SUNSHINE LAWS grew out of public concern over the ways public officials make decisions. Although their specific terms often are rooted in distinct local political conditions, each state’s sunshine laws seek to ensure that the public good rather than private gain is the primary factor in decision making within publicly controlled or funded entities, including higher education governing boards and, in many cases, related foundation boards.

Over the course of a century of statutory reform and revision, proponents have popularized sunshine laws as a tool for enhancing democracy and for holding government decision makers accountable for their actions. The working assumption of these laws is that by making meetings and records of public entities visible, a state can help ensure accountability and, ultimately, informed decision making regarding public resources. As such, the laws embody fundamental principles regarding the importance of citizen involvement in democratic governance. Those principles hold that representative democracies require the free flow of information so that citizens may make informed decisions about the extent to which government adequately represents their interests and preferences.

Historically, the ability of citizens to gather information from their government has been championed by media organizations, whose constitutional privilege serves as a check against government secrecy. Thus, the media function not only as vocal advocates of greater public access to information about governmental decision making but occasionally as adversaries toward powerful institutions in American society.

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Today, every state has sunshine laws, and in every case those laws have been applied to public higher education systems and institutions. Sunshine laws serve a variety of operational goals, including—most notably—helping to ensure that public colleges and universities are pursuing effectiveness and efficiency, academic honesty, fiscal soundness, financial stewardship, and both procedural and outcome equity in decision making. Because of these diverse goals, state open-meeting and records laws influence virtually every major area of campus functioning, including:

- Deliberation and in-service 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-related foundations and fund-raising,
- Intercolligate athletics.

In effect, the impact of sunshine laws on public higher education institutions is pervasive, influencing not only the context in which campuses make decisions but also the content of those decisions. Of course, broad national characterizations about sunshine laws gloss over much differentiation at the state level. There is substantial state-by-state variation in the nature of sunshine laws and in the ways they are applied specifically to public higher education. For example, scholar A.T. Schwing’s comprehensive cataloguing of state open-meeting statutes published in 2000 identified nine dimensions along which such laws vary. Among them are the definitions of public entities subject to open-meeting and records provisions; the definitions of meetings, quorums, deliberations, and voting; the exemptions for executive sessions; and the remedies and cures they provide for violations of the law.

Sunshine laws also vary substantially across geographical and jurisdictional boundaries. There often is variation by sector or system even within states in the applicability of open-meeting and records laws to public colleges and universities. For example, the flagship universities in California and Minnesota may have a form of constitutional autonomy not provided to other four-year and two-year institutions in those same states. Sunshine laws are partly or wholly specific to the system at hand.

Another form of differentiation may be found in...
the application of sunshine laws to vocationally focused postsecondary institutions, which sometimes are covered under the laws for K-12 education rather than those for two-year and four-year institutions of higher education.

Additionally, the actual climate of openness depends not only on the letter of the law but also on the context of acceptance and compliance with sunshine laws in a given state. Applicability varies according to the distinct historical, cultural, and political contexts in which open-meeting and records laws are fashioned and enforced in a state.

Sunshine laws also vary over time. Most states have refined their laws over the years on the basis of experience. Indeed, an important feature of the contemporary landscape of sunshine laws involves the frequency with which state legislatures debate amendments to the laws. At any given time, sunshine laws reflect the climate of public opinion about the proper balance between privacy and disclosure in the governance of public institutions. Thus, sunshine laws are prone to change as public sentiment changes and as lawmakers weigh the virtues of privacy and disclosure in policymaking.

More than any other issue, the topic that has inspired the most changes in sunshine laws affecting higher education is presidential search and selection. A recent analysis by university attorney Nick Estes noted that at least 22 states now have open-meeting and records laws containing exceptions that permit the nondisclosure of the names of applicants for public employment. Of those states, Michigan, New Mexico, and Texas 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.

A pattern is common: A public university’s presidential search attracts litigation from the media in pursuit of greater disclosure of candidates’ identities; the media win their lawsuits; then the university appeals to the legislature, pointing out that it cannot attract good presidential candidates under the rules demanded by the press and the courts. The legislature, in turn, adopts exemptions allowing greater confidentiality in searches. Thus, the landscape of state sunshine laws is marked by diversity, controversy, constancy, and change. Given the significant
implications of sunshine laws for the effective governance of higher education institutions and the realization of important societal values, this should come as no surprise to governing board members.

**Listening to Stakeholders.** In our recent national study of sunshine laws (see “Project Design and Acknowledgments”), we interviewed board members, presidents, chancellors, administrators, legislators, journalists, and university attorneys on issues relating to state sunshine laws. That analysis leads us to several observations.

1. Openness is a widely and deeply shared value in public higher education. College and university leaders may be uncomfortable with public deliberations and records, and they sometimes seek exceptions from enforced openness. But the respondents in our interviews repeatedly told us that maintaining open meetings and records is essential for ensuring public trust, accountability, and fairness in state-supported colleges and universities. We heard no proposals to abolish the laws, either in states with strong laws or those with weak ones.

2. Sunshine laws increasingly are institutionalized as part of the fabric of higher education governance. No respondent viewed the laws as a temporary hurdle to be endured and eventually surmounted. Most individuals and boards simply had incorporated the requirements into their way of doing business, and many no longer thought much about the matter. Most officials accept that there are trade-offs involved and that the costs of noncompliance far outstrip the potential benefits of evading the law or mounting efforts to overturn the law.

3. States and systems within them vary remarkably in their ongoing levels and nature of attention to openness issues in higher education. In some states, higher education officials attend closely to issues involving sunshine laws and devote substantial time and personnel to managing such issues. In other states, leaders we interviewed had to pause to think about exactly how these issues have been or might be involved significantly in their work. Interestingly, the laws’ required level of openness may not be the sole determinant of these variations. Media environments, critical judicial holdings, past controversies, and other factors may be equally important in shaping the laws’ salience.

4. Putative evidence regarding a trend toward a nationwide weakening of sunshine laws is inconsistent. We found no supporting evidence for any alleged trend away from openness. Several states have enacted substantial refinements to their sunshine laws in recent years, but some enhance and others diminish openness.

5. Stakeholders agree that sunshine laws merit continuing legislative, institutional, advocacy, and analytic attention. Although their specific suggestions differ according to circumstances and values, our respondents indicated a need for learning more about the effects and functioning of the laws themselves, about problems emerging in the laws, about stakeholder familiarity with the laws, and about how emerging developments in technology and campus security, for example, may influence the laws and their effects.

6. The specific applications of sunshine laws are not always well understood among stakeholders. It is not surprising that the public lacks a detailed understanding of sunshine laws. It is surprising, however, that many higher education leaders told us that the precise application of sunshine laws to a given situation often is ambiguous. There appears to be a notable zone of misunderstanding, indifference, or inattention surrounding the details of openness requirements. Board members believe that their boards are trying hard to comply, but they are concerned about the difficulty of holding to both the letter and spirit of the laws.

Particularly problematic is the fluid nature of state legal and political environments: Legislatures frequently amend their public-information laws; courts periodically interpret and reinterpret the applicability of those laws; and a transition from one attorney general to the next may subtly or dramatically change a state’s interpretation, monitoring, or enforcement of its laws. Frequent changes in the law, or in its interpretation or application, can create legal liabilities for campuses and breed uncertainty...
among decision makers about the nature of their decisions and the processes that govern them.

7. “Weaponization” of sunshine laws worries many higher education leaders. In every state, officials expressed concern about the “guerrilla tactics” used by “cranks,” “gadflies,” the “disaffected,” and others “with an ax to grind” or bearing “political grudges.” One external relations official said that reporters sometimes use the laws “as an act of intimidation.” But generally, those who use the laws as weapons are not from the mainstream media or any large organization. They tend to use sunshine provisions in ways the laws’ authors never intended.

For example, the occasional lone citizen, aggrieved at an institution or bent on targeting some individual, may use the laws to weigh down an institution with myriad records requests. “Weaponizing” also can include the use of the laws by commercial interests to gain a proprietary advantage over competitors, the use of the laws by parties involved in collective bargaining to gain an upper hand in negotiations with campus officials, and the use of the laws by parties involved in litigation as a way to circumvent legal “discovery” rules.

The inappropriate use of sunshine laws can force institutions to expend staff and financial resources at inopportune times, such as the end of a budget year or in the midst of legislative hearings on university funding. Similarly, at pivotal times in a negotiating process, unions may sue universities to tie the hands of officials, consume institutional resources, and create a public impression of impropriety. (Why would they have been sued if there were nothing to hide?) Similarly, institutions can become entangled in larger political squabbles when candidates sue for records in an attempt to cast suspicion on an opponent’s campaign.

8. The costs of compliance are substantial. The weaponizing issue brings up the broader issue of costs: Setting up ongoing personnel, legal, and organizational systems for responding to queries from the media and the public under the sunshine laws can be expensive, especially in states with complex, large, highly visible institutions. Appealing to state judicial authorities or an attorney general’s office for clarification presents additional financial burdens, both for institutions and for the state.

Such investments are largely defensive measures, to hear attorneys describe them, and raise the question of whether the funding could be better spent in other domains. A single records request can consume a “monumental” amount of time and resources. As one general counsel put it, “Even a relatively routine request that asks only for disclosable information puts a burden on the department that owns those records to pull them together, make copies, review the records to make sure there’s nothing privileged, and coordinate with the campus [open records] coordinator and possibly the campus legal counsel, and possibly the Office of General Counsel.”

9. Open meetings and open records involve distinct issues, and their application and effects should be considered jointly only with caution. Although their roots may be traced to similar public impulses, the two domains require different institutional responses and raise discrete issues. Interestingly, the two sets of laws can be contradictory: More than one attorney noted inconsistencies and differences in restrictiveness between their states’ meeting and records and laws. For example, a board may receive paperwork for its meetings at the meeting itself or before the meeting, via mail, and in some states it appears that different legal issues can be involved in these two forms of communication.

In Washington State, boards are allowed to meet in executive session to discuss a variety of issues, but state open-records laws require that any written notes taken in those executive sessions be subject to public disclosure. One implication involves the potential public perception of deception by the institution: It may be unclear why a university claims privilege involving oral comments when notes are subject to disclosure.

The two kinds of laws tend to draw different levels of attention, with open records viewed as more subject to disputes than open meetings, according to public-information advocates and institutional officials. Similarly, the press may be more interested in open records because of a perception that records are easier to conceal than are proceedings of meetings of senior institutional officials. Also, open records are coveted for their “concreteness” and because of a perception that official concealment of newsworthy information may be easier and more tempting in documents than in meetings.

In the press, institutions’ compliance with open-meeting laws has received less criticism than compli-
ancence with open-records laws. Media representatives complimented a given university or system for its staff’s compliance with open-meeting laws but criticized compliance with open-records laws.

10. Stakeholders hold distinct notions of the “public good” as it relates to public information in higher education. Citing a societal climate of visible and significant misuse of power by various public and business leaders, media respondents were reluctant on philosophical and parochial grounds to cede privacy privileges to colleges and universities. Virtually all said that openness is an absolute value and that more information about higher education institutions is an unalloyed public good. That is, the public good may be equated with complete public disclosure about virtually all aspects of campus governance, regardless of the implications for campuses. Commonly, the belief is that the public’s full knowledge about the manner in which tax-supported institutions function ultimately leads to public accountability and decisions made in the best interests of the public. Reporters and editors sometimes are sympathetic to the concerns and objections of higher education officials, but few are willing to compromise the public’s fundamental right to information (though some acknowledged that the media should be discreet about publishing personal information not central to a story).

In contrast, institutional leaders tend to view the public good in multifaceted ways—individual privacy rights and institutional needs for discretion in public disclosure sometimes outweigh blanket accommodation of media demands for openness. Leaders typically assert that sunshine laws are a tool of public accountability, but that if the tool is used bluntly and without regard to special circumstances, then the public good—having well-functioning institutions capable of making well-informed decisions—is undermined.

Perhaps the clearest statement against blanket openness came from the former president of a major university system: “These advocates of complete openness say subjecting our institutions to complete openness is beneficial,” he said, “but in fact it compromises the public good because many other noble goals of equal value are compromised or sacrificed, such as lowering the quality of board discussion and debate, lessening the quality of institutional leadership, reducing the number of public servants who will serve on boards.”

11. Media representatives tend not to be especially negative toward higher education, but they do express concerns over the attitudes of institutional leaders and the nature of their organizations. Most in the media referred to incidents of unsatisfactory institutional responsiveness to their inquiries. They tend to see colleges and universities as prone to secretiveness, cumbersome procedures, and poor information flows; institutions almost instinctively act to keep their activities out of the public eye, reporters say, sometimes with an attitude that is condescending.

More charitably, reporters and editors assured us that higher education leaders are not “mean-spirited or evil; it’s just that the law is so cumbersome and so subject to manipulation.” A few reporters even suggested that they could help officials see how their institutions’ fortunes would be served by greater openness.

12. Media representatives explain their aggressive approach to sunshine issues in varying ways. Some cited the pressures of competition within the media. Most expressed deeply held convictions about the public value of their pursuit of openness. “I don’t think journalists, and there are exceptions in any industry or field, go into the office every day gunning to bring down something at the local university,” one said. “We have a lot of people in our newspaper who went to those universities. They have really strong ties to those places, but they’re doing their jobs. These are taxpayer-based public institutions, and they operate very differently from private organizations. And they will be held accountable for that, as a result.”

13. Media officials and campus public-relations officials work hard to avoid conflict and legal action over public-information issues. Mistrust exists in press relations, but it is not as pronounced as many might believe, and reporters who regularly cover higher education tell of generally good working relationships with many administrators. Although a popular stereotype may be that of institutions reluctant to engage the media and of media eager to sue institutions, both parties told us they prefer to negotiate rather than litigate differences.

14. Journalistic, legal, and institutional cultures can collide around sunshine issues. A number of tensions exist among the three primary parties.
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Focusing on institutions and the media, in particular, the two camps operate on different clocks. While faculty, staff, and many leaders on campus tend to believe that the path to effectiveness lies in taking however long it takes to do something right, journalists tend to view effectiveness as closely related to speed. Accuracy is important in both cultures, of course, but accuracy achieved at severe cost to timeliness is not valued in print and broadcast journalism. These differences lead to complaints about the impatience of journalists and the inefficiency of institutions.

At the same time, both camps may experience tensions with the legal profession, which seeks to enforce order, clarity, and security in the often clouded and contentious territory of executive decision making. High-level leaders do not like to mince words but, in deference to the expertise of their legal watchdogs, often do. More broadly, sunshine laws crafted carefully for other public institutions, such as city governments, can create difficult hurdles for campus leaders, and yet such difficulties may not be easily understood by legal authorities.

15. Although faculty tend not to see sunshine laws as significantly affecting their own activities, significant connections are emerging. Requirements for openness on student records and, in some settings, on promotion and tenure processes, are visible to most faculty, if not always understood or accepted. But research activity and academic governance to most faculty seem to be only indirectly linked to openness. One area concerns researchers’ freedom to conduct research privately, without public notice and media attention. Another area of concern is the extent to which, under sunshine legislation, the faculty voice is heard at board meetings.

16. Individuals can play a major role in implementing, applying, and reforming sunshine laws. In some states, the laws take shape and are applied in particular ways because of certain key individuals. Fondly remembered champions, articulate and committed state officials, attorneys general who express varying attitudes toward the laws, powerful critics, beloved presidents, public demagogues, and scheming college officials were all mentioned in various states. Clearly, it would be a mistake for policymakers and institutional leaders to assume that sunshine laws are purely organizational or legal creations.

17. Sunshine disputes and the perceived need for more aggressive enforcement of sunshine laws are mitigated when governing bodies’ practices are more open. One faculty leader noted that openness can be produced and protected as an organizational value without the imposition of formal sunshine laws. Boards that are willing to include conversations with faculty and students, or that at least have faculty present at board meetings, even if they’re not formal voting members, may help immunize themselves from disputes, he said.

Board Performance and Effectiveness. Arguably, sunshine laws affect boards more dramatically than any other units in public higher education. Because of boards’ visibility and the tensions often surrounding the issues they address, two board-related domains merit particular attention: board effectiveness and presidential search and selection.

State open-meetings and records laws have had a direct and powerful impact on the manner in which public college and university governing boards deliberate and formulate policies. As one indication of boards’ acceptance of the “reality” of sunshine laws, respondents told us that boards had altered various routines, processes, and practices to accommodate open-meeting and records laws.

Most trustees, they said, view the costs of noncompliance as a simple cost-benefit calculation: The potential financial, legal, and political penalties may be far greater than the benefits that might be derived from breaking the law. To be sure, patterns of institutional compliance vary; courts have labeled a few boards as habitual offenders of their states’ sunshine laws. Nonetheless, the comment made over and again by board members is, “The public’s business deserves to be conducted in public.”

Board members tend to agree that the openness
required by state sunshine laws has enhanced public confidence and trust in their work. That view was echoed by journalists and public-information professionals. Additionally, some respondents suggested that sunshine laws actually had improved board performance by exposing boards to “the real world.” The head of one public university system favorably compared public higher education boards with their private-sector counterparts: “I have been to private board meetings where I’ve been asked to be a consultant. They don’t have nearly the free exchange that public boards have. They’re much more…dignified, proper. People don’t want to offend somebody that’s been on the board for a long time.”

Yet many institutional leaders and board members expressed concern about the negative impacts in such areas as board deliberation, communication, and cohesion. For example, sunshine laws create uncomfortable climates for board discussion to the extent that most board members become reluctant to discuss controversial issues publicly. This reluctance is said to stem from concern that comments will be misrepresented by the news media or, simply, that there may be no issue position that is acceptable to diverse (and sometimes hostile) institutional constituencies.

Issues that involve race and ethnicity, diversity in student populations, or faculty diversity, for example, are especially difficult for boards to discuss in public. Complicating matters is the concern that open meetings sometimes can degenerate into “media circuses” in which public spectacle replaces responsible debate. As one board member put it: “There are times when you’d love to have a meeting so you could get a free-thinking conversation going and get the best thoughts of your board members and maybe of some of your leadership that’s in the room with you. Everyone is choosing their words…. I think that’s what you miss” with sunshine laws.

As a result, respondents told us, boards often skim the surface of controversial issues in public or avoid issues altogether in favor of conversations that many board and campus officials characterized as “sugar-coated” or “fluff.” Said one president: “It’s impossible to have a frank discussion in a board meeting. All frank discussions go to sub-quorum gatherings of regents, so there’s not a possibility of actually all of them airing the same argument at the same time in any setting.”

What is not on the agenda can be as important as what is, and many issues are simply left off the agenda. One institution’s president reflected on a “raging” controversy over the location of new academic programs at particular campuses in his state. He characterized community activists representing the different proposed locations as having politicized the issue before it reached the governing board. Because the proposed locations of the new programs were in communities of differing racial and ethnic profiles, the issue had grown especially controversial. “There’s never been any board discussion of this issue and probably won’t be,” the president speculated. “At least…it’s not going to be full and frank, let’s put it that way.”

As one board member put it, “It would be great to talk about the effectiveness of a department, the effectiveness of a college, without ruining the reputation of that college on that campus.” Remarks such as these illustrate that such “non-discussions” sometimes may result in “nondecisions” and may constitute a failure of officials to take needed action. Respondents also voiced a related concern about the impact of sunshine laws on internal board communication and development, particularly in the area of “board learning.” Board members, especially new ones, must be able to learn outside of the public eye. They need to be able to ask any question that comes to mind and to seek information on issues about which they know little. Several respondents suggested board members need a place where they may ask “dumb questions” without fear of public embarrassment or of being labeled uninformed. Yet sunshine laws often provide no such refuge. Some institution officials said they believed board members’ need for a “safe space” has intensi-
fied because of the recent opinions of some attorneys general that “board briefings” — the practice by which staff provide board members information on problems or issues that may come before them — violate open-meeting and records statutes. A senior campus official in Texas, which recently outlawed the practice of private board briefings, saw irony in the impact of such restrictions. “I think the public really knows less about [the] factors [that go into] decision making,” he said, “because [board members are] already going to have thought about it for the most part and have made a decision usually upfront” before the staff has had a chance to provide background.

Another way sunshine laws have negatively influenced internal board communication involves shifting patterns of influence within boards. For example, respondents in several states said that sunshine laws have strengthened the role of the board chair. Before open-meeting laws became pervasive, chairs often could expect candid discussions at meetings pointing to an undetermined outcome; now, chairs believe the most fundamental differences must be aired and reconciled before meetings take place.

Moreover, because of the restrictions on group deliberation, much discussion is said to occur in one-on-one conversations between the chair and individual members of the board. Thus, chairs have been significantly empowered because only they can obtain comprehensive knowledge of the concerns, positions, and political views of the other board members.

Respondents told us that presidents also have seen their influence within boards increase as a result of state sunshine laws. Presidents often act as intermediaries, relaying information and shuttling messages between individual board members who, under their open-meeting and records laws, may be prohibited from meeting as a whole group without public notice being provided. Factionalism is a second way shifting patterns of board influence have led to dysfunction within boards. According to some respondents, the restrictions on the ability of boards to meet lead to splintering of boards into minority voting blocs and “cliques.” Because any or all board members may have limited knowledge of the one-on-one conversations that take place between individual members, and because group communication is infrequent, a minority of organized members in a closed system can exert disproportionate control over the majority. As one state official said: “When you have the ability of three or four [board members] to get together to agree to fire someone, you can more or less govern the board. If someone is strong enough and ruthless enough and feared enough, then one person in a closed system wields a tremendous amount of authority.”

The absence of informal opportunities for board members to gain familiarity with one another and to learn about their colleagues’ values, experiences, or aspirations for the institution may inhibit the development of a board climate conducive to productive working relationships and undermine effective decision making. Sunshine laws are premised on the notion that, absent public supervision, governmental agents are prone to corrupt decision-making processes. Yet many of the board officials we interviewed bemoaned their lack of interaction with colleagues.

With so many criticisms of sunshine laws, it stands to reason that some capable citizens might be reluctant to serve on public higher education governing boards. Some respondents, however, dismissed out of hand the assertion that sunshine laws diminish the enthusiasm of citizens for serving. Moreover, in a few states respondents characterized public college and university board appointments as political “plums” for which there is still plenty of competition.

The serious challenges sunshine laws pose to board deliberation, communication, and cohesion sometimes tempt boards into skirting the spirit of the law. We found no evidence that boards systematically violate sunshine laws, but a few campus officials told of the legal “fine lines” their boards sometimes tread in attempting to optimize the climate for effective decision making. Several respondents, for example, spoke of boards finding creative ways to link nonexempt issues with other topics covered by executive-session privilege.

Many boards have found ways to function effectively despite the challenges sunshine laws pose. In Iowa, for example, subquorum “work groups” involve clusters of board members to gain substantive expertise on important issues. These ad hoc groups are devoted to topics such as health care and hospital administration, intercollegiate athletics, and finance. The work groups are designed expressly for
consultation and discussion, rather than for deliberation or policymaking. Public higher education officials characterize the work groups as effective vehicles for enhancing trustees’ knowledge and expertise in substantive areas. The work groups have proved not to be sources of sunshine-related controversy and litigation in that state.

Nor are board retreats, which some states permit under open-meeting and records laws. Board and campus officials said these occasions for informal dialogue and discussion were extremely valuable in educating board members about important issues and building rapport.

Finally, board members and other senior officials mentioned their desire to build better working relationships with media as one strategy for reducing conflict over openness issues. Respondents cited efforts made both before and during board meetings to accommodate reporters as one indication of the desire for better relations with the media. Some respondents indicated that such improved relations depend heavily on board chairs making special efforts to interact well with reporters.

Presidential Search and Selection. The selection of a president produces more controversy, litigation, and editorializing than does any other sunshine-related decision arena in higher education. This is not surprising, given that such decisions are the most important governance responsibility of public college and university trustees. 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 those cases, news organizations alleged a presidential search committee had either met illegally or had illegally withheld public records pertinent to a search.

Although the issues confronting stakeholders are complex and multifaceted, the principal challenge is how best to balance the demands of accountability to the public, the effectiveness of institutions in recruiting capable candidates, and the protection of individual privacy rights during the search. This dilemma often challenges campus leaders, state policymakers, and the press to deal with a variety of operational questions:

- Is the public interest best served by publicizing the names of all applicants and nominees for a university presidency? Should only the names of finalists be subject to public disclosure? What precisely is the “public interest” in the context of selecting university leaders?
- Should the public have access to the proceedings of presidential search committees? If so, at what stage of the search process?
- Does the availability of more information always advance the public interest?
- Are the potential benefits of attracting experienced 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?
- Is it in the public interest to permit (or encourage) the use of executive search firms by public higher education institutions?

The legal and political climates in which presidential searches at public institutions are conducted vary widely across states, and even across systems and jurisdictions within states. For example, under Florida’s open-records laws, the names of all applicants and nominees for a presidency must be disclosed upon request. What’s more, even the personal notes of search committee members that reference candidates’ names, or the names of prospective candidates, are subject to disclosure. Likewise in Ohio, members of a university search committee were instructed that state records law required disclosure of all handwritten notes about candidates.

By contrast, in North Carolina, members of a university search committee were advised they could take and retain notes of candidate interviews as long as those notes were personal ones and not kept in possession of the institution conducting the search. Iowa, Massachusetts, and Texas require that only the names of position finalists be made public; indeed, some states specify the number of days prior to a search committee’s final selection when the names must be disclosed. And in California, the constitutionally autonomous University of California conducts its executive searches largely in private, while the California State University system and the Community College System of California (being statutory rather than constitutional creations) are obliged to follow much the same convention in their executive searches as other state agencies.

Despite the diversity of practice, we found a
broad consensus that presidents should be selected with substantial public input. Most stakeholders believe the high visibility and sheer importance of the job of a college or university president are too great for the decision to be shielded from public view. Respondents indicated they believe the public is entitled to information about the state of a presidential search, should be able to review and comment on presidential candidates, and should have access to the deliberations of search committees.

The chief rationale for this stance is belief in the need for state-supported higher education institutions to maintain the trust of the public. Indeed, many respondents said that if a search for a public college and university president in their state were conducted “behind closed doors,” it would very likely diminish public confidence in both the search process and its outcome, feeding cynicism among the general public and campus communities that “inside baseball” or “dirty politics” had determined the selection.

Thus, while campus officials often lament the inconvenience and inefficiency that state sunshine laws may visit upon presidential search processes, most view the prospect of searches conducted outside the public view as inconsistent with the public purposes of their institutions. By way of comparison, several respondents pointed to the current practice of some universities in Michigan, where courts recently upheld the right of universities to conduct presidential searches closed to media organizations and the general public as one fraught with danger because of the perceived lack of public involvement.

Yet stakeholders revealed nearly universal support for the claim that sunshine laws can negatively influence presidential search and selection processes in public higher education. Most share the view that the public interest is best served when both the public is broadly informed and public colleges and universities can recruit capable and experienced leaders to guide their institutions. But many voiced concern that the application of state sunshine laws to presidential search and selection at public colleges and universities tends to favor the former virtue at the expense of the latter.

Virtually all of the college and university chief executives (current and former alike) said that sunshine laws reduce the likelihood of sitting presidents applying for openings at peer institutions. The belief is that candidates already holding presidencies at comparable institutions are unwilling generally to expose their candidacies to public view for fear of losing the backing of the board and core constituencies at their present institutions. Said one president, “The best you can do is to attract vice presidents who have not as much to lose by having their candidacy made public.”

The length of time candidates are publicly exposed also may be an important factor influencing the likelihood that well-qualified individuals will become candidates. As with so many other sunshine-related issues, a key issue for respondents was not whether search processes should be open but rather how open they should be. Because in most states the complete absence of public access to information about presidential selection is untenable, respondents report that the challenge for stakeholders is in determining what constitutes sufficient citizen input into the search process. The dilemma for institutions, the press, state governments, and society is not whether but when to involve citizens—in other words, at what stage in the process of selecting a new public college or university president should citizens gain access to information?

Public-information advocates, including newspaper reporters, editors, and publishers, generally believe that the public interest is best served when citizens have access to as much information as possible as early as possible. They often cite Florida’s laws as a standard against which to compare their own states’ commitment to the principle of the public’s right to know.

By contrast, most board members, presidents, and other institutional representatives say that it is the length of time individuals are publicly exposed, rather than the nature of their exposure alone, that discourages prospective candidates. In Massachusetts, information about candidates for public college and university presidencies remains confidential until a slate of finalists is named. Institutions in Texas must give public notice of all finalists no less than 20 days before a search committee’s selection; before that, candidate information is kept confidential. Respondents in those states, and in others requiring the disclosure of only the names of position finalists, credit the provision with enabling public higher education institutions to cultivate the interest of some well-qualified and experienced
Many claimed that public institutions would be far less capable of attracting even the initial interest of top candidates if the legal basis for shielding candidate confidentiality were removed or substantially restricted. In fact, institutional officials in Florida pointed to the absence of candidate confidentiality in the early stages of the search processes as greatly diminishing candidate pools.

Stakeholders differ sharply in their assumptions about why sitting presidents typically are reluctant to declare themselves candidates for a peer institution’s presidency. Public-information advocates often characterize sunshine laws as an effective screen of candidates’ true level of interest in a presidency; that is, those who are willing to “go public” with their candidacy are thought to have more interest in the position, or greater sincerity of purpose, than those who are reluctant to do so. Likewise, proponents of maximum openness often view public exposure of candidates during the process as an indication of the candidates’ tolerance for public scrutiny. This reasoning suggests that, because a public college or university presidency is an especially high-profile position, candidates should be willing to demonstrate their capacity for serving in the public eye. As one newspaper executive put it, “If the potential leader is incapable of tolerating the scrutiny involved in applying for a job in an open way, why would the university want to hire that person to manage its institution?”

On the other hand, campus officials attributed the tendency of sitting presidents not to apply for presidencies at peer institutions to apprehension about the possible loss of support on their home campuses rather than to ambivalence about a particular opening or to reluctance to engage diverse public constituencies. One president commented: “Imagine being the president of [one university] and having everybody read your name [in the newspaper as a candidate for another presidency]. The chairman of the board would be on the phone to say, ‘If you’re interested in leaving, we can arrange that this afternoon.’” Stories of this kind of backlash abound, with the premier example being that of the president of Florida State University exploring the presidency of Michigan State, only to lose his position at Florida State as a result.

Respondents voiced concern that the potential long-term impact of the “no lateral moves” phenomenon will be to systematically disadvantage public colleges and universities in their competition with private higher education institutions for a limited number of highly qualified leaders. Some respondents see more ominous implications: the diminished quality and effectiveness of public higher education as a whole.

Media representatives tended to reject the assertion that sunshine laws have burdened public colleges and universities with substandard leadership. They see little evidence of permanent or persistent damage. One newspaper editor observed: “This contention that making candidate lists public scares off the best candidates has been around for as long as I have been asking reporters to go get the candidate list so that we can look at it. And I’m sure it has scared off some. But has that meant that the institutions have ended up with second-class leaders?”

The practice of employing executive-search firms to assist in the search for a new president has grown widespread, with both good and bad consequences. Sunshine laws have contributed to the growth of this practice. In some states and systems, such consultants are viewed as a vital, even indispensable, resource in helping institutions conduct successful searches under the constraints of open-meeting and records requirements. The consensus view is that the chief benefit of employing a private search firm is institutional access to the formal and informal networks of professional contacts that a particular firm or consultant may possess. This asset is especially valuable in states where sunshine laws greatly limit the confidentiality of communications between institutional search committees and prospective candidates. Thus, in hiring consultants to act as “inter-
mediaries,” public institutions may indirectly explore the interest and vet the suitability of prospective candidates without exposing those individuals to public view—at least not early in the process.

Also, in states where sunshine laws restrict communication between and among board members, consultants can serve as intermediaries within the board or search committee. A particularly critical role for consultants is to coordinate the negotiations process for the final selection. Finalists not selected often will need to “save face” (announce their withdrawal) prior to public announcement of a search committee’s selection, and consultants typically can help ensure this happens. No less important, institutions often need assurances that there will be no “surprises” with the finalist they intend to select.

Yet some public-information advocates, media representatives, and even a few campus and board officials whom we interviewed negatively characterized the use of search firms as tantamount to “hiring people to hide paper.” In some instances, courts have required consultants, who had presumed that their communications with candidates were privileged under state law, to surrender such materials as resumes and cover letters pertinent to a search.

**Emerging Challenges.** While the impact of state sunshine laws on board effectiveness and presidential search and selection occupies much of the attention of stakeholders, respondents mentioned several other emerging challenges and concerns that deserve sustained interest and monitoring in the future. They include university-related foundations, communications technologies, and campus security.

**University-Related Foundations.** These independent 501(c)(3) organizations, numbering at least 1,500 across the country, are established for the purpose of raising private funds and investing, managing, and dispersing those funds on behalf of their host institutions or systems. They are a frequent source of debate and, on occasion, litigation involving the application of sunshine laws to their activities. Since 1980, courts have been asked to decide whether open-meeting and records laws may be applied to university-related foundations at such institutions as 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).

University foundations typically act as repositories for gifts, endowments, and other donations made to public universities; make investment decisions regarding those assets; and work closely with universities in spending the monies they raise. These foundations occupy an increasingly prominent role on the public higher education landscape because universities, struggling to deal with tight fiscal constraints, have become more dependent on these foundations as sources of private revenue.

For precisely this reason, public-information advocates continue pressing university-related foundations for access to their meetings and donor records.

Fundamentally, the question often put before courts is, “To what extent may these private foundations be considered public bodies subject to the disclosure requirements of state open-meeting and records laws?” However, specific disputes often surround one or more of the following questions: Should board meetings of university foundations be open to the public? 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 requests of donors who request privacy?

In several important early cases, courts compelled disclosure of foundation records and required that foundation meetings be opened to the public. In summarizing case law on university foundation disputes prior to the mid-1990s, analyst S. Geevarghese in a 1996 paper noted that “rarely” would a foundation’s private, nonprofit status “be considered independent of the public university it serves.” Yet in a string of more recent decisions, courts have affirmed the independent status of several university-related foundations, often exempting them from the requirements of open-meeting and records laws generally applicable to governmental entities or to agents of the state. (See “State University-Related Foundations and the Issue of Independence,” by Thomas Arden Roha, AGB Occasional Paper No. 39, published in 1999.)

Despite what appears to be a trend in some courts recognizing the legally independent status of university-related foundations, respondents report
both lingering and new controversy over questions pertaining to the application of sunshine laws to university foundations. “The area where we have had the most hassles by far, relating to anything having to do with the university, is in open-records requests of the university-affiliated fund-raising foundations,” said one university’s chief counsel.

Controversies surrounding foundations often center on donations. One kind of controversy involves efforts by foundations to protect the anonymity of donors and, correspondingly, efforts by reporters to seek disclosure of donors’ identities. Institution officials said that they seek to protect the anonymity of donors because donors often do not want their identities revealed; forced disclosure would breach the individuals’ privacy rights, which in turn could hurt fund-raising.

Institution officials also expressed concern that, if publicly disclosed, donors’ identities not only would become part of the public record, but they could also serve as the basis for journalistic exposés that might bring personal embarrassment to those individuals. This happened in a famous case from the early 1990s at the University of Toledo Foundation.

At the heart of the fights over the application of sunshine laws to university-related foundations is the question of how best to balance the individual privacy rights of donors against the public’s interest in accounting for funds used to benefit publicly owned and operated institutions. A veteran print journalist recounted a bruising conflict between his newspaper and foundation officials affiliated with a local university. While sympathetic to the motivations of donors who may wish to remain anonymous, this reporter said: “They accept anonymous donations, given by people for the best of reasons. And those people desire anonymity for reasons that we don’t know because they’re anonymous. They may be the best of reasons; they may not.”

Communications Technology. Emerging electronic communication devices have created new ambiguities and sources of strain. E-mail, teleconferencing, videoconferencing, and other sophisticated communications media have blurred the meaning of what constitutes a public “meeting” or “record,” and the application of state sunshine laws to electronic communications is a source of concern to many public higher education officials.

Numerous respondents told us that intense budget pressures and, in some cases, strict travel limits placed on state officials had made e-mail and videoconferencing particularly attractive options for informal communications and formal meetings among board members. The use of these technologies by boards varies across states and systems, however. In some places, board members report relying extensively on e-mail as a tool for distributing information to board members and discussing board business, while in other locales board officials say they use e-mail only sporadically.

Some states have amended their sunshine laws in recognition of these complex issues, but other states are only beginning to grapple with them, while still others have yet to undertake any sustained discussion. Nonetheless, the increasing availability of new communication media raises a variety of sunshine-related challenges. In some instances, disputes have arisen over a records request for the entire e-mail database of a campus or for the e-mail accounts of particular senior administrators. In other instances, disputes have centered on the use of e-mail by boards to privately discuss sensitive personnel matters, such as executive compensation or the removal of a sitting president.

A dispute in one state 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 between two board members qualify as publicly disclosable information or require a public posting if that communication is forwarded from one member to the next until all members of the board have been involved? If so, where precisely does mere electronic discussion of issues end and deliberation begin? If the deliberation standard used in many states to determine the applicability of public-disclosure laws does not apply, then how does e-mail communication differ from the so-called “serial meeting” (illegal in some states) where, in an effort to avoid attaining quorum, one board member telephones a second member, and the second telephones a third, and so on, until all board members have “discussed” a particular issue?

In many states, the law is underdeveloped in its application to such questions. Sometimes, the result is that boards and senior campus officials, when confronted with ambiguity, have been reduced to “trial-and-error” or best-guess approaches that can
prove publicly embarrassing. Senior campus and system officials also expressed concern about their colleagues’ increasing reluctance to electronically record and exchange new or provocative ideas for fear those electronic documents might be obtained through public-records requests. These respondents say that sunshine laws thus have diminished creative thinking and problem solving among senior officials.

University leaders and public-information advocates are likely to continue to clash over the permissible uses of technology under state sunshine laws. It also is likely that the mere existence of these technological capabilities will continue to generate suspicions about potential misuse, even where none may currently exist.

Campus Security. Public college and university officials report they are paying greater 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 safety issue (and thus a college-choice issue), and recent federal mandates requiring the reporting of campus crime data, are a few of the reasons. Public institutions are responding to these concerns, for example, by installing cameras and other electronic devices on campus grounds as a means of enhancing security.

Yet such actions have become the source of public-information disputes. For example, does the public have the right under public-information law 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.

Institutional officials in each of the states we studied expressed deep concern about ensuring the security of their campuses, while also avoiding violating their states’ open-meeting and records laws. For instance, several campus officials wondered aloud whether their institutions could be compelled under sunshine laws to publish campus-security plans, the routines of police patrols, or evacuation procedures in the case, for example, of a bomb threat. Numerous officials voiced concern for the security of national research laboratories located on their campuses. One president wondered whether his institution would be obliged to post on a Web site the location on campus of dangerous chemicals.

While many respondents characterized as insufficient the attention their states have paid to issues involving sunshine laws and campus security, others reported that exemptions increasingly are being carved into state statute specifically to address security-related concerns. Additionally, some campus officials say they have been encouraged by legislatures, attorneys general, and higher education system officials to rely on those exemptions when in doubt about the nature of a request that may have national or campus-security implications. This development, in turn, raises important questions about the nature of the exemptions being created by legislatures. For example, how should those exemptions be crafted in order to protect campuses while not unduly restricting public access to other legitimate (non-endangering) forms of information?

For most respondents, the tension requires a delicate balance. These officials voiced support for narrowly tailored legal exemptions that balance access to public information against reasonable restrictions on information. Understandably, many media representatives voiced apprehension at the prospect that legislatures and courts may permit public higher education institutions to use national security as “cover” for substantially scaling back the public’s access to institutional records.

Conclusions and Recommendations. Sunshine laws pose two fundamental questions for public higher education governing boards: (1) To what extent do open-meeting and records laws interfere with the mandate of public higher education governing boards to function effectively in fulfillment of their public trust? and (2) If the laws do interfere, how should the interferences be weighed against the virtues of public disclosure and the accountability of public colleges and universities?

The differences among states revealed in our study argue against any attempt to offer prescriptive recommendations. Such recommendations must be tailored to distinctive state, system, and institutional circumstances. Still, we can offer some broad recommendations that can be adapted locally.

1. Establish ongoing informational efforts regarding...
sunshine laws. The complexity of open-meeting and records laws, compounded with the continuing evolution of the laws, makes maintaining timely, comprehensive knowledge difficult in any state. In this context, it may make sense (particularly in states with an abundance of sunshine-related disputes) to develop responsibility centers within state government or institutions. Such centers would be charged with maintaining up-to-date materials and offering educational programming for those needing to stay abreast of a state’s openness legislation and statutes. These efforts should be targeted not only toward board members but also toward high-level system and institutional officials, media representatives, faculty, and students.

It also is important to consider ways to improve the public’s understanding of their rights to information about public affairs, including public higher education institutions. While a big-budget public-information campaign on this topic may be neither feasible nor cost-effective, modest efforts merit serious consideration.

At the national level, we recommend the establishment of information dissemination, research, and best-practices initiatives relating to open-meeting and records laws. It was striking to us that state and institutional officials seemed to lack comparative information on other states’ approaches to such pressing issues as exemptions for presidential searches, openness requirements for university foundations, and the legal status of e-mail. The present report is a start, but further attention is needed, and may comprise a worthy agenda for a national association or foundation. AGB’s Center for Trusteeship and Governance has an active program on university-related foundations, and the National Association of College and University Attorneys follows the laws through a variety of publications, electronic dialogues, and conferences. For those with interest in the topic but no legal background, however, something more accessible and expansive seems needed.

2. Maintain ongoing dialogues within individual states regarding the adequacy and effectiveness of existing open-meeting and records laws. Laws should be adjusted periodically to fit emerging developments, such as new technologies and expanding roles for university foundations. Ideally, such adjustments should come preemptively, based on reasoned dialogue over time, rather than reactively based on legal rulings. Often, however, openness-related disputes arise out of new developments before substantive public consideration of the relevant issues by legislators, the media, and other stakeholders. Parties to such disputes typically seek resolution in the courts, a highly public and stress-filled venue. The courts become, in effect, policymakers and interpreters on sunshine issues. Later, legislators may address perceived problems in legal rulings.

As an alternative, it seems important that leaders create opportunities for more thoughtful, less pressured dialogue as new issues appear. The question of responsibility for providing such opportunities is a difficult one, but the offices of state higher education systems, state coordinating boards, or state attorneys general seem potentially reasonable choices as conveners.

It is essential that the media be part of the discussions. In the face of recent controversies—limited openness in the search process created serious problems with two successive presidencies at the University of Tennessee, for example—tensions have arisen between institutions and the media. Threats to the working relationships between the press and higher education officials should be a significant concern. C. Peter Magrath, president of the National Association of State Universities and Land-Grant Colleges and former president of several universities, has perceptively written, “While these tensions may be intellectually fascinating and partially inevitable, such tensions—in their more extreme forms—are not healthy for a political system that depends in large part on strong educational institutions and strong journalistic institutions.”

3. Provide confidentiality for presidential search processes but openness for presidential selection processes.
Openness advocates passionately state the case for totally transparent presidential transition processes, while many veteran postsecondary leaders caution that a substantial measure of privacy is essential to effectively filling presidencies. We confess to having been episodically convinced, and often moved, by partisans on both sides of this issue. In the end, a balanced approach may be best: States should seek to ensure appropriate privacy for candidates in the early stages of a presidential transition process (the search), but should publicly reveal finalists before reaching any selection decision—in essence, confidentiality in the search for presidents and openness in the selection of presidents.

The consensus view on that appropriate time is one we share. The identities of candidates should remain secret until the naming of a meaningful pool of finalists (at least three and no more than six). Some states have adopted laws that require openness after a set period rather than a set number of finalists. Without further evidence, we are not convinced that such an approach is superior to that pegging openness to a set number of candidates. On “flagship” campuses that claim constitutional autonomy within their states, this approach is likely to generate resistance. Recent disputes at the Universities of Michigan and Minnesota highlight the sensitivities surrounding the application of state openness legislation in such settings. Such institutions often are highly regarded and capable of securing presidents from other prestigious public institutions. As such, they cherish autonomy sufficient to allow them to conduct discreet searches without fear of controversies in the home states of their candidates. Their interest in such privilege is entirely understandable. Nonetheless, the encouragement of at least some limited level of public consideration of prospective candidates for presidencies seems to us, on balance, worth pursuing in all institutions.

4. Consider asynchronous approaches to openness. Much of the literature on openness examines the problem as a dichotomy: Simultaneous or near-simultaneous decision making and openness in governance versus confidentiality in governance. Critics complain that the stakes are too high for simultaneous openness, and thus support barring meetings or records from public view. Supporters wince at the denial of any accountability under such an approach. Perhaps, for at least some issues, there is a middle ground.

Experiences at the federal level may be instructive. Deliberations about certain critical national concerns are shielded from public view for a specified time, then made public for review by historians and other analysts. The understanding that records and transcripts will be made public at a later date surely has a restraining influence on any national leader bent on misdeeds, but at the same time preserves freedom of action in the short term. This asynchronicity may have potential in resolving some of the difficult disputes surrounding specific applications of sunshine laws in higher education. One respondent noted that releasing deliberations before the fact is “exactly what happens with presidential searches” currently, and asynchronous alternatives do merit consideration.

5. Consider the potential uses of third-party arbitration in sunshine disputes. Disputes over openness issues often proceed to legal resolution, which can be expensive and time-consuming. A legislature may wish to consider legitimating in statute a third-party arbitration process to (a) determine for specific circumstances the benefits and liabilities of opening certain meetings and records and (b) determine which portions of specific meetings or records should be opened. By creating a mediating entity between disputants in a sunshine issue, legislators may facilitate more timely and cost-effective resolution of conflicts. The development of such a system would require involvement and endorsement from major parties in likely disputes, including media representatives, elected leaders, and education officials.

6. Allow boards to conduct a limited number of closed retreats in which substantive discussion is allowed but no decisions are made. The most consistent concern expressed by board members and presidents was the absence of opportunities for informal discussion outside of public scrutiny. Without such opportunities, these officials argue, learning opportunities are limited and board effectiveness suffers. Critics might view the absence of such opportunities for board members as less troubling than the potential loss of accountability stemming from removal of some board meetings from public view. We weigh the alternatives differently. In recent years, many states have moved to provide limited opportunities for retreats for general board discus-
sion. Media respondents from such states volunteered no strong objections to such sessions, as long as business decisions continue to be made in credible ways in public forums. In states without provisions for retreats, creating a venue for open discussion without public scrutiny would allow boards a valuable growth and development opportunity. Of course, it would be incumbent on university attorneys and other officials, including perhaps some representatives of state interests, to monitor proceedings at such retreats.

7. **Permit board members to receive informational briefings by designated staff.** A major finding of our study was that board members feel they often have insufficient information to make reasoned decisions about issues affecting their institutions. They also say that few venues allow them to seek that information without risking public embarrassment. One argument against board briefings is that they may blur the line between legally sanctioned discussion and illegal deliberation. By meeting individually with every board member prior to a meeting, staff may indirectly shape the outcome of the decisions made in the meeting. Yet our interviews revealed that board members routinely rely on their colleagues or on the president for information to help trustees make decisions. Therefore, prohibiting board briefings by staff simply may reduce the rich, analytical information that could help them make well-reasoned and independent decisions.

8. **Provide institutions adequate discretion and resources for responding to open-records requests.** Our campus-based respondents frequently voiced concern that their institutions often do not have enough time to review public-records requests, clarify the precise nature and scope of request, and meet the request in an appropriate way under state requirements. Some also said that institutions cannot always pass along the true and full costs of document duplication, especially when responding to requests for voluminous amounts of information. In response, openness advocates would reasonably argue that these are public activities for which public institutions should bear some responsibility in terms of the budget and human resources. When appropriate, institutions may wish to meet and discuss these issues with legislators and staff of the state attorney general.

9. **Allow university attorneys to discuss privately with boards potential litigation, as well as actual suits that already have been filed.** In a number of states, sunshine laws severely circumscribe the nature of counsel's discussion with boards. This can harm institutional effectiveness, in that a board’s ability to plan and decide wisely and deliberately can be compromised without adequate, early discussions with attorneys. Effective governance is hampered when openness requirements preclude a board from receiving information necessary for success in impending legal disputes. Institutional interests in legal disputes are most often benign and consonant with broader public interests.

10. **Integrate core academic values and personnel more fully into the refinement and application of sunshine laws.** It is striking that public-institution faculty so frequently plead a lack of expertise, information, or interest regarding sunshine laws. Faculty are at the heart of the academic enterprise and share broad values beyond their specific disciplinary affiliations and cultures, including a concern with fairness, peer review, academic freedom, participation in governance, and the recognition of merit. On the one hand, promotion and tenure decisions at the department level usually are shielded from public view, as the exclusive definition of peers does not include broader participation or observation. On the other hand, faculty are excluded from many high-level decisions in the institution, including, often, the selection of a president.

11. **Design mechanisms for governing boards to be beneficiaries as well as targets of openness measures.** Most often, discussions of sunshine laws revolve around the question, “To what extent should the public and other stakeholders have access to the decisions and records of institutional leaders and board members?” It also seems reasonable to turn the question around: “To what extent will I as a leader or board member have access to information regarding the views of other stakeholders?” That is, how can high-level officials benefit more fully from access to available information about campus and external issues? This may be as much or more a matter of designing appropriate information flows as it is a matter of legally opening new channels of board access.

12. **Consider the core purposes of sunshine laws and develop ways to achieve those purposes independently of formal provisions for openness under the law.** Insti-
tutions may wish to consider the degree to which their state’s sunshine laws adequately reflect their own missions and values concerning openness. Some institutions have developed approaches that not only serve openness but also deflect pressures for stronger legal constraints on academic functioning. It seems incumbent on supporters of the laws to identify alternative policy mechanisms for achieving the same purposes. Likewise, those who are substantially unhappy with sunshine laws could apply creative suggestions to achieve the benefits of openness without currently legislated sunshine requirements.

RESOURCES


“Is the Press a Trustee’s Friend or Foe?” *Trusteeship,* March/April, 2002.


