Choose Public-College Presidents in the Sunshine, but Know When to Draw the Shades

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Last week a new president assumed office at the University of Tennessee, marking the end of what has been called “the most public presidential search in the history of higher education.” The trustees' interviews with the finalists for the position were even available on the Internet. The presidential search was the third that Tennessee had been forced to conduct in just five years, and this time the university hoped to avoid any unexpected problems by making it as public as possible.

Is such openness, however, always a good thing? How open should colleges and universities be about issues that concern the public, including delicate and often contentious matters like presidential searches?

We recently spent a year examining state “sunshine laws,” the open-meetings and open-records laws designed to provide public access to decision making in state-supported institutions. Across the United States, such laws are being challenged, reconsidered, and revised in response to discontent over their use and ambiguities about their applications to new circumstances. Although presidential searches are the most visible focus of concern, the controversies have included debates over board deliberations, negotiations with businesses, the adoption of new technologies, and the activities of university foundations.

We recognized that in our research we should hear the views of a wide range of people, including presidents and other senior campus and system officials, faculty members, students, members of governing boards, state attorneys general, and representatives of the news media. We also wanted to understand how different institutions and systems dealt with openness, so we identified a regionally diverse group of states for site visits, interviews, and document analysis. We were especially interested in and visited institutions in states where sunshine controversies have been prominent or where approaches to openness were of national importance. Those included California, Florida, Iowa, Massachusetts, Texas, and Washington State.

To our surprise, however, a news story unfolding in our own home state became the nation's most visible sunshine-related controversy of the past few years. We are Vanderbilt University faculty members, but we are also Tennessee citizens. As such, we shared the shock when the University of Tennessee's president, John Shumaker, as The Chronicle put it, “flamed out in the most spectacular way” in August 2003. Shumaker's final blaze, like that of his predecessor, J. Wade Gilley, was fueled by Tennessee's openness requirements. What's more, Shumaker had won the job in a process that, critics charged, subverted those requirements.

Shumaker had been hired in 2002 after a two-track process in which a public search and a private search ran simultaneously. On the public side, faculty members, students, and alumni participated in the vetting of nominees. At the same time an external consultant was conducting a separate search that, in effect, circumvented Tennessee's sunshine laws. The dual approach produced five publicly identified nominees and one private nominee – and the privately generated choice, Shumaker, apparently won the job easily. He entered office with widespread support and no visible liabilities.

Quite soon, however, things began to unravel. Shumaker asked for a new university airplane to replace the aging model then in use. Journalists using open-records laws found travel logs showing that the president had flown frequently in the new plane, with some visits appearing to be purely personal in nature. He quickly reimbursed the questioned expenses. Nonetheless, sensing a story, reporters began aggressively examining his spending, using sunshine laws to obtain information. With public concern growing, the trustees ordered an internal audit. After revelations of a variety of arguably inappropriate expenses – including $493,000 in unauthorized renovations to the president's home and $165,000 for football-related entertainment – the heat grew. In the end, Shumaker resigned after little more than a year on the job.

The saga in Tennessee is by no means the only recent and prominent sunshine-related controversy. At Virginia Tech's board meeting in March 2003, trustees moved into a closed session in which they ended affirmative action in hiring and admissions and certain protections for gay men and lesbian women. Later, facing heavy public criticism, the board retreated. In January of this year, the California Supreme Court ruled that sunshine provisions required
release of internal transcripts from the University of California suggesting that the system’s retirement and endowment funds could have earned billions of dollars more in previous years had they been better managed. Other examples abound.

Laws requiring that a state’s public business be conducted in public view first arose around a century ago, in Utah and Florida. The Watergate scandal and a variety of contemporaneous state and local incidents sparked a wave of reform much later, in the 1970s, when all states without sunshine laws enacted their first openness measures, and many states with existing laws strengthened their provisions. Each state's laws seek to ensure that the public good, rather than private gain, is the chief factor in decision making by public agencies. Indeed, sunshine’s proponents say mandated openness is an indispensable tool in ensuring public accountability and is an extension of America's pluralistic democratic tradition.

But the laws present distinct challenges for higher education – what Harlan Cleveland, who conducted the last previous national study of the laws, in the early 1980s, called a trilemma. He meant that mandated openness in state-supported higher education creates an inherent tension among three desirable, but often competing, societal objectives: ensuring public accountability, via the public's “right to know”; protecting individual privacy rights; and providing institutions the autonomy they need to pursue effectively, efficiently, and equitably their many public purposes.

Our study examined how states currently balance those tensions, and with what consequences for institutional governance. According to our findings:

- **Openness is widely and deeply valued in public higher education.** Although campus leaders are sometimes uncomfortable with public deliberations and records, they unanimously view openness as essential for ensuring public trust and accountability in their institutions.

- **The specific applications of sunshine laws are often not well understood by trustees, senior campus and system officials, and university lawyers.** Confusion exists, even at the highest levels of governance, over the proper application of the laws to a given situation. Frequent statutory changes, reinterpretations by state lawyers, and the absence of clear legal precedents in many crucial areas have helped breed the uncertainty.

- **The “weaponization” of sunshine laws worries many higher-education leaders.** "Weaponizing“ – the excessive use of sunshine laws by disaffected parties -- typically occurs when a lone citizen aims to bog down an institution in myriad and costly records requests. It also can include the use of the laws by commercial interests seeking a proprietary advantage over competitors or by litigants attempting to circumvent legal rules of discovery.

- **Both reporters and campus officials try to avoid conflict and legal action over public-information issues.** While a popular stereotype may be that of colleges reluctant to engage the news media and of journalists eager to sue campuses, both parties say they work hard to develop productive relationships.

- **Trustees and administrators believe that sunshine laws can sometimes impair the effectiveness of governing boards.** Trustees believe that while mandated openness enhances public confidence in their work, it also sometimes inhibits full and frank deliberation, hinders internal communication, and impedes board cohesion.

- **Trustees and administrators are particularly concerned about the potential negative impact of openness on presidential search-and-selection processes.** There is a broad consensus that presidents should be selected with substantial public input, but many leaders worry that conducting searches entirely in the open may have a "chilling effect" that dilutes both the quality and the quantity of applicants.

- **Emerging electronic communications have created new sources of strain.** E-mail, teleconferencing, and vide conferencing have blurred the meaning of what constitutes a public “meeting” or “record,” thus creating ambiguities and potential legal liabilities for campus decision makers.

- **College officials express concern about ensuring campus security under openness requirements.** After September 11, 2001, such officials have tried to tighten security, but they worry about being forced under sunshine laws to reveal the location and scanning patterns of surveillance cameras, the routines of police patrols, or the blueprints of research laboratories.
In all, our fieldwork suggests complexities and ambiguities that defy quick and easy resolution. Still, we can offer four broad recommendations.

First, a search process should be neither totally open nor totally closed. Openness may dissuade some good candidates, yet maintaining complete privacy can greatly disserve the public good. Seeking a wide, public airing of views can be valuable in vetting candidates and in building public support for the selection of a new president, yet a measure of confidentiality is essential to effectively filling presidencies. Thus we endorse a balanced approach, one that ensures confidentiality in the search for presidents and openness in the selection of presidents. States should seek to ensure confidentiality for candidates in the early stages of a presidential transition process, but should publicly reveal finalists before reaching any decision.

Second, policy makers, advocates, and campus leaders should consider the timing of the release of information. Contemporary debate typically structures the problem of openness as a dichotomy: an all-or-nothing choice between holding "real time" meetings and releasing records immediately, and not being open at all. There may be middle ground. In some commissions and agencies at the federal level, deliberations are shielded from public view for a specified time, then made available. Citizens may be given opportunities to testify, thus ensuring that public opinion is broadly considered as officials deliberate, but the deliberations are confidential, at least initially.

Third, boards should be allowed to conduct a limited number of closed “retreats” at which substantive discussion is allowed but no decisions are made. Trustees and presidents consistently lament the absence of opportunities for informal discussion. Without such opportunities, board effectiveness may suffer.

Critics might view the absence of such retreats as less troubling than the potential loss of accountability stemming from closing some board discussions to public inspection. Some states, however, have recently established limited opportunities for those discussions. The journalists whom we surveyed from those states volunteered no strong objections to such sessions, as long as board decisions continued to be made in public forums.

Finally, trustees should be permitted to receive closed informational briefings from staff members. Trustees often say they lack vital knowledge and neglect important issues because they have few venues in which they may comfortably ask “dumb questions.” Permitting staff members to brief trustees on looming issues may provide board members with valuable information with which to make well-reasoned decisions.

Public institutions vary in their cultural, political, legal, and media environments, and those environments, in turn, create various contexts for institutional governance. Sunshine laws will never be made definitively “right” – circumstances and preferences will always change. Still, as works in progress, those laws should represent the best thinking on the most appropriate avenues toward a widely shared goal: responsible and responsive public openness.