

## Governing in a Fishbowl: Leveraging the Time and Talents of Community Leaders on Public Hospital Boards

By James A. Rice, Ph.D., FACHE, Managing Director, Governance and Leadership, Gallagher Integrated

Public district hospitals face a distinct disadvantage when open meeting laws enable monitoring of their strategic planning, budgeting, and service line marketing strategies to be exposed to not only the public, but competition from for-profit and tax-exempt, non-profit hospitals. This article addresses such challenges by exploring: 1) how CEOs and board chairs can lead a public hospital board, 2) board meeting best practices for a public board, and 3) what to cover in executive session vs. at board meetings.

### Governing in “the Sunshine”: Trends in State Open Meeting Laws

Most state statutes sweep up public hospitals, as they do school boards, in their general open meeting laws. Groups that are required to hold official meetings publicly (“public bodies”) include government authorities, boards, commissions, committees, councils, or other bodies. These laws are generally held to apply to all public bodies of the state, or of one or more counties, cities, and school administrative units. Backers of such legislation usually argue that because hospitals receive millions of dollars in state and federal funds, the board meetings of these institutions should be subject to the state’s open meeting laws.<sup>1</sup> Hospital lobbying, however, has caused some relaxation in the rigor of these laws for hospitals in certain states where the argument is made that hospitals, although existing to serve in the public’s interest, are

<sup>1</sup> See *The First Amendment Handbook*, “Sunshine Laws,” Reporters Committee for Freedom of the Press (available at [www.rcfp.org/first-amendment-handbook/sunshine-laws](http://www.rcfp.org/first-amendment-handbook/sunshine-laws)); and “Con-Certificate of Need State Laws,” National Conference of State Legislators, August 25, 2015 (available at [www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx#2](http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx#2)).

sufficiently unique in that they’re facing competitive pressures impacting their vitality, and because of this, in certain situations (e.g., strategic planning, executive pay reviews, physician recruitment, and service innovations) exemption from open meetings is warranted.<sup>2</sup>

#### Key Board Takeaways

- Retaining the public’s trust and ability to remain exempt from local property and sales taxes requires boards and their CEOs to carefully establish and follow an assertive and quantitative “community benefits plan.”
- Public hospital board leadership needs a proactive strategy to inform local media and community leaders about backstories of the hospital’s competitive challenges and the need for reasonable confidentiality for strategic investment and growth plans.
- Public boards should meet periodically with their legal counsel and state hospital association staff about sensible ways to relax some of the open meeting regulations that constrain their capabilities for earned vitality as an important employer and care provider in the region.

### How CEOs and Board Chairs Lead a Public Hospital Board

As hospital district boards continue to advocate to minimize the competitive disadvantages of operating in compliance with open meeting laws,

<sup>2</sup> For more on this, see [www.rcfp.org/gsearch?srch=hospital+open+meetin+gs](http://www.rcfp.org/gsearch?srch=hospital+open+meetin+gs).

board leaders will need to earn the public's trust and support by establishing and following a culture of board work with these five imperatives:

1. Commit to develop and publish a community health needs assessment that was actively developed in collaboration with the public and other community organizations.
2. Post its strategic performance goals on the hospital's Web site along with its annual report to the community of its value and community benefits. This report should candidly describe results in care quality, consumer satisfaction, and financial vitality of the organization.
3. Convene a quarterly discussion with local mass media organizations to discuss the plans and performance of the hospital and its many services and programs.
4. On the Web site, make it easy for patients and the general public to see who serves on the hospital's board and senior executives of the hospital, as well as how to connect with them.
5. Convene an annual "Town Hall" type public forum to present a report on, and listen to reactions about, the organization's plans and performance.

Leadership to make these initiatives happen needs to be championed by the board chair and CEO.

## Board Meeting Best Practices for Public Boards

Much of the public hospital's work occurs in meetings of the board and its committees. Three practices are known to help enhance trust and the effectiveness of these meetings:

1. Seek an annual letter from the hospital's legal counsel that defines specific guidance about how best to address sensitive agenda items the board and CEO believe should best be explored in confidence or closed session.
2. Every other month, the board chair and CEO should discuss issues and board meeting agenda items that could place the organization in a disadvantaged position if the issue were anticipated to arise from animated community leaders or fellow board members.
3. Embrace a meeting culture that provides a relaxed environment where members feel

confident speaking up and everyone is encouraged to listen attentively to board comments and questions. External attacks and distractions can be minimized by:

- Sincere invitations to talk between meetings
- Practicing "Appreciative Inquiry"<sup>3</sup>
- Ensuring prompt and candid follow-up and follow-through to issues that surface in public meetings

## The Origins of Public Meetings

The challenge of open meetings has its roots in a 70-year-old hospital development law passed at the close of World War II.<sup>4</sup> After World War II, a booming economy and returning veterans catalyzed the desire for enhanced medical care and hospital access. The Hill-Burton law that resulted from this euphoria directed millions of taxpayer dollars to construct hundreds of small hospitals during the 1950s and 60s.<sup>5</sup>

In order to help pay for the operational costs of these newly capitalized hospitals, many state legislatures took action to enable the formation of public hospital districts. Most of these laws were enacted for certain public district hospitals to have the ability to levy taxes to generate revenue to retire Hill-Burton debt and support hospital operations. In consideration of this public funding came a call for the hospitals to conduct their governance in the open/sunshine. Ironically, with 50 years of hindsight, the statutes seeking to protect the public's interests may be constraining the public's access to needed hospital and healthcare services.

<sup>4</sup> Hospital open meeting laws are shaped by their state statutes for general public open meetings (see [https://ballotpedia.org/State\\_open\\_meetings\\_laws](https://ballotpedia.org/State_open_meetings_laws)).

<sup>5</sup> Surprising in today's hostile political environment, this was a bipartisan law named for a Northern Republican (Sen. Harold Burton of Ohio) and a Southern Democrat (Sen. Lister Hill of Alabama).

<sup>3</sup> Roselyn Kay, "Boards Using Appreciative Inquiry for Strategic Planning," Charity Channel, May 5, 2005 (available at <https://charitychannel.com/boards-using-appreciative-inquiry-for-strategic-planning>).

## Best Practices on What to Cover in Executive Session vs. with the Full Board

Most public hospital boards can consider two types of executive sessions to address sensitive plans, decisions, and investments. One form of executive session seeks to have the board meet with the CEO to explore alternative options away from prying eyes of competitors or suppliers trying to gain unfair advantage in future capital spending initiatives. The second form of executive session meets without any staff, also to discuss an array of sensitive issues.

### Executive Session to Mitigate Risks of Open Meeting Disclosures

While each state and legal counsel may guide the board and CEO to be more or less restrictive in the use of executive sessions without scrutiny by the public or media, the agenda items that need to take advantage of this more-protected venue include:

- Offer to purchase new facilities
- Discussion of investments to start a new clinical service
- Acquisition of a medical group
- Possible merger with another hospital or assisted-living facility
- New mass media marketing campaign for a bold entry into cancer care
- Preparation of a bid to provide orthopedic services to the area school district

The board should confer with legal counsel about how best to apply the following tactics, which will help optimize discussions during executive sessions:

- Earn the trust of key public groups like the League of Women Voters, veterans groups, school officials, minority chambers of commerce, and faith-based communities before you need their support to guard against their misinterpreting the board's need for confidential study of complex issues.
- Conduct many of the analyses and early study of options in selected committees or task forces that then bring the final decision to the public.
- Seek a temporary legal waiver from the open meeting law from the state attorney

general for selected projects of significant scale and sensitivity.

- Ask staff to meet with key parties to assess, screen, and prioritize decision points before it comes into the board's decision-making arena.

### Executive Session to Minimize Staff Constraint to Board Deliberations

The second form of executive session without staff can have an attorney or other advisor present. Executives are often sensitive to the idea of this type of session. Because one of the board's chief responsibilities is to assess the performance of the hospital and its CEO, boards often need to discuss sensitive issues without staff present. Some instances needing candor and confidentiality include:

- Annual meeting with the auditor
- Evaluation of the chief executive, and establishing the chief executive's salary
- Conflicts between two board members, or serious criticism of a board member by another
- Investigation into concerns about the chief executive, or a report from a management consultant
- Review of salary schedule, compensation policy, etc.

Some organizations can also establish a type of "semi-executive session" during which the chief executive is present, but no other staff. Such sessions may include discussions concerning:

- Lawsuits, complaints, or grievances from staff or former staff
- Individual staff situations
- Evaluation of the chief executive with the chief executive

Even if the chief executive is also a board member, the board can meet without staff present.

Despite a certain awkwardness that occurs when staff are asked to leave the room, and despite the frequent need to overcome resistance on the part of the chief executive, there are some discussions that are appropriately held just among board members, such as those listed above. For example, one board member might want to raise a concern about the development director to see whether others share the concern or whether his

negative experience was the exception. Another board member might want to discuss an issue involving herself and another board member without getting staff involved. A frank discussion of the chief executive's strengths and weaknesses usually results in both sides being clearer about each other's expectations.

It is hoped that these observations and suggestions will stimulate boards, executives,

and their legal counsel to be more intentional about their management of compliance with public meeting obligations. Without some relief from the constraints of these sunshine laws, either by conversion to not-for-profit, tax-exempt hospitals or by rewriting the open meeting requirements, we are likely to see a continuing erosion in the number and vitality of smaller district hospitals across the U.S.

*The Governance Institute thanks James A. Rice, Ph.D., FACHE, Managing Director, Governance and Leadership, Gallagher Integrated, for contributing this article. He can be reached at [Jim\\_rice@ajg.com](mailto:Jim_rice@ajg.com).*

