Sunshine and Searches – Pulling the Shades, or Pulling the Wool?

by
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The July 9, 2004 *Chronicle* article "Choose Public-College Presidents in the Sunshine, but Know When to Draw the Shades", by James Hearn and Michael McLendon, argues that sunshine laws (or open-meetings and open-records laws – state versions of FOIA, the federal Freedom of Information Act) are complicated, baffling, and vague. Indeed, the only two phrases emphasized in bold print in that article were "Confusion exists, even at the highest levels, over the proper application of the sunshine laws to a given situation" and "Our fieldwork suggests complexities and ambiguities that defy quick and easy solution." Hearn and McLendon relate the concerns of college and university senior administrators about the "weaponization" of sunshine laws, administrators' concerns about the danger of impairment of the effectiveness of governing boards, and administrators' concerns about the "negative impact of openness on presidential search-and-selection processes".

Little is mentioned about the positive aspects and extreme usefulness of sunshine laws in search processes from the perspective of rank-and-file faculty, students and staff. On the contrary, the four recommendations that Hearn and McLendon make (that search processes should be kept partially secret – "neither totally open nor totally closed"; that campus leaders should consider delaying release of records; that boards should be allowed to conduct closed retreats; and that trustees should be permitted to receive closed "informational" briefings), read like a Senior Administrators' Wish List.

In reality, sunshine laws are remarkably easy to use, and are extremely valuable for the general campus community – both in search processes and in other situations. How could Hearn and McLendon possibly have missed that? After all, they assure us "We are Vanderbilt University faculty members" who "recently spent a year examining state 'sunshine laws'", and "recognized that in our research we should hear the views of a wide range of people, including presidents and other senior campus and system officials, *faculty members, students* [emphasis added], members of governing boards, state attorneys general, and representatives of the news media." But the conclusions of their "fieldwork" appear so remarkably pro-administration – if they really talked to students and faculty members as well, how could they have failed to report that sunshine laws are essentially quite simple, and are every bit as important for ordinary campus members as they are for senior administrators?

One important clue for this glaring omission is a fact that Hearn and McLendon's *Chronicle* article did **not** report – their yearlong study was funded by the *Association of Governing Boards of Universities and Colleges*, whose website (http://www.agb.org/) proudly proclaims "*AGB serves* 34,500 trustees, regents, presidents, chancellors, rectors, executive directors, board secretaries, [and] senior administrators". Hearn and McLendon's May-June 2005 *Academe* article, which also failed to acknowledge support by the *AGB*, describes their study in somewhat more detail, reporting on interviews with 92 people, namely, "members of governing boards; presidents, chancellors, and provosts of individual institutions; university attorneys; heads of faculty senates; education reporters; heads of university systems and state agencies; state attorneys general; legislators; and other informed observers". Where is the input and perspective of "faculty members, [and] students"?

It is important for *Chronicle* readers to have the record balanced. First, the use of open records acts by citizens, including rank-and-file faculty, students and staff, is remarkably uncomplicated. In Georgia, for example, a citizen need only tell the record custodian, verbally, "I would like to see the following records…". No written request, or mention of the magic words "Georgia Open Records Act" is required. Similarly, the sunshine task from the standpoint of the record custodian is equally easy. For a college or university administrator to decide which documents are subject to disclosure under open records laws, he need only ask the campus attorneys. (Of course there are always issues balancing privacy and openness, just as in the federal FOIA setting, but those are matters for the courts, not the people who request or maintain campus records.)

Second, it is important to illuminate the crucial role that sunshine laws can play in search processes, not only for the benefit of board members and journalists, but also for the general campus community. Even the examples in Hearn and McLendon's *Chronicle* article – the presidential-search "saga in Tennessee," and the "billions of dollars" of potential lost revenues in retirement and endowment funds at the University of California – clearly illustrate importance of sunshine laws for the general good of the community.
Faculty, students and staff have a need to know – what is the presidential (or dean, or provost, etc) applicant's management record, especially with regard to finances and fairness? Has the applicant misused public funds? Has he abused subordinates? Violated basic civil or faculty or students' rights? What is the applicant's *own* record on sunshine laws and openness?

An applicant's former supervisors, especially those that are anxious to get rid of a problem, are not likely to reveal serious deficiencies in their glowing letters of recommendation. Abusive college administrators are often "promoted" from one campus to another, just as they are in other institutions. Open records can help prevent that. Records of faculty grievances against an applicant, records of audits in the applicant's unit, and records of state-level complaints about discrimination or retaliation, are normally not subject to disclosure via the FOIA, but often can easily be obtained via state sunshine laws. It is essential for ordinary faculty to be able to review those reports so they can provide informed input, from the faculty perspective, to senior-level search committees, as well as to other internal and external review committees.

Open records laws can also be powerful tools *even when records do not exist*. For example, two years after officials at the Georgia institute of Technology (Georgia Tech) promised the State Attorney General, in writing, that they would investigate evidence of double-billed travel expenses by a campus administrator, many faculty suspected that nothing had been done. A simple open records request then forced the university to *create an official record*, namely a legal response to the open records request, documenting the fact that there were no records of any such investigation. As another example, when one Georgia Tech department received secret mass raises during a year of publicly announced budget restraints, a single open records request, asking to see all records of mass raises in other departments, forced the administration to *disseminate information* about the secret raises to other units, and also documented the fact that no other units received the windfall. With such documents in hand, rank-and-file faculty can respond to queries from external search committees with concrete evidence of the applicant's favoritism and financial mismanagement. Not only is sunshine important, it is as vital to academic life as it is to photosynthesis.

Our conclusions are based, not on research sponsored by a strongly biased organization, but on first-hand experience. One of us (TH) has made hundreds of opens records requests concerning administrators' use of public funds. Certainly the Georgia Tech administration portrayed this as an example of what Hearn and McLendon called "weaponization" of sunshine laws by a "lone citizen aim[ing] to bog down an

institution in myriad and costly records requests", but the documents he obtained led to audits both by campus authorities, and by the State University Board of Regents auditors, investigation by the State Attorney General (whose office labeled the travel expense abuses at Georgia Tech "systemic"), and repayment of tens of thousands of dollars to the State of Georgia. The other (HH) has been part of the search process, as well as other aspects of academic freedom and openness, both from inside the highest board levels, and from the faculty perspective; he recently served as chair of a Chancellor Search Committee for the University System of Georgia, and serves as Executive Secretary of the Georgia Conference of the *American Association of University Professors*.

Based on those experiences, we have two concrete recommendations that we believe would significantly improve the openness processes in state colleges and universities: (i) campus Ombuds or *AAUP* offices should provide instructive handbooks, and professional advice, concerning sunshine laws (many institutions have exactly such resources for administrators only); and (ii) at least one campus attorney should be assigned to advising rank-and-file campus community members in general matters, and, in particular, in understanding and using open records and open meetings laws (most campus attorneys represent the current administration – not the community in general, nor even the greater institute interests over time).

Hearn and McLendon conclude, " Sunshine laws will never be made definitively 'right'". Similarly, the basic Freedom of Information Act will probably never be absolutely perfect. But both are essential democratic tools, complement each other, and are a far cry better than the alternative – pervasive control of information by select senior administrators. For sunshine laws to be effective, however, openness must be valued and understood from the bottom up as well as the top down, and that includes disclosure of potential bias within our own ranks.

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