



ADVISORY COMMITTEE ON OPEN GOVERNMENT

December 21, 2020

The Honorable Gov. Bill Lee
The Honorable Lt. Gov. Randy McNally
The Honorable House Speaker Cameron Sexton
State Capitol
600 Dr. Martin Luther King, Jr. Blvd.
Nashville, TN 37243

Dear Governor Lee, Lt. Governor McNally and Speaker Sexton:

Please find attached a report from the Advisory Committee on Open Government evaluating the impact and effectiveness of the revisions to T.C.A. 49-7-154 - Confidentiality of applications and materials submitted with application for position of chief executive officer of public institution of higher education – Records of finalists.

When the General Assembly approved the revisions in April 2018, it mandated ACOG submit to the Governor and Senate and House speakers a report evaluating the impact and effectiveness of the revisions and identify considerations and recommendations relative to its continuation, revision, expiration.

Committee members met on multiple occasions this fall to discuss and develop the report. The full committee unanimously adopted it on December 17, 2020.

We sincerely hope this report helps inform your discussions and deliberations regarding this important issue for Tennessee governance and transparency. Please do not hesitate to contact us with questions or comments. The committee stands ready to help.

Respectfully,

Handwritten signature of Carey Whitworth.

Carey Whitworth
Co-Chair, ACOG

Handwritten signature of Adam Yeomans.

Adam Yeomans
Co-Chair, ACOG

Report on Selection Process Of Higher Education Chief Executives in Tennessee

Submitted by the Advisory Committee on Open Government

December 17, 2020

T.C.A. § 49-7-154 requires the Advisory Committee on Open Government (ACOG) to submit a report to the Governor, the Speaker of the Senate, and the Speaker of the House of Representatives evaluating the impact and effectiveness of Public Chapter 770 of the Tennessee 110th General Assembly. The report must identify considerations and recommendations relative to its continuation, revision, or expiration.

On September 23, 2020, ACOG met and was provided with an overview of T.C.A. § 49-7-154. The Committee voted to create a subcommittee to review and prepare a report. Subcommittee members included ACOG Co-Chair Adam Yeomans (representing the Tennessee Coalition for Open Government), ACOG member Carey Whitworth (representing the University of Tennessee), ACOG member Jack McElroy (representing the Tennessee Press Association), and Deborah Fisher (representing the Tennessee Coalition for Open Government).

The subcommittee met in public meetings on Friday, October 23, 2020, and Friday, December 4, 2020. This report was prepared and covers background, facts regarding recent hires and considerations for various options. The full committee approved the final report at a public meeting on Thursday, December 17, 2020.

Summary of Public Chapter 770 of the Tennessee 110th General Assembly and Background

Public Chapter 770 was signed into law on April 18, 2018 and added a new provision regarding the process of selecting a president of a public institution of higher education in this state. The legislation was sponsored by Sen. Joey Hensley and Rep. Harry Brooks, and had input from open government stakeholders.

The law made changes to T.C.A. § 49-7-154.

As background, T.C.A. § 49-7-154 came into being in 2012. It added an exemption to the Public Records Act to allow higher education governing boards to keep confidential records that would identify candidates for chief executive positions of chancellor and president, except for the records related to at least three (3) finalists selected by a search committee. Under the 2012 statute, the search committee was required to select *no fewer* than three (3) finalists.

Public Chapter 770 in 2018 effectively changed the requirement for how many finalist candidates for president positions had to be made public through the public records law. The new law reduced the requirement for public colleges and universities to name finalists. Specifically, the wording in the law changed from “no less than three (3)” to “up to three (3)”. This effectively meant that colleges and universities could name only one candidate publicly if they chose.

The 2018 change applied only to the following positions:

- (A) A president of a locally governed state university;
- (B) The president of the University of Tennessee system;
- (C) A president of a community college; or
- (D) A president or director of a Tennessee college of applied technology.

Notably, the change did not apply to the position of chancellor at public institutions of higher education, a position that continues to be covered under the “no less than three (3) finalists” provision. We will discuss this more later. But, in brief, it does not apply to five positions: chancellor of the Tennessee Board of Regents, and chancellor of each of the four universities in the University of Tennessee System.

The 2018 law kept in place the previous requirement that the documents regarding the finalist (or finalists, if the search committee chose more than one finalist) become public for at least 15 calendar days before the governing board made its final selection.

The 2018 change added a new provision for the college president selection: At least seven (7) calendar days before the governing board votes to select the candidate to fill the position, the governing board must hold at least one (1) public forum with the candidate. It also added a provision that required a governing board to hold a public meeting “to establish the search process, a timeline, and a statement of qualifications for the position” before initiating the search.

The 2018 provision is scheduled to be automatically repealed on July 1, 2021, reverting to the 2012 law.

Discussion

The 2012 law that first added some confidentiality around candidates for the chief executive position at public colleges in Tennessee was established because of concern by higher education governing boards that applicants might be negatively impacted in their current job if their names became public, which could reduce the pool of qualified candidates who apply.

Open government advocates expressed two major concerns:

- Closing records identifying candidates would prevent public vetting of candidates; and
- Closing records would undermine public confidence that a fair search and consideration of candidates had taken place for a powerful public position.

Even with the 2012 change, by 2018, a concern had arisen over a chancellor search at University of Tennessee. A candidate that was identified as a potential strong contender did not want to be considered for the UT chancellor position because the person’s name would become public in the “final three” list. It was explained that at stake for a person in such a situation was not only the person’s relationship with the person’s governing board, but also potential impact on donors and potential donors.

The University of Tennessee would soon be seeking a new president to serve over the entire system. UT President Joe DiPetro had announced he would retire by 2019. Other changes were taking place during this period. The UT Board of Regents was being reconstituted into a smaller board.

Open government advocates worked with the bill’s sponsors and then-Gov. Bill Haslam, and lawmakers passed the 2018 modification allowing “up to three” finalists to be announced in college president searches. Ultimately, the legislation passed in the House 79-12 and the Senate 31-0.

A repeal date for 2021 was included and ACOG, made up of 14 members of representatives of the government, public and news media, was tasked in the statute with providing a report by November 1, 2020.

Implementation

Since the legislation was signed into law, there have been eight college president positions filled under the jurisdiction of this provision — all of them at community colleges and colleges of applied technology. No presidential searches were completed by the locally governed institutions (the six universities that formerly were under the Board of Regents) or the University of Tennessee System.

Table 1 below provides a summary.

Name	Start Date	Institution	Were There Any Public Records Requests?	Were Any Public Records Requests Denied?	Number of finalists presented in public forums
Michael L. Torrence	May 1, 2018	Motlow State CC	No	No	4
Shanna Jackson	June 1, 2018	Nashville State CC	No	No	4
Jon D. Mandrell	July 1, 2018	TCAT Murfreesboro	No	No	3
Kelli A. Chaney	January 2, 2019	TCAT Knoxville	No	No	2
Bethany H. Bullock	January 2, 2019	Northeast State CC	No	No	2
Mike Whitehead	April 1, 2019	TCAT Pulaski	No	No	2
George J. Pimentel	July 1, 2020	Jackson State CC	No	No	3

Transparency Efforts

Though the statute required only one (1) finalist's information to become public, each of the community colleges and colleges of applied technology that hired a new president made at least two (2) finalists public, holding public forums with each. The Tennessee Board of Regents system office and many of its colleges proactively posted on their websites the resume and/or curriculum vitae of the finalists. There were no public records requests for the application materials of these candidates.

The community colleges and colleges of applied technology, and the Tennessee Board of Regents (TBR) which governs them and leads searches for their presidents, took other measures above and beyond the statutory requirements to publicize the search and selection by:

- Distributing statewide press releases for search-related meetings of the governing board and posting the press releases on the institution's website home page.
- Posting on TBR's and the institution's website the full board materials for respective executive search-related meetings, including the full search criteria for candidates.
- Inviting the public to attend a forum with the selected finalist(s).
 - Allowing all attendees to make statements and ask questions.
 - Distributing the times and locations of the public forums to the media and posting on the institution's website home page and the TBR website.
 - Publicly streaming the forums and posting the video to ensure access.
- Inviting the public to participate in a survey posted on the institution's website to provide feedback on the selected finalist(s).
- Publicly streaming and posting the video of Board of Regents meetings, including meetings with search-related actions and the appointment of the president on the agenda.

University of Tennessee

Because the problem related to attracting the best-qualified pool of candidates arose from an issue at University of Tennessee, we will note here the details of the selection of Randy Boyd as president of the University of Tennessee System in March 2020.

Boyd was appointed as interim president in September 2018 by the University of Tennessee Board of Trustees at the recommendation of its chairman, John Compton. Under state law, nothing prevents higher education governing boards from making appointments without a search.

After Boyd had served more than a year as interim president, the board decided in early 2020 not to conduct a search for a new president, but to consider appointing Boyd to the position instead. The board held a public meeting where their process for selecting a president was deliberated. A recommendation was made and approved that in lieu of a search, the board would do a performance review, which was made public, as well as a statewide feedback tour. There were roughly six to seven town hall style meetings across the state, hosted by the respective UT campuses, that were all open to the public and livestreamed. The public, students, faculty, and staff had the opportunity to ask

questions in those public forums. A survey was also distributed to employees and other stakeholders. The survey results were overwhelmingly positive, and the results were publicized. Finally, the decision to elect Boyd as president was deliberated in a public meeting that was livestreamed, publicly noticed, and archived. Because the UT Board of Trustees did not conduct a search, it did not fall under Public Chapter 770, which only applies to the confidentiality of records associated with applications “arising out of the process of search for and selecting an individual for a position of chief executive officer of a public institution of higher education...”

ACOG Considerations and Policy Options

The statute requires ACOG to submit a report “evaluating the impact and effectiveness of this subsection (c) and identifying considerations and recommendations relative to its continuation, revision, or expiration.”

Considerations:

1. While the new law allows governing bodies to reveal up to three finalists and as few as one, all higher education governing boards who hired a college president since 2018 have included at least two (2) finalists whose names and materials were public.

2. The problem that Public Chapter 770 was expected to fix had to do with creating a better candidate pool for chief executive positions at the University of Tennessee and other public higher education institutions by allowing more confidentiality.

The UT Board of Trustees did not conduct a presidential search which would have fallen under this subsection; thus, confidentiality provisions did not come into play. One UT Knoxville faculty member, Dr. Beauvais Lyons, attended the October 23, 2020 ACOG subcommittee meeting to voice support for a search committee for Chief Executive positions that includes faculty and students. Importantly, all institutions that have either appointed or conducted a presidential search since passage of the statute have held numerous public forums for faculty, staff, student, and community input. The faculty member stated he did not have concerns regarding the “up to three” provision.

The University of Tennessee Faculty-Senate approved a resolution on Oct. 19, 2020, calling on the UT Board of Trustees “to amend its bylaws to ensure a rigorous, open and inclusive search process for present and future presidential searches.”

The resolution also called for including stakeholders in the selection process — particularly, “faculty and administrators from across the relevant units, departments, colleges, and campuses.”

3. The new 2018 subsection did not apply to chancellor searches. However, a new chancellor for UT-Knoxville was selected during this period and the selection process fell under the provision that required at least three (3) finalist identities be public.

Three chancellor finalists were announced, and public forums were held for each before the board selected Donde Plowman.

4. The terms *chancellor* and *president* mean different things within the University of Tennessee System as compared with the rest of the state’s public higher education institutions.

Within the University of Tennessee System, four chancellors are in charge of campuses at UT Knoxville, UT Chattanooga, UT Martin, and UT Health Science Center. Conversely, within the Board of Regents, there is one chancellor over the entire system, and the *president* title is conferred on those who run the individual colleges. President is also the title conferred on the chief executive officers at the six locally governed institutions.

The reversal of titles relative to the job scope creates a question about the intent by the General Assembly — was the more limited (one finalist) public candidate pool meant to apply to the top position (president of the UT System and chancellor of the Board of Regents) or to the position at the college level (chancellors at UT universities and presidents at the state’s other local college and universities)?

5. The new requirement of at least one public forum with a finalist for college president was positive. It is possible that this codifies what was already generally the practice. The livestreaming of the public forums and making the video available on the website afterward provided an even higher level of transparency not required by statute.

Alternate Policy Options

ACOG is not making a recommendation but laying out possible options discussed by ACOG members.

- Allow the “up to three” finalist provision to expire, reverting to the requirement that at least three finalists be named.
- Continue the “up to three” finalist provision another three years with a new repeal date to allow for observation of the application of the statute at a public four-year institution.
- Allow the “up to three” finalist provision for college president positions to expire and require that a minimum of two (2) finalists be named.
- Continue the “up to three” finalist provision with no change.
- Continue the “up to three” finalist provision and expand it to include chancellors to provide consistency in the treatment of searches for public higher education chief executives.
- Amend the law to specify that the “up to three” provision applies to the chancellor of the TBR system, the president of the University of Tennessee system and the presidents of the locally governed four-year universities, but not to the TBR campus presidents and the chancellors of the University of Tennessee campuses.

Advisory Committee on Open Government

Carey Whitworth, Co-Chair, University of Tennessee

Adam Yeomans, Co-Chair, Tennessee Coalition for Open Government,

Jack McElroy, Tennessee Press Association

Leah May Dennen, Tennessee County Services Association

Shauna Billingsley, Tennessee Municipal League

Brett Henley, Tennessee School Board Association

Joy Fulkerson, League of Women Voters of Tennessee

Jeff Hughes, Tennessee Association of Police Chiefs

Dick Williams, Common Cause Tennessee

Amy Garner, Tennessee Hospital Association

Dan Haskell, Tennessee Association of Broadcasters

Harold Beaver, AARP Tennessee

Steve Cavendish, Society of Professional Journalists - Middle Tennessee Pro Chapter

Mike Breedlove, Tennessee Sheriffs' Association

Janet Kleinfelter, Tennessee Attorney General and Reporter (ex-officio)

Rep. Kelly Keisling, Chair, House State Government Committee (ex-officio)