

**UNIVERSITY OF FLORIDA**

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October 2, 1997

**MEMORANDUM**

TO: Elizabeth D. Capaldi, Provost

FROM: Pamela J. Bernard, General Counsel

RE: Promotion and Tenure Committee Meetings

The promotion and tenure processes at the University of Florida, like that of virtually every other university in the nation, provide the opportunity for faculty to candidly assess the research activities, scholarship, teaching, service and other relevant factors of candidates seeking promotion and/or tenure. The evaluation of faculty members for promotion and tenure is primarily a faculty responsibility; scholars with expertise in a particular field are best able to judge the competence of their peers. The active participation of faculty in this evaluation, including discussions of the candidate by promotion and tenure committees, traditionally has been the model and expectation for such determinations. Likewise, confidentiality of this evaluation process long has been the tradition in academe to assure the most candid and honest evaluations of promotion and tenure candidates.

The Florida Legislature recognized the need to ensure that honest written assessments are made by peers reviewing an application for promotion and/or tenure by enacting Section 240.253 of the Florida Statutes. That law exempts from disclosure, which otherwise may be necessary under Florida's Public Records Law, documents containing such academic evaluations of performance.

Article I, Section 24 of the Florida Constitution, and Section 286.011 of the Florida Statutes, commonly known as the "Sunshine Law," require meetings of some university committees to be open to the public. A question arises as to whether the Legislature has recognized the need for confidentiality of the discussions of promotion and tenure committees as it has for documents reviewed and created in the promotion and tenure process. There is no express exemption in the Sunshine Law for such committee discussions.(1) As detailed below, absent such an express exemption, it is likely that a court would conclude that discussions by University of Florida tenure and promotion committees at the departmental and university-wide levels, given their current practices, must take place in a meeting open to the public.

The more comprehensive discussion which follows is not intended to be a detailed discussion of legal authority but, at your request, is a summary based upon an exhaustive review of all relevant constitutional provisions, Florida Statutes, Florida case law, Attorney General opinions, case law from other jurisdictions, relevant University of Florida documents, and other appropriate legal or policy authorities on the issue.

### **Analysis**

Under Section 286.011 of the Florida Statutes, the Legislature has determined that meetings of a board or commission of a state agency, including a state university, at which official acts are to be taken are open to the public.(2) The Sunshine Law provides that notice must be given of such meetings, and that minutes shall be kept. One of the consequences of a committee meeting being deemed subject to the Sunshine Law is that any discussion by two or more members of the body about an issue which conceivably will be taken up by the body is prohibited except at a public meeting.

Florida courts have defined the meaning of "board or commission" to include some types of committees. In the university setting, the Florida Supreme Court has held that a search committee for the dean of the University of Florida College of Law was a "board or commission" subject to the Sunshine Law. The case, *Wood v. Marston*, established the rule that advisory boards which perform policy-based, decision-making functions, even if not empowered to bind the university, are subject to the Sunshine Law. A key to the court's decision was that by screening candidates' applications, the committee performed a decision-making function delegated to it by the President of the university, even though the President had the final appointment authority to select the dean. Other courts have followed the Florida Supreme Court's analysis in examining the role of a committee in the

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(1) A logical argument could be made that an exemption to the public records law automatically gives rise to an exemption to the Sunshine Law. Prior to 1991, case law supported this proposition. However, the Legislature's intent to the contrary was made clear when it amended the Florida Statutes in 1991 to nullify case law which recognized that important public records law exemptions could result in open meetings exemptions when opening the meeting would give no effect to the public records exemption.

(2) In 1992, the Florida Constitution was amended to elevate the public records and open meetings laws to constitutional status. The Constitution provides the Legislature with the authority to create exemptions, but such exemptions are to be only as broad as necessary to justify the public necessity of the exemption.

decision-making process, finding the Sunshine Law applicable when committees provide "structured recommendations" which eliminate choices by the final decisional authority, or even when they rank choices for the final authority.

The Wood v. Marston decision did not hold that all meetings in a university setting are subject to the Sunshine Law. Committees clearly can remain outside the scope of the Sunshine Law by performing "fact-finding" staff functions, such as a committee which solely gathers information for a final authority and serves in a consultation role, or a committee which has no decision-making functions itself, whether final or not.

As to the question of whether the Sunshine Law would require discussions by promotion and tenure committees at the University of Florida to be held in public, we first must examine the process at each promotion and tenure level. On the departmental level, university rules provide that a positive vote on the promotion and tenure candidacy by the faculty of greater rank or by the tenured faculty, respectively, will result in the application going forward to the college level. When both the faculty and chairperson render negative votes, the application does not go forward.(3)

When a department uses a promotion and tenure committee, or an area committee, to recommend or vote on candidates for promotion and tenure, such committees likely would be found to be subject to the Sunshine Law. An essential function of the committee, to decide in appropriate cases not to recommend a candidate for consideration at the next level could reduce the alternatives available to the final authority. Florida courts have found a committee's reduction of options for the decision-maker is, at a minimum, sufficient to invoke the Sunshine Law. The delegation to the departmental committee of the right to eliminate a candidate from further consideration would, therefore, render the committee a "board" within the meaning of the Sunshine Law.(4)

Turning to promotion and tenure committees at the college level, these committees operate somewhat differently than committees which may be used at the departmental level. On the college level, the promotion and tenure committees serve in a purely advisory capacity. The college committee evaluates and discusses an applicant's candidacy, then reports to the dean its findings about whether a candidate's application should go forward to the university-wide Academic Personnel Board.(5) The dean makes the decision, and can accept or reject the committee's views. If the dean determines not to approve a candidate's application, the application will not go forward to the University's Academic Personnel Board.

An argument can be made that because the dean has absolute authority to determine independently whether each candidate's application should go forward, the committee's determination is purely advisory and does not reduce any choices the dean has in regard to the suitability of a candidate for promotion and tenure. There is no delegation from the dean of any part of dean's decision-making authority. Given the dean's independent

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(3) Note that faculty appeal rights are independent of the promotion and tenure committee process discussed herein.

(4) Many departments do not use promotion and tenure committees in the departmental evaluation process. Rather, the departments may use only written evaluations to provide the faculty members' votes. That process should not implicate the Sunshine Law inasmuch as there is no committee performing duties which would be subject to the Sunshine Law, nor is the process used as an evasive device.

authority, the committee's view is nothing more than information provided to the dean from faculty members performing the staff function of gathering information and advising the dean. The dean is free to consult with others, and only after such consultations as the dean deems necessary, and after the dean's personal evaluation of the applications and information, does the dean reach an independent judgment on the issue.

Thus, were a college promotion and tenure committee to serve only in the role of a fact-finder for the dean, reporting information and providing consultation to assist the dean in executing the dean's duty to evaluate a candidate's suitability for promotion and tenure, the committee probably would be determined to be outside the scope of the Sunshine Law. The dean also can gather information without using a committee at all, through direct contact with faculty members or others with whom the dean chooses to consult. The courts recognize that it would not be tolerable to require that every "contact and discussion" between a decision-maker and staff from whom they might seek information or consultation be a public meeting. It is the delegation to a committee of a whole or part of the decision-making responsibility, whether final or not, which triggers the Sunshine Law.

At the university-wide level, the University's Academic Personnel Board, constituted of five tenured full professors, the Provost, an Associate Vice President for Academic Affairs, and the Vice President for Research/Dean of the Graduate School, has final responsibility to advise the President with respect to promotion and tenure nominations which have been forwarded to it by a dean. In addition, the Academic Personnel Board advises the President on policy-related matters. The President is vested with the final authority to make the decision on whether a candidate will be recommended for tenure to the Board of Regents, or whether the candidate will receive promotion. The Academic Personnel Board forwards both its positive and negative recommendations to the President.

Like a college committee, an argument can be made that the Academic Personnel Board is not subject to the Sunshine Law because it does not reduce alternatives for the final authority. The Academic Personnel Board could be seen as providing the same type of information and consultation to the President as does the college committee to the dean. However, I believe the Sunshine Law would be interpreted to be applicable to the Academic Personnel Board because of its stated role of advising the President on policy matters and the existence of a number of key policy-makers on the committee.

It is important to note that even if meetings of some promotion and tenure committees at the University of Florida are determined to be subject to the Sunshine Law, the records reviewed by such committees, in particular the portion of the promotion and tenure packets which contain academic evaluations of a faculty member's performance, remain confidential under Florida law. This means the members of those promotion and tenure committees may not read from the confidential portions of the promotion and tenure packet in a public setting, nor may such committees distribute those portions of the packet to members of the public who might attend the meeting. Obviously, this produces an awkward if not unworkable result.

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(5) The word "dean" as used in this memorandum is meant to encompass other unit administrators who make the decision whether to forward a candidate's application to the university-wide committee.

In addition, the law is well settled that committees subject to the Sunshine Law may not use secret ballots for voting or as a substitution for discussion. However, if a committee subject to the Sunshine Law is not used, written ballots of faculty maybe used in the promotion and tenure process, as authorized in university rules and the collective bargaining agreement. Like in the departmental setting, such written ballots when used outside the committee structure in promotion and tenure decisions are confidential, even when they do not bear the name of the reviewer. However, as to the use of secret ballots in conjunction with a committee function, even if that committee were performing staff functions, courts will look upon such use with disfavor as a device intended to evade the requirements of the Sunshine Law.

The above opinion does not preclude the use of promotion and tenure committees. The opinion only expresses the view that if such committees are used on the departmental and university-wide levels as in current practice, those committees likely are subject to the requirements of the Sunshine Law. If a college committee is restricted to fact-finding and consultation, it probably is not subject to the Sunshine Law. I have not overlooked the consequences of this opinion and recognize there are compelling public policy arguments which can be made in support of having closed committee discussions of promotion and tenure candidates at every level. The law is clear that in interpreting the Florida Constitution, the law and other legal authority concerning opening meetings in Florida, a court is circumscribed in considering public policy. The court's role is to construe these laws broadly so as to permit access; it is the Legislature's role to create exemptions to the open meetings law based on strong public policy justifications. To date, the Legislature has not done so for all promotion and tenure committee meetings as they currently operate at this university. On balance, therefore, it is my view a court would apply the Sunshine Law broadly to hold that some of these meetings are within the scope of the Sunshine Law.(6)

## **Summary**

In summary, it is my opinion that meetings of promotion and tenure committees as currently used by the university on the departmental and university-wide levels are subject to the requirements of Florida's Sunshine Law. I will be happy to work with you and the faculty as we move forward to maintain the integrity of our promotion and tenure process while assuring compliance with the law.

Cc: President John V. Lombardi

(6) Further, this opinion does not express any view on the applicability of the Sunshine Law to any other committee at the University of Florida. Such determinations must be made on a case-by-case basis.