Why "Sunshine" Laws Matter: Emerging Issues for University Governance, Leadership, and Policy

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Abstract

In recent decades, all fifty states adopted open-meetings and records laws as a device for broadening citizen access to public decision-making. These laws, known colloquially as "sunshine" laws, have become significant institutionalized features of higher-education governance and policy. In this essay, we describe recent developments, emerging issues, and important implications of the laws for board performance, presidential selection, and other aspects of university operations.

Recent financial scandals involving some of the largest publicly held companies in the United States (e.g., Enron, WorldCom) have dramatically increased the attention given corporate governance by the public, the media, the courts, and policymakers. Public scrutiny and cynicism have followed in the wake of these high-profile episodes of corporate malfeasance. More broadly, policymakers have proposed and, in some cases, implemented wide-ranging reforms aimed at promoting "openness," "transparency," and "accountability" in corporate governance.[2]

Although the corporate sector is the most recent arena of American society to be subject to questions and legislation regarding openness in decision-making, it is by no means the first. Public-sector organizations have long been subject to a variety of openness requirements. In a roughly twenty-year period dating from the early-1950s through the mid-1970s, virtually every state government adopted or substantially revised existing open-meetings and records laws, known colloquially as sunshine laws, in an effort to broaden citizen access to and participation in decision-making by public agencies.[3] Much of the legislation, championed by the media, citizen advocacy groups,

[2] The Sarbanes-Oxley Act, which President Bush signed into law in July 2002, has been described as the most sweeping regulatory reform for U.S. businesses since the New Deal era (*The Washington Post,* 2003).

[3] Utah, in 1898, enacted the first statute requiring openness in public decision-making, followed soon thereafter by Florida. Florida significantly revised its laws in 1954, an effort that helped stimulate new legislation in numerous other states. At least twenty-five states wrote or rewrote sunshine laws between 1952–1962, often as a result of public pressure brought by media organizations (Sherman 2000). Although the concept of openness in government received major support in 1967 with passage of the federal Freedom of Information Act, the next major wave of state-level activity occurred in the first half of the 1970s, when many states enacted landmark legislation as a response to criminal activities of public officeholders. Texas, for example, passed its Open Meetings and Records Act of 1973 in the wake of a land-fraud scheme (the "Sharpstown" scandal) that resulted in the criminal indictment of the governor, attorney general, and top legislative officials.

and politician-reformers campaigning on "good government" platforms, arose in direct response to political scandals that had severely eroded public confidence in America's democratic institutions. Proponents popularized sunshine laws as a tool for enhancing democracy and for holding governmental decision-makers more accountable for their actions. The legal basis for this approach lies in fundamental principles regarding the citizen's appropriate role in democratic government (Yudof 1983). In the words of one commentator, "the notion of a citizenry's right to self-government necessarily implies a right to gather information from one's government, even when the government resists disclosure" (ibid.). Today, sunshine laws exist in all fifty states.

Notably, these laws have become an institutionalized feature of higher-education governance everywhere. Indeed, while all public entities are to some degree subject to these laws[4], perhaps no other public institution has felt the laws' impact more directly than have colleges and universities. Because sunshine laws differ from one state to the next[5], the specific nature, manner, and extent to which the laws are applied to higher-education institutions also vary widely across the fifty states. In fact, in some places, such as California, the laws even vary across higher-education sectors or systems within the same state. Generally, however, and with some important exceptions[6], state open-meetings and records laws influence virtually every major area of campus functioning, including the following:

- Board deliberation and development
- Presidential search and selection
- Personnel policies
- Research and intellectual property issues
- Budget decisions and resource allocation
- Investments and financial holdings
- Business negotiations and transactions
- University affiliated foundations and fundraising
- Athletics

In other words, open-meetings and records laws are likely to influence the manner and conditions under which university boards of trustees meet, communicate, and deliberate; new presidents are recruited and hired (and outgoing ones fired); academic programs and policies are adopted; budgets are debated; private gifts and donations are cultivated; financial investments are weighed; and, institutional policies of all stripes

[4] Municipal governments and local school boards also are sites of frequent conflict.

[5] In her comprehensive survey of state open-meetings statutes, Schwing (2000) notes nine dimensions along which the laws vary: definitions of entities subject to the laws; mechanical details; definitions of meetings, quorums, deliberations, and voting; exemptions for executive sessions; remedies; cures; defenses to actions under open-meetings laws; prescribed process of litigation; and, stipulations for attorneys' fees, defense arrangements, and reimbursement.

[6] All states provide under law certain "executive session" privileges, which allow public bodies to meet privately in deliberation of particular matters. Typically, these privileges pertain to personnel issues, privacy rights, real-estate transactions, and attorney-client privilege.

(from benefits packages to admissions policies to campus safety plans to athletic ticket pricing) are formulated. In effect, state sunshine laws may directly and indirectly influence not only the context in which campus decisions are made but, quite often, the very substance of those decisions.

State sunshine laws are notable for the frequency with which legislatures debate their amendment. Since 1997, lawmakers have undertaken substantial reform of sunshine statutes, or seriously debated it, in a number of states, including North Carolina (1997), North Dakota (1999), West Virginia (1998), Georgia (1999), New Jersey (1999), Pennsylvania (1999), Texas (1999), Mississippi (2002), Colorado (2000), and California (2003). Additionally, because legislatures routinely tinker with particular exemptions to their existing open-meetings and records acts, the legal and policy environment involving questions of openness in government often is fluid and uncertain.

Far from being sideline to various reform initiatives, controversies involving higher-education institutions have inspired many of the recent efforts to modify state sunshine laws. For example, in a dispute that had been gradually building for years between the University of North Carolina and the North Carolina Press Association over the media's access to "advisory committees" of the chancellor[7], university leaders sponsored legislation in 1997 that would have substantially altered the state's open-meetings and records provisions. One news account characterized the conflict in this episode as involving "subtle threats and high-octane lobbying" of the legislature by both sides in the dispute (Kirkpatrick 1997a), while another characterized the university-sponsored legislation as having potential to "unravel 20 years of gains and balance in the laws that govern open meetings and public records" (Kirkpatrick 1997b). In numerous other states, similar disputes over the application of state sunshine laws to higher education institutions have sparked wider debates within legislatures about changing open-meetings and records laws.

Despite the clear significance of these laws for virtually every area of campus functioning and the frequency with which the laws undergo change, only a modest literature on sunshine laws in higher education has accumulated over the past several decades. Some of the literature of the 1970s and 1980s, the years of increasing universality of sunshine laws in higher education, may be viewed as foundational (e.g., see Cleveland 1985; McLaughlin and Riesman 1985, 1986). Particularly noteworthy is the work of Cleveland (1985), one of the few national studies of sunshine laws and higher education. Cleveland referred to the "trilemma" of interests involved: the need for a delicate balancing among the public's right-to-know, the individual's rights to

[7] Although much of the controversy in this case centered on public access to faculty and student committees that advised the chancellor, the University-sponsored legislation reportedly also sought to seal donor records and certain alumni records, to restrict access to UNC office mail (a newspaper's request for weekly access to the UNC president's mail helped spark the confrontation), and to shield from public view legal opinions written by university attorneys (Kirkpatrick 1997b).

privacy, and the public college or university's mandate to serve the public good. Since that early period, however, few comparable contributions to the literature have been made. Indeed, with the exception of several thoughtful legal analyses (Estes 2000; Geevarghese 1996; Sherman 2000), little systematic effort has been made in recent years to understand the impact of sunshine laws on public universities. In our view, sunshine laws are a critically important but grossly understudied topic.

In 2002, the Association of Governing Boards of Universities and Colleges and the Center for Higher Education Policy Analysis of the University of Southern California commissioned us to conduct a study of the impact of state sunshine laws on the governance of public higher-education institutions. Our final report will rely on site visits we conducted in six states (California, Florida, Iowa, Massachusetts, Texas, and Washington) and on an extensive array of interview data we obtained from nearly 100 officials from across the nation. We interviewed representatives of all major stakeholders involved in sunshine-related issues in higher education, including members of governing boards; system heads, campus presidents, provosts, and university attorneys; faculty leaders; newspaper publishers, editors, and reporters; staff of the state attorneys general; legislators; consultants; and various national observers of higher education.

Because our research and analysis are ongoing, we do not present in this article the ultimate findings of our study. Rather, we attempt to demonstrate the contemporary significance of state open-meetings and records laws for university governance, leadership, and policy. Our central assertion is that sunshine laws should "matter" to public universities and their leaders because the laws represent a set of highly fluid state policies that hold potentially profound consequences both for campus governance and for the legitimacy accorded higher education by the American public. Arguably, sunshine laws are an especially important concern in urban institutions, because those institutions may be more likely than others to face high levels of public visibility (owing to nearby media centers), demands from a large and diverse range of stakeholders and constituencies, sensitivities regarding environmental and land-use practices, and contentious labor relations. Sunshine laws can play a central role in shaping how institutions deal with these and other difficult organizational issues. In the several sections that follow, we illustrate the challenges sunshine laws pose for university governance, leadership, and policy by examining recent developments and emerging issues in four important areas: board performance and effectiveness; presidential search and selection; university-affiliated foundations; and technology and campus security.

Board Performance and Effectiveness

The express purpose of state sunshine laws was to change the nature of decision-making in public organizations by requiring transparency in deliberations among public officials. Quite naturally, therefore, state open-meetings and records laws have had direct influence upon the manner in which public university governing boards deliberate and formulate policies for their institutions. One question sunshine laws

pose for campus leaders and state policymakers is whether and to what extent the laws interfere with the mandate of boards to function effectively in fulfillment of their public trust and, if so, how those interferences should be weighed against the virtues of public disclosure and accountability. There appears to be some degree of consensus among campus stakeholders that much good has come from efforts to make governing boards open to participation and inspection by the public. Nevertheless, concern about the potential negative impacts of sunshine laws on board performance and effectiveness is evident. That concern centers on several facets of board communication and deliberation.

Many observers note that boards under sunshine laws are sometimes uncomfortable discussing potentially controversial issues in the glare of media and public attention. The reluctance of boards to publicly discuss the "tough issues" may stem from a concern that comments made publicly will be misrepresented by the news media (e.g., difficult issues involving race or ethnicity) or, simply, that there may be no issue-position that is acceptable to diverse university constituencies (e.g., tuition or fee hikes). Complicating the matter is the concern by some that board meetings made open to the public can degenerate into "media circuses" in which public spectacle replaces responsible and reasoned debate. As a result, boards may choose to skim the surface of controversial issues in public. Respondents in our study described the current content of many board deliberations in such evocative terms as "candy coated," "sugar coated," and "fluff." Boards also may choose to bypass deliberation of issues deemed too controversial to discuss in public. Of course, what is not on the agenda can be as important as what is, and many issues are simply left off the agenda. Ironically, board members' reluctance to publicly discuss certain issues may force decisions regarding those issues to be made after less effective forms of deliberation (one-on-one conversations), or after avoidance altogether. Sometimes, non-decisions may be the inevitable result of non-discussion, and may constitute a failure on the part of public officials to take needed action.

A related issue involves what might be termed "board learning." Do sunshine laws impede opportunities for development and socialization of board members outside of the public eye and, if so, does that diminish their effectiveness? A number of observers have noted that board members, especially those new to such service, need ample opportunities to ask any questions that come to mind and learn outside of the public eye. As several respondents to our study put it, board members need a place where they may ask "the dumb question," without fear of being seen as uninformed and ineffective. Some board members believe this need has intensified due to recent opinions rendered by state attorneys general that board "briefings"—the practice of campus administrators or state agency officials providing board members information or analysis on matters before the board—violate their states' open-meetings and records statutes.

A third potential way in which sunshine laws may impact board performance and effectiveness relates to shifting patterns of influence within boards. Some board members believe that sunshine laws have altered the role of board chair significantly.

Where, in the past, chairs could expect open discussion at meetings pointing often to an undetermined outcome, they now feel a need to have the most fundamental differences aired and reconciled prior to official, on-the-record board meetings. Moreover, because of the restrictions on group deliberation, much discussion is now said to occur in one-on-one conversations between the chair and individual members of the board, with the chair at the center of activity. Have chairs been significantly empowered by sunshine laws because only they may be able to obtain rich, comprehensive knowledge of the concerns, positions, and political view and sensitivities of each of the board members? Has this alleged strengthening of the position of board chair enhanced board effectiveness, or diminished it?

Many public information advocates are likely to view the concerns raised above as challenging ones, but as not overly burdensome for boards given the countervailing benefits of openness in public decision-making. Moreover, proponents are likely to view the problems we described as an indication of the need for boards to work more effectively within the constraints of existing public-information laws, rather than as evidence of the need for the laws to be changed. They might point, for example, to the case of Auburn University, whose board, a circuit-court judge ruled in 2001, violated the state's open-meetings act at least 39 times during the previous three years (Schmidt 2001). Nonetheless, the questions raised about the effectiveness of boards under state sunshine laws have important implications for university governance, leadership, and policy, and deserve more systematic and thoughtful consideration by all stakeholders.

Presidential Search and Selection

The selection of a new president arguably is the single most important governance responsibility of university boards of trustees. It is understandable, therefore, that no other sunshine-related decision arena in higher education has attracted more controversy, litigation, and editorial attention than has that of presidential search and selection. Public-information advocates claim that the public should be allowed to observe the deliberations of search committees and be able to review and comment on the candidates considered because of the high visibility and sheer importance of the job of a public university president. In opposition to that view, some board members and institutional leaders argue that the exposure of search processes to public view discourages qualified, accomplished candidates wary that "losing in public" would be embarrassing and detrimental to their future effectiveness in their current positions.[8] Additionally, some observers have characterized the nature of board discussion of candidates conducted in the open as descending to the level of either "innocuous platitude" or "rancorous posturing" (McLaughlin and Riesman 1985). Thus, the central issue confronting boards, state legislatures, and courts is whether and how to strike a balance among the competing demands of public accountability, individual privacy rights, and institutional effectiveness in attracting and retaining top-flight presidents.

[8] Four kinds of arguments are made against open searches. Open searches, critics say, may (1) scare away good candidates, (2) negatively impact the honesty of candidate evaluations, (3) diminish the candor of remarks made by candidates during public interviews, and (4) reduce the number of lateral hires (i.e., presidents who come to their new position from another presidency).

Among the specific questions with which campus leaders and state policymakers must contend are the following: Is the public interest best served by having the names of all applicants and nominees for a university presidency be made known? Alternatively, should only the names of finalists be subject to public disclosure?[9] Is it in the public interest to allow universities to employ executive-search firms, a practice that is popular not only for the expertise such firms may bring to the process, but also for their ability to privately assemble and vet a pool of candidates? For that matter, what precisely is the public interest in the context of selecting university leaders? Does the availability of more information always advance the public interest? Or are the potential benefits of attracting experienced and well-regarded candidates—benefits alleged to result when searches are conducted with some measure of confidentiality for candidates—sufficiently compelling to warrant restrictions on public access to information?

While there is sparse empirical evidence on these questions, numerous anecdotal accounts demonstrate the highly contentious and volatile terrain that university presidential searches occupy under state sunshine laws. In recent years, controversies over public access to presidential searches resulted in lawsuits involving Michigan State University, Georgia State University, and the Universities of Kentucky, Michigan, Minnesota, New Mexico, and Washington, among others. In all of these cases, news organizations brought suit against universities alleging a presidential search committee either had met illegally (i.e., in private or without proper notice) to interview or discuss candidates or had illegally withheld public records (e.g., names of candidates for the position or scoring sheets used to evaluate candidates) pertinent to a search. Elsewhere, observers have identified sunshine laws as one factor, among several, contributing to lengthy, unwieldy, frustrated or "failed" searches (Basinger 2001; Leatherman 1995).

The case of Michigan illustrates both the turbulent legal and political environment in which presidential searches often are conducted and the stresses such searches can place upon relations among universities, the media, and legislatures. Controversy over the applicability of sunshine laws to presidential searches at public universities in Michigan dates back nearly two decades, when the *Ann Arbor News* and *Lansing State Journal* brought suit against the University of Michigan Board of Regents alleging the university had broken the state Open Meetings Act during its 1988 search for a new president. The university argued, as it would in subsequent suits, that the state constitution's "autonomy" provision for public universities superceded the open-meetings statute. In 1993, however, the Michigan Supreme Court sided with the papers, ruling that the University of Michigan had indeed violated state law ("Booth Newspapers"). Several months later, a Michigan appellate court ruled similarly in favor of the *Detroit News* and the *Lansing State Journal* when it found that Michigan

[9] Proponents of complete openness often claim that, only by knowing the names of all candidates for the position of president can the public make an informed determination about the adequacy of a given search. Alternatively, advocates of restricting public access typically assert that publishing the names of all candidates reduces the quality and quantity of the candidate pool because few individuals, particularly sitting presidents, are willing to risk their relationship with their current institution by having their names publicly disclosed in the early stages of a search.

State University had violated the law during its 1993 search for a new president—a decision the university appealed. In response to those challenges, university officials began aggressively lobbying lawmakers to exempt presidential searches from the state's open-meetings provisions (Leatherman 1993). In 1996, nine years after its previous search, the University of Michigan again began screening candidates to replace an outgoing president. This time, acting upon the advice of various legal experts, the university established a complex search process using consultants and an advisory committee to assemble and vet a pool of candidates in private (Peterson and McLendon 1998). Although this search was more open than previous ones (Sherman 2000), a handful of newspapers again sued the university claiming that all aspects of a presidential search were subject to state sunshine laws. A circuit judge initially sided with the papers. Over time, however, the accumulated lobbying efforts of universities, combined with growing public concern over the cost of conducting presidential searches in the sunshine[10] and defending them in court, led the Michigan legislature to take action of its own. In December 1996, the legislature amended the public information laws so as to permit university search committees to withhold the names of all but five finalists for the position of president (Healy, 1996). Meanwhile, the suit brought against Michigan State University in the case of its 1993 search reached the Michigan Supreme Court, which, in 1999, held in a landmark ruling that the application of the state's Open-Meetings Act to university presidential searches was an unconstitutional infringement upon university governing boards' power of institutional supervision ("Federated Publications, Inc.").

While Michigan may appear to be an extreme case given the unusual degree of autonomy which that state's flagship universities have maintained and zealously guarded over time[11], it is by no means unique in its distinctive pattern of presidential search, followed by litigation and judicial review, followed next by legislative intervention, and yet additional judicial review. In an analysis of recent changes in state sunshine laws, Estes (2000) notes that at least 22 states now have open-meeting and records laws containing exceptions that would appear to permit the nondisclosure of the names of applicants for public employment. Of that number, Estes found at least three states (Michigan, New Mexico, and Texas) that have applied the exemption exclusively to public university presidential searches. In all three states, legislatures rewrote the statutes in response to court decisions requiring universities to disclose the names of candidates. Estes characterizes the pattern across the states as follows: a public university's presidential search attracts litigation from the media in pursuit of

[10] In 1997, the *Detroit News* reported that the University of Michigan's 1996 search had cost in excess of one-half million dollars, including $225,000 paid to outside attorneys to help the school comply with Open Meetings Act and to defend the university against newspapers' suits (Peterson and McLendon 1998).

[11] The University of Minnesota also has a history of asserting its constitutional autonomy as a defense in litigation seeking to compel the university's disclosure of the names of candidates for president. See Hearn, McLendon, and Gilchrist (2003) for a discussion of the most recent case involving that institution, as well as Sherman's (2000) review of recent court decisions involving the application of state open-meetings and records laws to universities with constitutional autonomy.

greater disclosure of candidate identities, the media win their lawsuits, then the university successfully appeals to the legislature, pointing out that it cannot attract good presidential candidates under the rules demanded by the press and the courts. He concludes (p. 509) that this may not necessarily be a harmful pattern: "Perhaps state legislatures are in the best position to judge the value of attracting top leadership to their higher educational systems, and can balance the desire for total openness with the practical reality that such openness will diminish their state's chances of attracting top candidates...."

In addition to appealing to legislatures for relief from the requirements of public disclosure laws, many universities hire outside consultants, particularly those national firms specializing in higher-education executive searches, to assist them in the selection of a new president. Contributing to the growth of this practice is that many states regard the work of private consulting firms as falling beyond the reach of open-meetings and records laws. Thus, in hiring search firms to explore the possible interest and to vet the suitability of prospective candidates, universities may legally shield the names of candidates from public glare, at least during the early stages of the search process. Yet, the use of executive search firms can prove problematic. Some stakeholders, particularly faculty, object to the use of consultants on the grounds that it delegates institutional responsibility for presidential search and selection to outside groups, to the effect of diminished faculty participation. In some instances, courts have required consultants, who presumed that their involvement with candidates was privileged under law, to surrender materials (e.g., resumes and cover letters) pertinent to a search. Also, while campus leaders often seem satisfied with the services search firms provide, there have been sporadic cases of high-profile controversy associated with the use of consultants. For example, when information about the background of a recently hired president at the University of Tennessee helped force that president's resignation, legislative leaders concluded that the firm involved in the search must have conducted an inadequate screening of the candidate. Legislators demanded the state be reimbursed $90,000 in consulting fees paid and requested the consultant who directed the search appear before a legislative hearing to answer questions (Cass 2003).

University leaders face numerous crosscutting pressures as they grapple with how best to conduct presidential searches under state sunshine laws. On the one hand, demands for institutional accountability, expectations of public participation in campus governance, concerns about presidential compensation packages in an era of state fiscal distress, and the occasional, well-publicized scandal are likely to reinforce the view that presidential search and selection processes are simply too important to be closed off from close public scrutiny. On the other hand, many long-time observers, as well as chief executives themselves, claim that presidential searches conducted under the public microscope have had a "chilling effect" upon the search process, such that fewer candidates with the demonstrated experience that is required to lead complex public universities are willing to be considered, a development that, if true, also holds crucial implications for the public good. Some universities have found success pleading their case for certain restrictions on public access to presidential searches. However, it is worthwhile noting that, although appeals for legislative remedy may

lead to the loosening of legal strictures that govern presidential searches, such efforts may also extract substantial costs from institutions, both in terms of institutional resources (e.g., money and time) spent and public legitimacy lost.

University-Affiliated Foundations

Never before have public universities been as dependent upon private sources of revenue as they are today. Accordingly, university affiliated foundations—i.e., independent 501(c)3 organizations established for the purpose of raising private funds and investing, managing, and dispersing those funds on behalf of their host universities—occupy an increasingly prominent role on the public higher education landscape, and a controversial one, too, in the context of public-information laws. Most foundations are legally private entities independent of the public universities whose interests they serve. However, because foundations typically (1) act as repositories for gifts, endowments and other donations made to public universities, (2) make investment decisions regarding those assets, and (3) work closely with universities in spending the monies they raise, much ambiguity and, occasionally, controversy surround the extent to which these foundations may be considered public bodies subject to the disclosure requirements of state open-meetings and records laws. To some public-information advocates, a worrisome feature of the relationship between universities and their foundations is that the board memberships of the two entities often overlap, with campus presidents often serving on foundation boards in an ex-officio capacity. These relationships seem worrisome to some stakeholders because of the substantial financial contributions many foundations make to the executive compensation packages (e.g., presidents and athletic coaches) set by institutional boards and because of the presumed capability of foundations to influence institutional behavior through the allocation of financial gifts. Foundations and campus leaders often respond that board overlap for one or two governing board members, including the president, should actually be encouraged to improve communication, to promote mutual understanding of priorities, and to better coordinate fundraising activities.

Legal challenges and public controversies over the application of state sunshine laws to university-affiliated foundations typically revolve around the following kinds of questions: Should board meetings of university foundations be open to the public? Should foundations' budgets and audits be public information? Should donor financial information held by university foundations be subject to the public disclosure requirements of state open-records acts? How should the public's right-to-know be balanced against the likelihood of diminished trust of donors in foundations were all records publicly disclosed? Advocates of greater openness often assert that disclosure of foundation board membership and foundation procedures and practices is the only way to safeguard against inappropriate entanglements (or the appearance thereof) between foundations and the universities they support. Such advocates might point, for example, to the recent controversy involving the University of Tennessee Foundation, which attracted adverse media attention when it was learned that a board member who was also a University of Tennessee trustee owned a stake in the development company hired by the foundation to build a $60 million student apartment complex (Cagle

2003). On the other hand, foundation advocates often argue that improprieties are in fact uncommon, that required annual reports and independent audits of university-affiliated foundations already provide sufficient public accountability, and that donor records must be kept private for those donors who request anonymity.

Litigation is frequent in sunshine-related disputes involving university foundations. Since 1980, courts have been asked to decide whether open-meetings and records laws may be applied to foundations affiliated with the University of Louisville (1980), West Virginia University (1989), Louisiana's Nicholls College (1989–1990), the University of South Carolina (1990–1991), the University of Toledo (1992), Kentucky State University (1992), and Indiana University (1995) (Geevarghese 1996; Moore 2000; Roha 2000). Two of these cases—those involving the University of Toledo and Indiana University—demonstrate the evolving and inconclusive nature of case law relating to the legal status of university-affiliated foundations. The Toledo case is representative of some early rulings that labeled foundations as public entities (Roha 2000). In 1991, Toledo's daily newspaper, *The Blade,* sued the University of Toledo Foundation, seeking access to its donor records under state open-records law. The foundation argued that it was a private, non-profit entity and, thus, was exempt from the provisions of state sunshine laws. The Ohio Supreme Court, however, found otherwise. Geevarghese (1996) notes that in using a balancing test to weigh "the public's interest in the disclosure of the donor records over the donors' privacy interests," the court ruled the foundation was in fact a public body and, as such, was required under law to disclose its donor records. *The Blade* soon thereafter published a series of exposés about the foundation's fund-raising strategies using personal information it had uncovered about particular donors (Nicklin 1997). In summarizing case law on university foundation disputes prior to the mid-1990s, Geevarghese writes that, while "a consensus in approach [by courts] has not yet developed...one thing is clear. Despite the foundation's private, nonprofit status, it will rarely be considered independent of the public university it serves." However, in a more recent analysis of foundation related litigation, Roha (2000) argues that courts have begun to regard university foundations as legally independent. For example, in a 1995 ruling the Indiana Supreme Court held that a "not-for-profit foundation that solicited and managed funds from private sources for use by or for the benefit of Indiana University is not a public agency" under the state's public records act (Roha 1990). This, despite the fact that the foundation managed the university's endowment for a fee, several university officials served on the foundation's board, and the university lacked its own fund-raising program.

The university foundation arena remains a source of contemporary debate and active litigation as it involves the application of state sunshine laws to foundation activities. In some places, courts and legislatures have compelled disclosure of foundation records and required foundation meetings be opened to the public (Geevarghese 1996). In a few instances, foundations are reported to have voluntarily (and legally) deleted sensitive information from donor records in an effort to protect donors' privacy, a development said to have placed university-affiliated foundations at a disadvantage as fund-raisers (Nicklin 1997). Elsewhere, however, courts have affirmed the independent

status of university-affiliated foundations, exempting them from the requirements of open-meetings and records laws that are generally applicable to public entities. Although statutes and court precedents vary widely across states and jurisdictions, litigation and the prospect of litigation have led foundations and the universities with which they are affiliated to develop operating agreements and memorandums of understanding with one another to clarify responsibilities, goals, and objectives. What appears certain is that, inasmuch as university foundations are likely to grow in their financial importance to universities and to remain flashpoints in public-information disputes, campus leaders should be aware both of the recent legal trends and countertrends involving foundations and of the complex set of privacy and public-disclosure issues that reside at the core of these disputes.

Technology: Communications and Campus Safety

Just as the technological advances of the past two decades posed new opportunities and challenges for campus administrators, so too have emerging communication technologies created new ambiguities and sources of strain in the debate over public access to information and decision-making within universities. The open-meetings and records laws of the 1970s-era were aimed at curbing the secrecy and elitism that attended "back-room" deliberation, where officials made policy out of public view, but in close physical proximity to one another. Those laws could not have anticipated the rapid technological improvements of the 1980s and 1990s, which saw electronic mail, teleconferencing, videoconferencing, and other sophisticated communication mediums blur the meaning of what constitutes a public "meeting" or "record."

The growth and spread of electronic communication has raised numerous sunshine-related challenges for university leaders. One potentially problematic aspect involves the nature of this communication medium and the potential for institutional embarrassment that may arise when news organizations raise the specter of its inappropriate or illegal use. In many instances, disputes have centered on the use of electronic mail by boards to privately discuss sensitive personnel matters, such as executive compensation or the removal of a sitting president. In North Dakota, for example, the Attorney General launched an investigation when several news organizations filed open-meetings complaints against the state Board of Higher Education for a series of electronic-mail exchanges in which board members flirted with the idea of dismissing a campus president (Wetzel 1998). For its part, the board asserted that, because the e-mail conversations were preliminary in nature (i.e., no board action was authorized), no laws were broken. Regardless, the nature of the communication created the appearance of impropriety, inviting front-page news coverage. Other scenarios require university leaders and, ultimately, lawmakers, to make even finer distinctions about what constitutes "deliberation" under state open-meetings and records statutes. An example in one of the states we recently studied arose over whether sunshine laws should apply to an e-mail message that was forwarded from one member of a university board to another, until a majority had responded. Does electronic communication of a dyadic and asynchronic nature, if such communication eventually involves all members of a board, fall under open-meetings

and records restrictions pertaining to board deliberation? If so, precisely where in the context of this example does mere discussion between board members end and deliberation begin? If existing legal conventions do not apply, then how does e-mail communication differ in substance or spirit from the so-called "serial meeting" whereby, in an effort to avoid attaining quorum, one board member will telephone a second member, and the second will telephone a third, relaying the essence of the previous conversation, and so on until all board members will have "discussed" a particular issue? In many states, the law is quite underdeveloped in its application to these kinds of questions with the result that institutions, when confronted with ambiguity, may be reduced, quite literally, to potentially embarrassing "trial-and-error" approaches.

A related issue of emerging significance lies at the intersection of technology and campus security. There are good reasons for university leaders to be paying increased attention to security on their campuses. Heightened expectations in the "post-9/11" era about the preparedness of public agencies for potential acts of terrorism, the growing sensitivity of students and their families to campus crime as a consumer-safety (and thus college-choice) issue, and recent federal mandates requiring the reporting of campus crime data, are a few of those reasons. Universities are responding to the concerns in a variety of ways including, significantly, the installation of cameras and other electronic monitoring devices in buildings and on campus grounds as a means of enhancing security. Yet, university leaders should be aware of the potential these actions hold for fanning public-information disputes. For example, does the public have the right under public-information laws to know the precise placement of security cameras on a public university campus? When a student newspaper recently sued the University of Texas at Austin to obtain that information, the state attorney general's office ruled that the answer is yes: because the university is not a police agency, it cannot keep this information private, even though doing so might allow criminals and terrorists to avoid detection. University officials, therefore, were confronted with an important and potentially controversial decision: whether they should disclose the locations of the cameras or remove them (Young 2003). This example illustrates the murkiness of the issues confronting universities as they attempt to balance legitimate public-safety concerns against the "public's right to know."

Proliferating communication technologies present distinctively new challenges in the broader debate about openness in university governance and decision-making, both because university leaders and public-information advocates will likely continue to clash over the permissible uses of technology under state sunshine laws, and because the mere existence of these technological capabilities raises suspicions about potential misuse, even where none may currently exist.

Conclusion

Although they are an institutionalized feature of public higher-education governance everywhere, sunshine laws also have been subject in recent years to much controversy, conflict, and change. That the application of state sunshine laws to public universities engenders as much controversy as it does may seem ironical given universities'

traditional commitment to the ideals of critical discussion, unfettered inquiry, and participative decision-making. The recent history of sunshine laws demonstrates that while the principle of openness is unassailable, the concrete application of that principle to public higher-education institutions requires a delicate balancing of openness against other legitimate concerns, including those of individual privacy rights and institutional effectiveness. In this article, we have attempted to demonstrate the importance of open-meetings and records laws to university governance, leadership, and policy by examining recent developments and emerging issues in several specific arenas of activity. We believe the tensions we have explored are likely to intensify, rather than abate, in coming years as university leaders and state policymakers continue grappling with existing challenges even as they confront emerging ones.

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