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OPINION COMMITTEE

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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

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."

At the April 8th 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.¹ 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 9th have been provided to him.²

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.

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).

¹ 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.

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

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 [14th 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 [14th 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 9th 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