



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 2, 2012

Mr. Wm. Eugene Powell  
Chairman  
Board of Regents  
The University of Texas System  
201 West Seventh Street  
Suite 820  
Austin, Texas 78701-2902

Dear Chairman Powell:

I write in response to your request that the Office of the Attorney General review and comment on the University of Texas System General Counsel's October 15, 2012 "Report and Recommendations on the Relationship Between The University of Texas at Austin School of Law and The University of Texas Law School Foundation" ("Report"). You requested that the Office of the Attorney General independently review the General Counsel's legal conclusions in order to ensure that the Board of Regents fulfilled its fiduciary duty to the State of Texas. Our independent review of the General Counsel's Report is complete and our conclusions related thereto are detailed below.

It is our understanding that the General Counsel prepared the Report at the request of the Board of Regents. Report at 1. The Report describes the Law School Foundation ("Foundation"), examines the Foundation's legal relationship to The University of Texas School of Law ("Law School"), and addresses legal issues surrounding the Foundation's compensation program for Law School professors. Under this program, the Foundation provided forgivable multi-year loans to selected Law School professors. Although the Report concluded that no legal violations occurred, the General Counsel recommends that the Foundation's forgivable loan program be abandoned because of potential legal and ethical issues. For the following reasons, we agree with the Report's conclusions and concur that its recommendation should be implemented.

As a threshold matter, please note that our independent review was limited to the legal conclusions and recommendations contained in the Report.<sup>1</sup> The Report indicates that

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<sup>1</sup> We note that Chairman Powell offered to make University of Texas at Austin and University of Texas System Board of Regents personnel available to this office in the event additional facts were needed to facilitate our independent review. However, given the extensiveness of the General Counsel's factual

the Office of General Counsel conducted witness interviews, gathered documents, and compiled evidence supporting the Report's factual conclusions. Report at 1 n.3. This office did not independently review the documentary and testimonial evidence collected by the Office of General Counsel. Nor did we independently investigate the facts. Instead, our review of the Report's legal conclusions and recommendations relies exclusively on the Report's factual findings and the documentary evidence appended to the Report in Exhibits 1-26. Given the extensive nature of the General Counsel's investigation into the underlying facts, we have no reason to doubt the accuracy of the Report's factual findings. Accordingly, the legal analysis contained herein assumes that the Report's recitation of the facts is true and accurate.

## **I. The Structure of the Law School Foundation**

The Report concludes that Foundation is currently structured as an independent legal entity separate and apart from The University of Texas at Austin and the Law School. *See* Report at 15-19. We generally agree with the Report's conclusion. As a private entity incorporated under the Texas Nonprofit Corporations Act, the Foundation has a completely independent board of directors, and receives no taxpayer funding. *Id.* at 15. Moreover, while the Foundation receives non-monetary support from the Law School—in the form of office space and use of Law School employees—pursuant to a Memorandum of Understanding executed by both parties, the Foundation compensates the law school for any benefit it receives from utilizing University resources. We agree with the Report's conclusion that support of this nature does not run afoul of Article III, Section 51 of the Texas Constitution because it serves a public purpose and adequate controls exist to ensure the requisite public purpose is fulfilled. *See* Op. Tex. Att'y Gen. No. MW-373 (1981).

We also agree with the Report, however, that the close working relationship between the Foundation and the Law School—particularly the authority exercised by the Law School Dean and other law school employees over the Foundation's finances—raises legitimate questions about the Foundation's independence. *See* Report at 17-18. In light of those questions, the Report recommends that certain measures be implemented to fortify the Foundation's independence from the Law School, including the adoption of a revised Memorandum of Understanding governing the relationship between the two entities. *Id.* at 18-19 and Exhibit 11.<sup>2</sup> Based upon our review, we generally concur with the recommendations outlined in the Report and advise that those recommendations merit thoughtful consideration by all relevant decision-makers.

## **II. The Forgivable Loan Program**

We turn now to the Report's discussion of the Foundation's provision of financial compensation to Law School faculty. As stated above, our charge was not to conduct an

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findings and the limited, legal nature of our review, we required no additional information and relied exclusively on the detailed factual findings contained in the Report.

<sup>2</sup> We express no opinion here on any specific provision of the revised Memorandum of Understanding attached to the Report as Exhibit 11.

independent investigation into the factual circumstances surrounding Law School faculty compensation. Thus, our analysis relies upon the Report's factual findings regarding the "forgivable loan program" and the Foundation's role in that program. That said, we fully agree with the Report's legal conclusion that Foundation-funded forgivable personal loans are an "inappropriate" means of supplementing Law School faculty members' income. *See* Report at 25; *see also* Report at 22, 26-27. As the Report concludes, the program suffered from inadequate financial oversight, created the appearance that faculty members were subject to the influence of entities outside the Law School, and obscured from public view the true compensation of public employees. Each of these three principal concerns are specifically addressed below.

The Report's findings indicate that the Foundation's forgivable loan program suffered from inadequate financial oversight. *Id.* at 25-26. This governance flaw was particularly acute under Dean Larry Sager, whose operation of the forgivable loan program created the appearance of financial impropriety and self-dealing. *Id.* at 23. Unlike his predecessor, Dean Sager authorized financial benefits for himself without first obtaining approval from his superiors at the University of Texas at Austin or the University of Texas System. For example, the Report details how a Foundation-funded deferred compensation package for then-Dean William C. Powers was approved by the Provost, the President, and the Vice Chancellor for Academic Affairs. *Id.* at 21. The Report further explains that Dean Powers elected to seek the aforementioned approvals prior to accepting compensation from the Foundation. In contrast, the Report reveals that Dean Sager proposed and accepted a forgivable loan that only he and the Foundation's Executive Committee approved. *Id.* at 22. The Report further explains that Dean Sager had been denied a salary increase by his superiors at the University, sought a forgivable loan from the Foundation, and excluded his superiors at the University of Texas and the University of Texas System from the approval process. *Id.* at 23. Dean Sager's apparent attempts to avoid oversight by more senior University officials illustrates why the Report correctly concludes that the current arrangement between the Law School and the Foundation "creates an impression of self-dealing that cannot be condoned." *Id.*

The Report also examines whether forgivable loans from the Foundation to Law School faculty are appropriate given the potential appearance that faculty members are subject to outside influence. As State employees, Law School professors are subject to the statutory prohibition on the payment of honoraria to public servants. *See* TEX. PEN. CODE § 36.07. The Penal Code does not define the term "honorarium," and the legal prohibition on honoraria is an extremely undeveloped area of the law on which there is no useful guidance from the courts. Consequently, it is neither possible nor appropriate for us to conclusively determine whether any particular case of Foundation-funded faculty compensation comports with the State's honorarium law. However, on a prospective basis, we agree with the Report's conclusion that the Foundation should no longer compensate professors directly, but should instead donate funds to the Law School, which the University can then allocate to professors in the ordinary course of business and pursuant to the University's policies governing faculty compensation. This finding is discussed in greater detail below.

We further conclude that the existing program is problematic because it obscured the amount of compensation received by employees at a public university. As the Report notes, the Public Information Act specifically provides that state employees' salaries are public information that must be made available to the public. Report at 26 n.147 (citing TEX. GOV'T CODE § 552.022(a)(2)). Utilizing the Foundation to directly compensate faculty members interferes with the Legislature's effort to ensure the public has access to information about the amount of compensation received by state employees. Additionally, this approach could further subject the Foundation to the Texas Public Information Act. Specifically, information the Foundation maintains regarding salary supplements to faculty members could be subject to public disclosure under the Act.<sup>3</sup>

In sum, we concur with the Report's legal conclusions regarding the propriety of the Foundation's forgivable loan program. *See* Report at 25-26.

### **III. The Report's Recommendations**

Having reviewed the facts and legal analysis supporting the Report's conclusions, we now address the General Counsel's recommendations. As a threshold matter, we concur with the recommendation that the Foundation should not directly supplement faculty members' salaries in the future. Rather, the Foundation should donate funds to the Law School, which can then utilize these dollars to compensate faculty members in a manner that comports with the University policies and procedures. Such a process would improve transparency, increase university controls, resolve governance issues outlined in the Report, and ensure that faculty compensation is not solely subject to the control of the Dean or the Foundation's board. As explained in the Report, the Foundation could continue supporting competitive salaries for law professors by making restricted grants to the Law School for the express purpose of funding salary supplements. In turn, the Law School could utilize those grant donations to directly supplement professor salaries pursuant to standard approval processes for faculty compensation. Report at 26.

Any program employed by the Law School and the University to enhance the compensation of Law School faculty must comport with Article III, Sections 50 and 51 of the Texas Constitution. These constitutional provisions generally restrict a state agency, including the University of Texas, from granting public money or lending the State's credit for the benefit of a private individual. *See* TEX. CONST. art III, §§ 50-51. While there are few court decisions interpreting these constitutional provisions, multiple Attorney General Opinions have found that state agencies' payments or loans must serve a public purpose and be subject to controls that are sufficient to ensure the requisite public purpose is properly fulfilled. *See* Op. Tex. Att'y Gen. GA-0743 (2009) at 2 ("Like [Article III,] section 50, section 51 is not implicated if the gift or loan serves a public

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<sup>3</sup> As a private entity, the Foundation would not generally be subject to the Public Information Act, which is codified at Chapter 552 of the Texas Government Code. However, for the purposes of Chapter 552, the definition of a "governmental body" extends to "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds." TEX. GOV'T CODE § 522.003(i)(A)(xii). Thus, under Section 552.003, information that is produced, collected, or maintained with Law School resources—or by public employees—could be public information that is subject to the Act.

purpose of the entity expending the fund and includes controls to ensure that the public purpose is carried out.”); MW-373 (1981) at 11 (discussing sections 50 and 51 in the context of the Foundation and the Law School).

The public purpose element of this legal test is likely satisfied when the purpose of salary supplements is either recruiting or retaining high-caliber faculty for the Law School. The Report describes the Law School’s desire to attract high-caliber faculty and concludes that doing so is a worthy public purpose. See Report at 19-20. We have no reason to disagree with the Report’s conclusion. Determining whether the second element of the legal test—the existence of adequate controls to ensure the public purpose is carried out—is satisfied will depend on the characteristics of the supplemental compensation plan implemented by the Law School.<sup>4</sup>

While we agree in large part with the Report’s recommendations regarding the forgivable loan program and the structure of the Foundation, we disagree with the Report’s recommendation about how to properly handle the Foundation’s outstanding forgivable loan contracts. The Report recommends that the Foundation no longer extend forgivable loans directly to members of the Law School faculty—a recommendation with which we agree—but nonetheless recommends that outstanding loan agreements between the Foundation and faculty members be allowed to expire on their own terms. Report at 27.

According to the Report, all the Foundation’s existing forgivable loan agreements will expire within three years. *Id.* at 27 n.150. Given our conclusion that the Foundation’s forgivable loan program is legally problematic, it is difficult to also conclude that such an arrangement should nonetheless be allowed to continue years into the future. Accordingly, we conclude that the more legally sound approach requires that the Foundation extinguish its existing loans and instead allow the Law School’s new executive management to establish a properly controlled compensation program governed by applicable University policies and procedures.

Finally, when the General Counsel’s Report is published, all affected parties will be on notice that there are significant legal and ethical issues surrounding the Foundation’s forgivable loan program. Given the parties’ awareness of the prior program’s flaws, extinguishing and replacing the outstanding forgivable loan agreements is the surest step toward eliminating the possibility of future legal liability. The Report correctly notes that such action would require the involvement of both parties to the loan agreements and should not be undertaken without the advice of counsel, including tax counsel for the Foundation and for the faculty members.

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<sup>4</sup> Due to the undeveloped nature of Texas constitutional law on these matters, we are not in a position at this time to advise whether any particular supplemental compensation program will comport with the Texas Constitution. We can advise only that the Foundation’s forgivable loan program, particularly as operated by Dean Sager, was both legally and ethically problematic and should therefore be abandoned.

#### **IV. Conclusion**

Hopefully this letter resolves any outstanding questions you may have had about the Foundation's forgivable loan program. While we disagree in minor respects with some aspects of the Report's conclusions, we concur with its overall conclusion that the Foundation's forgivable loan program raises significant legal issues and should therefore be abandoned. Finally, we note that the General Counsel's exhaustively researched report thoroughly and effectively analyzes a variety of complex legal issues. Having independently reviewed the Report's conclusions and recommendations, we generally concur with the General Counsel's findings and believe the Board of Regents has ample justification to proceed accordingly.

If you have any further questions about this matter or need additional assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hodge", with a stylized flourish extending to the right.

Daniel Hodge  
First Assistant Attorney General