

# Ready for the Spotlight

Expanding sunshine laws mean boards should prepare for growing demands for transparency

By Derek Bauer and Darrell Solomon

Recent polls reflect an erosion of the American public's trust in government. This growing suspicion has affected every facet of federal and local government, from election results to the passage of legislation. One legislative trend — increased demand for government transparency — has sought to address a facet of the public's distrust by strengthening so-called “sunshine laws.” As such laws expand, so too has the public's expectation that institutions that serve or are perceived to serve a public function, such as hospitals, will conduct business more openly.

Sunshine laws are designed to execute on a key promise of the First Amendment: public access to the work product of the governmental agencies that are “owned” by and work for all of us. At the federal level, the Freedom of Information Act requires disclosure of information and documents controlled by the U.S. government.

All 50 states also have sunshine laws in some form. These include open records laws similar to FOIA and also include open meeting laws that are designed to give the public insight into decisions made by government officials by requiring that deliberative processes of public bodies (including committees) be open to citizens.

Sunshine laws are of significant importance to public hospitals, but also

may have application to private hospitals reorganized by or subcontracted to governmental authorities or even fully private hospitals that have substantial contractual relationships with govern-

ment authorities. Compliance with these laws is becoming progressively more challenging and the penalties for noncompliance are becoming increasingly severe. Knowing whether such laws apply to your institution and, if so, when they forbid executive sessions, can help the board avoid embarrassing incidents that may result in poor publicity for your hospital and monetary penalties for trustees.

## Common Features of State Laws

While each state's sunshine laws are distinct, they generally share many common characteristics. Most open records laws include some variation of the following:

- A definition of “public record,” which essentially identifies the information subject to the law
- An explanation of the process by

which members of the public may request access to the public record and the process by which the records are to be produced

- A description of records exempted from the law (e.g., health records or 911 telephone records)

- An appeals process by which a requestor may petition for reconsideration of a denied request

- The penalties for failure to comply with the law, which generally range from fines of \$100 to \$1,500, and may include criminal misdemeanor charges

Most open meeting laws generally include the following:

- An explanation of the governmental agencies and bodies subject to the law

- A provision allowing for closed meetings in limited circumstances, such as executive sessions

- A provision outlining the manner in which records of such closed meetings are maintained

- The penalty for failure to comply with the law, generally ranging from

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\$500 to \$2,000. In some states, any resolution, rule or formal action adopted in a closed meeting is invalid.

## Recent Trends and Decisions

Efforts to strengthen open records and open meetings laws have been major legislative initiatives in several states over the last several years. In March, for example, Utah amended its Government Records Access and Management Act to clarify that when the question of whether to disclose a record is a close call, government agencies are to err on the side of disclosure. The amended statute also provides that all communications by public officials made in the performance of their official duties are subject to disclosure.

Georgia's legislature also recently passed a bill that defines “executive session,” sets forth a process by which

minutes of executive sessions must be maintained, provides that certain votes taken in executive sessions will not be binding on an agency until a subsequent vote is taken in an open meeting, and increased penalties for violations.

Meanwhile, recent court decisions demonstrate why it is important that health care organizations — even private ones — understand sunshine laws.

In March, the Iowa Supreme Court held that a hospital had violated open records laws by withholding from the *Des Moines Register* an audit of its pharmacy performed after a string of drug thefts. Not only will the hospital have to disclose the audit but, depending on a later ruling by the trial court, it may be required to reimburse the requesting party's attorneys' fees.

In 2011, a Florida circuit court nullified a merger between a public hospital and private nonprofit health system because the would-be merger was the result of 21 closed-door meetings over a

16-month period in violation of Florida's sunshine laws. Further, the hospital board members ultimately agreed to pay almost \$1 million as a settlement to attorneys who had sued them for their legal fees in connection with the failed merger. The money was to come from the hospital district's insurance policy.

A 2008 Georgia Court of Appeals ruling found that private insurers who contracted to serve as third-party administrators of a state health benefit plan were subject to the open records laws because they were performing a service or function on behalf of a governmental agency, and thus were required to produce to the public copies of all of their fee schedules and contracts with providers.

In 2007, West Virginia's Supreme Court of Appeals ruled that meetings of a community hospital's medical executive committee are not exempt from that state's open meetings act.

### **An Informed Approach**

Staying informed about sunshine laws can help board members avoid costly civil and even criminal penalties. Experienced legal counsel can help an organization stay on top of such matters and, importantly, develop a proactive strategy to avoid problems.

Knowing the exceptions to your state's sunshine laws, such as exemptions for trade secrets, private health information or strategic planning, may be vital to understanding when meetings such as executive sessions may be subject to the law's disclosure requirements. Further, voluntarily producing information may be all that is needed to respond to legitimate requests for information about hospital activities without triggering the law's obligations. **T**

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