, Section 3.03, Comment c.

<sup>19</sup> 20 U.S.C. § 1232g(b)(1)(A).

<sup>20</sup> See Informal Letter Ruling No. OR2015-06918 (April 10, 2015).

<sup>21</sup> *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.<sup>22</sup>

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.....

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<sup>22</sup> *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,<sup>23</sup> 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,



Daniel H. Sharphorn, J.D.  
Vice Chancellor and General Counsel  
The University of Texas System



Francie A. Frederick, J.D.  
General Counsel to the Board of Regents  
The University of Texas System

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<sup>23</sup> Regents' Rule 10801 expressly requires compliance “with applicable law and policy.”