

## Office of General Counsel Annual Report FY2017

### 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 2016-17

Major areas of focus for the OGC in 2016-17 fell into several categories:

- *Free speech issues* – Like many universities nationwide, OSU experienced a significant increase in activism around a variety of issues, including concerns about diversity and inclusion, the federal election and subsequent federal policy changes, tuition increases, and more. We worked to proactively support OSU's goals of providing for 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
- *Federal policy changes* – Also similar to what universities experienced nationwide, OSU saw a substantial increase in often sudden significant federal policy changes this year after President Trump was inaugurated. OGC worked to quickly understand and advise on OSU's response to and implementation of these changes.
- *Governance changes, especially in 2017 Legislative Session* – This was another busy year for interpreting the legal landscape for OSU after Senate Bill 270, the bill that changed the institution's governance structure from the State Board of Higher Education to the OSU Board of Trustees, as well as altered the type of state entity status and powers. The legislative session heightened the need for this work, requiring interpreting and advising on hundreds of proposed bills and potential university responses. There was a particular focus on bills that potentially infringed on institutional autonomy, as well as those presenting the typical OGC concerns regarding liability or compliance.
- *Compliance issues* – Compliance issues have taken significant focus in recent years, as a result of the growing 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 on large, decentralized campuses with diverse compliance topic areas, making partnerships such as those with the offices of University Compliance and Audit Services critical. Title IX/Sexual Misconduct and Lab Safety remained the two top compliance areas of risk for OSU this year and required a substantial amount of work, including advising on many individual cases, as well as on significant revision of policies and procedures. Changing federal regulations complicated this work, but significant compliance improvement institution-wide in the high-risk areas is encouraging.
- *Bend and Newport* – A major focus in Bend was advising to support OSU's analysis of whether to purchase and remediate the landfill adjacent to the OSU-Cascades campus, as well as how to mitigate risks to OSU and support the negotiations. The start of

OSU-Cascades' first residence hall and dining center also presented opportunities for advising on student-related issues such as living and dining spaces, public safety, welfare/threat, and student conduct. Efforts in Newport focused on advising the steering committee overseeing the planning and construction of the new building for the Marine Studies Initiative. For both locations, the office also advised on a number of matters including transactions, other real estate matters, land use, employment and student issues, risk management, ethics, and public records/meetings. Although Bend and Newport have taken a targeted focus recently, OGC also continued to advise extension offices, experiment stations and other OSU locations across the state.

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

### LITIGATION 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.

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 actively litigate, there has been uncommon success. In fact, OSU has prevailed in every such litigation matter in the last three years. In addition, OSU's victories have recently been in pre-trial stages, before significant attorneys' fees have been expended. Litigation numbers over the past four years are provided in Attachment 3.<sup>1</sup>

OGC also manages all civil rights and employment administrative claims. These include complaints filed by employees or students in outside 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 every one of these claims in the last four years. Attachment 3 includes a summary of administrative claims over past four years.

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.<sup>2</sup>

<sup>1</sup> Note that most of the litigation over this four-year period involved employment disputes, although several involved injuries, several involved student discrimination claims, one involved free speech, and one brought claims regarding an OSU employee's participation as an expert in a criminal trial.

<sup>2</sup> 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).

## 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 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 in 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. Additionally, 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. Some of these expenses are paid from the OGC budget and some are paid by individual departments, projects or grants. Litigation expenses are paid by the university's self-insurance pool, but those matters and expenses are closely managed.

Even when outside counsel is engaged, OGC staff 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 an overview of OSU-wide outside counsel costs and the subset of outside counsel costs paid and closely managed by OGC over the last four years. The attachment also shows litigation costs over the last three years, which are paid by the university's risk pool but closely managed by OGC. A variety of cost containment measures have been implemented in working with outside counsel, some of which explain the steady decline in outside counsel costs in recent years; other factors also played a significant role. For example, the intense work in the governance transition from the State Board of Higher Education to the OSU Board of Trustees necessitated much higher outside counsel expenses in 2014, and those expenditures have tapered dramatically. Other outside counsel work ebbs and flows with the needs of new initiatives, such as the outside counsel work in the development of the OSU-Cascades and Newport locations.

It is encouraging to see that the great 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

OGC manages the public records process for OSU, and the Senior Paralegal is the university's Public Records Officer. OSU strives for transparency as a strongly held value, and the OGC works to produce responsive records to public records requestors quickly and cost-effectively. There are times, however, where records are 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 of those appeals.

This year, OGC responded to 233 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 four years.

OGC also manages the process of responding to subpoenas in which testimony or documents are sought for third party litigation. The office responded to 37 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 advanced 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 training. For example, this year's trainings include a session for OSU managers regarding legal issues at the all-day annual Managers' Legal Toolkit seminar, as well as other various trainings on myriad topics to particular departments, including the division of Student Affairs, the Office Human Resources, the Research Office, a student employee leadership group, the Diversity & Cultural Engagement leadership team, Extension Service Regional Administrators, the Finance & Administration leadership team, Student Health Services, Procurement & Contracts Services, and the leadership teams of the colleges of Business, Science, and Engineering.

**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, an executive assistant and an incoming legal assistant.<sup>3</sup> 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.

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<sup>3</sup> Given the significantly increased workload over the last several years, OGC assessed whether to add another attorney this year, but concluded instead to hire a legal assistant as a more cost-effective measure. The legal assistant will take workload from the two paralegals, thereby freeing them up to take on more work from the attorneys. The search for this position is currently open.

## Attachment 2

**DYNAMIC ADVISING ACROSS DIVERSE SUBJECT AREAS**

In addition to the high focus areas of advice highlighted above, OGC also provided advice in the following key areas in 2016-17<sup>4</sup>:

*Student issues* – Advised on issues related to student conduct (including substantial revision of student conduct code), student wellness, student government, academic appeals, academic program issues, and scholarships.

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

*Employment issues* – Advised on faculty grievances, terminations-for-cause, reassignments, non-renewals, agency complaints, tort claims, personnel management, 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 universities and state agencies, to issue both state-backed and university revenue bonds.

*Research issues* – Advised on permissible OSU role in marijuana and industrial hemp research/industry, other controversial research matters and academic freedom, personnel matters, research compliance, research misconduct actions, technology transfer issues, and grant compliance matters.

*Intellectual property issues* – Advised on patent, copyright and trademark issues regarding commercialization and ownership of technology, research, and course curricula. Also advised on patent and copyright disputes.

*Athletics issues* – Coordinated with other Pac-12 GCs on matters of common interest, as well as continued to provide greater support to 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, compliance regarding gender equality in athletic opportunity, coach contract revisions and personnel matters.

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<sup>4</sup> OGC works with many offices on campus who have primary responsibility in these areas – for example, Human Resources and Academic Affairs for employment issues, Equal Opportunity & Access on discrimination issues, the Office of Student Conduct & Community Standards on student conduct issues, Procurement and Contract Services on transactions. OGC is consulted when legal advice is needed or matters are particularly complicated, high value or high profile.

*Risk management* – Advised on University Risk Management initiative, as well as threat assessment, emergency response plan update, Veterinary Hospital client claims, personal injuries on campus, infectious disease issues (including meningococcal outbreak on campus), new travel policy, large or particularly risky events (including solar eclipse festival/housing), and other matters.

*International issues* – In addition to responses to federal Executive Orders on the travel ban and sanctuary cities, advised on issues related to international research endeavors, export control, student study abroad and athletic/music/academic team international travel, employee travel, immigration, overseas employee compliance and transactions matters.

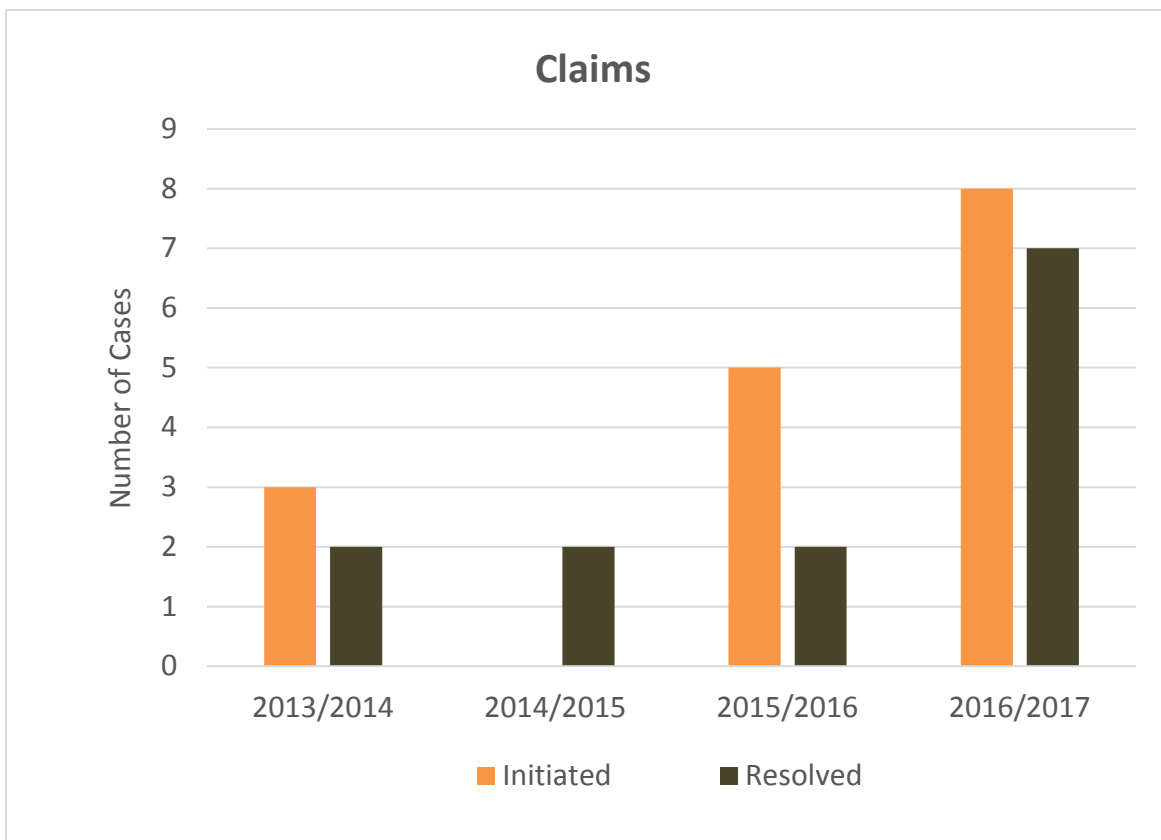
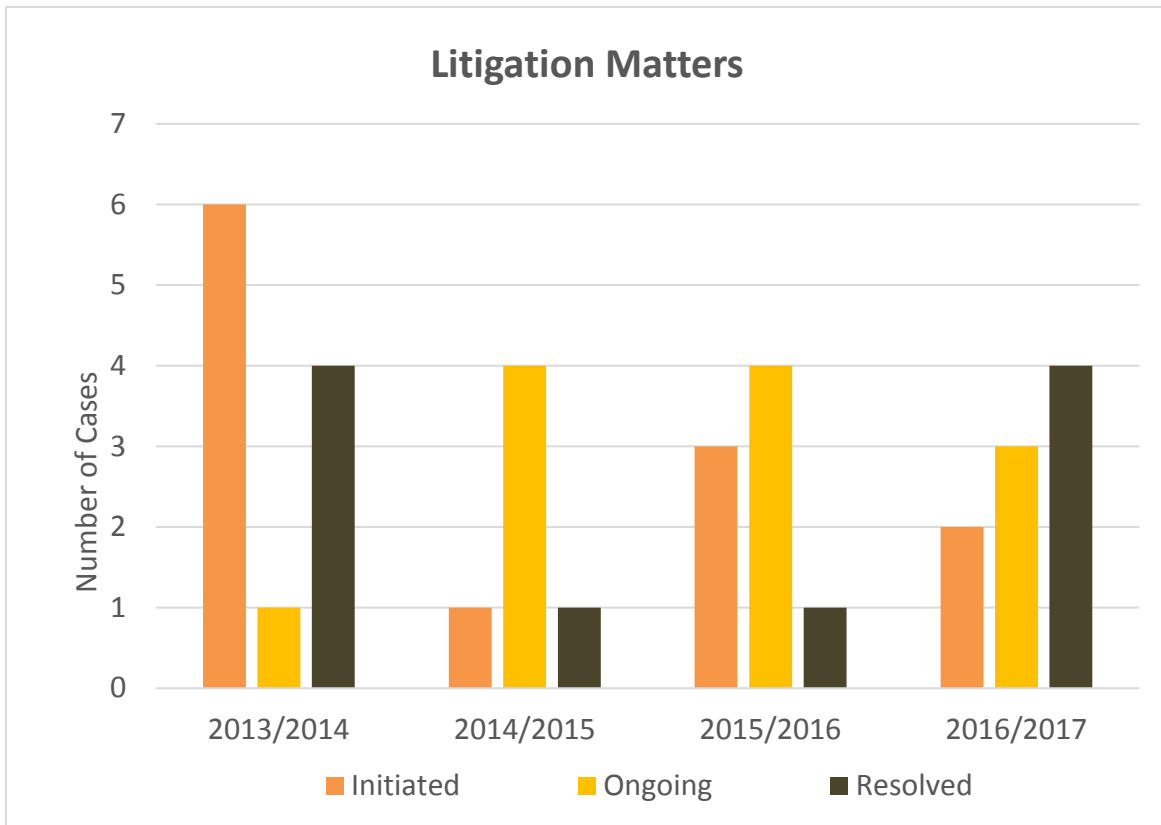
*Policies* – Advised on variety of proposed university policies or policy revisions, especially partnering with the Office of University Compliance and the new director of policy and standards on university's long-term policy modernization effort.

*City of Corvallis* – Worked with OSU and city leadership, as well as managed 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 partnerships.

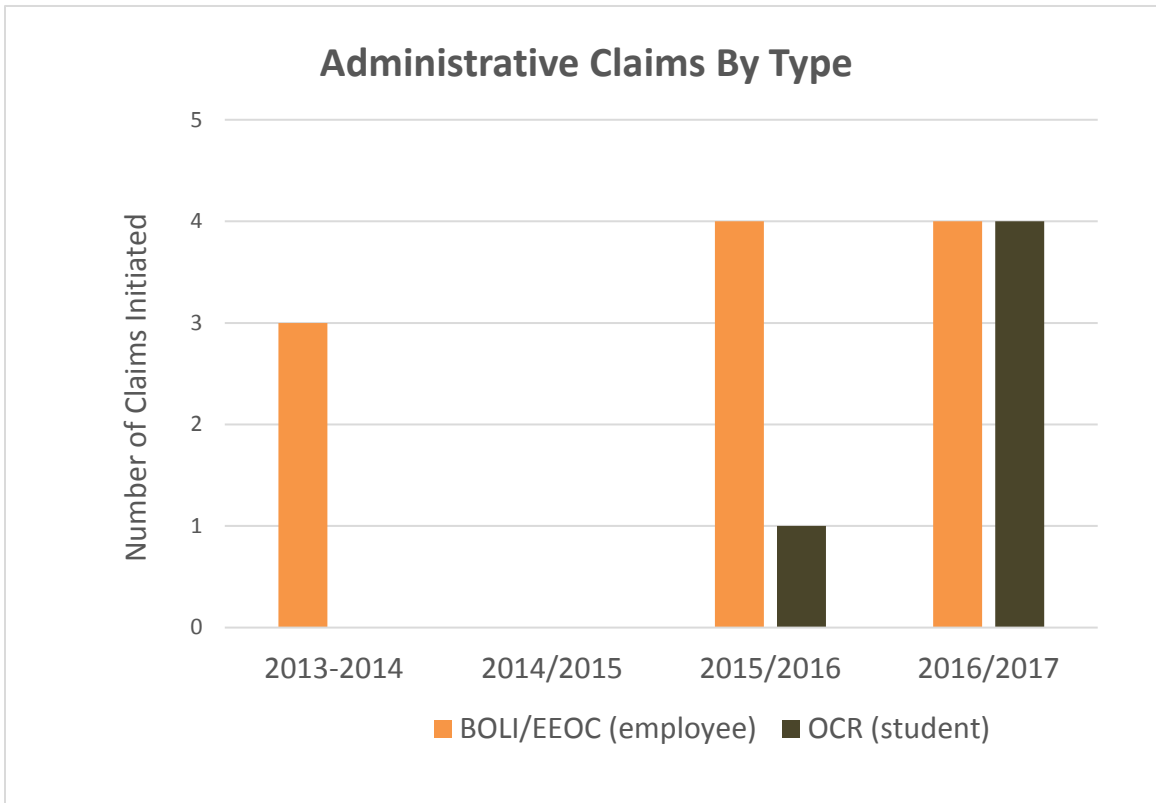
*Foundation* – Advised OSU employees and coordinated with OSU Foundation counsel on variety of gift and ethics questions.

*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.







### Total Outside Counsel Expenses by Type 2016/2017

