

Office of General Counsel Annual Report FY2019

BACKGROUND

The Office of General Counsel (OGC) provides an annual report to the President and the other Executive & Audit Committee members to assist with their governance and oversight responsibilities as outlined in the charter of the Oregon State University Executive & Audit Committee.

The OGC serves as a key resource to Oregon State University, providing legal advice on all manner of issues facing the complex and large organization. The OGC statement of philosophy and staffing details are provided in Attachment 1.

MAJOR AREAS OF FOCUS FOR 2018-19

Major areas of focus for the OGC in 2018-19 fell into several categories:

- *Faculty union* – OGC supported OSU in its preparation for, and the initial bargaining of, its first faculty contract. Goals have been to further OSU's healthy shared governance and to support faculty success, while positioning OSU well in terms of financial, legal or policy concerns to be addressed in the collective bargaining agreement. OGC also advised on a number of other issues and questions surrounding the support and management of faculty in a newly unionized environment.
- *Free speech and diversity/inclusion efforts* – OGC worked to proactively support OSU's goals of providing an inclusive, diverse and safe environment, as well as supporting and protecting free speech rights. This is a complicated legal area that often overlaps with other legal rights/obligations and presents significant risk in the legal and public relations arenas. OGC spent a fair amount of time advising in this area again this year, including helping OSU navigate situations involving controversial speech. This year also saw a renewed need for advising employees regarding their political speech in different contexts (i.e., OSU versus personal capacity).
- *Federal policy changes* – OGC advised on OSU's response to significant federal concerns that included the government shutdown, Deferred Action for Childhood Arrivals (DACA), immigration, Title IX, affirmative action, borrower defense regulations, and national security and export control concerns regarding international scholars, collaborations and travel.
- *Compliance issues* – Compliance issues continue to take significant focus, as a result of the long list of regulations with which OSU must comply, the increased complexity of the regulations and the heightened agency enforcement and public focus. Compliance is difficult to tackle in large, decentralized universities with diverse compliance topic areas, making partnerships such as those with the newly reorganized Office of Audit, Risk and Compliance critical. Title IX remained the top compliance area of risk for OSU this year and continued to require a substantial amount of focus, including advising on individual cases (especially as more reporting and responding parties engaged lawyers and outside agencies got involved) and on significant revisions of policies and procedures. Other critical compliance priorities included advising on the enhancement of OSU's youth safety program, as well as IT security and data breach protocols and response.
- *Transactions supporting innovation, research, and infrastructure* – OGC advised on a number of transactions and related issues that supported the increase of OSU's

research, innovation and infrastructure. Some examples include advising on the creation of OSU's first 501(c)(3) corporation (Link Oregon) to build OSU's statewide network project; contract amendments and operational issues regarding the large Regional Class Research Vessels (RCRV) project; contractual, federal license, risk management and compliance issues regarding the PacWave wave energy project; continuing to resolve issues related to the cross-laminated timber construction in the new Forest Science Complex; analysis of opportunity and potential terms for acquisition of the Elliott Forest; establishment of a new banking vehicle to allow OSU more flexibility in global banking needs; analysis of multiple public-private partnership opportunities; resolution of water rights disputes for agricultural experiment stations; and establishment of OSU's Global Hemp Innovation Center.

- *2019 Oregon Legislative Session* – OGC directed substantial efforts toward supporting OSU through the 2019 legislative session, in close collaboration with the Office of Government Relations and colleagues from the other six Oregon public institutions. OGC interpreted proposed bills and impact to OSU, helped to strategize university response and periodically testified in legislative hearings or discussed revisions with legislators or Legislative Counsel. Bill topics that took the most OGC focus included Title IX, workplace harassment, non-disclosure agreements, governance, HECC authority, academic freedom, equal pay amendments, student government political speech, GMO contamination liability, hemp, public safety officers, contractor requirements and public records.

See Attachment 2 for an overview of key subject areas in addition to the high focus areas listed here.

LITIGATION, ADMINISTRATIVE CLAIMS AND COSTS

OGC manages all litigation defense for OSU and works closely with outside litigation counsel at every stage. OSU has very low litigation rates compared to similarly situated national peers. A 2013 NACUA (National Association of College and University Attorneys) survey of hundreds of institutions nationwide revealed that comparator institutions had an average of 18-33 active litigation matters at any one time, whereas OSU has averaged approximately 4-6 open litigation matters at any one time. Given the national trends, it is unlikely that this very low trend will continue unchanged, although it is currently holding steady.

OGC works with leaders of all levels to address problems early and resolve concerns before they reach the litigation stage. Where settlement is more beneficial to OSU, efforts are made to resolve and remedy the claims as early as feasible.

For those matters that OGC continues to litigate actively, there has been uncommon success, as OSU has prevailed in every such litigation matter in the last five years. (This is uncommon because litigation is inherently risky and organizations should not expect success in all cases.) In addition, OSU's victories have usually been in pre-trial stages, before significant attorneys' fees have been expended. A snapshot of litigation rates over the past five years is provided in Attachment 3.¹

¹ The litigation over this five-year period involved employment disputes, injuries, and student discrimination claims, as well as one equipment dispute and one regarding an OSU employee's participation as an expert in a criminal trial.

OGC also manages all civil rights and employment administrative claims to and investigated by outside agencies. These include complaints filed by employees or students in agencies such as the federal Office for Civil Rights (OCR), the federal Equal Employment Opportunity Commission (EEOC), and the state Bureau of Labor & Industries (BOLI). There continues to be high success in this area, and OSU has prevailed on all but one of these claims in the last five years. Attachment 3 includes a snapshot of the numbers and types of these administrative claims over the past five years. OSU experienced more employment administrative claims this year than past years, but there is no discernible trend identified in the claims. Other than two of the claims (which were related to one unit and regarding issues that have been resolved), the claims involve unrelated issues, departments and individuals.

Other types of pre-litigation property or personal injury claims are managed by OSU's third-party administrator, Berkley Risk Management, along with OSU's Office of Risk Management. OGC advises the Office of Risk Management as needed on those claims.²

WORKING WITH OUTSIDE COUNSEL

OGC engages the assistance of outside counsel in several types of situations. The most common is where the area of expertise sought is highly specialized and where it is inefficient or infeasible to build that specialized expertise in-house. Additionally, although several OGC attorneys have backgrounds as litigators, litigation matters take more time, resources and attorneys than is feasible to handle in-house at the current OGC size. The office also engages outside counsel for matters in which it is advisable or required to have an independent review or opinion. Finally, there are times that outside counsel is engaged because the work and needed timelines surpass the capacity of the office; however, efforts are made to minimize this approach given the higher cost of outside counsel. Efforts are made to monitor the staffing numbers of in-house counsel versus outside counsel to ensure provision of the most cost-effective legal services.

Attachment 4 provides an overview of the types of matters that are sent to outside counsel. According to industry surveys, OGC uses outside counsel on similar types of matters as other peer universities.

Even when outside counsel is engaged, OGC lawyers work closely with that counsel on strategy, communication and implementation, as well as on ensuring that the advice is tailored to and consistent with OSU's context, values and goals.

Attachment 5 provides a five-year snapshot of OSU-wide outside counsel costs. Outside counsel work ebbs and flows with the needs of new initiatives and issues, and this year saw a decrease in outside counsel costs as compared to last year (FY2018). FY2019 costs remained higher than two years prior, FY2017, mostly due to continued outside compliance reviews and increased advising needed in real property issues, intellectual property and labor/employment matters (as well as more minor increases in transactions, research, immigration and intellectual property needs).

² The Office of Risk Management also manages OSU's insurance program. All of the former OUS institutions, with the exception of University of Oregon, participate in the Public Universities Risk Management and Insurance Trust (PURMIT), which is a self-insurance program allowed by statute. PURMIT is a separate legal entity from OSU, with separate legal counsel. OSU's Chief Risk Officer, however, sits on the PURMIT Board of Trustees, and OSU has a number of OSU-specific insurance policies (e.g., maritime policies).

It is encouraging to see that the majority of these university-wide outside counsel costs are to support OSU's proactive endeavors, with less going to traditional legal defense.

MANAGEMENT OF PUBLIC RECORDS AND SUBPOENA PROCESS

Over most of the last year (as with prior years), OGC managed the public records process for OSU. OSU strives for transparency as a strongly held value, and the OGC worked to produce responsive records to public records requestors quickly and cost-effectively. There are times, however, where records were withheld, consistent with the Oregon Public Records Law, to protect OSU or other individuals or to ensure compliance with privacy and other laws. As a governmental entity, OSU is also entitled to recoup the costs of complying with public records requests but takes seriously a commitment to provide records to requestors in the most cost-effective way possible. While requestors sometimes appeal OSU's decisions to withhold records, those appeals are rare, and, in recent years, OSU has won all such appeals.

This year, OSU responded to 274 public records requests, many of which were high volume and/or high profile. Attachment 6 shows the number of public records requests over the last seven years. The steady upward trend in this area led to the decision last year to create a standalone Public Records Office, consistent with university peers, so that OSU can better dedicate time and resources to this important work (and so that OGC stays advisory in business processes, rather than managing processes). OGC transferred the recently vacated FTE of one Legal Assistant to the division of University Relations and Marketing, which now houses the new Public Records Office. OGC worked closely with the new Public Records Officer over a number of months to ensure the smooth transition of this function, which was successfully completed on May 1, 2019. As with all other areas of the university, OGC will remain closely connected and advisory, especially in high profile or complex public records requests.

OGC continues to respond to subpoenas in which testimony or documents are sought for third-party litigation. The office responded to 17 subpoenas (some very large) this year and prepared and advised a number of OSU employees whose work-related testimony was sought in various third-party trials or depositions.

PREVENTATIVE LAW – OUTREACH AND TRAINING

OGC attorneys engage in preventive law every day, serving as key members of OSU teams in proactive planning and pre-decision phases. This advance advising often avoids or mitigates legal action later. Additionally, helping leaders at all levels trouble-shoot particular issues presents opportunities to provide education on applicable laws and policies.

OGC also takes many opportunities to provide more formal training. For example, this year's trainings included two sessions for OSU managers regarding legal issues at the all-day annual Managers' Legal Toolkit seminar, one session of the Leadership Academy for academic school heads, and one session at Training Days for all interested employees. OGC also provided various trainings on myriad topics to particular departments, including the division of Student Affairs, Student Conduct Hearing Committee, the Office of Human Resources, 4-H leadership team, the Research Office, the Office of Equal Opportunity and Access, ASOSU executive team, Extension Service Regional Administrators, Finance & Administration leadership team, Registrar's Office, Procurement & Contracts Services and others.

OGC Statement of Philosophy

The Office of General Counsel (OGC) serves as a key resource to Oregon State University, as we provide legal advice on all manner of issues facing this complex and large organization.

In providing legal advice, we add value by crafting creative and pragmatic solutions, fostering critical analysis, and facilitating resolution towards common goals across a spectrum of agendas and viewpoints. Our attorneys bring a high level of knowledge, judgment and common sense to every issue on which they advise, and their advice is contextualized and specific to OSU's needs. To be effective advocates and advisors, we take a genuine interest in and ensure understanding of OSU's history, culture, current activities/challenges and goals.

In working with OGC, OSU employees can count on impeccable ethics and integrity, as well as respect, collaboration and inclusivity. Building and maintaining relationships across OSU is paramount to our ability to provide excellent service. OGC is just one part of a large and multi-faceted team at OSU, and our attorneys respect the expertise, judgment and business decisions of OSU leaders. It is imperative that we be viewed as partners, advisors, and problem-solvers.

Although OGC is a fast-paced and often high-pressure environment that calls for a level of professional autonomy in each employee, our attorneys, paralegals and assistants work together to provide the campus with seamless service and to support and guide each other collaboratively. The principle of teamwork that is integral to the relationships with constituents outside the office is evidenced in our working relationships within OGC.

OGC Staff

The office includes six (6) attorneys, two (2) paralegals, and an executive assistant. While the office is staffed leanly, we provide high quality legal services in an efficient way. The university has a collaborative culture of bringing us in early in planning and problem-solving and the attorneys strive to practice preventive law in all arenas. Our success in providing efficient legal services is dependent on both of these conditions — leaders of all levels utilizing OGC in this proactive manner and our focus on preventive law. We also connect often with our colleagues within the state and nationwide to stay ahead of the curve on best practices for efficient and cost-effective services.

DYNAMIC ADVISING ACROSS DIVERSE SUBJECT AREAS

OGC provided advice in the following key areas in 2018-19³:

Student issues – Advised on issues related to student conduct, student wellness, student government, academic appeals, academic programs, Greek life and other student organizations, free speech, firearm rights, undocumented students, admissions policy, and scholarships/financial aid.

Civil rights investigations/issues – Advised on discrimination, sexual assault and bullying investigations, as well as disability accommodations and facilities accessibility reviews. Advised leaders across the university on civil rights and constitutional law issues.

Employment issues – Advised on faculty grievances, potential terminations-for-cause, reassignments, non-renewals, agency complaints, tort claims, personnel management issues, promotion/tenure appeals, employment law compliance, collective bargaining, and athletics employment contract issues.

Contracts, industry partnerships, association collaborations – Advised on variety of procurements and contracts including high value or complicated construction and goods/services agreements and transactions, as well as industry collaborations, sponsored research agreements and consortium/association agreements.

Bond due diligence – Worked with outside bond counsel, as well as counsel for other state agencies, to issue bonds.

Compliance – In addition to Title IX compliance, advised on many different regulatory compliance areas, including, for example, Clery Act timely warning/crime reporting, controlled substances issues, export control, Native American Graves Protection and Repatriation Act (NAGPRA), Title VI and VII, IT security compliance, hazardous materials storage/labeling/transport, HIPAA/FERPA, NCAA rules, financial aid regulations, payment card industry standards, human/animal subject research regulations, and European Union General Data Privacy Regulations (GDPR).

Research issues – Advised on hemp and marijuana research questions, controversial research matters and academic freedom, research compliance, research misconduct actions, technology transfer issues, grant compliance matters, liability/risk issues regarding research vessels and field work, and implementation of new federal Uniform Guidance for federally sponsored research.

³ OGC works with many offices at the university who have primary responsibility in these areas (e.g., the Office of Human Resources and Office of Faculty Affairs for employment issues, the Office of Equal Opportunity and Access on discrimination issues, the Office of Student Conduct and Community Standards on student conduct issues, Procurement and Contract Services on transactions, the Office for Commercialization and Corporate Development on licensing). OGC is consulted when legal advice is needed or matters are particularly complicated, high value or high profile.

Intellectual property issues – Advised on patent, copyright and trademark issues regarding commercialization and ownership of technology, research, and course curricula, as well as copyright clearance on certain OSU productions. Also advised on intellectual property disputes.

Athletics issues – Coordinated with the Pac-12 GC and other Pac-12 institution GCs on matters of common interest, as well as continued to provide greater support to OSU's Department of Intercollegiate Athletics regarding increasingly complex and high profile issues. Advised on matters regarding student athlete conduct, concerns regarding student athlete criminal history, NCAA issues, drug testing, public-private partnership opportunities, diversity and inclusion efforts, discrimination complaints, scholarships, gender equality in athletic opportunity and facilities, elimination of swim team, new head coach contracts and other coach contract revisions, personnel matters, sports betting issues and national litigation/legislation regarding concussions and other injuries, use of student athletes' name/image/likeness, student athletes as non-employees, and payments to student athletes beyond the cost of attendance.

Accreditation – Advised OSU through Northwest Commission on Colleges and Universities (NWCCU) re-accreditation. OSU's self-study and NWCCU site visit this year involved many questions of governance, compliance and policies.

Risk management – Advised on Enterprise Risk Management initiative, as well as threat assessment, emergency response plan update, Veterinary Hospital client claims, personal injuries on university property, infectious disease issues, new travel policy, large or particularly risky events, and other matters.

International issues – Advised on issues related to international research endeavors, export control and heightened federal national security concerns on research/education collaborations, student study abroad and athletic/music/academic team international travel, employee travel, immigration and travel ban issues, overseas employee compliance, international transactions and new federal regulations regarding foreign gift reporting. Also advised OSU regarding INTO relationship, including issues of contract interpretation, data transfer, compliance, real property and banking.

Policies – Advised on variety of proposed university policies or policy revisions, especially partnering with the Office of Audit, Risk and Compliance and the director of policy and standards on university's long-term policy modernization effort.

City of Corvallis – Worked with OSU and city leadership, as well as outside land use counsel, in preparation for the city's process for amending the OSU Zone in the land development code, as well as application of the interim development agreement to particular building projects. Coordinated with city attorney on variety of concerns, including police matters, student conduct matters, international student concerns, and transportation and public safety program collaborations.

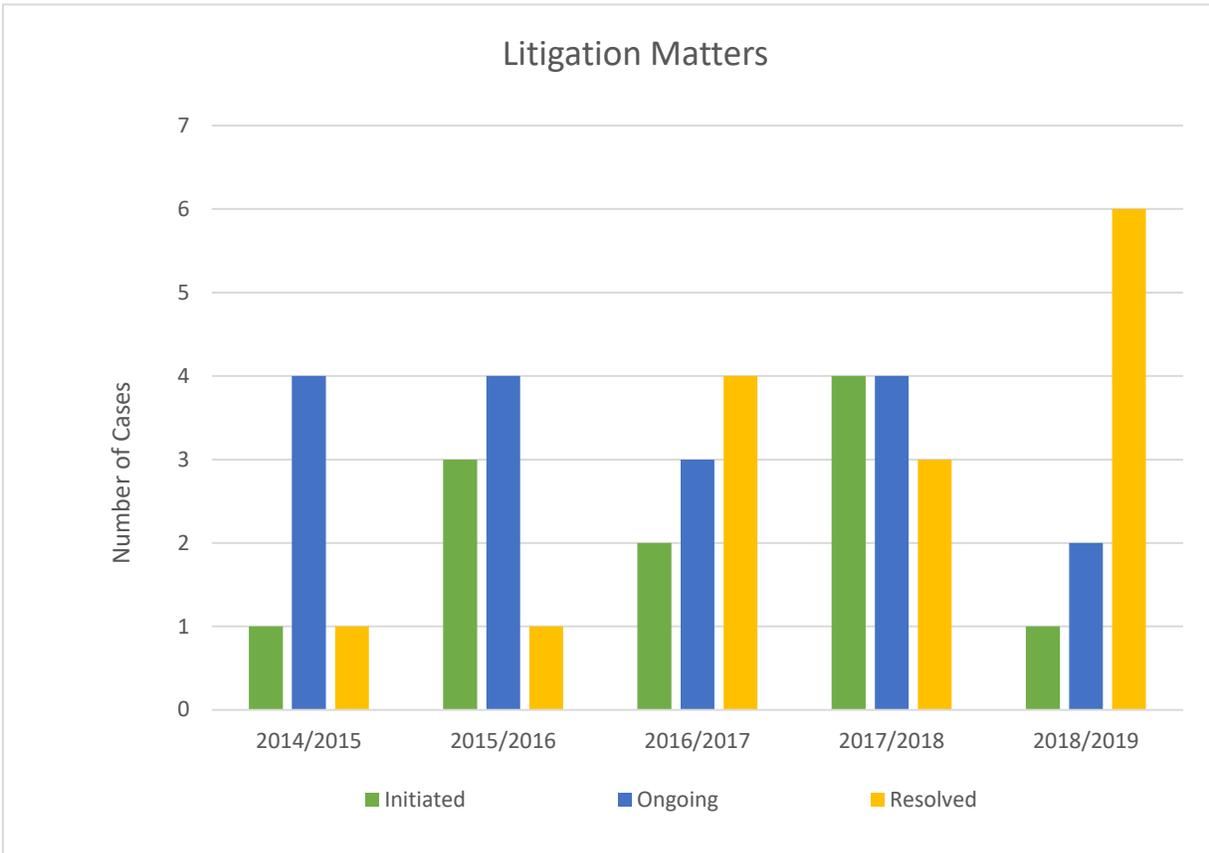
Legislation – Advised regarding variety of bills in the 2019 Oregon legislative session.

Foundation – Advised OSU employees and coordinated with OSU Foundation counsel on variety of contract, gift and ethics questions.

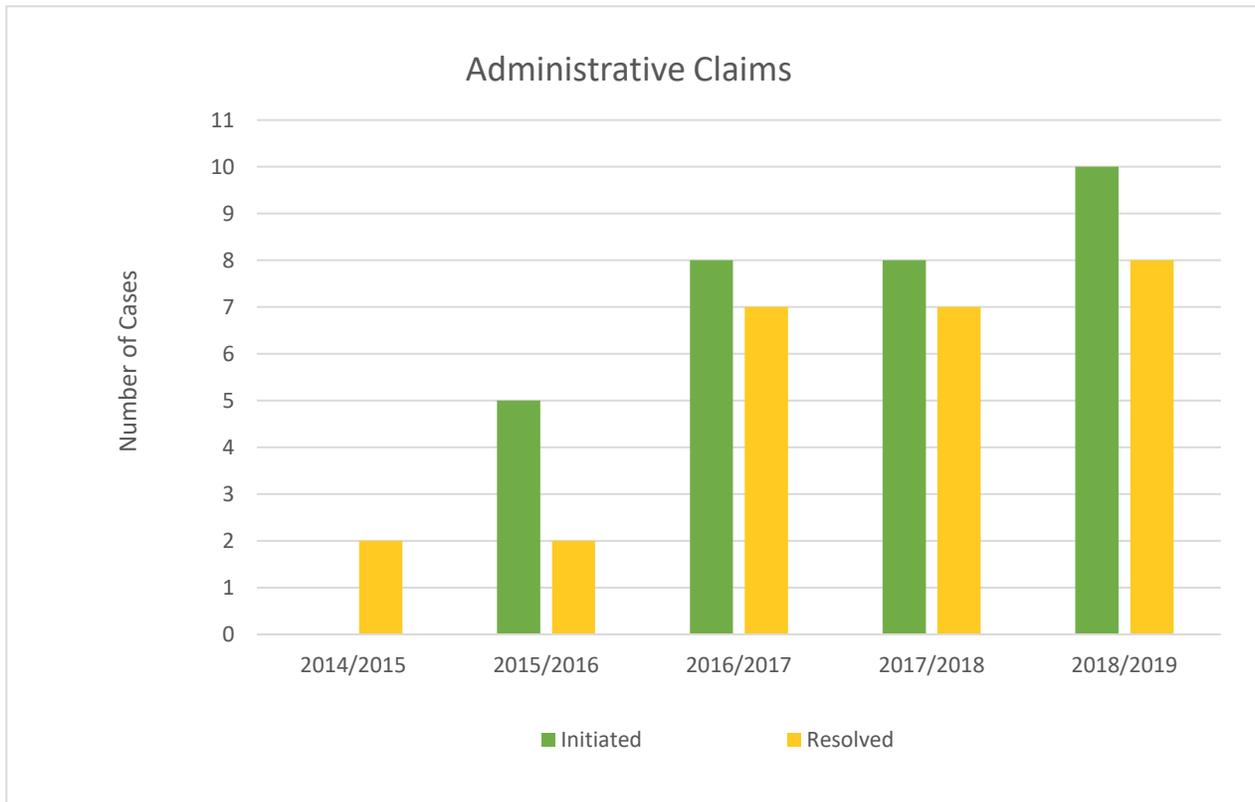
Ethics/audits – Advised on government ethics issues and internal/external audits.

Bankruptcy/collections matters – Advised on student, client and corporate vendor bankruptcies and collections matters to the extent they impacted OSU.

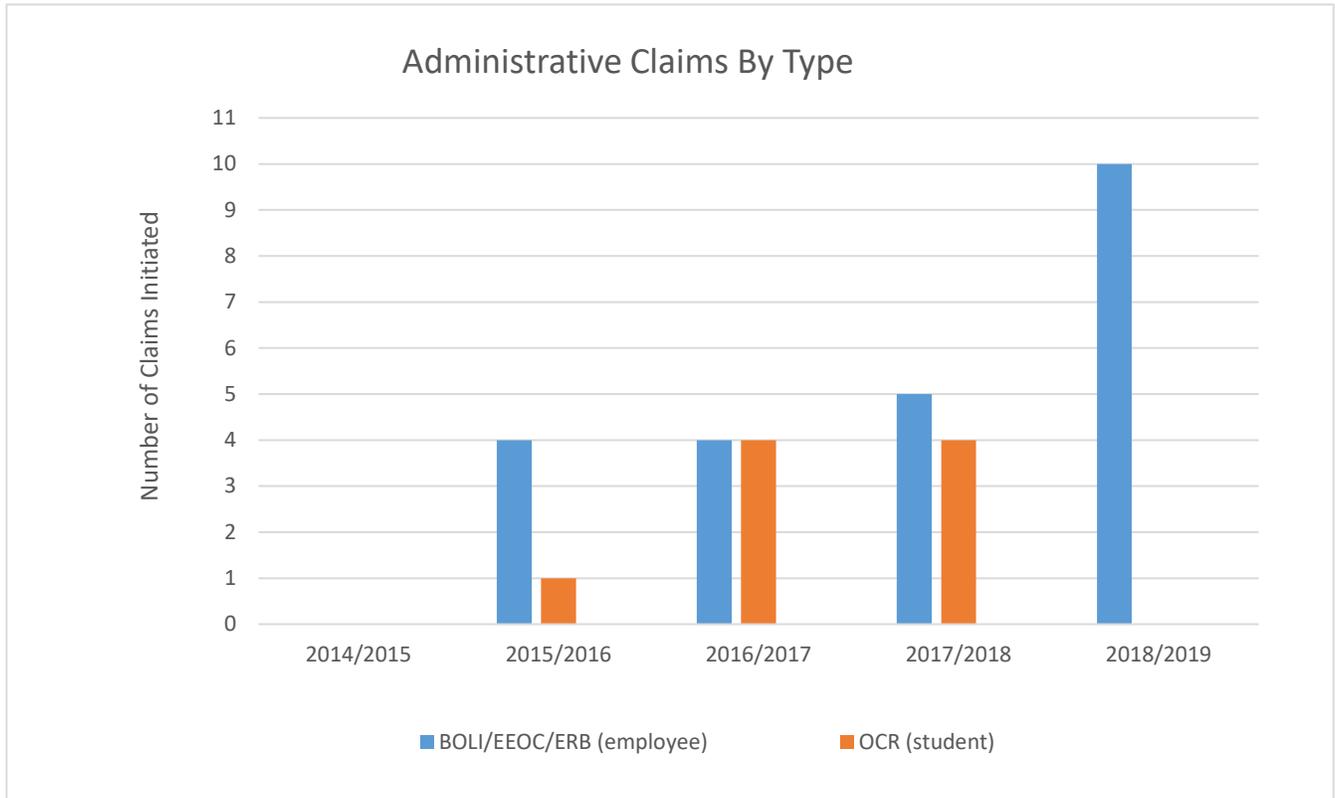
Litigation Matters: Five-year snapshot of litigation rates, showing numbers of cases filed against OSU and resolved each year, and those that carried over from previous years.



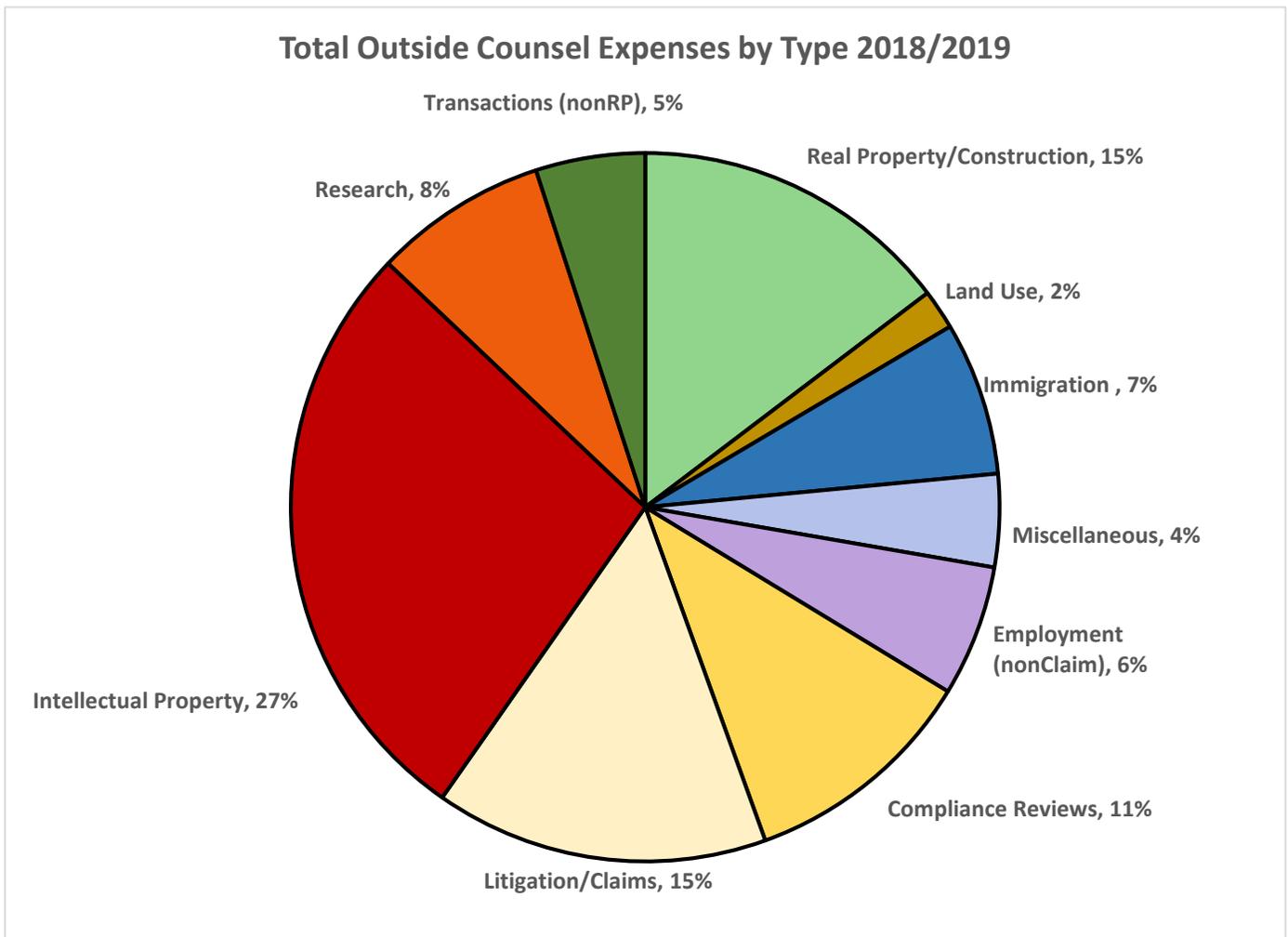
Administrative Claims: Administrative claims (claims by students or employees to and investigated by outside agencies) made over the past five years. Claims are generally resolved within a one year period, but may carryover from year to year.



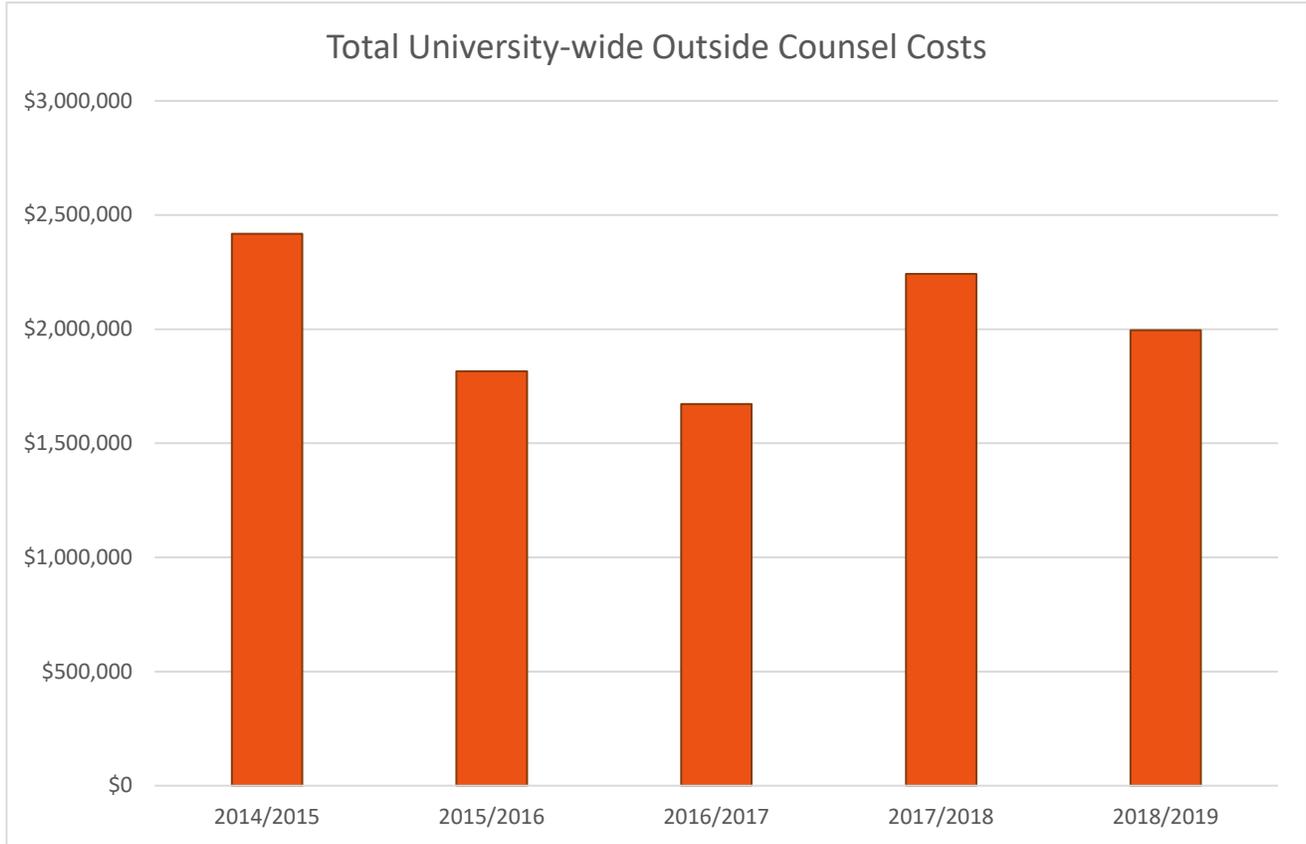
Administrative Claims By Type: Administrative claims broken out by claims from students versus employees made over the past five years.



University-wide outside counsel expenses broken out by category for Fiscal Year 2018. Miscellaneous includes tax, legislative issues, environmental, banking, and others.



Trends in university-wide outside counsel expenses annually over the past five years.



Number of public record requests submitted annually for each of the past seven years.

