

Governing in the Sunshine:
Open Meetings, Open Records, and
Effective Governance
in Public Higher Education

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EXECUTIVE SUMMARY

Every state in the union has legislation mandating that public higher-education institutions conduct meetings in the open and maintain open records of institutional documents. These “sunshine laws” are oriented to openness as a public value in and of itself, but operationally the laws pursue more specific objectives, including procedural equity in institutional governance and decision-making, outcome equity in institutional actions, financial probity, institutional efficiency, and educational effectiveness. The scope and details of sunshine laws vary notably by state and by system. Nevertheless, in all cases, the laws cover a wide range of crucial institutional activities, including board deliberations, presidential searches, fundraising, research and intellectual property, budgeting, business decisions, and athletics. The pervasiveness and importance of the laws mandate attention from those committed to improving the effectiveness of governance in higher education.

Unfortunately, the laws, and especially their implications for the governance of public higher-education institutions, have not been examined systematically and comprehensively in many years. While much has been written about select issues surrounding sunshine laws in higher education, the literature is largely anecdotal or hortatory. Few empirical studies have been conducted, and those that do exist are now nearly two decades old.

Examining the laws is important from several perspectives. Recent scandals and controversies in large organizations, including some universities, have heightened external scrutiny, and sunshine laws significantly shape the nature and extent of public higher education’s openness. In addition, policymakers and leaders are paying more attention to existing openness and privacy policies in the face of changing fiscal conditions in the states, increasing attention to accountability for public spending, critiques of governance in higher education, new developments in electronic technology, new threats to campus and national security, the emergence of university foundations sometimes shielded from sunshine laws, and evolving institutional arrangements for funded research, technology transfer, and corporate and individual support. Partly as a result of these developments, states have begun to rethink and refine their expectations regarding public access to public decision-making. In recent years, numerous states have modified their open-meetings and records laws as they apply to public colleges and universities.

In this climate, it seems appropriate to explore the laws at the heart of the public compact with higher education, those laws promising transparency in the workings of publicly funded institutions. Harlan Cleveland noted many years ago that sunshine laws pose for institutions and society a difficult tension among three desirable objectives: maintaining individual privacy rights, ensuring public accountability (i.e., the public's right to know), and providing institutions the autonomy they need for effective functioning. Cleveland's "trilemma" unquestionably remains salient today. Indeed, it seems reasonable to argue that threats to individual privacy, pressures for public accountability, and constraints on institutional functioning have each grown in the years since Cleveland's analysis. Understanding the place of sunshine laws in these trends is essential.

To that end, 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 in 2002 to conduct a study of the impact of state sunshine laws on the governance of public higher-education institutions. From a rigorous analytic perspective, ascertaining the precise effects of the many different implementations of sunshine laws in public higher education would be impossible. This project pursued a less ambitious but still important goal: improving our understanding of the variations, benefits, and costs of the laws.

The project staff collected relevant literature on open meetings and records laws and visited six states with varied applications of sunshine laws: California, Florida, Iowa, Massachusetts, Texas, and Washington. The states were selected on the basis of prior studies of sunshine laws, regional representation, and governance diversity. In each state, we sought to interview in person or by phone representatives of all major stakeholders involved in sunshine-related issues in higher education, including governing board chairs and vice chairs, presidents, chancellors, and provosts of individual institutions, university attorneys, heads of faculty senates, university board secretaries, newspaper editors and education reporters, system and agency heads at the state level, state attorneys general, members of higher-education committees in state legislatures, and other informed observers of a state's sunshine laws. Also in each state, we collected a variety of relevant documents (including newspaper articles, legislation, and reports). The state-level documents and interviews were supplemented by more general documents (e.g., articles in law journals) and interviews with selected national experts on openness issues in higher education. In all, 92 people were interviewed and numerous reports, legislative

actions, and articles were reviewed. The focus of the exercise was on learning as much as possible about open-meetings and records laws in individual states and nationally. This report is the result of that effort.

Surveying the Landscape

State open-meetings and records laws are, at the simplest level, laws requiring that a state's public business be conducted in full view of the state's citizens. Sunshine laws are products of public concern over the ways public officials make decisions. Although their specific terms are often rooted in distinctive local political conditions, each state's sunshine laws seek to ensure that the public good rather than private gain is the primary factor in decisionmaking within publicly controlled or funded entities. Today, every state has sunshine laws and, in every case, those laws have been applied to public higher-education systems and institutions. Because of their diverse goals, the laws influence virtually every major area of campus functioning.

Of course, broad national characterizations about sunshine laws hide much differentiation at the state level: there is substantial state-by-state variation in the nature of sunshine laws, and in the ways those laws are applied specifically to public higher education institutions. Not only does each state have its own organically derived version of sunshine laws affecting educational institutions, but within states there is often variation by sector or system in the applicability of open-meetings and records laws to public colleges and universities. Sunshine laws also vary over time: most states have refined their laws over the years since implementation, 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.

The landscape of state sunshine laws is one marked by diversity, controversy, constancy, and change. While the fundamental questions at issue (i.e., Public information, at what expense? Privacy rights, to what limit? Public agency discretion, to what end?) appear enduring, open-meetings and records laws continue to evolve, as does society's expectations regarding the laws' purposes, functions, and form. Given the significant implications of sunshine laws for the effective governance of higher-education institutions and the realization of important societal values, it is understandable that views of diverse stakeholders are characterized by both consistency and distinct differences.

Listening to Stakeholders

Our interviews and document analysis relating to state sunshine laws across the country suggested a number of consistent themes. At the same time, the analysis revealed some fault lines, areas of distinct difference of practice or opinion. The broader, orienting findings of our work include the following:

1. *Openness is a widely and deeply shared value in public higher education.*
2. *Sunshine laws are increasingly institutionalized as part of the fabric of higher-education governance.*
3. *States and systems within them vary remarkably in their ongoing levels and nature of attention to openness issues in higher education.*
4. *Evidence is inconsistent regarding a trend toward weakening of sunshine laws nationally.*
5. *Stakeholders agree that sunshine laws merit continuing legislative, institutional, advocacy, and analytic attention.*
6. *The specific applications of sunshine laws are not always well understood among stakeholders.*
7. *The “weaponization” of sunshine laws concerns many higher-education leaders.*
8. *The costs of compliance are substantial for many institutions.*
9. *Open meetings and open records involve distinct issues, and their application and effects should be considered jointly only cautiously.*
10. *Stakeholders hold very distinct notions of the “public good” as it relates to public information in higher education.*
11. *Media representatives generally 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.*
12. *Media representatives explain their assertiveness regarding sunshine-related issues in varying ways.*

13. *Media officials and campus external-relations officials indicate that they work hard to avoid conflict and legal action over public-information issues.*
14. *Journalistic culture, legal culture, and institutional culture can collide around sunshine issues.*
15. *Although faculty tend not to see sunshine laws as significantly affecting their own activities, significant connections are emerging.*
16. *Individuals can play a major role in the specifics of implementation, application, and reform of sunshine laws in public higher-education systems.*
17. *Sunshine laws have contributed to the “legalization” of the staffs of executive leaders.*
18. *There is appreciable variation in the nature of media relations with institutions.*
19. *Sunshine disputes, and the need for more aggressive imposition of sunshine laws, are mitigated to some extent by governing bodies pursuing openness-oriented compositional and process measures.*

From these findings emerges a general picture of stakeholder views. In some ways, those views defy conventional wisdom. There is no clear evidence of declining openness in higher education, and no evidence of outright revolt against sunshine laws. The media do not evince “devil theories” regarding higher education, and board members and presidents voice respect for the media’s role and responsibilities. At the same time, however, there are significant challenges and areas of tension in the implementation of sunshine laws in public higher-education institutions. Those challenges and tensions involve, most notably, the factors noted in the finding just above: the provisions for effective board discussion and deliberation, the connections between the laws and presidential searches and selection, and the application of the laws to emerging organizational, financial, and technical developments. Because of this consistency, we address these concerns in separate subsequent sections.

Making Critical Decisions in the Sunshine

At its highest level, governance in higher education involves deliberations among boards of trustees. The public, legislators, and the media pay their greatest attention to this level of higher-education governance, and it is at this level that the most critical decisions regarding resources, personnel, and strategies are made. Because of their visibility and, often, the tensions surrounding them, two board-related domains merit particular attention: board effectiveness and presidential search and selection.

State open-meetings and records laws have had a powerful impact upon the manner in which governing boards deliberate and formulate policies for their institutions. Most board members and other close board observers told us that their boards have “learned to live” with sunshine laws in the years since implementation. Although institutions undoubtedly vary in their compliance with both the letter and the spirit of sunshine laws, our interviews suggest that most boards generally accept the principle of openness in public higher-education governance.

Stakeholders tend to agree that much good has come from efforts to make public higher-education governing boards more open to inspection by the public. The board members whom we interviewed said they believed public higher-education institutions would lose much of the broad public support they currently enjoy were governing boards allowed to close their meetings and records to public inspection. Additionally, some respondents claimed that sunshine laws had actually improved board-performance by creating opportunities for public participation in the work of boards.

Yet, institutional leaders and board members also expressed concern about the negative impacts that sunshine laws have had on board performance and effectiveness. Their concern centered primarily on the areas of board deliberation, communication, and cohesion. Regarding board deliberation, respondents said that sunshine laws create uncomfortable climates for board discussion to the extent that board members are often reluctant to publicly discuss controversial issues. As a result, boards often only skim the surface of controversial issues in public, thus reducing board deliberations to superficial exchanges, or avoid issues altogether. Respondents also shared concerns about the impact of sunshine laws on internal board communication and development, particularly in the area of “board learning.” The inability of board members to ask questions without fear of “appearing stupid in public” may suppress creative thinking and diminish the likelihood of boards discussing novel or innovative ideas. Finally, respondents said state sunshine laws have undermined board performance and effectiveness by inhibiting the

development of a cohesive group culture necessary for effective decision-making. The absence of opportunities for board members to gain familiarity with one another informally and to learn about their colleagues' values and aspirations for the institution they commonly serve may inhibit the development of a board climate that is conducive to productive working relationships.

The serious challenges sunshine laws pose to effective board deliberation, communication, and cohesion sometimes tempt boards into skirting the law. Although virtually all of the board members and other senior institutional leaders whom we interviewed said their boards were vigilant in seeking to avoid violations of state sunshine laws, a few campus officials told of the legal fine-lines their boards sometimes tread in attempting to optimize the climate for effective decision-making.

Many boards have found ways to function effectively despite the challenges sunshine laws pose. For example, in some states sub-quorum "work groups" allow clusters of board members to gain substantive expertise on issues of importance to institutions and to public higher education. Additionally, respondents in states where board retreats are permitted point to this practice as an especially useful one in helping build board-cohesion and develop creative thinking and decision-making.

Many public-information advocates are likely to view the concerns raised here as ones that are indeed challenging for boards, but not overly burdensome given the countervailing virtues of openness in public decision-making. Moreover, many advocates of strong sunshine laws are likely to view the problems campus officials identified 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 modified or loosened. Nonetheless, the challenges and problems of mandated openness for the performance and effectiveness of public college and university governing boards are profound ones, and deserving of more systematic and thoughtful consideration by stakeholders about ways to remedy them.

The selection of a president produces more controversy, litigation, and editorializing than does any other sunshine-related decision arena in higher education. The principal dilemma 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 in the search and selection of a new president. This dilemma often takes the form of a variety of operational questions with which stakeholders perennially contend:

- Should the public have access to the proceedings of presidential search committees? If so, access at what stage of the search process?
- Is the public interest well served by revealing 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?
- 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, today an increasingly prevalent practice?

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 closed off from public view. Indeed, we found a broad consensus that presidents should be selected with substantial input from the public.

Yet stakeholders also expressed deep concern about the drawbacks often associated with conducting presidential searches in the public eye. The foremost criticism of sunshine laws in this area is that the laws have a “chilling effect” upon search processes, effectively diluting both the quality and quantity of applicants for the position of president. Most of the senior institution officials, and some media representatives, we interviewed said sunshine laws create a bias in the outcomes of presidential searches in public institutions towards candidates currently at lower-level positions—what might be termed the “no lateral moves” hypothesis. The length of time candidates are publicly exposed also may be an important factor influencing the likelihood that well qualified individuals will become candidates in presidential searches. Most board members, presidents, and other institutional representatives say that sunshine laws, although necessary in principle, discourage well-qualified individuals from applying for openings because the law exposes candidates too early in the search process.

Stakeholders differ sharply in the assumptions they make 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. 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. Many chief executives said that to publicly declare one's candidacy for another presidency is to put one's career in jeopardy.

Respondents voiced concern for the potential long-term impact of the "no lateral moves" phenomenon on the performance of public higher-education institutions. The chief criticism voiced by board members, presidents, and other senior campus officials is that sunshine laws have limited the experience levels of presidential candidate pools which, in turn, has systematically disadvantaged public colleges and universities in their competition with private higher-education institutions for a limited number of highly qualified leaders. Indeed, some believe that sunshine laws have over time diminished the quality and effectiveness of the public higher-education sector as a whole.

The practice by public colleges and universities of employing executive-search firms to assist them in their search for a new president has grown widespread, with both beneficial and problematic consequences for stakeholders. The consensus view of campus leaders we interviewed 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. Yet, the involvement of professional consultants in presidential-search processes is not without criticism or controversy. 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." There also have been sporadic cases of high-profile controversy associated with the use of consultants.

Most respondents to the study indicated that the central, vexing issue involving presidential search and selection in public higher education is not whether to provide the public with access and information about search processes, but when to provide it. Despite much diversity in the practice of presidential search and selection across states, most of those we interviewed favor confidentiality in the early stages of search processes,

but openness and broad participation by the public in later stages, upon the announcement of finalists.

Emerging Challenges and Concerns

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 deserving close attention in the future. University-affiliated foundations, communications technologies, and campus security are three such areas of emerging challenge and concern.

University affiliated foundations - 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 - are a rich source of contemporary debate and active litigation as it involves the application of state sunshine laws to foundation activities. Litigation is frequent in sunshine-related disputes involving university foundations. 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-meetings and records laws? Despite what appears to be a trend in some courts recognizing the legally independent status of university-affiliated foundations, our respondents reported both lingering and new controversy over questions pertaining to the application of sunshine laws to university foundations. Our interviews revealed two issues around which much contemporary controversy seems to center: issues involving donor anonymity and the extent to which foundations have followed donors' wishes regarding the disposition of gifts. Inasmuch as university-affiliated foundations are likely to grow in their financial importance to universities and to remain flashpoints in public-information disputes, campus leaders should be aware of the recent legal trends involving foundations and of the complex privacy and public-disclosure issues at the core of these disputes.

Emerging communication technologies have created new ambiguities and sources of strain in the debate over public access to information and decision-making within public colleges and universities. The increasing availability of new communication media has raised a variety of sunshine-related challenges for stakeholders in virtually all of the states we visited. In many states, newer forms of electronic communication challenge existing legal definitions and standards regarding what constitutes a meeting, a record, or a deliberation for purposes of determining the applicability of sunshine laws. Because

state laws often are vague on the question of the extent to which electronic forms of communication are subject to public-disclosure provisions, institutional officials often must make fine-grained distinctions about what constitutes an electronic “deliberation” in the absence of clear guidelines or legal precedent. Also, senior campus and system officials expressed concern about their colleagues’ reluctance to commit novel ideas to electronic record (e.g. e-mail messages, documents retained on computer hard drives) for fear those records might be obtained through public-disclosure laws. Thus, respondents say that sunshine laws have diminished creative thinking and the capacity for problem-solving among senior level administrators. It is likely that university leaders and public-information advocates will continue to clash over the permissible uses of technology under state sunshine laws. It is also likely that the mere existence of these technological capabilities will continue to generate suspicions about potential misuse, even where none may currently exist.

A third area of emerging concern for stakeholders occupies the intersection of campus security and the public’s right to know. Public higher-education officials report that they are responding to heightened security concerns, particularly ones relating to terrorism, in a variety of new ways, notably including installing cameras and other electronic devices on campus grounds as a means of enhancing the security of campus communities. Sometimes, these actions have created public controversy and resistance leading to successful court challenges. In light of such decisions, many campus officials fear their institutions could be compelled under state sunshine laws to publish campus security plans, the routines of police patrols, or evacuation procedures. While some respondents characterized as insufficient the attention their states have paid to issues involving sunshine laws and campus security, others reported that, increasingly, exemptions are being carved into state statute to address security-related issues. This development in turn raises an important question: how should exemptions be crafted in order to protect campuses, while not unduly restricting public access to other legitimate (non-endangering) forms of information? Most respondents voiced support for narrowly tailored exemptions under law that balance access to public information against reasonable restrictions on information that could place campus communities at risk. Given the gravity of the interests at stake, sunshine laws will continue to pose profound challenges for stakeholders as they attempt to balance legitimate public-safety concerns against the “public’s right to know.”

Conclusions and Recommendations

The specific problems instigating the original passage of sunshine laws for public institutions have faded in memory. Now, the laws are widely viewed as an accepted and largely healthy element in the institutionalized structure of campus relations with external bodies. We found few raging controversies around the country, and in many places, sunshine laws seem to attract little attention from stakeholders. Though sometimes time-consuming and sometimes a hindrance to quick action, the laws are nonetheless supported in general outline by virtually all parties to the process. Still, there is much in this domain for policymakers, media officials, and institutional leaders to consider.

This project brought to light a variety of provocative ironies, paradoxes, and ambiguities surrounding openness issues in higher education. In all, the ironies, paradoxes, and ambiguities posed by openness issues in higher education are not amenable to quick and easy understanding, much less quick and easy resolution. Some will argue that the problem is not so difficult: openness itself is the sole goal of the laws, and one need look no further than whether openness is served by the laws. As such, the laws fail as currently written: no state has laws that pursue openness unilaterally without some counterbalancing concern for privacy or efficiency or some other goal. Operationally, many organizational and public goals are ostensibly served by the laws, in areas ranging from finance to personnel to strategic planning to athletics. This multipurpose nature of the laws makes their success or failure difficult to discern: different stakeholders emphasize different specific operational goals through the laws. In this context, there is no simple analytic design that could determine how well the laws serve their various purposes.

Our examination of sunshine laws highlighted both striking similarities and striking differences across states. The differences argue against any attempt to offer highly specific recommendations - such recommendations must be tailored to distinctive state, system, and institutional circumstances. Still, on the basis of our work, we can offer some broad recommendations for consideration by the varied stakeholders for openness in higher education.

1. *Establish ongoing informational efforts regarding sunshine laws.*
2. *Maintain ongoing dialogues within individual states regarding the adequacy and effectiveness of existing open-meetings and records laws.*

3. *Provide confidentiality for presidential search processes but openness for presidential selection processes.*
4. *Examine asynchronous approaches to openness.*
5. *Consider the potential uses of third-party arbitration in sunshine disputes.*
6. *Allow boards to conduct a limited number of closed retreats in which substantive discussion is allowed but no decisions are made.*
7. *Permit board members to receive informational briefings by designated staff.*
8. *Provide institutions adequate discretion and resources for responding to open-records requests.*
9. *Allow university attorneys to discuss privately with boards **potential** litigation, as well as actual suits that have already been filed.*
10. *Integrate core academic values and personnel more fully into the refinement and application of sunshine laws.*
11. *Design mechanisms for governing boards to be beneficiaries as well as targets of openness measures.*
12. *Consider the core purposes of sunshine laws and develop ways to achieve those purposes independently of formal provisions for openness under the law.*

Several of these recommendations call for creatively designed policy refinements. Whether the mechanisms at hand provide for asynchronicity, public dialogue, third-party arbitrators, retreats, or private attorney discussions with boards, the goal is the refinement of sunshine legislation to more satisfactorily balance individual privacy, public accountability, and effective institutional autonomy. While not always easy, the balancing act must continue.

For many of our respondents, and for us, openness is not simply a means to an end, but also an end itself. Yet openness must be sought simultaneously with other values that are arguably equally important, including privacy and the success of our educational institutions. Our work reveals some of the complex issues raised by the ongoing application of sunshine laws in higher education. All told, we see an arena marked (perhaps inevitably) by complaints and ambiguities, but marked also by much agreement on core values and desired outcomes. The simplest recommendation in such

circumstances is to continue refinement. Sunshine laws will never be made definitively “right” - circumstances and preferences will always and continually change. Still, as works in progress, those laws should represent best thinking on the most appropriate avenues toward a critical, widely shared goal: responsible, responsive public openness.

INTRODUCTION

Every state in the union has legislation mandating that public higher-education institutions conduct meetings in the open and maintain open records of institutional documents. These “sunshine laws” are oriented to openness as a public value in and of itself, but operationally the laws pursue more specific objectives, including procedural equity in institutional governance and decision-making, outcome equity in institutional actions, financial probity, institutional efficiency, and educational effectiveness. The scope and details of sunshine laws vary notably by state and by system. Nevertheless, in all cases, the laws cover a wide range of crucial institutional activities, including board deliberations, presidential searches, fundraising, research and intellectual property, budgeting, business decisions, and athletics. The pervasiveness and importance of the laws mandate attention from those committed to improving the effectiveness of governance in higher education.

Unfortunately, the laws, and especially their implications for the governance of public higher-education institutions, have not been examined systematically and comprehensively in many years. While much has been written about select issues surrounding sunshine laws in higher education, the literature is largely anecdotal or hortatory. Few empirical studies have been conducted, and those that do exist (notably, Cleveland, 1985; McLaughlin and Riesman, 1985) are now nearly two decades old.

Examining the laws is important from several perspectives. Recent misdeeds in large organizations, including several major corporations, have focused public and legislative attention on the concept and practice of openness in public governance. In higher education, scandals have rocked some major institutions while tuitions have continued to rise. Sunshine laws significantly shape the nature and extent of higher education’s openness to external scrutiny and thus are central elements in these developments and debates. In addition, policymakers and leaders are paying more attention to existing openness and privacy policies in the face of changing fiscal conditions in the states, increasing attention to accountability for public spending, critiques of governance in higher education,¹ new developments in electronic technology, new threats to campus and national security, the emergence of university foundations sometimes shielded from sunshine laws, and evolving institutional arrangements for funded research, technology transfer, and corporate and individual support. Partly as a result of these developments, states have begun to rethink and refine their expectations regarding public access to

¹ See Association of Governing Boards of Universities and Colleges (1998).

public decision-making. In recent years, numerous states have modified their open-meetings and records laws as they apply to public colleges and universities (Estes, 2000).

In this climate, it seems appropriate to explore the laws at the heart of the public compact with higher education, those laws promising transparency in the workings of publicly funded institutions. Harlan Cleveland (1985) noted that sunshine laws pose for institutions and society an “inevitable and ineradicable” tension among three desirable objectives: maintaining individual privacy rights, ensuring public accountability (i.e., the public’s right to know), and providing institutions the autonomy they need for effective functioning. Cleveland’s “trilemma” unquestionably remains salient today. Indeed, it seems reasonable to argue that threats to individual privacy, pressures for public accountability, and constraints on institutional functioning have each grown in the years since Cleveland’s analysis. Understanding the place of sunshine laws in these trends is essential.

To that end, 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 in 2002 to conduct a study of the impact of state sunshine laws on the governance of public higher-education institutions.² From a rigorous analytic perspective, ascertaining the precise effects of the many different implementations of sunshine laws in public higher education would be impossible. This project pursued a less ambitious but still important goal: improving our understanding of the variations, benefits, and costs of the laws.

The project staff collected relevant literature on open meetings and records laws and visited six states with varied applications of sunshine laws: California, Florida, Iowa, Massachusetts, Texas, and Washington. The states were selected on the basis of prior studies of sunshine laws, regional representation, and governance diversity. In each state, we sought to interview in person or by phone representatives of all major stakeholders involved in sunshine-related issues in higher education, including governing board chairs and vice chairs, presidents, chancellors, and provosts of individual institutions, university attorneys, heads of faculty senates, university board secretaries, newspaper editors and education reporters, system and agency heads at the state level, state attorneys general, members of higher-education committees in state legislatures, and other informed observers of a state’s sunshine laws. Also in each state, we collected a variety of relevant

² It is important to note that this charge did not direct us toward study of issues involving the openness of individual personnel records (e.g., promotion and tenure processes) or student records (e.g., grades or disciplinary histories). Those domains are therefore not considered in the report.

documents (including newspaper articles, legislation, and reports). The state-level documents and interviews were supplemented by more general documents (e.g., articles in law journals) and interviews with selected national experts on openness issues in higher education. In all, 92 people were interviewed and numerous reports, legislative actions, and articles were reviewed.³ The focus of the exercise was on learning as much as possible about open-meetings and records laws in individual states and nationally.

This report is the result of that effort. The report surveys the current landscape of open-meetings and records laws affecting public higher education, with particular attention to the ways these laws can shape the governance activities of institutional boards and high-level campus leaders. The report next considers the views of a wide variety of stakeholders of sunshine laws. The report next examines the ways the laws affect critical organizational functioning in colleges and universities, including board operations and presidential searches. After a consideration of emerging challenges and concerns relating to sunshine laws, the report concludes with recommendations for policymakers and institutional leaders.

³ See Appendices A and B for more detailed information on data-gathering for the project.

SURVEYING THE LANDSCAPE

State open-meetings and records laws are, at the simplest level, laws requiring that a state's public business be conducted in full view of the state's citizens. Legislatively mandated openness in public-sector organizations is an experiment of uniquely American origin, one dating back more than a century in the nation's history. Utah and Florida initiated the first state laws in the U.S. at the turn of the 20th century. In 1954, Florida substantially reworked its laws, sparking a wave of revision in the sunshine statutes of many other states: by 1959, twenty states had a law requiring that government meetings and records be open to the public (Cleveland, 1987). A second wave of statutory reform occurred in the 1970's in the wake of the Watergate scandal and other highly publicized episodes of official state-level wrongdoing⁴ that severely eroded public trust in America's governmental institutions and leaders. Those crises of public confidence prompted all remaining states to adopt their own open-meetings and records laws, and inspired many states with existing laws to strengthen them. The intent was to broaden citizen access to and participation in decision-making by public agencies.

Thus, sunshine laws are products of public concern over the ways public officials make decisions. Although their specific terms are often rooted in distinctive 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. Over the course of one century of statutory reform and revision, proponents have popularized sunshine laws as a tool for enhancing democracy and for holding governmental decision-makers more accountable for their actions. The working assumption of these laws is that making meetings and records of public entities visible to citizens will 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 (Yudof, 1983). 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. In the words of one commentator,

⁴ The so-called "Sharpstown" scandal in Texas, a land-fraud scheme of the early 1970s that eventually brought down that state's governor, attorney general, and top legislative leaders, is representative of the kind of political malfeasance that sparked renewed interest in sunshine laws during this era. Texas passed its open-meetings and records act in 1973 as a response to the scandal.

“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., p. 249). Historically, the ability of citizens to gather information from their government has been aided by media organizations, whose constitutional privilege serves as a check against government secrecy. Thus, the media functions not only as a vocal advocate of greater public access to information about governmental decision-making⁵, but also as an institutionalized adversary of powerful institutions in American society.⁶

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 institutional 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-meetings and records laws influence virtually every major area of campus functioning, including:

- *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 effect, the impact of sunshine laws on the operation, management, and governance of public higher-education institutions is pervasive, influencing not only the context in which campuses make decisions but also the content of those decisions.

⁵ Much of the open-meeting and records legislation of the 1970s-era was championed by media organizations.

⁶ New York Times correspondent Tom Wicker (1975, p. 199) revealed that: “After the Bay of Pigs, President Kennedy sternly and publicly warned broadcasters and newspapers to ‘re-examine their own responsibilities’ and ask of every story they proposed to print: ‘Is it in the interest of national security?’ But two weeks later, in the privacy of the White House, he told Managing Editor Turner Catledge of The New York Times: ‘Maybe if you had printed more about the operation you would have saved us from a colossal mistake.’” On the basis of evidence such as this, Wicker suggests the press should “take an adversary position toward the most powerful institutions of American life” (p. 259).

Of course, broad national characterizations about sunshine laws hide much differentiation at the state level. Indeed, there is substantial state-by-state variation in the nature of sunshine laws, and in the ways those laws are applied specifically to public higher education institutions. For example, in his landmark study of sunshine laws nearly two decades ago, Cleveland (1985) developed a nationwide “spectrum of openness” that ranked the states based upon 25 characteristics of the law. Cleveland identified a few states, such as Tennessee and Florida, as exhibiting “great openness” under the law; others, such as Mississippi, South Dakota, Wyoming, and Pennsylvania, he labeled as “least open.” While slightly more than one-half of the states clustered near the middle of Cleveland’s continuum, these states nevertheless embodied many different combinations of statutory characteristics; no two states were identical in the nature of their sunshine laws.

More recently, Schwing’s (2000) comprehensive cataloguing of state open-meetings statutes identified nine particular dimensions along which those laws vary. For instance, laws vary from one state to the next in their definitions of public entities subject to open-meetings and records provisions; in their definitions of *meetings*, *quorums*, *deliberations*, and *voting*; in their exemptions for executive sessions; and, in the remedies and cures they provide for violations of the law, among other dimensions.⁷ As with Cleveland’s earlier work, Schwing’s compilation demonstrates the extraordinary richness and variety of the nation’s sunshine laws.

Because sunshine laws differ from one state to the next, the nature, scope and application of those laws to higher-education institutions also vary substantially across geographical and jurisdictional boundaries. Not only does each state have its own organically derived version of sunshine laws affecting educational institutions, but within states there is often variation by sector or system in the applicability of open-meetings and records laws to public colleges and universities. For example, the flagship university in some states, such as those in California, Michigan, and Minnesota, may have a form of constitutional autonomy not provided to other four-year and two-year institutions in the same state. In these 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

⁷ The nine dimensions Schwing identified are as follows: 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.

the laws for K-12 education rather than those for two- and four-year institutions of higher education. Additionally, it is important to note that 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. Thus, the distinctive historical, cultural, and political contexts in which open-meetings and records laws are fashioned and enforced in a given state serves as another source of differentiation in the concept and practice of mandated openness in public higher education governance.

Sunshine laws vary across states, but they also vary over time: most states have refined their laws over the years since implementation, 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 condition of public debate about the proper balance to be struck 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 the making of policy that effectively serves broad public interests. Since the mid-1990s, lawmakers have undertaken reform of sunshine statutes, or seriously debated it, in numerous states across the country, including California, Colorado, Georgia, Mississippi, New Jersey, North Carolina, North Dakota, Pennsylvania, Texas, and West Virginia.

Controversies involving higher education have served as inspiration for many of the recent efforts to modify sunshine laws. These controversies take many different forms. For example, a 1997 dispute between the University of North Carolina (UNC) and the North Carolina Press Association centered on whether the state's sunshine laws should be amended to make confidential the proceedings of faculty and student committees that advised the UNC chancellor, to seal donor records and certain alumni records, and to restrict access to the chancellor's office mail (Kirkpatrick, 1997a). One news account characterized the conflict in this episode as having potential to "unravel 20 years of gains and balance in the laws that govern open meetings and public records" in that state (Kirkpatrick, 1997b). In numerous other states, similar disputes over the application of sunshine laws to public higher-education institutions have sparked wider debate within legislatures over how best to balance the three tensions of Cleveland's "trilemma."

The application of open-meetings and records laws to presidential search and selection processes is an area of continuing interest and controversy among the public, the courts, the media, and legislative assemblies. More than any other issue, presidential

search and selection has inspired change in sunshine statutes. 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 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 notes a distinctive pattern to these reform episodes: a public university's presidential search attracts litigation from the media in pursuit of greater disclosure of candidate 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. Estes concludes (p. 509) that this pattern may be preferable in a democracy: "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..."

The landscape of state sunshine laws is one marked by diversity, controversy, constancy, and change. Although the fundamental questions at issue (i.e., Public information, at what expense? Privacy rights, to what limit? Public agency discretion, to what end?) appear enduring, open-meetings and records laws continue to evolve, as does society's expectations regarding the laws' purposes, functions, and form. Sunshine laws exert pervasive influence upon the context and manner in which public colleges and universities are governed and, in turn, are shaped by debate regarding their proper and effective application to public higher-education institutions. Given the significant implications of sunshine laws for the effective governance of higher-education institutions and the realization of important societal values, it is understandable that views of diverse stakeholders are characterized by both consistency and distinct differences.

LISTENING TO STAKEHOLDERS

Our interviews and document analysis relating to state sunshine laws across the country suggested a number of consistent themes. At the same time, the analysis revealed some fault lines, areas of distinct difference of practice or opinion. In subsequent sections of the report, we will explore specific themes relating to boards, presidential search and selection, and critical emerging issues. In this section, we review the broader, orienting findings of our work.

1. *Openness is a widely and deeply shared value in public higher education.* Public deliberations and records may be uncomfortable at times for college and university leaders, and they sometimes seek exceptions from enforced openness, but respondents repeatedly told us that maintaining open meetings and records is essential for ensuring public trust, accountability, and fairness in state-supported colleges and universities. Interestingly, we heard no proposals for abolishment of the laws, regardless of whether the state in question had relatively strong or relatively weak sunshine legislation.

Numerous examples point to our respondents' strong support of sunshine laws in public higher education. In all, respondents were impressively eloquent and passionate in expressing their commitment to openness as a value. The editor of an urban newspaper commented:

Anything at all that leads to more openness in higher ed is a good thing. And merely the existence of sunshine laws goes a long way toward creating a mindset both in the public and in these institutions that there is an assumption of openness, and a reminder which many people need, that they are working for the public.

A faculty leader at a research university commented:

I think that most of our colleagues on the faculty appreciate that they are at a public institution, and consequently, there is this certain amount of sunshine that always has to illuminate everything that we do. We are actually responsible to the public, you know. Most of the faculty here, if they wanted to, could traipse on to a private institution and command good salaries and do what they wanted. I think they enjoy being here

because of that aspect of public education that they so cherish: the diversity, the richness, and in many cases, the openness, too. That is part of what makes this public institution its own entity.

The leader of an institutional system stressed the representative-democratic underpinnings of openness in public higher education:

[T]here's this symbolic quality to having your deliberations and your votes in public... That's what you expect legitimate governments to do. Illegitimate governments do things in private so that's apart from whether you get a better decision, more involvement, more accountability. It's the symbolism of saying you know the taxpayers pay for this, that we live in a democracy, a republican form of government. And the institutions and democracies are supposed to be relatively open except under extreme circumstances.

A high-level campus administrator placed the argument for openness in broader philosophical terms:

I think some of the positive outcomes are, if I may go back to Plato, he said something to us about what we might do if we could do anything without anybody else knowing about it. Certain people like Emerson think that it wouldn't make any difference with an honest person, but I'm not too certain how many honest persons there are. What it does do, I think it helps in the matter of accountability because by knowing that what one says or what one does may, in fact, be exposed to many constituents, one exercises a greater degree of character in what one does or what one says.

Second, I think it brings parties into discussion who may not normally be a part of that discussion. It enriches it. Thirdly, sometimes there are concerns about decisions that are going to be made. Some people are less well-informed. I think the Open Meeting allows for greater degree of information to be shared, and sometimes averts a controversy.

I think [openness] is also, to me,... native to what universities should stand for, namely that it embodies

the universe of exchanges. Even though those exchanges may not take place, they potentially could.

2. *Sunshine laws are increasingly 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 in his or her state. Sometimes, our questions about reforming the laws were met with responses indicating that the laws were on the books and followed, but not especially salient matters in day-to-day business, i.e., individuals and boards had simply incorporated the requirements into their way of doing business and no longer thought much about the matter. For example, a state higher-education executive officer stressed:

It is such a natural part of operations that it is not something that you think about on an ongoing basis. ... Of all the issues that we grapple with, this issue is one that requires very, very, very little attention. So it's not something that we spend a lot of time looking at or talking about.

The head of a large state system noted:

When you do the public's business, you need to do it in the public ... You need to expect some heat from the sunshine, but that's what we get paid for.

A corollary of the institutionalization argument is that 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. The president of a community college was clear about the law's continuing place in his administrative career:

I think if you were to work in the public sector, you have to adopt that as the values that the state has. And I guess I've always... To me, if you decide you're going to do it, it's not as hard as deciding not to do it. If you decide not to do it, you're always fighting it, and you lose and lose and lose. The law is very clear in Florida and in every other state. I guess I have always determined that the business I do, I would be willing to read about it on page B1 of the newspaper.

Of course, the fact that the laws are quietly followed and largely taken for granted by many people in many settings does not imply that they are neutral and insignificant in their governance implications. Respondents told us of some senior institutional officials ceasing note-taking in meetings because of concerns over possible subsequent open-records requests. Such activity, or deliberate inactivity, may have noteworthy implications for institutional memory and, more broadly, effective governance. These effects of the laws merit attention.

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 assign substantial human resources to help manage those issues. Comments by leaders interviewed in such states are cautious and resonant with past experiences relating to the requirements of sunshine laws. In other states, leaders need 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 at work in shaping the extent to which the laws are salient to governance work.

Beyond the simple level of attention, there are differences in the nature of attention. The project's interviews suggest that the nature of requests to institutions involving sunshine laws differs by state and system. For example, institutional and system officials in several states suggested that the bulk of their public-records requests under the laws came from media representatives, while some California officials observe a higher volume of requests from the general public.

4. *Evidence is inconsistent regarding a trend toward weakening of sunshine laws nationally.* Open-records complaints by students to the Student Press Law Center have risen in recent years, according to officials of that organization cited by Schmidt (2001). In a similar vein, Charles N. Davis, executive director of the Freedom of Information Center at the University of Missouri School of Journalism (quoted in Schmidt, 2001, p. A21), has expressed the opinion that, "Overall, there has been a fairly steady retreat from openness" in higher education, adding that whereas before, "the presumption was disclosure ... Now, the presumption is litigation."

Despite these intriguing leads, our study found no supporting evidence for a trend away from openness. Several individual states have enacted substantial refinements to their sunshine laws in recent years, but these go both toward and away from reduced

openness. For example, the president of a flagship research university noted that in his state:

Legislative actions in recent years have supported greater openness, not less. I think this is a real motherhood and apple pie situation.

A state-level counsel and national authority on the laws takes the stance that observers are confusing the inevitable refinements of the laws with substantive movement away from openness as a value:

Take ... the Patriotic Act and all that. Most people feel that what you borrow when you go to the library should be confidential. Well, that's not a retreat from openness. It's a balancing of public-policy objectives. ... And I think it's just that people don't realize when they first pass these laws, what the trade-offs are. They think a few obvious things like medical records, ... personnel records, law-enforcement records. ... But then as time goes on, more and more things get called to legislature - the attention of either legislatures or courts and become dealt with in one way or another. ... You can certainly see ... in the reported cases [and] opinions the number of times various public entities try to get judicial exceptions and fail, far more often than they succeed. So, ... I would not accept the notion that there's some kind of general retreat from the concept.

Absent any clear patterns from our interviews or from our study of articles and institutional documents, we must conclude that there is currently no discernible national trend regarding openness in public higher education.

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 knowledgability on the laws, and about how emerging developments of different kinds (e.g., in technology, campus security, and other domains) may influence the laws and their effects and effectiveness.

A state executive officer confessed he did not know what the effects of sunshine might be on decision-making, for example:

You can argue that it improves decisions. I guess you could argue maybe that it makes decisions worse.

An official in the office of a state attorney general noted that the technological environment in which these laws today are applied is quite different from the one in which the laws originated:

Recent technology, which has developed the ability to store enormous amounts of material that can be accessed anonymously and efficiently has been the biggest unintended consequence of the open-government laws because people use the open-government laws as well as other mechanisms to obtain vast quantities of information, which then you don't now have to go down to city hall or personnel office to try to get. You hit a button on your computer. I don't think those that envisioned the open government laws envisioned that there would be so much information about so many people, so readily available for uses that were never even contemplated.

A university attorney raised questions about research and scholarly intellectual products and their connections to the law:

What in public records law would prevent [press] access to our famous poet's next poem before it's published? ... I characterize this like somebody growing roses in their garden, and somebody else is allowed to come in, collect all the roses, cut off the blooms and the thorns, and say, "This is what this farmer's doing: growing thorns."

Several attorneys working in state offices raised difficult questions about investment issues (e.g., how to deal with publicity-shy venture-capital funds that provide solid returns to institutions), while others noted the difficulty of the connections between sunshine laws and traditional attorney/client privilege. One commented, "The difference between providing some sort of oversight and regulation of the state and the agencies,

and providing zealous legal representation for positions is potentially problematic.” Each of these issues demands attention from policymakers and others concerned with the effectiveness of the laws.

Finally, a number of respondents noted the ambiguities and fluidity of the domain. A comment from an administrator and nationally recognized authority on the laws captures the point:

The principle sounds great. The idea sounds great. Everything should be open. No secrets in government. After all, secrets just lead to horrible abuses like we saw with Watergate. Though it sounds very democratic - and I don't mean to be cynical about that. I think generally speaking openness is appropriate. We are a democracy. And the fundamental principle is correct. But, then the devil is in the details. And I think with the passage of time, you could actually say in virtually every area of the law, with the passage of time, these principles come to be more refined. And people become aware of trade-offs that they hadn't thought of in particular areas when they were caught up in the moment and passed something embodying the broad principle. And I don't think that's anybody's fault. I'm sure I do the same thing every day when I try to write a policy. And you discover two years later, gee, we haven't thought of X, Y. So as you actually try to apply laws, as I say, trade-offs develop that hadn't been appreciated when they were written.

It is unlikely, such comments suggest, that laws could be put on the books that would endure unchanged, or that leaders' approaches to openness issues would not evolve over time.

6. *The specific applications of sunshine laws are not always well understood among stakeholders.* It is perhaps not surprising that the general public does not have a detailed understanding of sunshine laws.⁸ It is somewhat surprising, however, that even at the highest levels (board members, presidents, and sometimes even university attorneys),

⁸ One board secretary commented, “I don't think most members of the public have any idea, either about the Open Meetings or about public records and certainly not the discrepancy between the two.” A state official noted: “The reality is on public-record exemptions, the populace at large very rarely has enough information.”

respondents told us that the precise application of sunshine laws to a given situation is often ambiguous. One board secretary who is also an attorney said:

The exceptions are very confusing and really probably more in the Public Information area right now. And I think even people who want to comply and want to understand the law, unless you read it and reread it often, unless you keep up with every single opinion from the Attorney General that comes out, you've really run the risk of not being up to date.

Of course, any legal context creates room for differences of interpretation and grounds for potential court resolution, and this is no exception. At the same time, though, there appears to be a notable zone of misunderstanding, indifference, or inattention, surrounding the details of openness requirements in some states and systems. Board members believe that their boards are trying hard to comply, but are ever 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 the State's interpretation, monitoring, or enforcement of its laws. Frequent changes in the law, 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.

The effects of sunshine laws are not always well understood by the public, legislators, leaders, or researchers. Often, creative leaders can use the laws in ways unanticipated by the drafters of sunshine legislation. Consider this example from a leader working under Florida's very broadly written sunshine statutes:

Let's say you want to discipline a faculty member who has tenure, who if you go to court, you're probably going to lose. Maybe it's an abuse case, maybe it's dating a student, or, I don't know, something that's questionable. From a public relation's standpoint, it's an atrocity. But when you read the contract, it becomes questionable, and particularly when you go to court - could you win it? Now, "Do you want to stand up in public and have all of that revealed about your character, Doctor so and so? I think I'll just take a job

somewhere else.” That works for your advantage quite frankly, because you can use the press and the sunshine to get somewhere.

7. *The “weaponization” of sunshine laws concerns many higher-education leaders.* In every state, officials expressed concern about the “guerilla tactics” used by “cranks,” “gadflies,” the “disaffected” and others “with an axe to grind” or bearing “political grudges.” One external-relations official commented 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. Often, they are unaffiliated with any large organization. They tend to use sunshine provisions in ways never intended when the laws were adopted. For example, the occasional lone citizen, aggrieved at an institution or targeting some other individual, may use the laws to bog down an institution in myriad records requests. “Weaponizing” (i.e., the arguably excessive use of the laws by disaffected parties in the public or on campus) 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 be a substantial source of financial, legal, and personal costs for institutions.

Weaponizers may employ public-records laws to force institutions to expend staff and financial resources at particularly 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 of institutions, and create a public impression of institutional impropriety (e.g., 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 institutions for records in an attempt to bring suspicion to a candidate’s or incumbent’s campaign.

A stream of comments from our respondents reflects the extent of the weaponization problem. An official in a state attorney general’s office commented:

[Sunshine laws] can be used and abused by people who really aren’t trying to advance any public policy or accountability. They’re just trying to lay a beating on the agency, and this is a pretty way to do it. You know,

you put a stamp on something and send it to the agency and 300 hours of staff time just goes down the drain.

A state system leader told us:

These laws are used strategically by people who wish to challenge your decisions. It's like any other law. ... Whenever you create a capacity for someone to evoke a law, to be helpful in their particular cause then there's a strategic objective. So someone may make an open-records request not so much because they think there's something really in there, but to show they're really watching carefully and to up the ante and to be something of a pain. But any law could be used that way.

One university president even saw a little humor in the weaponization issue:

It's kind of a standing joke. Unless [a named individual member of the public] has filed suit against you, you're really not a public official. So you have a few political gadflies who do it. You certainly have members of the press who do it for a variety of reasons. You have people in political parties, one side or the other, screwing with the other. So it's used for a variety of different purposes that I don't think the public wanted it to be used for or ever intended it to be used for. But, it's always a fun thing if you're running in a campaign to file a Public Record's request against somebody. And put out a press release that you've accused them of violating the sunshine. Well, that's a helluva thing that you've got to stand up in a debate and all of a sudden say, "Well, I didn't do this."

Unfortunately, weaponizers tend to use volume as one of their weapons, according to a university system attorney:

The people who use it the most often, don't have the best motive or don't have the motive that the law envisioned.... We hardly ever have a member of the public who comes forward in an honorable way and says, "I'm just curious about how you run your affairs." Maybe once in a blue moon. It's always just somebody

who's just using it for a purpose that isn't public or that is more personal than public.

8. *The costs of compliance are substantial for many institutions.* The weaponizing issue brings up the broader issue of costs: setting up human, 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 state institutions. Appealing to state judicial authorities (e.g., an attorney general's office) for clarification of an institution's legal obligation presents additional financial burdens, both for institutions and for the state. Thus, sunshine laws can require sizable ongoing allocations. The risk of non-compliance, in terms of the remedies prescribed by the relevant sunshine laws, is simply too great for institutions and systems to do otherwise. Such investments are largely defensive measures, to hear attorneys describe them, and as such, raise the question of whether the funding could be better spent in other domains if the possible judgments against institutions and systems were not so painful.⁹

One state-level general counsel raised the possibility of an individual or group requesting hundreds of thousands of e-mail messages, forcing major disruption in the day-to-day business of institutions and systems. While there are usually charges associated with records requests, some requesting bodies (e.g., some media organizations and privately funded public-interest groups) are prepared to pay such charges. Unfortunately, the charges may not cover all costs to the records provider, such as the direct and indirect costs associated with unusual hiring, staffing, and subcontracting needs.

In the arena of public-records requests, a single records-request can consume a "monumental" amount of time and resources. Among the examples noted for us was an institution being asked for a record of every meeting of the president over the past three years. Redacting a president's calendar so as to ensure protection of individual privacy interests (e.g., a student disciplinary meeting the president may have attended) can be exceedingly time consuming and risky, in terms of the institution's liability. More broadly, some institutions have been subjected to what are arguably "fishing expeditions" or muckraking excursions, in which huge swathes of information are requested in the hopes that a suspicious shred of something may be found. A state education official empathized with reporters, but lamented the costs:

⁹ Although we refer mainly here to financial costs, it is important to remember that failure to comply with the laws also raises risks for political standing and institutional stature more generally.

A smart reporter will always do a little bit of fishing and so, even if they know that a document is this, they will ask for a little bit of vagueness so they will catch any entanglement or whatever. But if they do it too broad, we have to hire staff to make photocopies, which we have had to do on occasions.

Summing up the problem, the general counsel for a large institution commented:

It's really burdensome to comply with the public records act. ... Even a relatively routine request that is asking only for disclosable information puts a burden on the department that owns those records to pull them together, to make copies, to review the records to make sure there's nothing privileged, to coordinate with the campus coordinator and possibly the campus legal counsel, and possibly the Office of General Counsel. The timeframe is pretty quick. The initial response is due within ten days of receiving the request. And I can tell you, nothing happens at the university within ten days.

The situation prompted one counsel to gallows humor:

[S]even people fully exercising their rights under the California public records act could shut the university down. We joke about that. It's fortunate that it's a burden, it's a drag, but at no point in my experience has it ... made the university on any large scale dysfunctional. But on a small scale, it is a burden. And as budget cuts come and people are less staffed and have more on their plates, I think it will be even more so.

9. *Open meetings and open records involve distinct issues, and their application and effects should be considered jointly only cautiously.* Although they stem from similar public impulses, the two domains require different behaviors from institutions and raise quite different issues. In one state we visited, for example, a higher-education system's legal staff were divided neatly between those focusing on meetings and those focusing on records.

The two kinds of laws tend to raise different levels of attention. The comment of an official in the attorney general's office of one state was typical of responses across the country:

There's a much higher level of awareness and day to day application of public records to what the university does than there is to public meetings.

Interestingly, the two sets of laws can be ambiguously related: more than one attorney noted to us inconsistencies and differences in restrictiveness among their states' records and meeting 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. Along those lines, several informants in Washington state pointed to a "misalignment" in open-meetings and open-records laws boards are allowed to meet in executive session to discuss a fairly large number of issues, but state open-records laws require that any written notes taken in those executive sessions are subject to public disclosure. One implication involves the potential public perception of deception by the university: it may be unclear why a university claims privilege involving oral comments when notes are subject to disclosure.

The two kinds of laws may tend to be distinctive in their vulnerability to abuse. One university attorney commented to us:

You can't misuse those [open meetings] rules. The rules are what they are. I'd like it if they were less cumbersome and we had a little more discretion, but they are what they are and we either comply with them or we don't. It's very different when you're talking about the public records act where people can actually misuse those laws. And in fact, misuse is my notion of using them for a motive that is other than what the law intended. In fact, the misuses that I would cite to you are quite legal.

Several respondents suggested that open records are subject to more disputes than open meetings. Public-information advocates and institutional officials told us that more complaints and concerns about the laws relate to open-records provisions than to open-meetings provisions. Similarly, our interviews suggest to us that the press may be more

interested in open records, and more concerned about problems in that arena, perhaps because of a perception that records are easier to conceal than are proceedings of meetings of senior institutional officials. Members of the press may tend to be more interested in open records because of their “concreteness” and because of a perception that concealment may be easier and more tempting in that domain than in meetings. An editor told us:

I think our history shows that we had much many more fights or maybe more conflicts in relation to the documentation as opposed to public meetings, and that’s because there is just a lot more there.

Among the press, institutions’ compliance to open-meetings laws received less criticism than compliance to open-records laws. On several occasions, media representatives complimented a university or system for their compliance with open-meeting laws but criticized compliance to open-records laws. In Texas, for instance, institutions and the system have ten working days to gather and disseminate records in response to information requests. The original intent of this ten-day period was to provide institutions, when necessary, sufficient time to produce difficult-to-obtain requested information. The university suggests that gathering and disseminating the information takes time and labor and this often requires the full ten days. The press charges that institutions sometimes use the full ten days as a “stalling” mechanism, and that information is virtually rendered useless or outdated when not handed over immediately. Those in the press argue that the institution or system should have to make an explicit case for needing the full ten days time to produce the information requested. At the time of our visit, the legislature was voting to reduce the ten-day period, a prospect beloved by the press and troubling to the institutions.

10. *Stakeholders hold very distinct notions of the “public good” as it relates to public information in higher education.* Reflecting a societal climate of visible and significant misuse of power by various public and business leaders, media respondents were reluctant to cede grounds of privacy to colleges and universities. Their experience and values point them toward making few concessions to the public sector, an approach they pursue on both philosophical and parochial grounds. Virtually all of our media respondents presented the view that openness is an absolute value and 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 their tax-supported institutions function ultimately leads to public accountability and decisions that are made in the best interests of the public. The media are sometimes sympathetic to the concerns and objections of higher-education officials, but never are willing to concede the public's fundamental right to information.

Referring to the argument that the public is best served when interests in openness are balanced by allowing exemptions to sunshine laws under certain circumstances, an editor said:

There are very few exemptions that I think are appropriate, frankly, and if the test is what leads to the best public policy, what level of restrictiveness or openness of government decision making leads to the best policy — my belief is that the more open the decision making, the better the public policy. ... I think every scrap of information that is revealed about almost anything is beneficial.

Reporters from two other states on opposite coasts agreed, noting respectively:

I don't see how more information can be harmful to public debate... More seems better to me.

I've never seen an instance where, when information is public, that it's damaged anyone or made things worse. I think that universities hide behind the laws.

That suspicion of universities' attitudes was echoed in the statements of yet another reporter from yet another state:

One of the reasons why we are as aggressive as we are is in response to... this sort of notion by the university and public institutions in general that this is not the public's information.

Among the media respondents who did not volunteer a view along these lines, none voiced disagreement with the view, although some noted circumstances where the media should be discreet in publishing personal information not central to a story.

In contrast, institutional leaders tend to view the public good in multifaceted form - individual privacy rights and institutional needs for discretion in public disclosure sometimes outweigh blanket accession to 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 - i.e., having well functioning institutions capable of making well-informed decisions - is undermined.

A general counsel for a major institution, for example, noted that sunshine legislation can sometimes hinder rather than encourage the open exchange of views:

We ... have an exemption that allows us ... to delete the names or identifying features of the persons communicating with the president, [but providing the press the public's communications to him] under public-records requests may cause such persons in the future not to contribute their thoughts to the institution. So, you get to the question of whether or not there will be a chilling of public input because their comments would become public. Let's face it. When somebody, maybe in a fit of anger, writes off to the president, they don't expect that that's going to be on the front page of the newspaper. There's the whole question of fairness of that happening.

In the same spirit, a general counsel at the state level made a blunt assertion that the interests of the press and the public are "very often distinct."

Perhaps the clearest statement in opposition to the argument for 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, but in fact it compromises the public good because many other noble goals of equal value are comprised, are 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.

Thus, whether the public good is sometimes better served by shade rather than sunshine remains a point of contention. Perhaps the ambiguities of the “public good” question are best captured in the plainspoken terms of a veteran board member for a major university system:

I’ve sat there biting my teeth in a public meeting while some faculty person expressed through their rights under our bylaws and our rules and the Sunshine Meeting [law], beat the crap out of us. Okay? You don’t think the press is going to write my answer at the end of the meeting or write the positive outcomes, because [for] the press, good news is never news. It’s bad news that’s news. We’ve had them come in and march in our room and stand there on the wall on a tough issue. But, that’s democracy. That part never bothered me. You always wonder about the public perception the next day about does [the institution] have it together, or what have you. Those parts, I think, are the good parts about the Sunshine Meeting law. People get to confront the Board of Trustees.

11. *Media representatives generally 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 media representatives we interviewed referred to incidents of unsatisfactory institutional responsiveness to their inquiries. They tend to see colleges and universities as naturally prone to secretiveness, cumbersome procedures, and poor information flows and note that institutions almost instinctively act to keep their activities out of the public eye.

Some editors and reporters attribute a condescending attitude to institutional leaders:

In ... the general pursuit of information that one or both parties considers sensitive..., there’s this notion that “We’re smart”... And it’s the way they speak and the way they conduct themselves, I think that that there’s that general sense of a few of these people... who feel they’re operating at a whole other intellectual plane - “How dare you ask us for that kind of thing?” And it

makes us a little more aggressive in response to that. ... I'm certain that they flat out deny ... that sort of attitude persists, but just, you know, I've been the education editor at this paper ... for about three and a half years now, and there's a clear difference in our pursuit to get information out of higher ed than even K-12.

More charitably, several reporters and editors leavened comments about institutional preferences for secrecy with asides about the virtues of university leaders, e.g., "Despite the fact that those are usually good people, using good reasons, I simply think they're wrong" and "These are not people who are mean-spirited or evil; it's just that the law is so cumbersome and so subject to manipulation..."

An editor in Iowa noted the variability among university officials:

I think some of them are really good about it, meeting with the reporters and getting to know who they are and find out what their job is and what it entails. But I think others, they just view it as the big, bad enemy, and they don't want to have to deal with it at all.

Another editor also noted that institutions were not at all monolithically resistant to the press, and made the point that scrutiny of institutions tends to be less aggressive than for other public organizations:

I think it is less likely for journalists to look very closely at colleges and universities, partly because they are considered to be good from the outset, and it's all about education and the future and all of that stuff. So I don't think they get the scrutiny, generally speaking, that city expenditures and other government expenditures get. And generally, I think they have recognized the responsibilities under the law and responded fairly well.

Some members of the media attributed the resistance of universities to openness less to purposive evasion and misdeeds and more to organizational traditions and conditions. A reporter noted the differences of opinion on why relations with institutions were so frustrating for her newspaper:

Even though records are supposed to be open, we actually just had an editorial last Thursday saying how difficult it was to get information. And my colleagues and I differ on why we think that. Some of them think that it's on purpose. That they're manipulative and they don't want to give the information. I actually tend to believe they're just ... overwhelmed and don't understand and incompetent.

Interestingly, a few journalists suggested to us that they could help institutions see how their own fortunes would be served by greater openness, if only institutional leaders would be amenable to such a view. An editor wondered how some institutional leaders could be so blind to the mutual self-interest in their relations with the media.

I would be really curious, from the university's perspectives, of how they view the media.... Some of them are really good at realizing that we can be a tool for them and that we'll agree to disagree, but others, they just really don't want anything to do with us. And we're really not going away most likely. I think that we're really open about what our role is, that we're kind of a watchdog on governmental bodies and institutions and governmental businesses. Universities are included in that. So they are open to scrutiny by us. I don't think universities - they're not as open with what they need from us, and I think that's where a lot of the bashing of heads and the conflict can arise.

The editor went on to tell what she would say to institutional leaders if they would listen:

“At some point, something wrong is going to happen, and we'll be there. But it's up to you for how it's perceived. If you tell us, ‘No comment,’ you really don't do yourself any favors. And that's not our problem. We're the bearer of the message. Don't kill the messenger. You're killing yourselves.”

12. *Media representatives explain their assertiveness regarding sunshine-related issues in varying ways.* Most express deeply held convictions about the public value of their pursuit of openness. In the comments of numerous media representatives, there was

an underlying steeliness regarding their pursuit of greater openness in higher education.

One commented:

I don't think journalists, and there are exceptions in any industry or field, ... go into the office everyday gunning to bring down something at the local university. We have a lot of people in our newspaper who went to those universities. They've really strong ties to those places, but they're doing their jobs. These are taxpayer-based, public institutions, and they operate very differently than private organizations do. And they will be held accountable for that, as a result.

Along similar lines, an editor said:

As a representative of the media, if we don't stand up for the open-records laws and open-meetings laws, no one else will. And my job is to make sure that we're presenting as much of the story as possible and that my reporters are doing that as well. If I found out that one of [my reporters] was worried about the day-to-day relationship that they have with someone at the university, ... I would say that they're not doing their job for us, for our readers, for our newspaper. You know, the law exists not to serve the media; it's there for anyone to use. And certainly, you do have to keep your sources in mind, but you also can't be afraid to do your job, too, and by law, they're required to follow the law just as much as we are. And if we're afraid to call them on that, then I think that reporter should probably be moved to a different beat.

Several respondents raised the possibility that media competition may also contribute to the press's willingness to employ aggressive approaches to higher education. A staff member for a newspaper in a state capital gave us a portrait of the climate in which many higher-education reporters work:

We've just all had ... libel and open record workshops where they have told us that they want to become more aggressive in ... getting information. I think that they do recognize that there is sort of a clamp down [by institutions] and we need to be more aggressive. We

need to understand how the system works. Because I ... don't know how frequently we use this information and I think that they want to encourage us to do that more often.

An institutional leader in the same city presented his own, less charitable perspective on the aggression of the local media:

There are newspapers that understand that they sell newspapers by having scandals and problems and they fit everything in the worst light, and they're not afraid to misquote or partially quote what you say to get their point of view across.

13. *Media officials and campus external-relations officials indicate that they work hard to avoid conflict and legal action over public-information issues.* As some of the quotations above suggest, mistrust of higher education institutions by members of the media does exist, but that mistrust is not as pronounced as many might believe, and reporters who regularly cover higher education tell of generally good working relationships with many administrators.

Legal action lies on one extreme of the continuum of public-information interactions and the informal passing of information lies at the other. Between the two is the use of formal public-records requests under state law. Although a popular stereotype may be that of institutions reluctant to engage the media and of media eager to sue institutions, both parties reported to us that they expend much effort attempting to develop productive day-to-day working relationships and that, when tensions over sunshine laws arise, they prefer to negotiate rather than to litigate differences. Institutions and the media both express preferences for passing information informally rather than through formal public-records requests. When public-records requests are made, tensions can arise around the precise interpretation of the request, the depth and scope of information requested, the timing of the institutional response, and the costs for staff time and document duplication. An institutional counsel captured the process as follows:

It's important to be able to talk with reporters about what the institutional concerns are. And at the same time, it's nice for reporters to share, "This is really what I'm interested in." So, you can have the kind of conversation, rather than the kind of request that says,

“Give me everything you’ve got on subject matter X.” In a university, that could be thousands and thousands of documents in five or six different offices. Or you might say, find out, that they’re really interested in a personnel matter. If they’re interested in personnel, of course there’s going to be friction because that’s one of the exemptions. So, having that relationship and being able to talk through what reporters are interested in or not is important from both sides in protecting the institution’s legitimate interest and giving access to the press at the same time.

Numerous of our national and state-level experts echoed a point made by a trustee/journalist quoted in a dialogue published by the Association of Governing Boards of Universities and Colleges (2002, p. 11):

The basic question about friend or foe depends on the general relationship between the institution and the press. If the institution handles its press relations in a satisfactory way, then the press is going to get some information, but it is likely to be done cooperatively. If it’s a very vicious relationship, a lot of reporters and editors may try to “get you.” That’s just human nature.

A college president described how, in this context, the use of informal mechanisms is often in the best interests of the parties:

There’s nothing that gets me more annoyed [than] to have a reporter start a discussion by telling me, “Under the Open Records Act,” because my immediate response is, “File the report, then.” That’s the last thing they want, is to invoke the Open Records Act, because the clock is running, and if they want to do that, that’s okay; I’ll take my seven days upon receipt. In fact, I’ll ask a few questions to make sure I have it right. I’ll send you a note saying, “I’ve got your thing. I’m not sure. Is this what you want? ... Are you comfortable with the cost? ... You know, if you want me to follow the letter of the law, we’ll do that. If you want to invoke the spirit of the law, it’s a lot easier for everybody.” And the press never wants to have that discussion... I think the press does itself a real disservice with using it [sunshine legislation] as a club.

And candidly, the best reporters, I've never heard it out of their mouth. They know they can get it. I know they can get it. But they don't want it ten days from now.

Along very similar lines, an attorney for a system-level board described the process at work there:

From our perspective, the way that plays out is when we have requests, a request from a reporter often starts not as a formal written public-records act request, but a phone call to the Strategic Communications office, and they try to work things out before anybody even mentions the words "public-records act." [They] kind of say, "Well, can you get me this information?" Kind of informal. And then, if it goes to the level of a public-records act request, the next step ... we still are trying to work with them and they're trying to work with us, and it's infrequent that you would [get] to the point where they would, say, threaten litigation. And I think that that's sort of a factor that they do want to maintain these relationships they have with Strategic Communications.

14. *Journalistic culture, legal culture, and institutional culture can collide around sunshine issues.* A number of tensions exist among the three primary parties to sunshine issues in higher education. The three arenas use different languages, base their work on differing assumptions, and ascribe to different values and attitudes.

For example, as the quotation from the college president in the prior section suggests, journalists' conceptions of timeliness and effectiveness differ markedly from those of faculty and staff in higher education. To put it colloquially, the two camps operate on different clocks. While faculty, staff, and many leaders on campus may tend to see effectiveness lying in taking however long it takes to do something right, journalists tend to view effectiveness as very closely related to speed. Accuracy is important in both cultures, of course, but accuracy achieved at severe cost to timeliness is not valued in corporate-based print and broadcast journalism. These differences lead to complaints about the impatience of journalists and the inefficiency of institutions.

Interestingly, several higher-education officials noted in their interviews that journalists tend to view openness in religious terms. One said:

The publishers of newspapers throughout Massachusetts and New England are very protective of both laws, and the major newspapers, especially the Boston Globe and ... the Herald, they're very protective of both laws. And they seek to have them enforced almost like a religion.

A state official in Florida used similar imagery:

I will put it in religious terms, and I'm really not stretching it. [If we argue for closed meetings,] we basically come out speaking against someone's religion and the religion that we are speaking against is the religion of the media, particularly the print media.

In turn, journalists tend to be struck by the insensitivity of officials to their roles and responsibilities as members of the media. The editor of a city newspaper in a state capital put it this way:

[Institutions] are insulated. They have always been and they always will be. And even the public institutions see themselves in an almost cocoon-like environment. And so, their natural tendency is not to accept the fact that they are state employees and that they are subject to the same kind of rules and regulations and discovery procedures as clerks and secretaries. So, [compared to other public organizations] it's been more of an uphill ride, I think, with ... higher ed.

From an editor in another state, the theme of insensitivity to media perspectives arose in similar form:

I think a lot of journalists go into this field, not just newspaper but television and whatever, because they like telling people stories and doing work that they hope benefits their communities, that they can write a story that can help someone identify with something that they're going through. And so, to have that, "The media does this and the media does that," I just think to myself, that is so wrong! And boards and institutions and businesses often have that mindset.

From yet another state, a higher-education beat reporter noted the personal tensions involved in doing her job:

It's almost like this culture at [the state's major public research institution] in particular - I don't know, it's hard to say. It's almost sort of bad form. When you're asking them about it, you're a troublemaker. You put them out. So that becomes a problem because it's like, well, these are the people you count on to help you out. I think that I probably ask more than anybody about things. I don't know. But I think so. I'm not very well liked.

Beyond tensions between journalism and academe lie tensions of both those domains with the legal profession, which seeks to ensure and enforce order, clarity, and security out of the often clouded and contentious territory of executive decision-making. High-level leaders do not like to mince words but, realizing the expertise of their legal watchdogs, often must do so. More broadly, sunshine laws crafted carefully for other public settings, such as city governments, can create difficult hurdles for institutional leaders when applied in colleges and universities, but such difficulties may not be easily understood by legal authorities. In sum, the borderlands among the media, legal, and academic cultures can be difficult to cross, and can pose challenges to effective campus leadership.

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. For most faculty, however, research activity and academic governance seem to be unclearly and inconsistently connected to openness.

Several respondents raised some emerging concerns about faculty issues as they relate to openness. One area concerns researchers' freedom to conduct research privately, without public notice and media attention. An attorney for a research university noted that that freedom had not been a problem before because of their successful use of arguments based in first-amendment protection. Recently, however, several cases have arisen in which the success of the argument was apparently a close call. The official noted his concern, and said "Researchers, I think, are not aware of the issue because, up to now, they've been fairly well protected." Eloquently, the general

counsel for another state's major research institution noted the issue and defended faculty's protection against openness in this arena:

Individual researchers, we believe, ... have this academic/researcher's privilege that philosophically they should be entitled to conduct their research without invasive oversight. The watch-dogging of academic research happens through scientific peer review rather than having the public or worse, interested parties, kind of peering and poking and trying to affect the course of the research as it's going on. That's a real issue. And there isn't really any sound basis. We cobble together this argument that there is a researcher's privilege, but there are cases that suggest that there's not. We do our best. We win some and we lose some in that area, but that's something that's really valuable, really critical to the university research mission is this independence.

Another area of concern regarding faculty is the extent to which, under sunshine legislation, their voice is heard in board meetings. A faculty leader at a flagship research institution said:

I have to say frankly, our [board is] not well-educated about faculty issues in particular. You can't bring them altogether. You have to kind of do it one by one or two by two. And that's inefficient for the faculty and isn't really necessarily – It means the [board members] themselves don't get the benefit of hearing each other's questions about certain kinds of issues. So, again, it would be really nice in some way if there were a way to have certain kinds of interactions that weren't affected by this, without giving up the protections that I think [the sunshine laws] do provide.

More philosophically, a faculty leader aware of sunshine laws and their potential use or abuse in areas relating to faculty said:

One of the things that has made American universities great has been their insulation from political meddling, which is not to say that faculty shouldn't take political stands and express their assessment of a situation. ...

There is a profession associated with being a faculty member in higher education, which is not just your academic specialty, but it is an understanding of what it means to be an educator at this level and how you incorporate research with your teaching, the linkage that your scholarship embodies there, what it means... particularly in research universities, to be guiding graduate students and to be engaged in that as well as what it means to be educating the undergraduate population. And changes that would affect the autonomy of the faculty as a corporate body, as a professional class, I would have real concerns with. ... It would be really valuable to be able to have a conversation with the regents and the faculty about academic freedom issues and have it be a freewheeling, expressive kind of thing. We can't do that. I think that's to the detriment of the system.

16. *Individuals can play a major role in the specifics of implementation, application, and reform of sunshine laws in public higher-education systems.* In some states, it is clear that the laws take shape and are applied in particular ways because of certain critical individuals. Fondly remembered champions, articulate and committed state officials, attorneys general expressing different attitudes toward the laws, powerful critics, beloved presidents, public demagogues, and scheming college officials were all mentioned to us as important figures in various states, and it is clear that it would be mistake for policymakers and institutional leaders to work on the assumption that the laws are purely organizational or legal creations.

17. *Sunshine laws have contributed to the "legalization" of the staffs of executive leaders.* The increasing use of legal expertise in high-level administration in higher education has been noted since the 1980's.¹⁰ Proliferating federal and state regulations, increasing numbers of lawsuits, and other factors have made the securing of legal counsel imperative for institutions. Although sunshine laws have rarely been noted as contributing to this trend, there can be little question that such is the case. Several university attorneys told us that open-meetings and records laws were a "high-risk" arena for institutions. Penalties for non-compliance under the laws are far too steep in financial, legal, political, or stature terms for a university or a system to downplay or ignore, and legal staff increasingly are at the side of presidents and chancellors. As we

¹⁰ E.g., see Baldrige et al. (1980).

interviewed presidents and chancellors around the country, we were struck at how often their legal counsel was present for the interview and at how familiarly the two interacted around these issues.

The role is not an easy one. The general counsel for one system said their office was “getting eaten up”:

Usually we’re the scapegoat because we have to make the judgment call one or another, and somebody’s not going to be happy and there’s always room to argue. I’ve seen a lot of my colleagues across the country go down in environments like that, whether fair or not.

As noted earlier, there are tensions inherent in many attorneys’ serving a dual role as representatives of their state-supported institutions as well as servants of their state and its laws. Often, institutions may wish to find legal ways to keep some sensitive information confidential, while the public or the media may make a “public-good” argument for releasing it. In such settings, sunshine laws may place special burdens on attorneys.

18. *There is appreciable variation in the nature of media relations with institutions.* In some state systems and institutions, mutual accommodations and the broader social, economic, and political context have fostered productive working relationships between media and college and university leaders. In other settings, however, ongoing tension and distrust characterize media/institution relationships. Some states evince cordial, empathetic, and business-like relations overall. Others stood in stark contrast, such as that described below by a system official:

We have a very aggressive media. The culture has always been one of sort of rough and tumble politics. In a lot of cases, you don’t even need the open-meeting law. We have very good investigative reporters around here, and they almost don’t need the open-meeting law and public-record law to do their job.

A similar tone was struck by the general counsel of a university system facing sunshine controversies: he noted that sunshine legislation implies a lack of trust partly encouraged by the media:

It carries with it an assumption that but for the sunshine, we would misbehave. That produces a certain cynicism sometimes because we don't like to think that that's how we would behave. But, I understand how that works. ... We are in adversarial times. The whole erosion of trust in institutions has visited higher education and nobody trusts us much anymore. We're not given the benefit of the doubt very often. Enron and everything contributes to all of that.

Overall, there are striking differences across state systems and institutions in institutional relations with external information advocates.

The reasons for variations in institutional relations with the press are many. Several respondents have provided us with anecdotes about animosities between certain newspaper people and university presidents, noting that outright "dislike" clearly influenced press coverage and aggressiveness in those settings.

Another rationale potentially explaining the variation in media coverage is the competitiveness of the media: when more than one newspaper is present in a metropolitan area or covering state politics, and sales are critical to advertising dollars and ultimate survival for a media outlet, then coverage of governance and other activities in higher education may tend to be aggressive and intrusive. An expert on press relations with higher education suggested to us, however, that this hypothesis oversimplifies the issue: press competitiveness can also lead to the pursuit of efficiencies (e.g., pre-writing stories and skipping board meetings) that work against assertive media coverage of university affairs.

Other respondents suggested to us a "scent of blood" argument. The uncovering of problems in earlier years (e.g., lucrative contract settlements with disgraced former coaches) provides incentives to the press for continuing aggressive coverage, under the assumption that further scandals lie waiting for discovery in the local college or university. Similarly, the appearance of discomfort among university officials can encourage press scrutiny. A trustee who is also a professor has noted that (AGB, 2002, p. 11) that "Most universities I've covered are poor at handling the difficult or embarrassing story. ... They're almost always defensive, and they try to cover up. And any good reporter is going to go after that."

19. *Sunshine disputes, and the need for more aggressive imposition of sunshine laws, are mitigated to some extent by governing bodies pursuing openness-oriented compositional and process measures.* A faculty leader at a campus somewhat buffered

from sunshine laws noted to us that openness can be produced and protected as an organizational value without the imposition of formal sunshine laws:

I think academic institutions that are willing to include conversations with faculty and students, governing boards that at least have faculty present at board meetings, even if they're not formal voting members on that [board, go] a long way on covering some of these communication issues which sunshine laws are supposed to provide for.

A state higher-education system leader made a similar observation:

Our governing boards are largely inclusive of students and faculty and people from around the college community. So when you have the stakeholders involved in the decision-making process, that diminishes the likelihood that you're going to have a governing board that is operating independent and without some sense that this is a way in which we deal with the world. So the folks that would be most likely to have issues with decisions that are made by governing boards tend not to have that problem in the state because, in all segments, they are part of the process.

Conclusion: From these findings emerges a general picture of stakeholder views. In some ways, those views defy conventional wisdom. There is no evidence of declining openness in higher education, and no evidence of outright revolt against sunshine laws. The media do not evince “devil theories” regarding higher education, and board members and presidents voice respect for the media’s role and responsibilities. At the same time, however, there are significant challenges and clear areas of tension in the implementation of sunshine laws in public higher education institutions. Those challenges and tensions involve, most notably, the factors noted in the finding just above: the provisions for effective board discussion and deliberation, the connections between the laws and presidential searches and selection, and the application of the laws to emerging organizational, financial, and technical developments. Because of this consistency, we address these concerns in separate forthcoming sections.

MAKING CRITICAL DECISIONS IN THE SUNSHINE

At its highest level, governance in higher education involves deliberations among boards of trustees. The public, legislators, and the media pay their greatest attention to this level of higher-education governance, and it is at this level that the most critical decisions regarding resources, personnel, and strategies are made. Arguably, sunshine laws affect boards more dramatically than they affect any other units in public higher education. Therefore, although the general findings above connect to boards in many ways, it seems important to focus more directly on openness issues at the board level. Because of their visibility and, often, the tensions surrounding them, two board-related domains merit particular attention: board performance and effectiveness and presidential search and selection.

Board Performance and Effectiveness

State open-meetings and records laws have had a direct and powerful impact upon the manner in which public college and university governing boards deliberate and formulate policies for their institutions. This is not surprising, given that the originating intent of state sunshine laws was to change the nature of decision-making in public organizations by requiring transparency in deliberations among public officials. Respondents told us that sunshine laws have left a deep imprint upon the work of public higher-education boards, influencing every dimension of board activity. Virtually everywhere, governing board members and other close board observers stated that their boards have “learned to live” with sunshine laws in the years since implementation. Respondents often pointed to the variety of routines, processes, and practices boards had developed over time to accommodate open-meetings and records laws as one indication of boards’ acceptance of the “reality” of sunshine laws. As one official said:

When every board member is brought on, we give them the sunshine book. We send an attorney down [and], as a body, we go through a training session every year. And then [when] we bring [on] a new member...we give him all this stuff. We set him down with an attorney and say, “You need to understand this thing.” A pool of attorneys [meets] every new board member. At every board meeting, we start off [by reviewing the laws]. And every board meeting we end with, ‘Don’t forget the sunshine.’

Respondents familiar with boards often attributed board acceptance of sunshine laws over time to a simple cost-benefit calculation: Most board members, they said, view the costs of noncompliance (e.g., potential financial, legal, and political penalties) as far greater than the benefits that might be derived from breaking the law. To be sure, patterns of institutional compliance vary with respect to both the letter and the spirit of the law—courts have labeled a few boards around the nation as habitual offenders of their state’s sunshine laws (Schmidt, 2001). Nonetheless, our interviews indicate that most boards generally accept the principle of openness in public higher-education governance. The comment made over and over again by board members during the course of our interviews, “The public’s business deserves to be conducted in public,” appears to reflect this institutionalized acceptance of sunshine laws.

Stakeholders tend to agree that much good has come from efforts to make public higher-education governing boards more open to inspection by the public. Respondents often expressed the view that the openness required by state sunshine laws has enhanced public confidence and trust in the work of public college and university boards. The board members whom we interviewed said they believed public higher-education institutions would lose much of the broad public support they currently enjoy were governing boards allowed to close their meetings and records to public inspection. That view was strongly echoed by journalists, media representatives, and other public-information advocates. Additionally, some respondents claimed that sunshine laws had actually improved the performance of boards: by creating opportunities for public participation in the work of public college and university boards, sunshine laws had exposed boards to “the real world,” rendering them more effective in their service. The head of one public-university system, for example, 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 that sunshine laws have had on board performance and effectiveness. Their concern centered primarily on the related areas of board deliberation,

communication, and cohesion. Regarding board deliberation, respondents said that sunshine laws create uncomfortable climates for board discussion to the extent that board members are often reluctant to publicly discuss controversial issues. This reluctance is said to stem from a concern that comments made publicly 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 are reported to be especially difficult ones for boards to discuss in public, out of concern for the way in which comments made publicly might be interpreted by the media. One board member told us:

There are times...when you'd love to be able to have a meeting so you could get a free-thinking conversation going, get the best thoughts and get the passionate thoughts of your Board members, and maybe some of your leadership that's in the room with you. And everyone is choosing their words ... I think that's what you miss [with sunshine laws]. You know, I've been on bank Boards. We get in that room and we talk it through. We decide what's going to be done. And the...dynamics [are] the same - if you're on a bank Board, you care about that bank... But you're able to talk and not necessarily think, "Gee, everything's going to be in the paper tomorrow. What am I going to say here?"

Another board member stated:

The problem I've seen over the years is there sometimes [is need]...to have very candid conversations about the university, about its direction, about its finance. And it's very difficult to get prominent Board members...to speak openly, sitting there in a room with an audience made up of faculty and leaders of the institution and the press, and speak from their heart.

As a result, respondents told us, boards often only skim the surface of controversial issues in public, thus reducing board deliberations to superficial exchanges, or avoid issues altogether. Many board and campus officials we interviewed characterized the

current content of board deliberations as “sugar coated” or “fluff.” A university president made the following stark characterization about the discussion of controversial issues that have come before his board:

Well, 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. [Board members] are simply not willing to discuss the pros and cons of any controversial subject in open session. That’s pure and simple truth.

A faculty representative who had participated extensively in board discussions offered the following impression of the content of those discussions, both with and without the media present:

I sat in...on a number of trustee’s meetings ...and there was certainly a difference in the level of discussion that you had in those meetings about substantive policy issues when the press was present and the press was not present. To a certain extent, while I fully believe the public has a right to know, I think in the ideal world, [I’d] like to allow at least some of the business to be done more behind closed doors, and then have public intervention perhaps at a later stage.

Boards often choose to bypass deliberation of issues deemed too controversial to discuss in public. What is not on the agenda can be as important as what is, and many issues are simply left off the agenda. By way of example, 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. The president speculated:

There’s never been any Board discussion of this issue; probably won’t be. At least any discussion - it’s not going to be full and frank, let’s put it that way. It’ll be

sweetness and light, and ... about how all of our children are beautiful.

The head of one university system told us:

My view is the laws have had a singularly bad influence on the public conduct of board members and on the ability of boards to discuss in substantive fashion the issues that confront their institutions. How do you have candid, unpopular opinion if there is no protection of the individual's or the institution's reputation? Board members are ... less likely inclined to talk freely about the issues that really matter if the press is hanging on every word ready to report, or misreport, only the controversial elements of someone's comments.

One board member expressed his frustration with not being able to publicly discuss substantive issues without risking embarrassment for his institution:

A lot of times, 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... But okay, have you ever seen a discussion on that at a public Board meeting? It's so bland... because no one wants to hurt anybody, it's not about attacking, it's about learning. You want to get into ratios and you want to get into peer comparisons. And people get nervous if you want to do this in public... People can misunderstand [those discussions] in a press report.

Remarks such as these illustrate the tendency of many board members and, thus, presumably of many boards, simply to avoid discussion of those issues that hold risk of public embarrassment either for the individual or the institution. Sometimes, non-decisions may be the inevitable result of non-discussion, and may constitute a failure on the part of public higher-education officials to take needed action.

Respondents also voiced a closely related concern about the impact of sunshine laws on internal board communication and development, particularly in the area of "board learning." Many of the campus leaders we interviewed said that board members, especially new ones, need to 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: as several respondents phrased it, board members need a place where they may ask “dumb questions,” without fear of public embarrassment or of being labeled as uninformed. Yet, unless specifically amended, sunshine laws provide no such refuge. One university president observed:

What really is the problem with the sunshine law is it doesn't recognize that Regents have to learn, and it doesn't provide for that learning in any sense. People have to work through difficult problems without feeling that they're under television cameras, and I literally mean television cameras, when they're trying to find their way through a difficult issue. So, they find themselves either not asking questions they should because of the setting, or posturing because they each have political constituencies that they have to play to.

Another respondent, a university president, characterized the problem as one of board members needing time to acculturate to their new roles in a strange academic culture:

[The problem is trustees] not knowing enough about the issue to ask intelligent questions. [That] forces trustees or regents into a defensive position. When you orient trustees and regents to academic life, the first time you meet, most of them are quite humble about [the experience], “What am I doing here [running this] operation? How can I be helpful?” and so forth. The public nature of it hinders them from [asking questions] - nobody wants to appear stupid in public.

The inability of board members to ask questions without fear of “appearing stupid in public” may also suppress creative thinking and diminish the likelihood of boards discussing novel or innovative ideas. One board member colorfully captured the sentiment expressed by other respondents during the course of our interviews:

Open sessions often stifle creative thinking. That's my main problem with it...I think sometimes there isn't as much give and take as could be because a Trustee might think, “Well, this might be a crazy idea. It might be

worth discussing, but if it isn't, I don't want to look like an ass."

Some institutional officials believe that the need is greater than ever for a safe haven where board members may ask questions and discuss ideas at the margin of convention. In recent years, attorneys-general in some states have rendered opinions that "board briefings" - the practice by which staff provide board members information on problems or issues that may come before them - violate open-meetings and records statutes. A senior campus official in Texas, which recently outlawed the practice of board briefings, related the ironic impact this development appears to be having on board decision-making in that state:

I think the public really knows less about [the] factors [that go into] decision-making, in my opinion...because [board members are] already going to have thought about it for the most part and have made a decision usually, upfront ...rather, than if we had staff briefings and the ability to do some of the background work first, then we could get things to a point where we might not mind going ahead and offering different alternatives that could be discussed publicly, and people could give the pros and cons of each. But we would've done enough background work and gotten some initial reaction that we felt comfortable in having the alternatives discussed publicly. But we're just not able to do that.

One university president characterized the impact upon his board in the following way:

The way I'd summarize it is, I don't think the public knows any more, and I think the regents know less than they did before.

A university attorney in another state expressed similar concerns about the inability of campus leaders—particularly presidents—to confidentially provide board members background information about potential problems on their campuses:

But why the chancellor shouldn't be entitled to discuss with his board, candidly, issues of importance to the institution that may be controversial... he ought to

have more discretion than he does, I think. I had a situation not too long ago, and this has actually come up a fair amount. We have a public comment period at the end of our meetings. The trustees are often blindsided by - you know...somebody from this campus or that campus has some complaint about how they were treated. And the trustees have no information. Somebody stands up and says, "They treated me horribly." And the trustees kind of sit there. And so there have been times when we wanted to and sometimes have been able to find a way to share with the trustees in a closed session, "Look, you're going to hear from so and so. And here's what the story is. And this is... [and] so on." And there isn't a real clear way to do that.

Respondents told us that another way in which sunshine laws have negatively influenced internal board communication involves shifting patterns of influence within boards. For example, respondents in several states told us that sunshine laws have significantly strengthened the role of the board chair. Whereas, before open-meetings laws, chairs often could expect open discussion at meetings pointing to an undetermined outcome, they now feel a need to have the most fundamental differences aired and reconciled prior to meetings. Moreover, because of the restrictions in many states 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. Thus, some respondents suggested to us that chairs have been significantly empowered by sunshine laws because only they may be able to obtain rich, comprehensive knowledge of the concerns, positions, and political views and sensitivities of each of the other board members. One university president assessed the shift in board-influence in the following way:

[Issues] may be taken up, but they're going to be taken up one-on-one. And it moves probably even more power than would otherwise be true in the hands of the chair ... Because it's so awkward to orchestrate the discussions. [The] chair ends up orchestrating the discussions amid all those one-on-one [discussions]. That makes the chair's views ... much more heavily weighted ... in the discussions.

Respondents told us that presidents also have seen their influence within boards increase as a result of state sunshine laws. Presidents often play the role of intermediary, relaying information and shuttling messages between individual board members who, under their open-meetings and records laws, may be legally prohibited from meeting as a collective body.

Many of our respondents said that these shifting patterns of board influence involving chairs and presidents have damaged board effectiveness in two distinctive ways. First, what is often lost in these mediated or filtered “discussions” are the benefits of *group* conversation at the pre-deliberative stage: the ability of each individual to speak for himself or herself; an appreciation of nuance; and, the capability of decision-makers to develop ideas concurrently rather than sequentially - what one of our respondents characterized as the “piggy backing [of] ideas upon one another.” A university president we interviewed questioned whether, in fact, the public actually sees the decision-making processes that are theorized to occur under public-information laws:

So, I wind up talking to a lot of them individually, saying “Joe said” or “Ed said” ... Personally, I think it’s terrible because what you’re really getting when you’re getting opinions from somebody that you may be soliciting, is that you’re getting someone else’s opinion of that conversation they had. And it’s just a lot better in my mind to sit down and look somebody in the eye and talk to them and hear their voice. Sometimes it’s more important in this business what isn’t said than what is said. But you don’t get that.

The textbook says that “The public has the right to know. The public sees it happening.” [But] I don’t believe the public sees it happening. I believe the outcome is the threat of it more than the use of it, because what you do is you alter your style of administration as everybody’s done. We talk to board members privately one on one...They talk to other people, who talk to other people. So, it’s really not happening in public...

Another respondent, a system head, made a similar observation about the negative implications associated with filtering board discussion through intermediaries:

When we get to the point that we have a recommendation on the table to debate, I don't think that the Open Meetings law is any detriment at all. I think it's a plus. In developing those issues at an earlier stage where you're trying to seek an informal consensus, or...direction, [where] there's a hundred different alternatives...that's when it gets hard. Because as you know, the decision-making process sometimes changes when [board members] can hear what each other are saying and react to it. They may tell me today on the telephone, 'I strongly feel that this is the direction we ought to go.' And then the next person I call adds a different fact to the mix that if the first one had known [about], it might have changed his mind.

Respondents identified factionalism as a second way in which shifting patterns of board influence have led to dysfunction within some boards. According to this view, the restrictions boards face in being able to meet as a group lead to splintering into factions, minority voting blocks, and "cliques." Because board members may have quite 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. 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. And that could work, I suppose in a Machiavellian way for good, but more often in my experience, it squelches dissent and does not foster discussion of issues. The one person then controls by that ability to talk to an individual and two or three people together, especially if they have control over other aspects of those people's professions.

A campus official in another state similarly cautioned about the dangers of factionalism:

You ... have the potential, I think, if you don't limit conversation to the Board as a whole, [of] small groups or cliques or coalitions on various issues being formed within a Board, and I don't think that's healthy at all. So having the Board ... meet together and make decisions as a whole on most issues I think is very critically important because then you've got the buy-in and ownership and speaking as one voice for the institution on the policy issues.

This last concern suggests a third primary way in which respondents to our study said state sunshine laws have negatively influenced board performance and effectiveness: open-meetings and record laws inhibit the development of a cohesive group culture necessary for effective decision-making. The absence of opportunities for board members to gain familiarity with one another informally, to learn about their colleagues' values, experiences, or aspirations for the institution they commonly serve, may inhibit the development of a board climate that is conducive to productive working relationships, thereby undermining 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 board colleagues, and claimed that this lack of familiarity and collegiality often works to the detriment of board decision-making. The comment of one state attorney in our study reflects the tension between the need for more informal interaction among board members and the potential dangers of doing so:

I've often [thought] that it is unfortunate that there's not a way to allow university Boards of Trustees to, in some settings, have casual or informal dialogues. It seems to me [to] foster creativity or resolve, perhaps, wounded feelings, or just to talk people to people about the issues, and dialogue about things. People don't get on these boards because they don't care. They're concerned, at least in part, about the universities. But the difficulty is every time you balance any sort of erosion in the open government laws, you give someone who's unethical or not public spirited, the opportunity to violate those laws, or to utilize the exemption for their own benefit. It's unfortunate, but true.

With so many criticisms of sunshine laws, it stands to reason that particularly capable citizens might show reluctance to serve on public higher education governing boards. Yet, we found evidence inconsistent on the question of whether sunshine laws deter capable individuals from serving on boards. A few respondents suggested there is some truth in this possibility. Several university presidents said they knew personally of instances in which individuals had declined invitations to board service because of the financial disclosure that would have been required of them. Similarly, one system head speculated on the impact that legislative confirmation processes might have on candidates' interest in serving on public boards:

I could imagine there would be a number of people, though, that would decline to be appointed to a public board because they don't want to go through the nomination process that goes before a committee of the senate and sometimes be questioned pretty strenuously by members of the committee, sometimes not. In the citizen's view, they're giving up their time and so on to be in public service. Why do they have to take this kind of abuse that can sometimes occur?

Others respondents, however, dismissed out of hand the assertion that sunshine laws diminish the interest of citizens in serving on public boards. Several respondents commented that public universities in their states had no trouble attracting capable individuals to serve. Moreover, in a few states respondents characterized public college and university board appointments as political "plums" for which there is much competition. For example, one state agency official in Texas told us:

I don't think [sunshine laws have had a negative effect]. Just because there's such competition to get on these boards, and especially the more prestigious boards: the UT Board of Regents, A & M Board of Regents, the Coordinating Board, and others. The competition varies by board. The UT Board and the A & M Board have a great deal of prestige associated with them just because of the history of those two universities as well as the visibility and responsibility and perks that are associated with it.

The serious challenges sunshine laws pose to effective board deliberation, communication, and cohesion sometimes tempt boards into skirting the law. We found no evidence that boards systematically violate sunshine laws, and virtually all of the board members and other senior institutional leaders whom we interviewed said their boards were vigilant in seeking to avoid violations of state open-meetings and records laws. For them, it appears that the costs of noncompliance easily outweigh the benefits. Yet, 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 non-exempt issues with other topics covered by executive-session privilege. Doing so allowed them to take-up in executive session issues they believed required confidential discussion. One university president, for example, described a process his board had used:

We...have to manufacture such occasions, and it ...is always the question...how can you...get together and not talk about business? You look at the law and it says you are to meet in executive session on matters having to do with consultation with your attorney, with personnel issues, and real-estate transactions. So you try to find that angle. If you want to talk about the future of the medical school, you talk about it as a potential retrenchment [issue]. We want legal advice from our attorneys.

Many boards have found ways to function effectively despite the challenges sunshine laws pose. In Iowa, for example, sub-quorum “work groups” involve clusters of board members to gain substantive expertise on issues of importance to institutions and to public higher education in that state. These ad hoc work groups are devoted to various 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 the making of board policy. Public higher-education officials characterize the work groups as effective vehicles for enhancing trustees’ knowledge and expertise in different substantive areas. Importantly, the work groups have proved not to be sources of sunshine-related controversy or litigation in that state.

Additionally, respondents in states where board retreats are permitted under state open-meetings and records laws point to this practice as an especially useful one in helping build board cohesion and stimulate creative thinking and decision-making.

Board and campus officials said these occasions for informal dialogue and discussion were extremely valuable in both educating board members about important issues and building rapport. One campus official in Massachusetts, for example, commented on the nature and benefits of board retreats in that state:

The retreat can have a number of different purposes. One of which could be purely educational ... I can remember a retreat we did which had a component on distance education, online education. And it was an opportunity for the board to learn more about how technology can inform instruction... [it] was very new for them. We subsequently developed a very aggressive online unit within the university...that was an opportunity to educate the board. The retreat could also be an opportunity to talk about some of the challenges of the university that might offer trustees and higher ed administrators from the system office and from the campuses to candidly talk about some of the challenges we're facing. So, if you, for example are in the middle or at the end of yield season and you want to deal with a challenge that you have, and you don't want to affect your enrollment, you'd prefer to do it in a retreat than to do at an administration or finance meeting, or an academic affairs meeting. So, the purpose would not be to take any votes or to say something that everybody doesn't already know, but it's just to kind of make sure the trustees and the leadership of the university are on the same page about the challenges that we might be facing at a certain moment...And everybody feels freer there to do some brainstorming. And even if an idea gets shot down, no one is embarrassed about it.

Finally, board members and other senior institution officials mentioned their desire to build better working relationships with media as one strategy for reducing conflict over openness issues. Some, but certainly not all, of the campus officials we interviewed characterized their boards as working hard to improve board/media relations. Respondents described detailed efforts made both before and during board meetings to accommodate reporters as one indication of the desire for better relations with the media. One senior campus official said:

The protocol for dealing with the media at the meetings--[the board staff are] very, very attentive to media, in terms of special seating, special computer hookups, phones, anything that might be needed. They put all of the agenda and other materials out on the Web ahead of time, and also spend time with them going through them if they want to know ahead of time. And at the meetings when there are handouts that hadn't been distributed earlier and all that, then they make sure the media gets them.

Some respondents indicated that improved board/media relations depend heavily on board chairs making special efforts to interact with members of the media. A senior administrator who had taught classes in a graduate program of higher-education administration commented:

I know that individuals, members of boards or executives, they behave with reporters in a way to make sure that they don't get in trouble with a reporter. The board, particularly the Chairman of the Board, has been very interested in making sure that the press knows what's going on, and making sure that a particular reporter who had showed up and asked to be kept informed, be kept informed, so that we don't have negative reports coming out in the press. And as I deal with higher education students and future administrators, it's something we talk about a lot: You're going to have to deal with the press and don't be afraid of them. They've got a job to do and just deal with it.

One newspaper editor offered the following media-perspective on how to build productive relationships between boards and the press:

Well, the best thing that boards can do: meet them! You know, [political] candidates do it all the time. They go and talk and choose - with editorial boards and so forth. It works for them in some situations; sometimes it doesn't. I recently had the media director for the Iowa Chapter of the American Legion come in and just specifically ask questions, 'What do you want from us? How can we help you? Here's who we are

and here's what we are. Here's our philosophy.' ... Same thing with universities. I think some of them are really good about it, meeting with the reporters and getting to know who they are and find out what their job is and what it entails. But I think others, they just view it as the big, bad enemy, and they don't want to have to deal with it at all.

Conclusion. Sunshine laws pose for stakeholders two important questions regarding public higher-education governing boards: (1) To what extent do open-meetings and records laws interfere with the mandate of public higher-education governing boards to function effectively in fulfillment of their public trust? (2) To the extent that the laws do interfere, how should those interferences be weighed against the virtues of public-disclosure and the accountability of public colleges and universities? Many public-information advocates are likely to view the concerns raised here as ones that are indeed challenging for boards, but not overly burdensome given the countervailing virtues of openness in public decision-making. Moreover, many advocates of strong sunshine laws are likely to view the problems we have outlined 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 modified or loosened. Nonetheless, the challenges and problems of mandated openness for the performance and effectiveness of public college and university governing boards are profound ones, and deserving of more systematic and thoughtful consideration by stakeholders about ways to remedy them.

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 finding is not surprising, given that making these decisions is the single most important governance responsibility of public college and university boards of trustees. High-profile litigation over presidential searches at public colleges and universities is but one indication of this arena's central importance and contested nature: in recent years, disputes over public access to presidential searches resulted in litigation 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 brought suit against universities alleging a presidential search committee had either met illegally or illegally withheld public records pertinent to a search. Although the issues

confronting stakeholders are complex and multifaceted, the principal dilemma 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, in the search for and selection of a new president. This dilemma often takes the form of a variety of operational questions with which campus leaders, state policymakers, and the press perennially contend:

- Should the public have access to the proceedings of presidential search committees? If so, access at what stage of the search process?
- Is the public interest well served by revealing 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?
- 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, today an increasingly prevalent practice?

It is around these kinds of questions that most contemporary discussion, controversy, and state reform activity in the presidential search and selection arena revolve.

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, in Florida the names of all applicants and nominees for a presidency must be disclosed upon request by the public and even the personal notes of search-committee members that reference candidates’ names, or the names of prospective candidates, are subject to disclosure under that state’s open-records laws. By contrast, Iowa, Massachusetts, and Texas require that only the names of position finalists be made public, some specified number of days prior to a search committee’s final selection. California provides yet more variation in approach; in that state, 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 (those being statutory, rather than constitutional, creations) are obliged to follow much the same convention in their executive searches as other state agencies.¹¹

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 closed off from public view. Despite the diversity of practices noted above, we found across the states we studied a broad consensus that presidents should be selected with substantial input from the public. 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 presidential searches conducted outside of 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,¹² as one fraught with danger because of the perceived lack of public involvement in institutional decision-making. Said one university-system official:

¹¹ Respondents involved in various capacities with presidential searches in other states offered additional insights into the diversity of practices across the nation. For example, whereas members of a university search committee in North Carolina were advised that 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, members of a university search committee in Ohio were instructed that state records law required disclosure of all handwritten notes about candidates.

¹² Controversy in Michigan dates back over the course of nearly twenty years, during which time local newspapers brought a series of suits against the University of Michigan, Michigan State University, and Wayne State University alleging the institutions had violated state open-meetings and records laws. A series of court decisions (and legislative intervention) culminated in a landmark 1999 ruling by the Michigan State Supreme Court, which held that application of the state’s Open-Meetings Act to university presidential searches was an unconstitutional infringement upon university governing boards’ powers of institutional supervision (Federated Publications, 1999; Sherman, 2000).

I think, “My God, how risky would that be for [one of our] boards to do it the Michigan way? Gee, we just picked somebody. I wonder what they’ll think on campus? I wonder if they’ll like them or not, or support [them] or not?” So to me ... if we tried to do a more secretive process, I don’t think [the] board could survive that. I’m not sure the institutions could.

While this particular characterization of practices in Michigan may exaggerate the extent to which citizens of that state are removed from university search processes, the comment mirrors sentiment expressed by many stakeholders throughout the course of our interviews - i.e., public colleges and universities that select leaders without substantial input by citizens risk the erosion of public support which is so critical to the institutions’ legitimacy.

Yet stakeholders also expressed deep concern about the drawbacks often associated with conducting presidential searches in the public eye. Our interviews revealed nearly universal support for the claim that sunshine laws negatively influence presidential search and selection processes in public higher education. Most stakeholders 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. Many respondents, however, 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 one.

The foremost criticism of sunshine laws, in the context of presidential search, is that the laws have a “chilling effect” upon search processes, effectively diluting both the quality and quantity of applicants for the position of president. Indeed, virtually all of the college and university chief executives (both current and former) interviewed stated unequivocally that sunshine laws vastly reduce the likelihood of sitting presidents applying for openings at peer institutions. One president, for example, commented that the existence of sunshine laws:

...makes it almost impossible to attract a sitting president. In fact, I wouldn’t say “almost.” I will not put a qualifier in there. [I would] say it makes it *impossible* to attract sitting presidents. The best you

can do is to attract vice presidents who have not as much to lose by having their candidacy made public.

Characterizations such as this one reflect the conventional wisdom of most senior institution officials, and some media representatives, we interviewed: sunshine laws create a bias in the outcomes of presidential searches in public institutions towards candidates currently at lower-level positions, particularly provosts. The belief, which may be termed the “no lateral moves” hypothesis, 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. With this risk in mind, sitting presidents in public institutions avoid pursuing presidencies in similar institutions, making the field more open to second-level administrators (most frequently, provosts) at comparable institutions or presidents of less prestigious institutions. In the words of one president:

The problem is that it's impossible for a sitting president to be involved in an [open search] process like that, absolutely impossible. So what it does is, it changes your candidates to a pool of provosts...people who can afford to do it are provosts. It means that you can't look at sitting presidents unless they are making an obvious step up, somehow, in their career, or they've already announced they're leaving somewhere else.

The length of time candidates are publicly exposed sometimes can influence the likelihood that well qualified individuals will become candidates in the presidential searches of public colleges and universities. 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, a complete denial of public access to information about presidential search and selection is an untenable option, respondents report that the challenge for stakeholders is in determining what constitutes *sufficient* citizen input into search processes. The dilemma for institutions, the press, state governments, and society is not *whether*, but *when*, to involve citizens in the selection of public college and university presidents - 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. As noted in the last section of this report, media officials we interviewed tend to view presidential-search issues in much the same spirit, and often point to Florida, where open-meetings and records statutes provide citizens with unparalleled access to information about presidential candidates and search proceedings, as a standard against which to compare their own states' commitment to the principle of the public's right to know. For these respondents, the stage of the presidential search process at which the public should gain access to information is, "at the very beginning."

By contrast, most board members, presidents, and other institutional representatives say that sunshine laws, although necessary in principle, discourage well-qualified individuals from applying for openings because the law exposes candidates too early in the search process. In other words, sometimes 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 twenty days before a search committee's selection—prior to 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 candidates. Many of these same respondents claimed that, were the legal basis for shielding candidate confidentiality removed, or substantially restricted from its current status, public institutions in their state would be far less capable of attracting even the initial interest of top candidates. In fact, institutional officials in Florida often pointed to the absence of candidate confidentiality in the early stages of presidential search processes in that state as greatly diminishing candidate pools. Said one president: "You ... find that hiring presidents in Florida has become extremely difficult because of sunshine. You can't get people to apply." Thus, for the large majority of institutional representatives who recognize the need for openness but also fear the "overexposure" of candidates, the stage of the presidential search process at which the public should gain access to information is the point in time at which candidates become finalists. In the words of one college president:

Timing is everything. I don't have the slightest problem about saying you can't just wake up one day and read the name [of a new president] in the newspaper. That's inappropriate. But at the same time, the idea that [a university] is going to be able to attract capable, successful, sitting presidents who are willing to let their name be vetted out there for 6 or 8 weeks, it's a lose/lose proposition on the home front. I'm not arguing for secrecy. I'm simply arguing for timing. And by the way, what is really [at stake] with sunshine law is, you're really trying to protect timing. You're not trying to protect all the information; it's simply untimely now, or it's awkward at this juncture. All the other stuff that you see people arguing about is really a question of, "I'd like this not to get out now."

Stakeholders differ sharply in the assumptions they make about why sitting presidents typically are reluctant to declare themselves candidates for a peer institution's presidency. The issue of timing and candidate confidentiality is an important one because the stakes, professionally, personally, and politically, for sitting presidents who publicly declare their interest in another institution's presidency are steep. We noted, however, that different stakeholder groups make quite different assumptions about why sitting presidents may be reluctant to apply for the presidency of a peer institution.

For their part, public-information advocates often characterize sunshine laws as an effective screen of candidates' true level of interest in a presidency; i.e., 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 search process as an indication of the candidates' tolerance for public scrutiny. The reasoning goes as follows: 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, and enduring the scrutiny of an open search process can be viewed as a good barometer of such capacity. The comment made by one newspaper executive is broadly representative of this view: "My instinctive reaction is, 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?” Even some sitting presidents voiced sympathy for the logic of this perspective. One stated:

The public higher-education president is going to have to deal with the public, and there's a parallelism involved in the process of selection that I think makes it reasonable, in some sense, for people who are going to be candidates to be willing to get out there and [publicly announce their candidacy].

By contrast, 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 their reluctance to engage diverse public constituencies. Many chief executives said that to publicly declare one's candidacy for another presidency is to put one's career in jeopardy. For example, 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 (Leatherman, 1993a, b). Several board members admitted to having looked disapprovingly upon presidents of their institutions when it was revealed those presidents had become candidates for another presidency. One board member recounted his reaction to one such episode:

We had a chancellor at one of our campuses, who did a wonderful job for us. But, when he was starting to get itchy, he had several searches. The first search you say, “Gee, good luck to you.” Then you ...find out about the second search, you say, “Jesus, good luck to you.” And then by the third time, you say, “I really hope you find a job.”

A sitting president's candidacy for another presidency may carry political risks, too. Several respondents expressed their belief that one's declaration of interest in another presidency would likely erode support within one's own campus community, as well as

damage (perhaps irrevocably) relationships with state elective officials, a critical source of political support for any public college or university head. One president commented:

Basically, if you're a president of a public university ... and you're dealing with your governor and your state legislature, and your name comes out that you're being considered to be the next president of [another university], that can hurt back home because faculty and administrators and others will feel cheap. [They will say] "We're going to lose him or her. Why is this person wanting to leave us? What's wrong here?" One's credibility [then] can't be repaired with the state legislature, with government.

Respondents voiced concern for the potential long-term impact of the "no lateral moves" phenomenon on the performance of public higher-education institutions. The chief criticism voiced by board members, presidents, and other senior campus officials is that sunshine laws have limited the experience levels of presidential candidate pools which, in turn, has systematically disadvantaged public colleges and universities in their competition with private higher-education institutions for a limited number of highly qualified leaders. One respondent with experience in both the public and private sectors of higher education noted what he characterized as stark differences in the experience levels of public and private university chief executives, differences he attributed to sunshine laws:

The private institutions of this country by and large select people who have already served as a president at another major institution. The public universities in this country often choose the people who have served as dean or provost, who are sort of getting their first shot at [a presidency] ... who are learning on the job instead of people who can do the job.

Some respondents view the alleged decline in experience of presidential candidate pools in public higher education in quite ominous terms. In their view, sunshine laws, in combination with other factors such as growing resource disparities between public and private institutions, have over time diminished the quality and effectiveness of the public

higher-education sector as a whole. One board member, for example, offered the following sobering assessment:

Absolutely, there's a diminishment of the quality and demonstrated [capabilities] of the applicant pool. My own view is running public universities is a very, very difficult task. And people who are capable of so doing are a rare breed. And for public universities to disadvantage themselves as compared to private universities in the attempt to identify, recruit, and hire such scarce talent is one of the factors, not the only, but one of the predominant factors that [has] led to the comparative deterioration of the quality of public universities as compared with private ones over the last forty years.

Media representatives tended to reject the assertion that sunshine laws have burdened public colleges and universities with sub-standard leadership, however. These respondents concede that public higher-education institutions undoubtedly have lost some "exceptional" candidates because of sunshine laws. Nevertheless, they said they see little evidence suggesting that the losses some campuses have suffered in their presidential candidate pools have permanently damaged those institutions or the broader sector. One newspaper editor wryly observed:

You know, 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? I'm not sure it really has.

We note that evidence is indeed inconclusive about any long-term damage on institutional quality or effectiveness said to result from the application of state sunshine laws to presidential search processes. Nonetheless, we were impressed that numerous leaders and long-time observers of public higher education institutions perceive the impact in such stark terms. While affirming a basic commitment to the concept of openness in presidential search and selection at public colleges and universities, many of

those we interviewed nonetheless voiced deep concern about the institutional and sector-wide implications of open searches.

The practice by public colleges and universities of employing executive-search firms to assist them in their search for a new president has grown widespread, with both beneficial and problematic consequences for stakeholders. Among the various factors contributing to the growth of this practice in public higher education, sunshine laws figure prominently. In some states and systems, private consultants are viewed as a vital, even indispensable, resource in helping institutions conduct successful searches under the constraints of open-meetings and records requirements. The consensus view of campus leaders we interviewed 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. Familiarity with and access to a deep pool of highly qualified candidates for executive-level positions is the professional search firm's stock-and-trade - and a valuable asset to any public college or university searching for a new president. However, this asset is regarded as especially valuable in states where sunshine laws greatly limit the confidentiality of communications between institutional search committees and prospective candidates. Thus, in hiring private consultants to act as "intermediaries," public institutions may indirectly explore the interest and vet the suitability of prospective candidates without exposing those individuals to public view, at least in the early stages of the search process.

Private consultants also are highly valued by many campus officials for their logistical expertise and for their experience in navigating negotiations and the complexities of sensitive personnel matters. Many consultants perform a wide variety of functions critical to an effective search process, including facilitating discussions within boards and search committees regarding candidate profiles, working closely with governing boards to develop position descriptions, disseminating nationally information about a search, responding to media requests for information, communicating with prospective candidates about a search, organizing systems of candidate evaluation both for the search committee and various publics, and coordinating the campus visits of finalists. 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 often is that of coordinating the process by which a final selection is negotiated. Finalists not selected often will need to "save face" by announcing their withdrawal prior to public announcement of a search committee's

selection; consultants can help ensure this happens smoothly. No less important, institutions often want assurances that there will be no “surprises” with the finalist they intend to select. One respondent reflected on the work of consultants at this final stage of the search process, drawing analogy to the process of obtaining a real-estate mortgage:

You try to pre-qualify your candidate. You want to be sure that if offered, the person will accept. That means that everything has to be made - the conditions of employment, the kind of contract, that there is a contract, the salary, the benefits, and so forth. You don't want to wait until the person has been selected and then start the negotiating process because you may lose.

Yet, involvement of professional consultants in presidential-search processes is not without criticism or controversy. Faculty often decry the use of consultants as an inappropriate ceding of responsibility for institutional governance to outside parties. Additionally, some public information advocates, media representatives, and even a few campus and board officials whom we interviewed negatively portrayed the use of search firms as tantamount to “hiring people to hide paper.” For example, these critics noted the ability of private consultants to do something institutional representatives working under state sunshine laws often cannot do: keep candidate lists and other sensitive search-related documents out of the public eye.

Some critics also questioned the value of the services search firms provide. For example, one board member interviewed commented that he believed private consultants often use sunshine laws as cover for failure:

I'm not a big believer in search firms. I think they're basically in many ways worthless...they use the sunshine law when they fail as an excuse. When they get the perfect person, sunshine is never a problem. But when they don't, [they say], “Oh, had we not had this sunshine law...”, when they know it before they charge you a \$100,000 fee.

In some instances, courts have required consultants, who presumed that their communications with candidates were privileged under state law, to surrender materials (e.g., resumes and cover letters) pertinent to a search. Also, 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 in the state 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).

Conclusion. In an earlier study of the impact of sunshine laws on public higher education institutions, McLaughlin and Riesman (1985, 1986) identified four arguments typically levied against searches conducted in the open. Open searches, critics say, may 1) scare away good candidates, 2) negatively influence 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. Our interviews found evidence pertaining chiefly to the first and last of these classic criticisms, but generally not to the second or third ones.

Those findings relate closely to the question of timing. Most respondents to the study indicated that the central, vexing issue involving presidential search and selection in public higher education is not whether to provide the public with access and information about search processes, but when to provide it. Despite much diversity in the practice of presidential search and selection across states, most of our respondents favored confidentiality in the early stages of search processes, but openness and broad participation by the public in later stages, upon the announcement of finalists. This matter of "timing" information appropriately is viewed as having quite important implications for the careers of prospective candidates, for the effectiveness of public higher-education institutions, and for the good of society. Because of the complexities and increasing competitiveness of search processes, many public colleges and universities find private firms to be of particular value in assisting the conduct of searches for a new chief executive officer. Employing search firms carries with it potential problems as well as distinct advantages for institutions and states, however.

EMERGING CHALLENGES AND CONCERNS

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 deserving sustained interest and close monitoring in the future. University-affiliated foundations, communications technologies, and campus security are three such areas of emerging challenge and concern.

University-Affiliated Foundations

University affiliated foundations - 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 - are a rich source of contemporary debate and active litigation as it involves the application of state sunshine laws to foundation activities. 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 financial constraints at the state level, have become more dependent on them as sources of private revenue. For precisely this reason, public-information advocates continue pressing university-affiliated foundations for access to their meetings and records.

Litigation is frequent in sunshine-related disputes involving university foundations.¹³ 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-meetings 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 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

¹³ 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).

know be balanced against the likelihood of diminished trust of donors in foundations were all records publicly disclosed? In several important early cases, courts compelled disclosure of foundation records and required that foundation meetings be opened to the public (Geevarghese, 1996). In summarizing case law on university foundation disputes prior to the mid-1990s, one analyst (Geevarghese, 1996, p. 230) 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-affiliated foundations, often exempting them from the requirements of open-meetings and records laws generally applicable to governmental entities or to agents of the state (Roha, 2000).

Despite what appears to be a trend in some courts recognizing the legally independent status of university-affiliated foundations, respondents in each of the states we studied report both lingering and new controversy over questions pertaining to the application of sunshine laws to university foundations. The chief counsel of one university, for instance, characterized foundation issues as the most contentious sunshine-related issues his institution faces:

The area where we have had the most hassles by far, by far, relating to anything having to do with the university is open-records request of the university affiliated fundraising foundations. And that’s an area where I think people would say they are not satisfied.

Campus and system officials characterized the media’s intense interest in the affairs of university-affiliated foundations and their aggressive pursuit of access to foundation records and meetings as a primary reason why these issues occupy such prominence on the public agenda. One president made a comment representative of the views expressed by numerous other respondents in different states:

Well, I think our press is very vigilant...When [foundation] questions come up...around the state, I think the news media are pretty quick to make people aware when they feel they’re being shut out.”

Our interviews revealed two issues around which much contemporary controversy over sunshine laws and university foundations seems to center. Both issues relate to donations. One kind of controversy involves efforts by foundations to protect the

anonymity of donors and, correspondingly, efforts by media to seek disclosure of donors' identities. Institution officials we interviewed said that they seek to protect the anonymity of donors because donors often do not want their identities revealed, and that forced disclosure would breach the individuals' privacy rights, which in turn could hurt institutions' fund-raising effectiveness. One campus president stated:

And if you look at the typical public-records law, it talks about privacy, maybe clients of your medical clinic, students, your employees. But it doesn't say donors. And so you have the whole question, are you going to chill the environment for giving to higher education, without some pretty explicit protections of donors?

Another senior university official characterized the interest of institutions in the following way:

A lot of people were wanting to give gifts, even to public institutions, but they don't necessarily want it to be written up in the newspaper, for obvious reasons. Some, it's that they just don't want the attention. Sometimes they don't want other foundations and institutions knowing their capacity, because they don't want to be solicited.

Institution officials also expressed concern that, if publicly disclosed, donors' identities not only would become part of the public record, but they would also serve potentially as the basis for journalistic exposés that might bring personal embarrassment to those individuals. An official at one university in Iowa offered the following anecdote:

But I think one of the things...our foundations are a little leery about...several years ago...there was a large donation to Iowa State University, [a donor] who wanted to [remain] private. *The [Des Moines] Register* somehow was able to find out, and they published it...They used a couple of examples where foundations did not do what the donors wanted them to as examples of why [foundations] should be open to public scrutiny. But they never mentioned the fact that one of our concerns is the privacy issue.

Similarly, several respondents pointed to a widely reported episode in Ohio in the early 1990s as illustrative of their concerns. In that particular case, a daily newspaper sued the University of Toledo Foundation, seeking access to its donor records under state open-records law. The foundation argued it was a private, non-profit entity and, thus, was exempt from the provisions of state sunshine laws. The Ohio Supreme Court ruled, however, that the foundation was in fact a public body and, as such, was required under law to disclose its donor records. The newspaper 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).

Lying often at the heart of differences between institution officials and media officials over the application of sunshine laws to university-affiliated 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 by publicly owned and operated institutions. One university official commented:

I think that's probably one of the main issues, the problem, [from] the perspective of the foundations: There are donors who want to keep things secret or, private, because they believe it's their own money and there's no taxpayer money involved here. I'm sure people from the media would tell you they see it differently.

Indeed, members of the press typically do view the issue in terms that are starkly different from their institutional counterparts. For example, one reporter offered the following observation about a foundation dispute in his state:

There was a real struggle to get the documents for that organization, and finally, they did agree that they should present ... an audit and their finances and so forth, because it was just a ridiculous amount of money that was being used for a public university. It was just a very interesting juxtaposition, you know, a private fundraising arm for a public university, but yet the money that they're bringing in is going specifically for programs. How are they determining that?

Likewise, a veteran print journalist in another state 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 particular reporter believed the public's right to know the origins of private sources of funding for public universities outweighed those otherwise valid privacy concerns:

We had a big, extended fight...over disclosure of donors. Because...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...technically the money could've been coming from the American Nazi Party or some other thing or institution that would've created a considerable amount of [public] interest.

Finally, a respondent told us of an ongoing dispute pitting public-information advocates against university officials and sponsoring state legislators over the creation of a research institute on a university campus. The respondent claimed that the proponents:

... want to close all meetings except where they're talking about expenditure of state funds, they want to close all of their records, and they want forty-five million dollars of public money. You cannot have it both ways. You are either private or you're public. If you're public, you're open. If you want to be private, that is fine, but don't take my money. It is a constant battle and sometimes we lose in the legislature and then we just have to deal with the consequences, and usually that is litigation, challenging the constitutionality of [statutory] exemptions.

Respondents told of a second, and closely related, source of contemporary controversy over sunshine laws and university-affiliated foundations: the extent to which foundations have followed donors' wishes regarding the disposition of gifts. For example, in a well-publicized case in Iowa, a university foundation received highly critical coverage in the news over whether a piece of real estate bequeathed to the university was being administered in a way consistent with the now-deceased donor's wishes. The donor's family contended the university foundation violated the terms under which the gift was made when it sold the property; newspapers sought access to

foundation records to assess the allegation. When the university refused the newspapers' request for access, newspapers and other media produced a barrage of stories that brought unwelcome attention to the foundation and its affiliated university. Regarding the importance of the media's role in aggressively reporting on these kinds of sunshine-related issues, one media representative familiar with the episode said:

I think [our coverage] made the university's business a little bit more open, and [universities] are huge institutions for Iowa. Iowa has a lot of vested interest in [foundations]...They're directly tied to a taxpayer-based, public organization. We very much have an interest in that, and I think that there's nothing but positives that come out of us having access to their meetings and records.

Yet, respondents also provided examples of instances in which university-affiliated foundations helped divert the initial intent of a gift, to the benefit of the university and in ways ultimately acceptable to the donor. One university official provided the following anecdote illustrating, in his view, the importance of institutional discretion and donor-confidentiality:

The first really significant gift that [our] Foundation ever received, which was around 1970, was \$3.5 million. This was from someone who was not an alumnus... He was a huge wrestling fan, and wanted to put that entire amount, which would probably be five to ten times that today, into the wrestling program. The then president of the university was able to work with him on various uses for these funds. Some went to the College of Medicine. Some went to the Museum of Art. There was an auditorium that was being built on the campus at that time. Some of it went to that, and some went to wrestling, but not much. It met many, many more needs in the university in a very responsible way than it would have had the donor gotten his first wish with respect to that. In my view, that's the approach that needs to be taken on that... I do think that donor's request for confidentiality needs to be honored...And I think if that's done, there doesn't need to be a lot of concern about what the press is going to

do... I think these are things that [the press] can live with, frankly.

Conclusion. The application of state sunshine laws to university foundations remains a source of active debate and litigation. Compared with a decade ago, some courts appear more likely today to affirm the legally independent status of university foundations. Nevertheless, respondents reported that disputes in their states over, for example, donor confidentiality and records continue to generate substantial controversy over the public's right (and need) for information about foundations and their affairs. Moreover, recent efforts by legislatures to create new statutory exemptions that both enhance and restrict the confidentiality of foundation activities demonstrate that the arena is one of sustained activity and deserving of scrutiny in the future. Inasmuch as university-affiliated foundations are likely to grow in their financial importance to universities and to remain flashpoints in public-information disputes, campus leaders should be aware of the recent legal trends involving foundations and of the complex privacy and public-disclosure issues at the core of these disputes.

Communications Technology

Emerging communication technologies have created new ambiguities and sources of strain in the debate over public access to information and decision-making within public colleges and 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. The laws did not anticipate the rapid technological improvements of subsequent years: electronic mail, teleconferencing, videoconferencing, and other sophisticated communications mediums have since blurred the meaning of what constitutes a public "meeting" or "record."

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 electronic mail and video-conferencing particularly attractive options for both informal communications and formal meetings among board members, thus raising the likelihood of potential dispute over use of these technologies. Yet, the incidence of public-information disputes appears to vary across states and systems because development of the law in this area varies widely, as does use of these technologies by

boards. While some states have already enacted amendments to their sunshine laws in recognition of the complex issues involved, other states are only beginning to grapple formally with these issues, while still others have yet to undertake any sustained discussion at all. The uses of electronic communication by board members also vary considerably across states and systems. In some places, board members report relying extensively on electronic mail as a tool for distributing information to board members and discussing board business, while in other locales board officials say they use electronic mail only sporadically.

Nonetheless, the increasing availability of new communication media has raised a variety of sunshine-related challenges for stakeholders in virtually all of the states we visited. In some instances, disputes have revolved around records-requests made for the entire electronic-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 electronic mail by boards to privately discuss sensitive personnel matters, such as executive compensation or the removal of a sitting president. Because state laws often are vague on the question of the extent to which electronic forms of communication are subject to public-disclosure provisions, institutional officials sometimes must make fine-grained distinctions about what constitutes an electronic “deliberation” in the absence of clear guidelines or legal precedent.

An example in one of the states we visited 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 that is 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 many states) where, in an effort to avoid attaining quorum, one board member will telephone a second member, and the second will telephone a third, 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. 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 for institutions and individuals.

Senior campus and system officials also expressed concern about their colleagues' increasing reluctance to commit novel ideas to electronic record (e.g. e-mail messages, documents retained on computer hard drives) for fear those electronic documents might be obtained through public-records requests. These respondents say that sunshine laws thus have diminished creative thinking and the capacity for problem-solving among senior-level administrators. One state agency official observed:

So people are more cautious than they would be in other circumstances and afraid to put out the idea, or everything has to be done by telephone...On the staff level you can do it, but even on the staff level, you're cautious. If you are in an upper staff, say chancellor level or vice chancellor level, you have to be very careful because people will come in and request all your e-mail and you dump all your e-mail out and there goes that idea that maybe in bold print it doesn't look as grand as it did when you thought of it. I have had people complain about that. They wish that they could have a good idea and, maybe it's crazy, but it is a germ of an idea there. Send it around to people or put it in a document, float it around and have people work on it, and from there move it toward something that is reasonable and workable and [is] some great reform. You don't know how many of those ideas are not being planted because people just don't want to see, particularly at a high level, their name attached to some wacky thing that someone can get a hold of and try to do a story and embarrass you.

Conclusion. Proliferating communication technologies present distinctly new challenges in the broader debate about openness in university governance and decision-making. Newer forms of electronic communication challenge existing legal definitions and standards in many states about what constitutes a meeting, a record, or a deliberation for purposes of determining the applicability of sunshine laws. It is likely that university leaders and public-information advocates will continue to clash over the permissible uses of technology under state sunshine laws. It is also 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

A third area of emerging, significant concern for stakeholders occupies the intersection of campus security and the public's right to know. Public college and university officials report that they are paying greatly 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 the reasons for this heightened attention. Public higher-education institutions are responding to these concerns, particularly ones relating to terrorism, in a variety of new ways, notably by installing cameras and other electronic devices on campus grounds as a means of enhancing security. Yet, actions such as these taken to protect the security of campus communities have become the source of public-information disputes. For example, a provocative question being asked now in some states is, 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 (Young, 2003).

Institutional officials in each of the states we studied expressed deep concern about ensuring the security of their campuses, while simultaneously avoiding violating their states' open-meetings 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 under state records-law to disclose the location on campus of dangerous chemicals: "I just can't see that [a public university] would have to say, 'Here are our vulnerabilities' and put them on a website." A university attorney

offered the following example of the kinds of security-related public-information requests for which he was unsure of his institution's legal liability:

How do you treat a request for purchasing records for the security system put on a laboratory? Let's say you have a [sensitive] laboratory...and I, as a public do-gooder, go to the purchasing folks and say, "I want to know what kind of security system you purchased for laboratory 4850 in Jones Hall." Now, in general, you don't find in state laws an exception for something like that.

While many respondents characterized as insufficient the attention their states have paid to issues involving sunshine laws and campus security, others reported that, increasingly, exemptions are being carved into state statute specifically to address security-related concerns. Additionally, in some quarters, 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; namely, 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? On one hand, a small number of institutional officials we interviewed voiced little concern for the public's right to know when it collides with security on their campuses. For example, one president stated:

The safety and security of our people, especially on a college campus, which is always an open access - I lose sleep on that issue, because you cannot close the campus. And, therefore, you have to have high visibility; you have to have community-type policing. It has to be highly visible, and everybody needs to know it. The idea that that would be [publicly available information] in some way, I would be happy to debate that. It's clearly secondary to the safety of our students, in my mind. I could hardly dignify the other side of that argument...and I don't know where that's going to go. Sorry, I'm much more concerned about the safety and security of the students from bad guys.

For most respondents, however, the tension requires a delicate balancing act. These officials voiced support for narrowly tailored exemptions under law that balance access to public information against reasonable restrictions on information that could place campus communities at risk. In the words of one university president:

Well, I don't want to tell everybody where the cameras are and how they're hooked up. [But], like in anything, ... you can overdo it. I think we need very carefully drafted, narrow exemptions. So [the public is] entitled to know what your police budget is and maybe something about their effectiveness... But, when it actually comes to the security cameras and the feeds and the timing of visits by police officers, [that is confidential].

Understandably, many media representatives voiced apprehension about 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. One journalist, for example, drew a distinction between the short-term benefits of staving off potential security threats and the long-term drawbacks of enfeebling open-meeting and records laws:

I think they need to be really careful when putting in all of this slew of...laws, that we're really not getting into big trouble in terms of getting information. To fix certain incredibly pressing problems...terrorism and all that ... I wish that people were a little bit more - not with blinders on - looking at these issues just in light of those particular issues and looking at the wider range, larger perspective of open records and how important that is.

A veteran journalist drew ironic comparisons between the restrictions on information currently being put in place in some states with the governmental encroachments upon personal liberties of the 1960s-1970s era, which provided much of the impetus for the current generation of sunshine laws:

And since September 11th, of course, lots and lots of other information has been either removed from public

knowledge or is being fought over now...And the amount of surveillance, for lack of a better word, that universities are now being either asked or ordered to do on behalf of the U.S. government, particularly involving foreign students, is going to be hidden from the public by things like what they call the Patriot Act. And so, there are a lot of revisions I would like to make. There are a lot of things I see happening that I think are long-term very negative for the country, and absolutely unopposable under...the current political environment. Those of us old enough to remember when surveillance was a really bad word and when the government participated in it illegally during the 60's and early 70's, simply don't like the idea. People who do not remember the negative effects of that and who think if we provide surveillance of all of our foreign students, we will prevent terrorist attacks, see it differently. But...essentially the pendulum has swung the other way.

Conclusion. Concerns about security on public college and university campuses will continue to occupy the attention of campus officials, students and parents, the public, the press, and policymakers well into the future. Given the gravity of the interests at stake, sunshine laws will continue to pose profound challenges for stakeholders as they attempt to balance legitimate public-safety concerns against the “public’s right to know.”

CONCLUSIONS AND RECOMMENDATIONS

The specific problems instigating the original passage of sunshine laws for public institutions have faded in memory. Now, the laws are widely viewed as an accepted and largely healthy element in the institutionalized structure of campus relations with external bodies. Nothing akin to open conflict exists between higher-education institutions and public-information advocates over the application of state sunshine laws to public universities. In fact, the existence of formalized requirements and processes for openness, and formalized exceptions to those requirements, may lessen rather than exacerbate interpersonal and political tensions that might arise otherwise around openness issues. We detect substantial consensus and common ground in the belief that, on average, the benefits of public-information laws outweigh the costs. We found few raging controversies around the country, and in many places, sunshine laws seem to attract little attention from stakeholders. Though sometimes time-consuming and sometimes a hindrance to quick action, the laws are nonetheless supported in general outline by virtually all parties to the process.¹⁴ Still, there is much in this domain for policymakers, media officials, and institutional leaders to consider.

This project brought to light a variety of provocative ironies, paradoxes, and ambiguities surrounding openness issues in higher education. Several respondents provided examples of possible hypocrisy, or at least disingenuousness, but those respondents disagreed about the identity of the parties most guilty of the charge. It seems instructive here simply to caricature these arguments holistically. Media officials view protection of their own news sources as sacred ground, but often insist on the unbridled openness of others, including academic leaders. Likewise, legislators often exempt themselves from the same sunshine laws they apply to other public actors and domains. If openness is so important for all the reasons cited by legislators and journalists, why then should its societal benefits be limited by exempting from public scrutiny other actors in whom the public also places its trust, namely those same legislators and journalists?¹⁵

¹⁴ The use of “virtually” here is perhaps unnecessarily cautious: not one of our 92 respondents argued against the principles and general outlines of the laws.

¹⁵ One system president made this point bluntly: “I think it would very interesting and informative for our state legislature and governor to operate under the laws they have adopted for a couple of years, for all legislative proceedings and actions of the governor to be conducted in accordance with the state agency meeting laws. And I think that would help them understand what they are expecting of the public agencies and help them understand changes that may [be needed].”

If the retort by media is one of constitutional right (in their case, First Amendment privilege), then what difference is there when constitutionally independent flagship universities in states like Michigan or Minnesota assert that they are not subject to sunshine laws? Before academics take too much comfort in these arguments, they might consider the search for truth as it relates to sunshine laws: journalists and scholars share an avowed focus on pursuing truth wherever it might lead, but academic leaders sometimes protest that journalists' pursuit of truth can go too far when it delves deeply into university dealings.¹⁶

In all, the ironies, paradoxes, and ambiguities posed by openness issues in higher education are not amenable to quick and easy understanding, much less quick and easy resolution. Some will argue that the problem is not so difficult: openness itself is the sole goal of the laws, and one need look no further than whether openness is served by the laws. As such, the laws fail as currently written: no state has laws that pursue openness unilaterally without some counterbalancing concern for privacy or efficiency or some other goal.¹⁷ Different public goods clash and must be weighed against each other. What is more, few would agree that openness itself is the measure of the law's success. Operationally, many organizational and public goals are ostensibly served by the laws, in areas ranging from finance to personnel to strategic planning to athletics. This multipurpose nature of the laws makes their success or failure difficult to discern: different stakeholders emphasize different specific operational goals through the laws (procedural fairness in hiring, for example, or unassailable probity in financial decision-making). In this context, there is no simple analytic design that could determine how well the laws serve their various purposes.

Our examination of sunshine laws highlighted both striking similarities and striking differences across states. The differences argue against any attempt to offer highly specific recommendations - such recommendations must be tailored to distinctive state, system, and institutional circumstances. Still, on the basis of our work, we can offer some broad recommendations for consideration by the varied stakeholders for openness in higher education.

¹⁶ An attorney working in a state's attorney general's office on sunshine issues presented a particularly wry view of the same general issue: "I find that people have this sort of idea that if they are interested in the information, it needs to be open [but] if the information is about them, it needs to be closed."

¹⁷ Even Florida's aggressively designed sunshine laws allow some deviation from all-encompassing openness.

1. *Establish ongoing informational efforts regarding sunshine laws.* The complexity of open-meetings and records laws has been noted by Schwing (2000) and many others. That complexity, 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 active sunshine-related disputes) to develop responsibility centers within state government or institutions 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. Such efforts should be targeted not only toward board members but also toward high-level system and institutional officials, media representatives, faculty, and students.

It is also important to consider ways to improve the public's understanding of their rights to information about public affairs, including public higher-education institutions. A number of institutional and system leaders as well as media representatives told us that the public lacks of knowledge about sunshine laws and the laws' implications for governance in higher education. While a big-budget public-information campaign on this topic may be neither feasible nor cost-effective, more modest efforts merit serious consideration.

At the national level, we believe that the establishment of information dissemination, research, and best-practices initiatives relating to open-meetings and records laws is warranted. 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. Given the widespread attention to these issues around the country, it makes no sense for states to be "reinventing the wheel." The present report is a start, but further attention to across-state concerns regarding openness in higher education is needed, and may comprise a worthy agenda for a national association or foundation.¹⁸

2. *Maintain ongoing dialogues within individual states regarding the adequacy and effectiveness of existing open-meetings and records laws.* Laws should be periodically adjusted to fit emerging developments, such as new technologies and expanding roles for university foundations. Ideally, such adjustments should come pre-emptively, based on reasoned dialogue over time, rather than reactively based on legal rulings. Often,

¹⁸ The National Association of College and University Attorneys [NACUA] does follow 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.

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 inherently adversarial venue. The courts become, in effect, policymakers and interpreters on sunshine issues. Later, legislators may address perceived problems in legal rulings (a cycle first noted by Estes, 2000).

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.

Regardless of the convening party, it is essential that the media be part of the discussions. In the face of a variety of recent controversies and challenges in public higher education, tensions have arisen in the relationships between institutions and the media, the public's primary de facto representative in higher-education governance.¹⁹ Threats to the relationships between higher education and the media should be a significant concern for institutional leaders and policymakers. Peter Magrath (1998), current president of NASULGC and formerly president of several universities, has perceptively addressed the issue:

Why does it matter that tensions exist between higher education and the media? Because, 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.* As noted earlier, the presidential transition in public institutions constitutes perhaps the single most mentioned area of dispute concerning sunshine laws nationally. Openness advocates passionately state the case for totally transparent processes, while many veteran postsecondary leaders caution that a

¹⁹ For example, serious problems with two successive presidencies at the University of Tennessee have been widely publicized, with particular attention to an arguably too-limited degree of openness of the governing board's search processes (see Pulley, 2003).

substantial measure of privacy is essential to effectively filling presidencies. We confess to having been episodically convinced, and often moved, by partisans we interviewed on both sides of this issue. In the end, we endorse a balanced approach: 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. This recommendation in essence argues for confidentiality in the *search* for presidents and openness in the *selection* of presidents.

Virtually every institutional president and system head we met expressed a desire for search processes that are neither totally open nor totally closed. Instead, searches should begin in some confidence but be opened to public scrutiny at an appropriate time. The consensus view on that appropriate time is one we share: that the identities of candidates should remain secret until the naming of a meaningful pool of finalists (we would argue for at least three and no more than six). Experiences in recent searches around the country suggest that, while openness may not always be comfortable and may even dissuade some good candidates, maintaining high levels of confidentiality can disserve the public good.²⁰ Seeking and obtaining a wide, public airing of views and information can be extraordinarily valuable for this, arguably the most important decision made on university campuses.

Our view on this is likely to generate resistance on “flagship” campuses claiming constitutional autonomy within their states. Recent disputes at the Universities of Michigan and Minnesota highlight the sensitivities surrounding the application of state openness legislation in such settings. Such institutions are often highly regarded and capable of securing presidents from other quite visible public institutions. As such, they cherish autonomy sufficient to allow them to conduct searches discreetly without fear of controversies in the home states of candidates. Their interest in maintaining such privilege is entirely understandable. Nonetheless, without venturing into legal issues well beyond our expertise, we can only offer a value position: 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. *Examine asynchronous approaches to openness.* Much of the literature on openness structures the problem as a dichotomy: simultaneous, “real-time” openness in governance versus full confidentiality in governance. That is, the choice is between

²⁰ 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.

holding all meetings in the open and releasing records as quickly as possible, on one hand, and not being open at all. Critics, arguing that the stakes are too high for real-time openness, favor barring meetings or records from public view. Sunshine supporters wince at the denial of any accountability under such a closed approach. Perhaps, for at least some issues, there is 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 intent 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 college president provided us his thoughts on such an approach:

Well, the Federal Reserve releases all its minutes after the fact, but it would totally inappropriate to release their deliberations before [federal interest rates are changed], right? You'd have wide speculation. ... But then the full transcript is released afterwards, and the public interest is served in that way, because it provides both continuity and completeness.

This respondent went on to note that releasing deliberations before the fact is “exactly what happens with presidential searches” currently, and asynchronous alternatives do merit consideration.

Under an asynchronous system, the prevention of outright wrongdoing and the timely acquisition of valuable outside insights may become more difficult, but college officials involved in decision-making would realize that the meeting or the record is not truly and finally closed, and that whatever is said or done will eventually be exposed to sunshine.

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 conflict episodes. The development of such a system would require from the beginning involvement and endorsement from major parties in likely disputes, including media representatives, state-level leaders, and educational officials.

6. *Allow boards to conduct a limited number of closed retreats in which substantive discussion is allowed but no decisions are made.* We found 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 full 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 discussion. Our 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 growth and development opportunity not available at present. Of course, it is incumbent on university attorneys and other officials, including perhaps some representatives of state interests, to monitor proceedings at retreats to ensure compliance with the agreements concerning such meetings.

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, and that there are few venues in which they may seek that information without risking public embarrassment. As a result, board members say they lack critical knowledge and boards neglect important issues, or deal with them superficially. In many states, board briefings have been an effective instrument through which trustees may obtain critical information to assist them in their decision-making responsibilities. However, recent decisions by some state courts and attorney generals have called the practice into question. One argument against board briefings is that they constitute a form of serial meeting that blurs the line between legally sanctioned discussion and illegal deliberation: by meeting individually with every member of the board 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 of the institution

for information to help them make decisions. Therefore, prohibiting board briefings may simply reduce the kind of information board members receive prior to official, on-the-record meetings; i.e., 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, seek to clarify the precise nature and scope of request, and meet the request in an appropriate way under state requirements. Some also voiced concerns that institutions cannot always pass along the true and full costs of copying or 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 budgetarily and in terms of human resources. Circumstances vary by state and institutions, and this concern does not arise on all campuses. Still, a review of current circumstances surrounding request protocols and processes seems warranted in many institutions. When appropriate, institutions may wish to meet concerning these issues with legislators and staff of the office of the state attorney general.

9. *Allow university attorneys to discuss privately with boards **potential** litigation, as well as actual suits that have already 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 rarely malign and are often consonant with broader public interests. The possibility that interests may be malign in certain circumstances should not stand in the way of effective resolution of the large number of the cases in which institutional and larger public interests coincide.

10. *Integrate core academic values and personnel more fully into the refinement and application of sunshine laws.* It is striking to us 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. As Clark (1983) has noted, they share certain broad values beyond their specific disciplinary affiliations and cultures, including

a concern with fairness, peer review, academic freedom, shared participation in governance, and the recognition of merit. As noted elsewhere in this report, these values are often affected by sunshine legislation. On the one hand, promotion and tenure decisions at the department level are usually shielded from public view, as the exclusive definition of peers does not include broader participation or observation. On the other hand, faculty are not engaged in many high-level decisions in the institution, sometimes even including the selection of a president. For example, the complaints of campus faculty that they were uninvolved in the recent failed University of Tennessee presidential searches are painful to read, and arose in a state viewed by some as having unusually strong openness requirements.²¹ Surely, boards cannot consider the choice of an academic leader a matter not requiring openness to faculty values and views.

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 seems reasonable to turn the question around, as well: “to what extent will I as a leader or board member have access to information regarding the views of other stakeholders?”²² 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 to access by leadership. Regardless of the provenance of the information, however, governance effectiveness could benefit from more attention to the kinds of information flows capable of aiding governance at the highest levels.

12. *Consider the core purposes of sunshine laws and develop ways to achieve those purposes independently of formal provisions for openness under the law.* Institutions may wish to consider the extent to which the sunshine laws under which they work are adequate reflections of their own missions and values concerning openness. Some institutions have developed approaches that serve openness and may also serve to deflect pressures for stronger legal constraints on the academic heart of the institution. It seems incumbent on supporters of the laws to identify alternative policy mechanisms for

²¹ For example, a faculty member who was appointed to an “advisory council” created to assist the board-driven presidential search at Tennessee (Pulley, 2003) suggested that the faculty view was not aggressively sought: “They wanted it to look more open than in the past. Frankly, we were ignored.”

²² We are indebted to Bill Tierney for raising this provocative question.

achieving the same purposes.²³ Recent debates and legal challenges concerning affirmative action led to consideration of alternative ways to serve the diversity goal in the face of public challenges. In parallel fashion, the existence of substantial discontent with the implementations of sunshine laws in certain settings may require creative attention to ways that the benefits of openness in public organizations might be achieved absent currently legislated sunshine requirements. As we noted in the “Listening” section of this report, we visited some campuses in which governance participation norms were expansive throughout the institution and appointments to governing bodies were unusually inclusive of varied interests and perspectives. Informants on those campuses told us that their institutions were achieving many benefits of openness without the laws being aggressively applied to their institutions and that such arrangements may help deflect efforts to impose stricter legal requirements for openness there. Such claims merit close attention.

Several of these recommendations call for creatively designed policy refinements. Whether the mechanisms at hand provide for asynchronicity, public dialogue, third-party arbitrators, retreats, or private attorney discussions with boards, the goal is the refinement of sunshine legislation to more satisfactorily balance Harlan Cleveland’s three public goods: individual privacy, public accountability, and effective institutional autonomy. While not always easy, the balancing act must continue.

For many of our respondents, and for us, openness is not simply a means to an end, but also an end itself. Yet openness must be sought simultaneously with other values that are arguably equally important, including privacy and the success of our educational institutions. Our work reveals some of the complex issues raised by the ongoing application of sunshine laws in higher education. All told, we see an arena marked (perhaps inevitably) by complaints and ambiguities, but marked also by much agreement on core values and desired outcomes. The simplest recommendation in such circumstances is to continue refinement. Sunshine laws will never be made definitively “right” - circumstances and preferences will always and continually change. Still, as works in progress, those laws should represent best thinking on the most appropriate avenues toward a critical, widely shared goal: responsible, responsive public openness.

²³ Again, we are indebted to Bill Tierney for suggesting this question.

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APPENDIX A: Project Design

The “State Open-Meetings and Records Laws” project had three phases. Phase 1, beginning in December 2003, focused on the production of an annotated bibliography of relevant literature on open-meetings and records laws, interviews with national authorities on these laws, and the design of a data-collection and analysis plan.

Phase 2 focused on data collection in six states with sunshine laws of various kinds. On the basis of prior studies of sunshine laws, regional representation, and governance diversity, the six states chosen were California, Florida, Iowa, Massachusetts, Texas, and Washington. In these states, we collected documents (including newspaper articles, legislation, and reports) and conducted interviews in person and by phone over the period April through August of 2003. Key persons interviewed included governing board chairs and vice chairs, presidents, chancellors, and provosts of individual institutions, university attorneys, heads of faculty senates, university board secretaries, newspaper editors and education reporters, system and agency heads at the state level, state attorneys general, members of higher-education committees in state legislatures, and other informed observers of a state’s sunshine laws. The focus of the interviews was on learning from individuals with substantial knowledge regarding the application, operation, and impact of open-meetings and records laws in their states.

Interview protocols were differentiated by respondent category. The following questions asked of board members, however, closely reflect the content of all the protocols.

1. To what extent are sunshine laws factored into the various operations of your governing board (e.g., presidential searches, appointments to the board, electronic communications, academic policy decisions, contracting decisions, etc.)?
2. An examination of your state open-meetings and records laws shows that exemptions (e.g., executive sessions) are allowable for certain issues. In your opinion, are these exemptions appropriate and sufficient?

3. How is the compliance of your board with sunshine laws monitored or enforced?
4. What are the positive outcomes of implementing open-meetings and records laws in this state?
5. Have there been any negative or unintended effects of implementing open-meetings and records laws in this state?
6. It has been said that open-meetings and records laws present a kind of “trilemma” among the public’s right to know, the individual’s right to privacy, and the public college or university’s mandate to serve the public interest. To what extent are these three needs effectively balanced in this state?
7. In your view, do open-meetings and records laws in this state need to be refined? If so, what suggestions do you offer for improving the design and implementation of these laws?
8. In this state in recent years, has public and political support for open-meetings and records laws increased, decreased, or stayed roughly the same?
9. On this board, what approaches have you taken to establish positive working relationships with the media?
10. The nature of laws in a given state may tend to fit the distinctive political, historical, and cultural characteristics of that state. Can that be said of open-meetings and records laws here?
11. We are eager to learn more about open-meetings and records laws here and elsewhere. Are there any questions I should have asked you but didn’t? Also, do you have any other suggestions for us as we continue this project?

Including both the national and state-specific respondents, 92 people were interviewed for the project (see Appendix B). Most interviews lasted from 30 minutes to an hour. These interview data were transcribed and coded by theme for subsequent analysis. At least two people coded each transcript and discrepancies were reviewed and resolved.

Inevitably, there are limitations to the project data. Most importantly, we were not able to interview all of the arguably critical actors in any state. Time, resources, and respondent willingness to participate each posed constraints, and make us hesitant to suggest conclusions and recommendations specific to any one of our six states. Faculty often told us that they had little expertise, information, or interest regarding sunshine laws. Also, the sample was affected by the timing of the data-gathering stage: the spring of 2003 was a difficult one for public higher education across the country, as legislators, institutional leaders, and boards struggled to deal with pressing financial constraints at the state level. In that context, we found some potential respondents reluctant to commit to scheduling an interview. This reluctance to participate most notably affected our sample of legislators and system leaders. Still, as Appendix B reveals, the final interview sample was impressive in its size and diversity: we found many people willing, and indeed eager, to discuss openness issues.

Phase 3 focused on data analysis and the preparation of the final report presenting findings and policy recommendations. A planned further outcome of the project will be conference presentations and the submission of work for publication.

**APPENDIX B:
Individuals Interviewed**

David Armstrong, Chancellor, Florida Community College System

Debra Austin, Chancellor of Colleges and Universities, State of Florida

Michael Baer, Senior Vice President, Division of Programs and Analysis, American Council on Education

Suzanne Behnke, Editor, Des Moines Register

Robert Berdahl, Chancellor, University of California, Berkeley

Selma Botman, Vice President for Academic Affairs, University of Massachusetts

Ann Marie Brick, Division Director, Regents & Human Services, Department of Justice, State of Iowa

Don Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board

Mary Burgan, General Secretary, American Association of University Professors

Missy Cary, Assistant Attorney General, Division Chief, Open Records Division, State of Texas

Shirley Chater, Senior Consultant, Academic Search Consultation Service and former president, Texas Women's University

Ward Connerly, Member, University of California Board of Regents

Constantine Curris, President, American Association of State Colleges and Universities

Barbara DeVico, Secretary, University of Massachusetts Board of Trustees

Tricia Dewall, Assistant Managing Editor, Iowa City Press-Citizen

Robert Downer, Member, Iowa State Board of Regents

Bill Edmonds, Director of Research and Economic Development, Florida Department of Education

Charles Estes, Jr., General Counsel, University of New Mexico

Larry Faulkner, President, University of Texas at Austin

Francie Frederick, Counsel and Secretary to the University of Texas System Board

Nancy Fuller, Chair Opinion Committee, Attorney General of Texas, State of Texas

Susan L. Garrison, Assistant Attorney General, Opinion Committee, State of Texas

Jerry Gaston, Deputy Chancellor of the Texas A&M University System

E. Gordon Gee, Chancellor, Vanderbilt University

William Giblin, Vice President, University of Massachusetts Board of Trustees

Pat Gleason, General Counsel, Office of the Attorney General, State of Florida

Judith Gill, Chancellor, Massachusetts Board of Higher Education

Jo Ann Gora, Chancellor, University of Massachusetts, Boston

Michael Granof, Chair of the Faculty Council, University of Texas at Austin

Jan Greenberg, General Counsel, Texas Higher Education Coordinating Board

Carol Greta, Legal Consultant, Administrative Law Judge, Iowa Department of Education

Ronald Gronsky, Vice Chair, Academic Senate, University of California, Berkeley

Terri Hardy, Staff Writer, Sacramento Bee

June Hardin, Assistant Attorney General, State of Texas

Christine Helwick, General Counsel, California State University System

John Hoey, Director of Communications, President's Office, University of Massachusetts

Barbara Holland, Executive Director, National Service-Learning Clearinghouse

James Holst, General Counsel, The Regents of the University of California

Ann Hopkins, former president, University of North Florida

Richard T. Ingram, President, Association of Governing Boards

Madeline Jerousek, Staff Writer, Des Moines Register

Jack Johnson, Senior Assistant Attorney General, Division Chief, University of Washington, State of Washington

Katie Johnsonius, Assistant General Counsel, Texas Higher Education Coordinating Board

Robert Karam, former chair, University of Massachusetts Board of Trustees

Ken Keller, Professor and former president, University of Minnesota

Stephen Kinslow, Executive Vice President, Academic, Student and Campus Affairs, Austin Community College

Catherine Koshland, Chair, Academic Senate, University of California, Berkeley

Anita Kumar, Staff Writer, The St. Petersburg Times

Winston Langley, Vice Chancellor Academic Affairs. Associate Provost, Professor of Political Science & International Relations, University of Massachusetts, Boston

William Lasher, Vice Provost and Professor of Higher Education Administration, University of Texas at Austin

Karen L. Laughlin, Dean of Undergraduate Studies and Associate Professor of English, former president, Faculty Senate, Florida State University

Bill Law, President, Tallahassee Community College

Richard Martin, Assistant Metro Editor, The Seattle Times

Robert Maxson, President, California State University, Long Beach

Emoryette McDonald, Department of Colleges and Universities, Florida Department of Education

Judith McLaughlin, Professor, Harvard Graduate School of Education

Peter McGrath, President, National Association of State Universities and Land Grant Colleges

Sydney H. McKenzie III, Special Counsel, Florida Department of Education

Robert Moore, Executive Director, California Postsecondary Education Commission

Kenneth Mortimer, former president, University of Hawaii and Western Washington University

Barry Munitz, former chancellor, California State University

Wayne Newton, President, Board of Trustees, Kirkwood Community College

Carol S. Niccolls, Executive Assistant to the President, University of Washington

Greg Nichols, Executive Director, Board of Regents, State of Iowa

Norm Nielsen, President, Kirkwood Community College

Thomas Nussbaum, Chancellor, California Community Colleges

Earl Nye, Chair, Texas A&M University Board of Regents

Patricia Ohlendorf, Vice President for Institutional Relations and Legal Affairs, The University of Texas at Austin

Terence O'Malley, General Counsel, University of Massachusetts

Alan Ostar, Senior Consultant, Academic Search Consultation Service and former president, American Association of State Colleges and Universities

Steve Parrott, Director of University Relations, University of Iowa

Jennefer Penfold, Secretary of the Board, University of Washington Board of Regents

Barbara Petersen, President, First Amendment Foundation, Florida

Phil Power, former regent, University of Michigan Board of Regents

William Proctor, Executive Director, Council for Education Policy Research and Improvement, Florida

Charles Reed, Chancellor, California State University System

Kevin Rothstein, Staff Writer, The Boston Herald

Jenna Russell, Reporter, The Boston Globe

Maria Shanle, University Counsel, University of California

Jim Smith, Vice-Chair, Board of Trustees, Florida State University

Joseph C. Sullivan, General Counsel, The Commonwealth of Massachusetts Board of Higher Education

Paul Tanaka, University Counsel, Iowa State University

John Thrasher, Chair, Board of Trustees, Florida State University

Deborah Turner, Member, Board of Regents, State of Iowa

Steve Uhfelder, Member, Florida Board of Governors

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Fred Zipp, Managing Editor, [Austin American-Statesmen](#)