



# Sunshine Law: Shining a Light on Governmental Hospital Transactions

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**G**overnance and social factors play a significant role in determining a hospital's openness to change and its ability to complete a business transaction, be that a merger, acquisition, or other strategic partnership. For government-owned hospitals, tension between the goals of government entities and the goals of a hospital's board, in addition to added legal complexities, may result in failed or generally avoided transactions.

One of those complexities, sunshine laws, require governmental hospitals to make certain proceedings and information available to the public. While the goal of increased transparency of a hospital's financial relationships is arguably noble, the additional disclosure requirements placed on governmental hospitals can put them at a disadvantage in terms of executing a partnership process.

As one of the factors behind the more arduous and subsequently slower innovation among governmental hospitals, sunshine laws should receive due attention from governmental hospital owners, hospital board members, and any system that seeks to form a partnership or other combination with a governmental hospital.

## Key Board Takeaways

- Sunshine laws are not important for only governmental hospitals. Any health system that seeks to form a partnership or business combination with a governmental hospital should also be aware of sunshine law implications, especially as they relate to a competitive process.
- Sunshine law requirements vary by state. In addition to engaging skilled transaction counsel, it is also essential to work with local counsel that has experience with the intricacies of state-specific matters.
- Governmental hospital transactions generally involve more stakeholders who have input in the transaction process. It is important to understand the underlying positions and motivations of each stakeholder group and to maintain open lines of communication between these groups, especially in light of sunshine laws.
- Along with hiring skilled legal counsel, a transaction process has the greatest likelihood for success when experienced investment bankers and communications experts are also engaged.

## Impact to Hospital Transactions

Sunshine laws require transparency with regard to the details of pending hospital transactions, but that transparency is often counter to the interests of a competitive partnership process. A competitive process depends, to some degree, on the various parties not knowing the financial and non-financial terms offered by their competitors. Sunshine laws may run in opposition to this premise by pushing the parties' terms into the public sphere.

Similarly, sunshine laws may allow competitors to review materials associated with a partnership

proposal, including strategic information or other valuable competitive intelligence. Other non-governmental parties, like non-profit health systems seeking to enter into a new relationship with a governmental hospital, are also wary of the public nature of the process, fearing that the release of proposal terms may impact their ability to negotiate effectively in future transactions with other parties.

When these conflicts arise between the demands of sunshine laws and the demands of executing a successful transaction, governmental hospitals often choose to pursue management contracts or other non-change-of-

ownership affiliations rather than an outright sale, merger, or other business combination, despite these change-of-ownership transactions being a better fit for achieving the goals of the organization. This may be partially due to the fact that these other loose affiliations may involve fewer approvals or sunshine law requirements, lowering the risk of transaction failure.

However, while the decision to pursue a looser affiliation may avoid certain approvals or disclosure requirements, it doesn't necessarily mean it is the best option for the hospital. Governmental hospitals face the same pressures to reduce costs, improve quality outcomes, and transition to a value-based model as their other non-profit counterparts. Often, a change in ownership is what a governmental hospital needs to make these things happen. When a hospital cannot pursue the strategic plan it needs, innovation efforts suffer.

## One State, Different Outcomes

When Bert Fish Medical Center entered into merger discussions with Adventist Health behind closed doors, claiming the discussions to be "strategic planning sessions" for which there is an exemption in the sunshine laws, the Bert Fish Foundation stepped in, asserting the hospital had broken the state's public disclosure laws. The judge agreed that these merger talks did not belong under the strategic planning exemption, ruling the parties had violated Florida's "government in the sunshine" laws.

In order to attempt to rectify the situation, the hospital board held a second set of meetings publicly and released documents regarding the potential deal, but to no avail. Based on the court's ruling, "the hospital district and its attorney Louis Mrachek of West Palm Beach [claimed] the merger was

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rescinded because of [the legal counsel's] 'failure to properly advise the Plaintiffs through the merger process to comply with the Florida Sunshine Law.'"<sup>1</sup> Legal malpractice claims against the hospital district's attorney followed. The failed merger cost Bert Fish Medical Center and its community millions of dollars.

On the other hand, another Florida governmental hospital, Indian River Medical Center (IRMC), and the Cleveland Clinic completed a transaction without issue, holding numerous public meetings, hiring legal teams who shared the details of the agreements publicly, and working openly with the Cleveland Clinic's trustees and IRMC's board. In a news release from Cleveland Clinic, Hospital District Chair Marybeth Cunningham said, "We can all be very proud of how transparently the process was conducted, and this terrific end result of that hard work."<sup>2</sup>

These two cases point to the significant impact sunshine laws have on governmental hospital transactions and the importance of government-owned hospitals following these laws closely. It's also important to note that sunshine laws vary by state, and in order to improve the chances of a successful outcome, governmental hospitals should hire experienced counsel

who can advise on state-specific matters.

## Governance Challenges Mean Added Complexity

Non-profit hospital boards are fully focused on the successful delivery of affordable, high-quality healthcare to the hospital's communities. Yet, government-owned hospitals face a different, wider set of considerations. Governmental hospitals have to share financial resources with other public works, such as police and schools, and so the owners—elected commissioners—cannot focus entirely on healthcare delivery.

Often, government-owned hospital boards cannot make decisions without the approval of the owners. Because these owners are elected officials, many decisions are at the mercy of politics and election cycles. This can be detrimental when running a competitive partnership process, particularly if commissioners are voted out of office mid-transaction. This is a heavy disruption, particularly when the newly elected officials are not on board with the plans of the previous owners. Sunshine laws mean that all decision making, and subsequently any potential conflict, is brought out into the open before the public.

In light of these added complexities, hospital boards have to work in tandem with the governmental owners—and some boards have more control than others. Depending on the degree to which government entities exert their control over a hospital, the hospital's board may face more or less resistance to

1 Florida Society of News Editors, "[SE Hospital District Files Malpractice Suit over Failed Bert Fish Merger](#)," 2012.

2 Cleveland Clinic, "[Indian River Medical Center to Join Cleveland Clinic Health System](#)" (press release), October 3, 2018.

change and transaction difficulties, making open and frequent communication crucial for success. A lack of communication, and the related lack of a unified plan, between a hospital's board and its owners is often the culprit in failed governmental hospital ownership changes.

### Where to Start

Governmental hospitals face added challenges in transactions as a result

of their organization. In addition, there are generally more individuals and stakeholders who have input in the transaction process. It is imperative to understand the positions and underlying motives of such individuals and stakeholders in order to chart a course that results in the best possible outcome for the governmental hospital. It is also important to fully understand the implication of sunshine laws and strategize how best to maneuver through the sunshine laws in a way

that still maximizes the competitive process, despite such laws.

Ultimately, it is essential that governmental hospital boards engage skilled legal advisors, an investment banker, and communications counsel to help educate hospital boards and navigate the intricacies of sunshine laws as they relate to partnerships and other strategic hospital transactions.

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