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Sunshine Laws and Public Hospital Governance: When Can Boards Close the Door?

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Public, or government-sponsored, hospitals account for one in five U.S. hospitals.[1] While this figure is trending downwards due to a combination of social, regulatory, and economic reasons that have led many public hospitals to consider alternative corporate structures, public hospitals continue to provide essential healthcare services to communities, particularly in rural areas serviced by a single healthcare provider. While good governance practices, such as building a qualified board, defining roles and responsibilities, and aligning strategies with goals, may apply to all hospital boards, public hospitals must be mindful that they do not enjoy the same level of board confidentiality as private hospitals. The public has broader access to information about public hospitals, such as financial performance, patient health outcomes, and executive compensation. This information, which is generally not made available by private institutions, factors heavily into board decision making, which itself is made public through open meetings and public records obligations, which vary from state to state.

What Are Sunshine Laws and Why Do They Exist?

Statutory in nature, public hospitals and their boards come in many forms—some hospitals are city- or county-owned, whereas others operate under a separate, legislatively created body or in some cases a non-profit entity that is treated as a quasi-governmental entity. Hospital board members may be appointed by public officials, the general public, and/or the board itself. Differences aside, public hospital boards in most cases are required by law to make meetings open to the public, based upon state laws. These statutory schemes are known as Open Meeting Acts (OMAs) or more generally, "Sunshine Laws." Hospital boards are keenly aware that Sunshine

1 American Hospital Association, "Fast Facts on U.S. Hospitals, 2022."

Laws exist, as the consequences for failing to comply may pose significant legal, economic, and reputational risk and create avoidable delays. However, OMAs, with their many nuances, still cause confusion.

Sunshine Laws were widely enacted by states in the 1960s and 1970s out of growing concern over a lack of transparency into government decision making and use of resources. Although the laws vary by state, they share a common purpose of providing the public with greater visibility into government processes, thereby holding government (or government-sponsored) bodies accountable to their constituents. Specifically, OMAs generally provide that when a governing body of a public entity convenes, the public receive 1) adequate notice of the meeting and 2) access to meeting minutes, including resolutions offered and votes taken.[2] Informal meetings that do not involve deliberation may not qualify for OMA coverage, and state statutes may exclude certain points of discussion (as described more below). In the wake of COVID-19, some states may have suspended or modified their OMAs to permit boards of public entities to meet virtually.

➜ Key Takeaways for Public Hospital Boards

- Consult legal counsel on procedural requirements, including providing notice and publishing minutes, under the applicable state OMA.
- Avoid discussing matters of public policy without giving thought to OMA requirements, even in informal settings or chance gatherings.
- Be mindful that emails, text messages, and phone calls to each other may trigger OMA requirements based on a quorum of members and/or may fall under public records obligations.
- Create board committees (or give the board authority to create committees at a later date) in your bylaws or other governing documents. In addition, committees should be given authority to make recommendations to, but not act on behalf of, the board.

2 A useful 50-state compendium of information on OMAs and public records statutes is published by the Reporters Committee for Freedom of the Press (see www.rcfp.org/open-government-guide).

What Are the Repercussions of Violations?

OMAs generally permit any "interested person" (a broad term that includes taxpayers, the media, public advocacy groups, and even governmental entities) to bring an action to prevent or reverse a threatened or potential violation by a hospital board. Violations of OMAs may result in civil remedies and/or criminal penalties, depending on the nature of the violation. Most commonly, the board action(s) in question is deemed null and void by a court. In that case, the board usually can conduct a "do-over," reaching the same result following the applicable OMA. In the event of serious OMA violations, a court may consider imposing more serious fines, suspensions, and even criminal sanctions. In addition to the legal consequences, violations create economic, timing, and reputational risks. Strategic partnerships declared void can cause a hospital to lose millions of dollars. Allegations alone, such as those made by local mayors in Eastern Tennessee over a public hospital's notice procedures (or lack thereof) in appointing a new CEO, may erode public confidence in its hospitals.[3]

Do Board Decisions vs. Deliberations Make a Difference?

This begs the question: do boards need to conduct *all* business pursuant to Sunshine Laws? Unsurprisingly, the answer is, *it depends*. As a threshold matter, whether or not an open meeting is required often depends on whether the entire board has gathered or only a few members, whether the gathering is informal or "chance," and whether the board plans to make a decision as opposed to having informal discussions about a topic. As a general rule, board decisions must be made at meetings open to the public, whereas deliberations may only require an open meeting if a quorum of the board is present. The distinction between the two, however, is less than clear-cut. A "decision" generally refers to an action or vote on a motion, proposal, or other measure that requires a vote by members and that furthers public policy. *(A note of caution: a gathering of members that results in consensus-building but does not involve a formal vote may still trigger OMA obligations.)* Although a "quorum" is generally defined by a hospital's governing documents or by statute, email and telephone interactions among board members complicate matters. Does a quorum exist on an email thread when board members are copied but do not respond? Has a meeting occurred if a board member calls several other members individually but back-to-back to convey the same message? The board should consult its trusted legal advisers to parse out these issues.

3 Ayla Ellison, "Tennessee Hospital Shakes up C-suite," *Becker's Hospital Review*, June 22, 2022.

When Are Closed Sessions Permitted?

While Sunshine Laws were enacted to promote transparency into government affairs, state legislatures have also recognized that certain exemptions that permit closed sessions are necessary, for example, to promote a competitive marketplace, protect personal privacy, and honor institutional autonomy. As a result, states generally allow public hospitals to conduct closed meetings for matters such as:[4]

- Marketing strategies and strategic plans
- Ongoing legal proceedings
- Legal advice
- Human resource issues (and hence, an individual's constitutional right to privacy)
- Real estate negotiations

In addition, many states have exemptions related to competitive bidding. For example, the Texas Health and Safety Code contains a specific carve-out for hospital boards to discuss pricing and other financial information related to bids for services or product lines in closed meetings.[5]

In some instances, board committee meetings may be conducted in closed sessions, so long as committee authority is limited to making recommendations to the full board. Board committees of public hospitals may provide a venue for discussions about sensitive issues such as quality and patient safety, strategic planning, compensation, and compliance. However, if a public hospital's bylaws or other governing documents grant committees the authority to act on behalf of the board, a claimant may argue that the committee has replaced the board and should be subject to OMA. A hospital's bylaws can create specific committees that will exist for a set period of time, known as "standing committees," and/or give the board authority to create "special committees" on an as-needed basis.

Finally, boards should be mindful of any differences in meeting requirements for standing versus special meetings under their governing open meeting laws. Special meetings are used to decide or discuss a matter that must be addressed before the board's next regularly scheduled meeting. While states may still require "adequate

4 See, for example, Tenn. Code Ann. § 68-11-238 (Meetings of public hospital boards to discuss, but not to adopt, marketing strategies, strategic plans, and feasibility studies may be closed; however, action adopting a plan or strategy is subject to the OMA, and studies considered in connection with the specific plan or strategy are subject to the public records laws.)

5 TEX. GOV'T CODE § 551.085(a)(1).

notice" to the public for special meetings, what constitutes adequate notice often depends on the circumstances, particularly in the case of an emergency. States may also provide boards more flexibility in how they conduct special meetings, for example, by allowing meetings where immediate action is required to be held by telephone conference call.[6]

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6 TEX. GOV'T CODE § 551.121(c)(1).