

## THE GOVERNMENT IN THE SUNSHINE ACT— AN OVERVIEW

In response to a continuing concern that the federal government be held accountable to the American people, Congress enacted the Government in the Sunshine Act<sup>1</sup> in 1976, requiring that all portions of all meetings conducted by federal agencies be open to the public unless they fit within one of ten exemptions.<sup>2</sup> The Act reflects the feeling that greater accountability will increase the public's confidence in and understanding of the decision-making process.<sup>3</sup> This concept is not new; the Sunshine Act parallels open meeting provisions that are currently in force in all fifty states.<sup>4</sup> In

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### THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

The Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (to be codified in 5 U.S.C. § 552b) [hereinafter cited as Sunshine Act];

*Hearings on S. 260 Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Senate Hearings*];

*Hearings on H.R. 10315 and H.R. 9868 Before a Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *House Hearings*];

H.R. REP. NO. 880 (pt. 1), 94th Cong., 2d Sess. (1976) [hereinafter cited as 1 HOUSE REPORT];

H.R. REP. NO. 880 (pt. 2), 94th Cong., 2d Sess. (1976) [hereinafter cited as 2 HOUSE REPORT];

S. REP. NO. 1178, 94th Cong., 2d Sess. (1976) [hereinafter cited as CONFERENCE REPORT];

S. REP. NO. 354, 94th Cong., 1st Sess. (1975) [hereinafter cited as SENATE REPORT].

1. Sunshine Act § 3(a), 5 U.S.C.A. § 552b (West Supp. 1977). Section 3(a) is of primary relevance to the present discussion. It establishes the general requirement for open meetings and sets forth the exemptions from that requirement; it also contains provisions governing procedure and judicial review under the Act. Other sections of the Act take the form of amendments to various existing statutes. *See, e.g.*, Sunshine Act § 5(a) (amending 39 U.S.C. § 410(b)(1)(1970)).

2. Sunshine Act § 3(a)(b), 5 U.S.C.A. § 552b(b) (West Supp. 1977).

3. *See* SENATE REPORT 4-5; 1 HOUSE REPORT 2; 2 HOUSE REPORT 12. In a Harris survey commissioned by the Senate Subcommittee on Reorganization, Research, and International Organizations, public confidence in government was found to be very low. Of the 1,600 people surveyed nationwide, 76% agreed with the statement, "too many Government leaders are just out for their own personal and financial gain," and 78% agreed with the statement, "the trouble with most Government leaders is that they think people will believe them when they make promises." *Senate Hearings* 164-65 (testimony of Lou Harris, Harris Associates).

Meeting behind closed doors creates suspicion. This does not mean, however, that governmental entities meeting in private engage in improper conduct. This Act was not designed to police agency conduct, but rather to remove the cloak of suspicion which surrounds the secrecy of closed meetings. Although it is hoped that open meetings will restore confidence and trust in government, the Act's open meeting provisions are also intended to increase the public's understanding of the governmental process whether or not the understanding results in greater or less trust. *See House Hearings* 98 (prepared statement of Glen O. Robinson, Commissioner, Federal Communications Commission).

4. *See* SENATE REPORT 52 and statutes cited therein. Since the listing in the Senate Report, New York has become the fiftieth state to enact a law providing for open meetings. N.Y. PUB.

addition, other legislation is in effect on the federal level which opens up various aspects of the governmental process. The Freedom of Information Act<sup>5</sup> (FOIA), enacted in 1966, requires agencies and executive departments to provide a wide variety of government documents to the general public.<sup>6</sup> The Federal Advisory Committee Act of 1972<sup>7</sup> requires meetings of executive branch study panels and advisory and ad hoc committees to be open to the public.<sup>8</sup> Likewise, the House of Representatives and the Senate have adopted resolutions opening most meetings of congressional committees to the public.<sup>9</sup>

Although the Government in the Sunshine Act may not embody any new underlying policy concerns, it provides the public with its most meaningful opportunity to date to view the governmental decision-making process first-hand. The Act is of necessity, however, a product of balancing the need for openness with the needs for personal privacy and administrative efficiency. The ultimate goal of openness pervades the Act's diverse and detailed provisions, yet the drafters did not lose sight of the need to make the administrative burden as light as practicable. This Note will provide a general explanation of the Act's provisions, examining them in light of the stated policy of the Act and its legislative history. Those provisions which

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OFFICERS LAW §§ 90-101 (McKinney Supp. 1976). The success of state open meeting statutes provided strong support for the federal legislation. Although many state statutes are more or less comprehensive in their coverage than their federal counterpart and differ in other aspects, *see, e.g.,* Comment, *Open Meeting Laws in Michigan*, 53 J. URB. L. 532 (1976), they furnished proof that openness in government is workable and that many of the concerns and fears accompanying the change were, in hindsight, unnecessary or exaggerated. *See Senate Hearings; House Hearings*; 121 CONG. REC. S19433 (daily ed. Nov. 6, 1975) (remarks of Sen. Ribicoff). For useful but slightly outdated surveys of state open meeting laws see *State Open Meeting Laws*, in *House Hearings* 323-39 (prepared by Common Cause, January 1975); J. ADAMS, STATE OPEN MEETING LAWS: AN OVERVIEW (Freedom of Information Foundation Series No. 3, July 1974).

5. 5 U.S.C. § 552 (1970).

6. *Id.* § 552(b)(2).

7. 5 U.S.C. app. 1 (Supp. III 1973).

8. *Id.* § 10. Another bill governing federal agencies in the information area has been introduced in the current Congress. It would direct high-level agency officials to disclose many communications from non-agency sources concerning agency business and would also require the officials to maintain public calendars. S. 316, 95th Cong., 1st Sess. (1977). *See also* S. 1289, 94th Cong., 1st Sess. (1975).

9. S. Res. 9, 94th Cong., 1st Sess., 121 CONG. REC. S19371 (daily ed. Nov. 5, 1975); H.R. Res. 5, 94th Cong., 1st Sess., 121 CONG. REC. H5 (daily ed. Jan. 14, 1975); H.R. Res. 259, 93d Cong., 1st Sess., 119 CONG. REC. H1448 (daily ed. Mar. 7, 1973). The open meeting rules cover "markup" sessions (committee or subcommittee sessions in which bills are studied and revised before presentation to the full House or Senate), committee hearings and conference committee meetings. In the House, 92% of all committee hearings and markup sessions were open to the public in 1974 as compared to 56% in 1972. *House Hearings* 42 (prepared statement of Rep. Fасcell). A Common Cause study of the effects of the House open meeting rule concluded that open meetings had not resulted in the decreased productivity feared by opponents of the rule. *Senate Hearings* 78, app. I (testimony of John Gardner, Chairman, Common Cause).

sparked the most controversy in their adoption or which are likely to prove the most troublesome in their application will be scrutinized more extensively.

### SCOPE

The Sunshine Act requires that "every portion of every meeting of an agency shall be open to public observation,"<sup>10</sup> unless it falls within an exemption. Exemptions are permissive rather than mandatory, and a strong presumption in favor of openness exists.<sup>11</sup> However, the true import of the open meeting requirement becomes clear upon an examination of the scope of its application. Two questions arise in this context: what is considered to constitute a meeting, and which agencies come within the coverage of the Act?

*Agency.* Although the Sunshine Act's definition of the term "agency" incorporates by reference the FOIA's definition of the term,<sup>12</sup> the key definitional requirement is that an agency must be headed by a "collegial body"<sup>13</sup> of not less than two members, the majority of whom are appointed by the President and confirmed by the Senate.<sup>14</sup> Included within the scope of

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10. Sunshine Act § 3(a)(b), 5 U.S.C.A. § 552b(b) (West Supp. 1977). The Act does not address itself specifically to opportunities for public participation. Subsection (b) requires only that meetings be open "to public observation." Agencies are expected to provide space, visibility and acoustics which are adequate to ensure that the right to observe will be meaningful. See CONFERENCE REPORT 11; 122 CONG. REC. H7867 (daily ed. July 28, 1976) (remarks of Rep. Abzug).

11. See SENATE REPORT 3, 20. While exemptions are "permissive" in the sense that a meeting may be closed pursuant to one of the exemptions, this discretion is not unlimited. An agency must determine whether it would be in "the public interest" to open the meeting to the public. Sunshine Act § 3(a)(c), 5 U.S.C.A. § 552b(c) (West Supp. 1977). While an agency would appear to have a great deal of discretion in assessing the public interest in openness, it should be possible to challenge abuses of that discretion under the Administrative Procedure Act. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). If the public interest so requires, the meeting *must* be open.

12. 5 U.S.C. § 552(e) (Supp. IV 1974). The definition in the FOIA in turn relies on the Administrative Procedure Act's definition of the term, 5 U.S.C. § 551(1) (1970). The FOIA definition states that an "agency" includes

any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

13. Sunshine Act § 3(a)(a)(1), 5 U.S.C.A. § 552b(a)(1) (West Supp. 1977). The term "collegial body" was intended to encompass those who have common duties. 1 HOUSE REPORT 7.

14. Sunshine Act § 3(a)(a)(1), 5 U.S.C.A. § 552b(a)(1) (West Supp. 1977). Recent litigation regarding the scope of the definition of "agency" under the FOIA and the Administrative Procedure Act raises the possibility that the definition of "agency" in the Sunshine Act may cause similar problems of application. See *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 187-88 (1975); *Washington Research Project, Inc. v. United States Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 245-48 (D.C. Cir. 1974); *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). These cases suggest that administrative bodies may or may not fall within the

the definition are any subdivisions of an agency which are authorized to act on its behalf.<sup>15</sup> Therefore, panels or boards composed of two or more agency members which are authorized to conduct hearings, make preliminary decisions, or submit recommendations are subject to the provisions of the Act even if their actions are not final in nature.<sup>16</sup>

Excluded from coverage are advisory committees<sup>17</sup> and agencies headed by only one official.<sup>18</sup> However, an agency such as the United States Postal Service<sup>19</sup> or the National Railroad Passenger Corporation (Amtrak), which relies upon a single administrator for day-to-day supervision but is governed by a collegial body, is considered to be an agency for purposes of the Act, and is therefore subject to its provisions.<sup>20</sup> It is anticipated that the

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definition of "agency" depending upon the function they are performing in a particular instance.

Suggestions were made to replace the definition with a list of all of the administrative entities which Congress intended to be covered by the Act. 1 HOUSE REPORT 35 (additional views of Rep. Horton); *id.* at 540 (letter of Dec. 8, 1975 from the Office of Management and Budget to Rep. Brooks); 122 CONG. REC. H7898-99 (daily ed. July 28, 1976) (remarks of Rep. Kindness).

15. Sunshine Act § 3(a)(1), 5 U.S.C.A. § 552b(a)(1) (West Supp. 1977).

16. 1 HOUSE REPORT 7.

17. Advisory committees are governed by the Federal Advisory Committee Act, 5 U.S.C. app. 1 (Supp. III 1973). The Sunshine Act amends the Federal Advisory Committee Act to make the opening of advisory committee meetings subject to the exemptions contained in the Sunshine Act. Sunshine Act § 5(c) (amending 5 U.S.C. app. 1 § 10 (Supp. III 1973)). Prior to this amendment, advisory committee meetings were subject to the exemptions contained in the FOIA. This amendment represents an attempt to eliminate the problems that were caused by making meetings subject to exemptions designed for documents. CONFERENCE REPORT 26.

18. Even though a single-headed agency may be run by the agency head along with his deputies and assistants, they are not a collegial body since they do not share common duties. A commission in which one commissioner serves as chairman would, however, come within the definition of an agency.

One reason for excluding single-headed agencies from coverage under this Act's open meeting provisions concerns the nature of their decision-making process. Unlike the give-and-take nature of decision-making in collegial agencies, the director of a single-headed agency is the only person ultimately responsible for the agency action. This structural difference might account for the use of different standards. *House Hearings* 192 (statement of Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Dep't of Justice).

Two practical justifications were also advanced for excluding single-headed agencies from Sunshine Act coverage. First, there was concern that the bill would not pass if it included both multiheaded and single-headed agencies. *House Hearings* 74 (remarks of Rep. Abzug). Second, it was felt by some members of Congress that it would be better to experiment with multiheaded agencies before extending the concept to single-headed agencies as well. *See House Hearings* 225 (remarks of Rep. Fascell: "we wanted to walk before we started running"). Congress felt that single-headed agencies should eventually be subjected to open meeting requirements, but decided that this would best be achieved through separate legislation designed especially for those agencies. SENATE REPORT 17.

19. The Sunshine Act amends 39 U.S.C. § 410(b)(1) (1970) to make its provisions specifically applicable to the United States Postal Service. Sunshine Act § 5(a) (amending 39 U.S.C. § 410(b)(1) (1970)).

20. CONFERENCE REPORT 10-11.

Act's coverage will extend to forty-seven agencies.<sup>21</sup>

*Meeting.* A "meeting" is defined as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ."<sup>22</sup> Thus, a meeting is not limited to the situation in which agency members convene for the express purpose of discussing agency business. Congress rejected the "purpose test" to restrict the opportunity for circumvention of the open meeting requirement by agency members.<sup>23</sup> This definition ensures that not only the final announcement of the agency's action or decision but all of the discussion leading up to the final decision will be open to the public.

In order to constitute a meeting for the purposes of this section, there must be a substantive discussion of official agency business. A social gathering or casual encounter is not required to be opened to the public if there are only passing references to agency matters.<sup>24</sup> Similarly, a speech referring to agency affairs which is made by an agency member and attended by several other agency members does not constitute a meeting since there is no "joint conduct" or disposition of business.<sup>25</sup> On the other hand, conference telephone calls may be covered under this section if they include discussion of official agency business and involve the requisite number of agency members.<sup>26</sup> The determinative factors are not where and how the discussions are held, but rather what is discussed and by whom.

To be considered a meeting for the purposes of the Sunshine Act, discussions must be engaged in by a quorum of the agency (or subdivision authorized to act on its behalf). Therefore, a discussion between a Commissioner and his or her staff employees would not be a meeting. The quorum requirement presents a potential problem: agencies may avoid open meeting

21. For a list of the agencies the Sunshine Act is expected to govern, see SENATE REPORT 15-16. In the final analysis, however, the definition itself will determine which agencies will be covered. The Senate listing has already caused two agencies to question their inclusion. Both the Indian Claims Commission and the Railroad Retirement Board claim that they are not subject to the provisions of the Administrative Procedure Act and therefore should not be subject to the Sunshine Act. See *House Hearings* 422-23, 467-68.

22. Sunshine Act § 3(a)(2), 5 U.S.C.A. § 552b(a)(2) (West Supp. 1977).

23. See CONFERENCE REPORT 10-11.

24. SENATE REPORT 18; 122 CONG. REC. H7867 (daily ed. July 28, 1976) (remarks of Rep. Abzug).

25. SENATE REPORT 18.

In the Senate and House versions of the Act—S. 5, 94th Cong., 1st Sess. and H.R. 11656, 94th Cong., 2d Sess. (1975)—a discussion was considered a "meeting" if it "concerned" the joint conduct or disposition of agency business ("official" agency business in S. 5). The Sunshine Act definition is more narrow, requiring the deliberations to "determine or result in the joint conduct or disposition of official agency business." Sunshine Act § 3(a)(2), 5 U.S.C.A. § 552b(a)(2) (West Supp. 1977).

26. CONFERENCE REPORT 11.

requirements by engaging in discussions and making preliminary decisions in small groups which do not constitute a quorum of agency members.<sup>27</sup>

Another and more direct way for agency members to avoid open meetings is to consider agency business in writing. Consideration of agency business through circulation of written material among individual agency members is generally not subject to the open meeting requirement.<sup>28</sup> In addition, the written memoranda would not have to be disclosed under the FOIA's mandatory disclosure provisions if they fell within the FOIA's exemption for "inter-agency or intra-agency memorandums or letters . . . ."<sup>29</sup>

Agency use of written memoranda could thus prove to be a favorite technique for circumventing the requirements of the Act.<sup>30</sup> Fortunately, however, written consideration of agency matters is to some extent self-limiting. On controversial issues, written memoranda will generally provide

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27. The Attorney General of Florida suggested that the quorum requirement in the federal Act be changed to reach all meetings of two or more members (as Florida's sunshine law requires, *see* FLA. STAT. ANN. § 286.011 (1975); *Hough v. Stembridge*, 278 So. 2d 288 (Fla. App. 1973)) in order to avoid small-group decision-making. He noted that there have been no problems with Florida's requirement that two or more members hold open meetings. *House Hearings* 59-61 (remarks of Robert L. Shevin, Attorney General, State of Florida).

The apparent concern regarding such a change is whether the tighter standard would be too inflexible and thus cause widespread confusion and litigation. While it is difficult to predict how either standard would fare, future experience under the Sunshine Act should provide some degree of comparison since there are agencies covered by the Act in which two members constitute a quorum.

28. CONFERENCE REPORT 11. There are two situations, however, in which the information contained in intra-agency memoranda is required to be disclosed under the Sunshine Act. If the contents of a memorandum are discussed in a meeting, and the information contained in the memorandum is not exempt under any of the exemptions of the Sunshine Act, then the discussion of the memorandum must be open to the public. *See* Sunshine Act § 3(a)(b), 5 U.S.C.A. § 552b(b) (West Supp. 1977). Similarly, if the contents of a memorandum are discussed in a closed meeting, and the information contained in the memorandum is not exempt under the Sunshine Act, then the portion of the verbatim transcript covering that discussion will have to be made public. *See* notes 120-27 *infra* and accompanying text. It should be noted that the information contained in the memorandum would not be entitled to protection under Exemption 3 for "matters specifically exempted from disclosure by statute (other than § 552 of this title)" since the FOIA (5 U.S.C. § 552) is specifically excluded from the exemption's protection. Sunshine Act § 3(a)(c)(3), 5 U.S.C.A. § 552b(c)(3) (West Supp. 1977). Absent this exclusion, the argument would be that the information fell within the intra-agency memorandum exemption of the FOIA, *see* note 29 *infra*.

29. 5 U.S.C. § 552(b)(5) (1970); *see* Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366, 382-85 (discussing the limitations on this exemption which have been derived from the statutory language).

Such material would have to be disclosed under the FOIA, however, if it were properly characterizable as a final opinion. The FOIA requires that "[e]ach agency . . . shall make available for public inspection and copying final opinions . . . made in the adjudication of cases." 5 U.S.C.A. § 552(a)(2)(A) (West Supp. 1977); *see* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); Note, *supra* at 372-82.

30. *See* *House Hearings* 168 (statement of Roderick M. Hills, Chairman, Securities and Exchange Commission).

an insufficient basis for informed decision-making, and will necessarily give way to oral debate on the pros and cons of the proposed agency action.

A final and most important consideration is that many agencies routinely consider noncontroversial agency matters in writing in order to mitigate their heavy workloads.<sup>31</sup> Requiring written consideration of agency matters to be subject to the open meeting requirement could therefore seriously impede the administrative bureaucracy.<sup>32</sup>

The Sunshine Act could undoubtedly have been more tightly drawn to close off such loopholes.<sup>33</sup> If it had been, however, the Act would have become inflexible to the point that administrative efficiency might be seriously impaired and the quality of the work product adversely affected. While it is in the public interest to have open government, it is also in the public interest to have a government which operates as efficiently and productively as possible. Therefore, enough flexibility had to be retained to avoid straight-jacketing the agencies subject to the Act's provisions.

Although the definition of the term "meeting" might at first appear to be a source of confusion to agency members, no significant problems should result. The requirement of a quorum and joint action, and the legislative history on the meeting question<sup>34</sup> should help to allay any fears concerning the effect of stopping to chat or going out to lunch with other agency members. Drawing the line when only two agency members constitute a quorum may be more difficult, but if there is any question as to whether a discussion satisfies the definition of a meeting, the presumption is in favor of openness—the Act is premised on the belief that the open meeting requirement should not adversely affect the quality of decision-making,<sup>35</sup>

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31. See, e.g., *House Hearings* 520 (letter of Dec. 9, 1975 from Charles A. Tobin, Secretary, Federal Trade Commission, to Rep. Åbzug).

32. There would also seem to be obvious practical difficulties in applying the open meeting provisions to written consideration of agency business.

33. Commissioner Glen O. Robinson of the Federal Communications Commission, however, suggested that tight drafting might be ineffective, because

if agency officials are going to evade [the Act], then there is nothing that legislation can do to stop it . . . . I think the point is to try to enlist as much as possible the voluntary acceptance and coordination—an acceptance of the spirit of the legislation, and the one way of doing this is to provide some degree of flexibility.

*House Hearings* 82.

34. See notes 24-25 *supra* and accompanying text.

35. Perhaps the most vocal criticisms of the Act have been that open meetings will inhibit candid expression of controversial views and that open meetings will encourage grandstanding. See *House Hearings* 134-35 (statement of Arthur F. Burns, Chairman, Federal Reserve System); *id.* 183-84, 186 (prepared statement of Roderick M. Hills, Chairman, Securities and Exchange Commission). Although an audience might be somewhat inhibiting at first, it is reasonable to expect that agency members would adapt rapidly. While grandstanding will occur to some extent in open meetings, speaking for the benefit of the audience or the record may diminish as open meetings become the rule rather than the exception.

If the fear of inhibition stems less from a concern for self-consciousness than from a paternalistic concern that candid expression will not be beneficial to the public, it should be

and that any resulting administrative burden<sup>36</sup> is outweighed by the benefit to the public.

#### EXEMPTIONS

It is recognized in the Act that some agency deliberations involve sensitive material that may warrant an exception to application of the general open meeting requirement. The Act sets forth ten exemptions from this requirement.<sup>37</sup> Each reflects Congress' belief that the benefits of public

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remembered that a policy determination to the contrary has been made by Congress in drafting and enacting this legislation. A Harris opinion survey found that 72% of the people questioned believed that "most Government leaders are afraid to treat the public as adult and tell them the hard truth about inflation, energy, and other subjects." *Senate Hearings* 165 (testimony of Lou Harris, Harris Associates). Agency members are not permitted by the Act to make their own determinations concerning the proper degree of openness to present to the public except when the meeting falls within one of the ten exemptions of subsection (c), in which case they may decide to close it.

Proof that an open meetings policy can work in a federal agency comes from the experience of the United States Consumer Product Safety Commission, which formally adopted an open meetings policy in 1973. *See House Hearings* 48-57 (statement of Richard O. Simpson, Chairman, Consumer Product Safety Commission). The Chairman of the Commission stated that open meetings have neither inhibited expression nor increased grandstanding. *Id.* at 74. While admitting that "rules on 'openness' are not always easy to live with," he claimed that the experience of the Commission shows that the "difficulties perceived are over-estimated and become trivial when compared to the benefits of increased public confidence." *Id.* at 54. Other commissions with open meeting policies are the Commodity Futures Trading Commission, *see House Hearings* 358, and the Federal Election Commission, *see id.* at 497; 121 CONG. REC. S19433 (daily ed. Nov. 6, 1975) (remarks of Sen. Ribicoff).

It is also widely believed that not only will open meetings not impair decision-making, but they will actually result in improved decision-making by encouraging increased attendance, greater preparedness, and better organization of meetings. *See* SUBCOMM. ON REORGANIZATION, RESEARCH, AND INTERNATIONAL ORGANIZATIONS OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 1ST SESS., GOVERNMENT IN THE SUNSHINE: RESPONSES TO SUBCOMM. QUESTIONNAIRE ON S. 260 67 (Comm. print 1974) (letter of August 8, 1973 from Prof. Kenneth C. Davis to Sen. Ribicoff); *House Hearings* 98 (prepared statement of Glen O. Robinson, Commissioner, Federal Communications Commission); 121 CONG. REC. S19433 (daily ed. Nov. 6, 1975) (remarks of Sen. Ribicoff). Open meetings are also expected to minimize information leaks and end speculation about what transpired "behind closed doors," which often can be more injurious than the facts themselves. *See House Hearings* 98-99 (prepared statement of Glen O. Robinson, Commissioner, Federal Communications Commission); *Senate Hearings* 217-18 (testimony of Henry Geller, former general counsel of the Federal Communications Commission).

36. The administrative burden is eased to some extent by the provision that any deliberations engaged in pursuant to subsections (d) and (e) (regarding the closing of a meeting and advance public notice of a meeting, see notes 95-119 *infra* and accompanying text) are not considered to be meetings and are thus not subject to the open meeting requirement. Sunshine Act § 3(a)(2), 5 U.S.C.A. § 552b(a)(2) (West Supp. 1977). For example, if agency members vote on whether to close a meeting, that vote does not have to be opened to the public.

37. Sunshine Act § 3(a)(c), 5 U.S.C.A. § 552b(c) (West Supp. 1977). In addition, subsection (c) exempts from disclosure any information which subsections (d) and (e), pertaining to voting on closing meetings and public notice of meetings (see notes 95-119 *infra*), would otherwise require to be disclosed. Such information must, however, also fall within one of the specific exemptions enumerated in subsection (c). *Id.*

observation may be outweighed by other factors such as the right to privacy or the need for secrecy. As with the FOIA,<sup>38</sup> the exemptions from the Sunshine Act are permissive, not mandatory; an agency *may* close a meeting or any portion of a meeting if it is protected by one of the exemptions, unless the agency determines that “the public interest requires otherwise”<sup>39</sup> or the meeting is required to be kept open pursuant to any other law.<sup>40</sup> Closure of one portion of a meeting should not lead to closure of any other portions unless they too are protected by an exemption.

In order to close a meeting, an agency need not be certain that exemptible information will be disclosed. A meeting may be closed if it is “likely to”<sup>41</sup> disclose such information—if it is “more likely than not that the event or result in question will occur.”<sup>42</sup> If only a possibility of such disclosure is apparent, however, the meeting must be open.<sup>43</sup> The use of the word “likely” in describing when the exemptions may be invoked is designed to keep an agency from having to bear the unreasonable burden of proving certainty of disclosure in order to close a portion of a meeting, while making clear that the Act’s open meeting requirement cannot be circumvented simply by claiming that there is a “possibility” of disclosure.

Many of the Sunshine Act’s exemptions are similar or identical to exemptions found in the FOIA,<sup>44</sup> and were adopted with regard for the judicial interpretations of those exemptions. These include:

- (1) Exemption 1: Matters pertaining to national defense or foreign policy;<sup>45</sup>

38. 5 U.S.C. § 552(b) (1970); see Note, *Developments Under the Freedom of Information Act—1976*, 1977 DUKE L.J. 532.

39. Sunshine Act § 3(a)(c), 5 U.S.C.A. § 552b(c) (West Supp. 1977). See note 11 *supra*.

40. Sunshine Act § 3(a)(1), 5 U.S.C.A. § 552b(1) (West Supp. 1977).

41. Sunshine Act § 3(a)(c), 5 U.S.C.A. § 552b(c) (West Supp. 1977).

42. CONFERENCE REPORT 15.

43. If disclosure of exemptible information becomes imminent during a meeting, an agency may close that portion of the meeting pursuant to subsection (d)(2) of the Act. Sunshine Act § 3(a)(d)(2), 5 U.S.C.A. § 552b(d)(2) (West Supp. 1977).

44. 5 U.S.C. § 552(b) (1970).

45. Sunshine Act § 3(a)(c)(1), 5 U.S.C.A. § 552b(c)(1) (West Supp. 1977). This exemption covers material which is authorized by executive order to be kept secret in the “interests of national defense or foreign policy,” and which is properly classified under such an order. *Id.* In order for material to be “properly classified” it must currently be entitled to its original classification under the applicable executive order. 1 HOUSE REPORT 9. An agency must close a meeting if it is likely to disclose classified information; although the exemption imposes no specific obligation to do so, it would be an abuse of an agency’s discretion to disclose the information, see SENATE REPORT 21 (agency lacks authority to declassify material previously classified by another agency), and disclosure may also constitute a crime. See 18 U.S.C. § 798 (1970). The exemption is identical to Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1) (Supp. IV 1974), and parallel construction is expected. SENATE REPORT 20. There has been little definitive law on the FOIA’s exemption since Congress amended it in 1974, 5 U.S.C. § 552(b)(1) (Supp. IV 1974) (amending 5 U.S.C. § 552(b)(1) (1970)), to overrule *EPA v. Mink*, 410 U.S. 73 (1973),

- (2) Exemption 2: Internal agency personnel rules and practices;<sup>46</sup>
- (3) Exemption 3: Information specifically exempted from disclosure by statute;<sup>47</sup>
- (4) Exemption 4: Trade secrets and commercial or financial information;<sup>48</sup>

which had made the judiciary virtually a rubber stamp for executive decisions classifying information. See Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251, 252-59. As a result of the amendment, the judiciary now has power to determine whether documents are "both . . . classified and classifiable." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

46. Meetings concerning an agency's personnel rules and practices may be closed to the public, Sunshine Act § 3(a)(c)(2), 5 U.S.C.A. § 552b(c)(2) (West Supp. 1977), in order to protect the privacy of the agency staff and to facilitate the handling of internal management matters. This exemption extends only to internal matters and does not cover inter-agency personnel programs. Cf. 2 HOUSE REPORT 35 (Civil Service Commission suggestion that exemption be modified to cover such programs). Discussions concerning employees dealings with the public are also not exempt. SENATE REPORT 21. Exemption 2 of the FOIA, 5 U.S.C. § 552(b)(2) (1970), is the parallel provision for this exemption, and the Supreme Court's construction of the FOIA exemption in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976) should assist in the interpretation of the Sunshine Act. CONFERENCE REPORT 15. *Rose* held that Exemption 2 of the FOIA is not generally applicable to matters in which the public has a legitimate and significant interest. "Rather," the Court stated, "the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." 425 U.S. at 369-70. Use of this exemption is basically restricted to routine housekeeping matters in which the public has little interest. See Note, *supra* note 38, at 545-47.

47. Sunshine Act § 3(a)(c)(3), 5 U.S.C.A. § 552b(c)(3) (West Supp. 1977). See notes 54-59 *infra* and accompanying text.

48. *Id.* § 3(a)(c)(4), 5 U.S.C.A. § 552b(c)(4) (West Supp. 1977). This exemption is identical to the trade secrets exemption of the FOIA, 5 U.S.C. § 552(b)(4) (1970); its case law should govern the Sunshine Act provision. CONFERENCE REPORT 15; see *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975); *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416, 441-44. The exemptions cover trade secrets and commercial or financial information which is received from a person and which is either confidential or privileged. The court in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) stated that material is confidential for the purposes of Exemption 4 of the FOIA

if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

The same standard will no doubt be applied to Exemption 4 of the Sunshine Act. (The House Report indicates that matter subject to certain evidentiary privileges, such as the physician-patient privilege and the attorney-client privilege, qualifies under the "privileged" branch of this exemption. 1 HOUSE REPORT 10).

Information given to an agency by another agency may be protected by this exemption only if the first agency received the information from a person and the information otherwise qualifies under this provision. SENATE REPORT 23. The Sunshine Act is subject to the Administrative Procedure Act's definition of "person," an important term in this exemption, which includes an "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2) (1970).

- (5) Exemption 6: Information the disclosure of which would be an unwarranted invasion of personal privacy;<sup>49</sup>
- (6) Exemption 7: Investigatory records or information compiled for law enforcement purposes;<sup>50</sup>
- (7) Exemption 8: Information contained in or relating to examination, operating, or condition reports on financial institutions.<sup>51</sup>

49. Sunshine Act § 3(a)(c)(6), 5 U.S.C.A. § 552b(c)(6) (West Supp. 1977). See notes 63-73 *infra* and accompanying text.

50. *Id.* § 3(a)(c)(7), 5 U.S.C.A. § 552b(c)(7) (West Supp. 1977). The information is exempt if it would

(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

*Id.* Meetings may be closed only if the information which would be disclosed falls within one of these statutorily defined categories. Exemption 7 of the FOIA, 5 U.S.C. § 552(b)(7) (Supp. IV 1974), is almost identical in form, the only difference being that the Sunshine Act also covers non-written information which, if written, would be included in the investigatory records. Sunshine Act § 3(a)(c)(7), 5 U.S.C.A. § 552b(c)(7) (West Supp. 1977). The FOIA was amended in 1974 to its present reading to give it more limited application, *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 164-65 (1975), reversing a previous judicial trend which had given investigatory records virtually a blanket exemption. *See* Weisberg v. United States Dep't of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

To qualify for this exemption, the records or non-written information involved must concern specific persons. SENATE REPORT 23. Discussion involving general records, such as annual surveys, is not covered. *Id.* The legal strategy of an investigation may be protected if disclosure might frustrate the implementation of the strategy and interfere with enforcement proceedings. *Id.* If a discussion would disclose investigatory techniques or procedures, this exemption may be applicable, but only to the extent that the information has not already been disclosed to the public by judicial proceedings, the media, or other sources. 1 HOUSE REPORT 11. Although the records or information must pertain to a specific person, the "investigatory techniques and procedures" protected may be general in nature. *See id.*

Information supplied by a confidential informant is exempted only if disclosure would reveal the identity of the informant. SENATE REPORT 23. For the purposes of this exemption, another federal agency is not considered a confidential source. 1 HOUSE REPORT 11.

Subparagraph (D), protecting the identity of a confidential source, is intended to protect individuals, as is subparagraph (C), covering unwarranted invasions of personal privacy. *See* ATTORNEY GENERAL'S MEMORANDUM ON THE 1974 AMENDMENTS TO FREEDOM OF INFORMATION ACT 9 (1975).

For a discussion of the comparable FOIA exemption, see Note, *supra* note 38, at 547-53; Note, *supra* note 29, at 399-408.

51. Sunshine Act § 3(a)(c)(8), 5 U.S.C.A. 552b(c)(8) (West Supp. 1977). Such reports are "prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions," *id.*, and contain highly sensitive financial information "relevant to both monetary policy and bank regulatory functions." *House Hearings* 144 (remarks of Thomas O'Connell, Counsel to the Chairman, Federal Reserve System). Bank regulatory agencies preparing such reports are the Federal Reserve Board, Federal Home Loan Bank Board, and the Federal Deposit Insurance Corporation. SENATE REPORT 25. An identical exemption is contained in the FOIA, 5 U.S.C. § 552(b)(8) (1970), and the Sunshine Act exemption should be interpreted in a consistent manner. SENATE REPORT 25.

Congress' intent that these provisions be interpreted in a manner consistent with the FOIA<sup>52</sup> should help to minimize litigation. As many issues concerning the FOIA's exemptions have already been litigated,<sup>53</sup> the following discussion will focus only on those provisions of the Sunshine Act on which current FOIA case law sheds little light.

*Exemption 3: Specific statutory exemptions from disclosure.* This provision allows the agency to close a meeting or a portion of a meeting to avoid disclosure of information specifically exempted from disclosure by another statute, other than the FOIA.<sup>54</sup> To fit within this exemption, a statute must either leave no discretion on the issue of disclosure, set forth specific criteria for withholding, or describe specific types of information to be withheld.<sup>55</sup> The FOIA has been amended by the Sunshine Act so that both statutes now contain substantially identical third exemptions;<sup>56</sup> much of the case law for the previous FOIA exemption is therefore no longer valid.<sup>57</sup>

A permissive statute will come under this exemption only if the decision to withhold information under that statute is to some degree nondiscretionary; a standard to be applied or a listing of types of exemptible information must be included in the statute.<sup>58</sup> Thus, for example, section 1104 of the Federal Aviation Act of 1958 would not be covered by this exemption since it permits withholding of information if it is believed that disclosure "is not required in the interest of the public."<sup>59</sup>

52. See SENATE REPORT 20-25; 1 HOUSE REPORT 10.

53. See notes 45-51 *supra* and materials cited therein for discussions of the parallel FOIA exemptions.

54. Sunshine Act § 3(a)(c)(3), 5 U.S.C.A. § 552b(c)(3) (West Supp. 1977).

Although the Sunshine Act does not require an agency to close any meeting, it would be an abuse of discretion to hold an open meeting if another statute requires nondisclosure of the information to be discussed therein. In addition, the agency would often need to close its meeting in order to avoid statutory sanctions. See, e.g., 42 U.S.C. § 2000e-8(e) (1970) (information obtained by EEOC related to unlawful employment practices may not be publicly disclosed prior to the institution of proceedings involving such information, on penalty of a fine of not more than \$1,000 or imprisonment of not more than one year).

55. Sunshine Act § 3(a)(c)(3), 5 U.S.C.A. § 552b(c)(3) (West Supp. 1977).

56. The exemption in each statute specifically excludes the other act from its coverage; the provisions are otherwise identical. Compare *id.* with 5 U.S.C. § 552(b)(3) (1970), as amended by Sunshine Act § 5(b).

57. The language of the Sunshine Act is a direct response to the Supreme Court's holding in *FAA Administrator v. Robertson*, 422 U.S. 255 (1975), construing the related exemption in the FOIA. CONFERENCE REPORT 14; See Note, *supra* note 38, at 553-55.

58. The language in the exemption specifically excluding the FOIA (which permits but does not require withholding) from coverage under this provision is an indication of Congress' intent to extend coverage to other permissive statutes. See also 122 CONG. REC. H7897 (daily ed. July 28, 1976) (remarks of Rep. Fascell and Rep. McCloskey).

59. 49 U.S.C. § 1504 (1970). Another statute which is expressly mentioned in the Conference Report as not being protected by Exemption 3 of the Act is section 1106 of the Social Security Act, 42 U.S.C. § 1306 (1970) (information may not be disclosed, except as the Secretaries of HEW or Labor may prescribe by regulations). CONFERENCE REPORT 14.

*Exemption 5: Criminal accusations or formal censure.* Discussions which involve formal censure or an accusation that a "specific" person has committed a "specified" crime may be conducted in private.<sup>60</sup> The agency must be considering formal action, although it is not necessary that the formal action ever be taken.<sup>61</sup> This exemption recognizes that opening such a discussion to public observation could cause irreparable harm to reputation. Corporations, partnerships, organizations, and associations, as well as individuals, are protected by this provision.<sup>62</sup>

*Exemption 6: Unwarranted invasion of personal privacy.* An exemption may be triggered if a meeting or portion thereof is likely to result in disclosure of personal information and such disclosure would be a "clearly unwarranted invasion of personal privacy."<sup>63</sup> Discussions involving a review of an individual's professional competence, finances, health, or alleged drinking habits may be closed under the exemption.<sup>64</sup> Since the purpose of this provision is to protect an individual's privacy, any discussion which the individual prefers to have open to the public should not be closed.<sup>65</sup>

Exemption 6 should not be invoked automatically whenever there is a discussion which involves personal information relating to an individual; such unrestricted use would run counter to the stated policy of the Act.<sup>66</sup> Instead, the agency should employ a balancing test like that used under the similar exemption in the FOIA to determine whether the proposed invasion of privacy would be "clearly unwarranted."<sup>67</sup> A balancing test will allow the agency to consider the status of the individual concerned in deciding

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60. Sunshine Act § 3(a)(c)(5), 5 U.S.C.A. § 552b(c)(5) (West Supp. 1977).

61. See SENATE REPORT 22.

62. See note 48 *supra* for the Administrative Procedure Act's definition of "person," which is applicable to this exemption.

63. Sunshine Act § 3(a)(c)(6), 5 U.S.C.A. § 552b(c)(6) (West Supp. 1977).

64. SENATE REPORT 21; 1 HOUSE REPORT 11.

65. SENATE REPORT 22; 1 HOUSE REPORT 11.

66. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Sunshine Act § 2.

67. In *Department of Air Force v. Rose*, 425 U.S. 352 (1976), the Supreme Court dealt with the parallel FOIA exemption which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1970). The Court cited with approval the Senate Report's statement that [t]he phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.

425 U.S. at 372 (quoting S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965)).

whether a discussion can be closed.<sup>68</sup> Private individuals and public officials should be treated differently, since the public has a vested interest in the competence of a public official and thus in knowledge of all the factors that may affect the carrying out of his or her public duties.<sup>69</sup> The use of a balancing test may also, however, make administration of this exemption more difficult than administration of those exemptions which set forth particular criteria to guide the agency. This may, in turn, lead to increased litigation.

It could be argued that the criminal accusation or formal censure exemption is redundant in light of the privacy exemption. The privacy exemption applies only to individuals,<sup>70</sup> however, while the criminal accusation exemption is broader in scope.<sup>71</sup> There could therefore be no overlap if a charge were brought against a corporation. In addition, unlike the exemption for criminal accusation or formal censure, the privacy exemption requires a balancing of interests. Thus, there may be instances in which discussions concerning the formal censure of or criminal accusations against an individual covered by the criminal accusation or formal censure exemption would not be covered by the privacy exemption because of a determination that the invasion of privacy was not "clearly unwarranted." Congress has undertaken to extend protection in the area of formal censure or criminal accusation regardless of the strength or weakness of the privacy or reputation interests of the parties involved.<sup>72</sup> This judgment is, of course, always subject to the requirement that an agency open a meeting, regardless of the applicability of an exemption, if it finds that the public interest so requires.<sup>73</sup>

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68. See SENATE REPORT 21-22; 1 HOUSE REPORT 11. One of the House bills excluded "any officer or employee of the United States or any branch, department, agency or establishment thereof, with respect to his official duties or employment" from coverage under this exemption, as well as the exemption concerning criminal accusations and formal censure. H.R. 10315, 94th Cong., 1st Sess. § 3(c)(3)(4)(1975).

69. As the Supreme Court noted in *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964):

Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public reputation . . . [But there is a] paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Compare *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

70. The legislative history refers only to an individual's privacy. See SENATE REPORT 21-22; 1 HOUSE REPORT 11. In addition, the House Report specifically stated that the provision applied only to individuals. 1 HOUSE REPORT 12.

71. See note 62 *supra* and accompanying text.

72. The balancing approach appears less appropriate if corporations or public officials are involved, since both may be less deserving of this type of protection than private individuals. See notes 68-69 *supra* and accompanying text.

73. See note 11 *supra*.

*Exemption 9: Premature disclosure having specific adverse effects.*

The ninth exemption<sup>74</sup> applies in certain instances in which premature disclosure of information would have adverse effects on the continued efficient operation of an agency. Subparagraph (A) applies only to agencies such as the Securities and Exchange Commission and the Federal Reserve Board<sup>75</sup> which regulate “currencies, securities, commodities, or financial institutions.”<sup>76</sup> These agencies may hold closed meetings if disclosure of the information involved would be premature and likely to lead to “significant” financial speculation or “significantly” imperil the stability of any financial institution.<sup>77</sup> Meetings involving the financial stability of a federal reserve bank or the possibility of suspension of trading in a certain security could be closed under this exemption.<sup>78</sup>

There are three exemptions under the Sunshine Act which deal with financial information—Exemption 4, covering privileged or confidential financial information;<sup>79</sup> Exemption 8, covering examination, operating, or condition reports on financial institutions;<sup>80</sup> and Exemption 9(A). It is likely that some discussions of financial information will fall within more than one of these exemptions.<sup>81</sup> If Congress had simply included one exemption for financial information it might well have been so broad that it would have encompassed not only those situations covered by the exemptions, as they now stand, but other cases as well in which an exemption would be unjustified.<sup>82</sup> The inclusion of three exemptions gives the public a clearer idea of the reason for closure than would a broad exemption which could be cited uncritically as support for closing all meetings involving financial information.

Subparagraph (B) of Exemption 9 applies to any agency and covers information which, if prematurely disclosed, would be likely to “signifi-

74. Sunshine Act § 3(a)(c)(9), 5 U.S.C.A. § 552b(c)(9) (West Supp. 1977).

75. SENATE REPORT 24.

76. Sunshine Act § 3(a)(c)(9)(A), 5 U.S.C.A. § 552b(c)(9)(A) (West Supp. 1977). Included within the term “financial institutions” are

banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, exchanges dealing in securities or commodities, such as the New York Stock Exchange, investment companies, investment advisors, self-regulatory organizations subject to 15 U.S.C. § 78s, and institutional managers as defined in 15 U.S.C. § 78m(f).

SENATE REPORT 24.

77. Sunshine Act § 3(a)(c)(9)(A), 5 U.S.C.A. § 552b(c)(9)(A) (West Supp. 1977).

78. SENATE REPORT 24.

79. See note 48 *supra* and accompanying text.

80. See note 51 *supra* and accompanying text.

81. See *House Hearings* 143.

82. Outdated financial information which is neither privileged nor confidential, nor contained in an operating, examination, or condition report, and the release of which posed no danger of speculation or threat to financial stability, could easily fall within a vague general exemption.

cantly frustrate implementation of a proposed agency action."<sup>83</sup> This provision is explicitly inapplicable, however, if the nature or content of the agency's proposed action has already been disclosed by the agency itself,<sup>84</sup> or in cases in which an agency is required by law to disclose such information before it takes final action.<sup>85</sup>

If, however, disclosure of proposed agency actions is made by a source other than the agency, the agency is still protected by this provision.<sup>86</sup> If the purpose of this provision is to avoid "significant frustration" in the implementation of a proposed action, then the policy of protecting information already disclosed by another source is questionable, since most of the potential harm will probably have occurred already. In addition, the policy seems unsound if one accepts the view that transcripts made of closed meetings are to be released once there is no longer any need for the exemption.<sup>87</sup> According to this view, if information regarding a proposed agency action were disclosed by a source other than the agency, and the agency subsequently closed a meeting in which the information was discussed, the transcript of the meeting would have to be made available, since there would no longer be any reason for the exemption. The information would thus reach the public notwithstanding closure of the meeting.

Compelling the opening of meetings in which the information discussed has not been disclosed by the agency but rather has been "leaked" to the public might tend to encourage such unauthorized disclosures. Nevertheless, the policy of the Act is to provide the public with the "fullest practicable information."<sup>88</sup> Once the nature or content of the proposed action has been disclosed—by whatever means—it is unlikely that holding an open meeting would significantly increase the chances that implementation of the agency's action would be frustrated. Since this concern and not the source of the disclosure should be the primary focus of subparagraph (B) the decision to allow closure if a source other than the agency has previously released the information appears misguided. Subparagraph (B) of Exemption 9 is worded loosely. It is somewhat of a catch-all, designed to ensure that the efficacy of agency actions is not sacrificed entirely to the goals of

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83. Sunshine Act § 3(a)(c)(9)(B), 5 U.S.C.A. § 552b(c)(9)(B) (West Supp. 1977).

84. *Id.*

85. *Id.* For example, if a proposed agency rule must be published before it can be implemented, discussion of the proposed rule may not be closed pursuant to subparagraph (B) of Exemption 9.

The soundness of requiring an agency to open a meeting concerning a proposed agency action if it is required by law to disclose such information prior to taking final action has been challenged. See *House Hearings* 209-10 (prepared statement of Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Dep't of Justice).

86. CONFERENCE REPORT 15.

87. See notes 132-34 *infra* and accompanying text. This policy determination also appears to be inconsistent with the decision made concerning Exemption 7 in regard to investigative techniques and procedures. See note 50 *supra* and accompanying text.

88. Sunshine Act § 2 (quoted at note 66 *supra*).

openness and public disclosure. As a practical matter, the most significant protection that this exemption is likely to afford will be to allow agencies to close discussions of labor negotiation strategy and other collective bargaining problems.<sup>89</sup>

*Exemption 10: Issuance of subpoenas and participation in civil actions or adjudications.* The final exemption provided by the Act protects matters concerning issuance of subpoenas and participation in litigation or agency adjudications.<sup>90</sup> Meetings involving discussion of whether to begin an action or adjudication may be closed pursuant to this provision. Discussion must involve a particular case or series of cases; discussion of general adjudication policies would not be exempt under this provision.<sup>91</sup> Underlying this exemption are the concerns that discussion of litigation strategy may affect an agency's ability successfully to resolve a case, and that public discussion of the innocence or guilt of the person involved may injure the person's reputation and affect the fairness or impartiality of the hearing.<sup>92</sup>

Closing agency adjudications to the public will not deprive the public of all knowledge regarding the adjudication. Adjudications which may be closed pursuant to this exemption must be decided solely on information in the record,<sup>93</sup> and the entire record will always be open for public inspection.<sup>94</sup>

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89. The Civil Service Commission expressed the view that Exemption 2, covering internal personnel rules and practices, see note 46 *supra*, should be modified to cover inter-agency personnel programs and policies, including government-wide labor-management relations strategy and negotiation tactics. 2 HOUSE REPORT 35. The Commission has a valid concern in desiring to keep discussions of inter-agency labor-management strategy and negotiation tactics private. It would be self-defeating and counterproductive to require the Commission to open such meetings to the parties with whom they are preparing to negotiate. Fortunately, discussions of negotiation tactics, although not covered by the personnel exemption, should be protected by subparagraph (B) of Exemption 9.

In the Senate version of the Act, S. 1, 94th Cong., 1st Sess. (1975), there was an additional subparagraph which authorized the withholding of information which related to the purchase of real property by an agency. The Act does not have such a provision, but the conferees intended that "in an appropriate instance" information relating to the purchase of real property by an agency would be protected by subparagraph (B). CONFERENCE REPORT 15.

90. The exemption protects meetings which

specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

Sunshine Act § 3(a)(c)(10), 5 U.S.C.A. § 552b(c)(10) (West Supp. 1977).

91. SENATE REPORT 26.

92. *Id.*; 1 HOUSE REPORT 12-13.

93. Sunshine Act § 3(a)(c)(10), 5 U.S.C.A. § 552b(c)(10) (West Supp. 1977). *See also* 5 U.S.C. § 554 (1970). Section 4 of the Sunshine Act, prohibiting *ex parte* communications in formal adjudications, will help to ensure that the cases are decided solely on the basis of the record. Sunshine Act § 4(a), 5 U.S.C.A. § 557(d) (West Supp. 1977).

94. *See* 5 U.S.C. § 554 (1970).

## SUNSHINE PROCEDURES

*Public Announcement of Meetings*

Whether a meeting is to be open or closed, the Sunshine Act requires public announcement of each meeting to be held by the agency at least one week before the meeting is scheduled to be held.<sup>95</sup> The announcement may be made less than one week before the meeting only if a majority of the collegial body determines by a recorded vote that the meeting must be called at an earlier date due to the urgency of agency business.<sup>96</sup> Even under such circumstances, the announcement must still be made at the "earliest practicable time."<sup>97</sup>

A recorded vote is not required to change the time or place of a meeting following the original public announcement, but such a change cannot be made unless it is publicly announced at the earliest practicable time.<sup>98</sup> After public announcement of a meeting, if an agency wishes to change the agenda of a meeting or change the decision to open or close the meeting, a majority of the full agency membership must determine by recorded vote that agency business requires the change and that earlier announcement of the change was not possible. The nature of the change and the vote of each member must be publicly announced at the earliest practicable time.<sup>99</sup>

Although the notice requirements decrease the agency's flexibility, advance public notice is necessary in order to make the public's right to attend meetings a meaningful one. The provisions of this subsection do, however, take into account situations in which unforeseen circumstances necessitate a more flexible notice requirement.

For advance notice to be meaningful, reasonable means must be used to ensure that the public is informed.<sup>100</sup> Although the statute sets forth no particular requirements other than publication in the Federal Register,<sup>101</sup>

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95. Sunshine Act § 3(a)(e)(1), 5 U.S.C.A. § 552b(e)(1) (West Supp. 1977). The announcement must notify the public of the time, place and subject matter of the meeting, whether it is to be open or closed, and the name and telephone number of the agency-designated official handling requests for information. *Id.* Identification of the subject matter of the meeting must be specific, referring to docket numbers or titles, for example, rather than simply providing a broad subject heading such as power rates or consumer complaints. SENATE REPORT 29-30; 1 HOUSE REPORT 15.

96. Sunshine Act § 3(a)(e)(1), 5 U.S.C.A. § 552b(e)(1) (West Supp. 1977).

97. *Id.* In all instances in which public announcement must be made at the "earliest practicable time," the conferees intended that the announcement be made "as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question." CONFERENCE REPORT 18.

98. Sunshine Act § 3(a)(e)(2), 5 U.S.C.A. § 552b(e)(2) (West Supp. 1977).

99. *Id.*

100. CONFERENCE REPORT 19.

101. All of the information required to be included in the public announcement, along with

reasonable means should include posting notices on the agency's public notice boards, publishing weekly calendars, using agency mailing lists, publishing notices in publications with readership which might be interested in agency meetings, and using press releases or recorded telephone messages.<sup>102</sup> Although these means do not exhaust the possibilities and need not all be used, agencies should take a pragmatic approach and employ a variety of measures so that the information is quickly and reliably disseminated.

### *Procedures to Close Meetings*

To close a meeting under one of the exemptions, a majority of the full membership of the agency must vote to take such action.<sup>103</sup> Each meeting for which closure is proposed must be voted on separately,<sup>104</sup> except in the case of a series of meetings concerning the same agenda item which are to be held within thirty days of the first meeting of the series.<sup>105</sup> In such a case, a single vote may be taken with respect to the whole series.<sup>106</sup>

The vote of each agency member voting on a closure motion is to be recorded and must be made public within one day of the vote,<sup>107</sup> in order to

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any changes, must be published in the Federal Register immediately following each public announcement. Sunshine Act § 3(a)(e)(3), 5 U.S.C.A. § 552b(e)(3) (West Supp. 1977).

102. *Id.*; SENATE REPORT 30-31.

103. Sunshine Act § 3(a)(d)(1), 5 U.S.C.A. § 552b(d)(1) (West Supp. 1977). If a meeting of an agency subdivision is involved, only a majority of the membership of the subdivision would have to vote to close the meeting. *See id.*; Sunshine Act § 3(a)(a)(1), 5 U.S.C.A. § 552b(a)(1) (West Supp. 1977).

The requirement that a "majority of the entire membership of the agency" must vote to close a meeting in order for it to be closed has been criticized as impractical. It has been suggested that a quorum vote rather than a majority vote should be required. *House Hearings* 545 (letter of Dec. 8, 1975 from the Office of Management and Budget to Rep. Brooks, Chairman, House Committee on Government Operations).

In order to assure that personal privacy interests are not overlooked, the Act includes a provision requiring a recorded vote whenever a person "whose interests may be directly affected" by a meeting or portion thereof for any of the reasons mentioned in Exemptions 5, 6 or 7 (criminal accusations or formal censure, personal privacy, or investigatory records) requests closure, and an agency member requests a vote on the matter. Sunshine Act § 3(a)(d)(2), 5 U.S.C.A. § 552b(d)(2) (West Supp. 1977).

104. Sunshine Act § 3(a)(d)(1), 5 U.S.C.A. § 552b(d)(1) (West Supp. 1977). A separate vote must also be taken "with respect to any information which is proposed to be withheld under subsection (c)." *Id.*

105. *Id.*

106. *Id.*

107. Sunshine Act § 3(a)(d)(3), 5 U.S.C.A. § 552b(d)(3) (West Supp. 1977). No proxies are allowed. Sunshine Act § 3(a)(d)(1), 5 U.S.C.A. § 552b(d)(1) (West Supp. 1977). A written copy of all votes taken to close a meeting or series of meetings, or to withhold information (*i.e.*, votes taken pursuant to subsections 3(a)(d)(1) or 3(a)(d)(2)) must be made public within one day of the vote, regardless of whether the meeting was voted open or closed. Sunshine Act § 3(a)(d)(3), 5 U.S.C.A. § 552b(d)(3) (West Supp. 1977). For any portion of any meeting which is to be closed to the public, a written explanation of the agency's action along with a list of all persons expected to be present at the meeting and their affiliation must also be made public within one day of the vote. *Id.* The agency's written explanation of its action should be as detailed as

provide the public with the voting record of agency members on questions of openness. Although all votes must be recorded, there is no requirement that the vote be taken at a meeting. Notation voting using a written tally sheet or ballot would therefore be acceptable.<sup>108</sup> The voting requirement is not expected to impose a significant administrative burden on the agencies since it is expected that most agencies will actually seek to close very few meetings.<sup>109</sup> It must also be remembered that deliberations concerning closure<sup>110</sup> or the public announcement of a meeting<sup>111</sup> are by express provision not considered "meetings"<sup>112</sup> and are therefore not subject to the open meeting requirement of subsection (b).

Certain agencies may find that the majority of their meetings fall within one of the exemptions to the open meeting requirement. In such a case, the Sunshine Act provides for closure by regulation.<sup>113</sup> Agencies which would be eligible to close a majority of their meetings pursuant to Exemptions 4, 8, 9(A) or 10<sup>114</sup> may promulgate regulations<sup>115</sup> providing for the closing of such meetings or portions thereof in the event that a majority of the agency membership elects closure by recorded vote at each exempt meeting, and a copy of the vote, identifying each member, is made available to the public.<sup>116</sup> If regulations are employed, voting procedures and the public notice requirements are relaxed.<sup>117</sup>

The agencies which should be able to employ this section are those regulating financial institutions, securities or commodities, such as the

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possible without disclosing the matter which is intended to be kept secret pursuant to one of the exemptions. At a minimum, the agency should specify the exemption under subsection (c) which provides the basis for closing the meeting, and the factors that were considered in making its decision. SENATE REPORT 28; 1 HOUSE REPORT 13-14.

108. SENATE REPORT 28; 1 HOUSE REPORT 13.

109. See 1 HOUSE REPORT 15. Voting will not be necessary to hold an open meeting, so the requirement will only be triggered if the agency itself or some interested private party raises the closure issue. See note 103 *supra*.

110. See notes 103-06 *supra* and accompanying text.

111. See notes 95-102 *supra* and accompanying text.

112. Sunshine Act § 3(a)(a)(2), 5 U.S.C.A. § 552b(a)(2) (West Supp. 1977).

113. Sunshine Act § 3(a)(d)(4), 5 U.S.C.A. § 552b(d)(4) (West Supp. 1977). The promulgation of regulations must be in accordance with subsection (g). Sunshine Act § 3(a)(g), 5 U.S.C.A. § 552b(g) (West Supp. 1977).

114. See notes 48, 51, 74-78, 90-94 *supra* and accompanying text.

115. Included in the regulations should be documentation of the likelihood that the agency will need to close a majority of its meetings pursuant to Exemptions 4, 8, 9(A) or 10, as well as descriptions of the types of meetings which will be subject to the regulations and a statement of the exemption(s) relied upon for closure of each type of meeting. SENATE REPORT 29.

116. Sunshine Act § 3(a)(d)(4), 5 U.S.C.A. § 552b(d)(4) (West Supp. 1977).

117. The provisions of subsection (3) (concerning public notice of meetings) and paragraphs (1)-(3) of subsection (d) (concerning voting and disclosure of votes) do not apply to a meeting closed by regulation. Nevertheless, the agency must make a public announcement of the time, place and subject matter of the meeting at the earliest practicable time. The agency is not required, however, to disclose material exempt under subsection (c) in the course of making the announcement. *Id.*

Federal Reserve Board and the Securities and Exchange Commission, and those whose primary business is adjudication, such as the National Labor Relations Board.<sup>118</sup> In determining whether it can properly close a majority of its meetings, an agency should examine its meeting records for recent years. An agency's asserted need to close a majority of its meetings should be subjected to careful scrutiny, since this provision is not designed to aid agencies in circumventing the open meeting requirement.<sup>119</sup> Rather, it is intended to ease an administrative burden in cases in which it might otherwise be unduly heavy.

### *Verbatim Transcript Requirement*

For each meeting or portion of a meeting which is closed to the public, the agency must maintain a verbatim transcript or electronic recording of the proceedings.<sup>120</sup> If a meeting or portion thereof is closed under the exemptions dealing either with information the disclosure of which would be likely to have specific adverse effects on the agency's operations,<sup>121</sup> reports on financial institutions,<sup>122</sup> or agency adjudications and participation in litigation,<sup>123</sup> the agency may maintain a set of minutes in lieu of a transcript or recording.<sup>124</sup>

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118. SENATE REPORT 29; 1 HOUSE REPORT 14. Congress did not want to subject these agencies to the normal voting requirements since they would prove extremely burdensome if applied to a majority of an agency's meetings. However, Congress believed that there would still be some meetings conducted by these agencies which could be opened to the public; it therefore did not want to grant any agency a blanket exemption to the open meeting requirement. An amendment to S. 5 to grant such an exemption to the Federal Reserve Board (except when it dealt with consumer activities) was defeated in the Senate by a vote of 57-36. 121 CONG. REC. S19434-39 (daily ed. Nov. 6, 1975).

119. See note 118 *supra*.

120. Sunshine Act § 3(a)(f)(1), 5 U.S.C.A. § 552b(f)(1) (West Supp. 1977). The agency must also have its chief legal officer certify publicly that the meeting (in his or her opinion) may properly be closed, specifying the relevant exemptions. *Id.* The agency is required to retain a copy of the certification, along with a statement from the agency official presiding over the meeting which sets forth the time and place of the meeting and the persons in attendance. *Id.*

A requirement that agencies maintain and make available a set of minutes for all meetings open to the public was deleted from the final version of the Act. See H.R. 11656, 94th Cong., 2d Sess. § 3(f)(2) (1976). Minutes of open meetings would be useful; members of the public may not always attend agency meetings in which they are interested and, more importantly, may not always receive adequate public notice to make the right to attend meaningful, as in the case of an emergency meeting. See Sunshine Act § 3(a)(e)(1)-(2), 5 U.S.C.A. § 552b(e)(1)-(2) (West Supp. 1977); see notes 100-02 *supra* and accompanying text. Congress may have felt that since the majority of agency meetings are expected to be open, requiring an agency to maintain a set of minutes for all open meetings would be too costly. See *House Hearings* 43 (statement of Rep. Fascell).

121. See notes 74-82 *supra* and accompanying text.

122. See note 51 *supra*.

123. See notes 90-94 *supra* and accompanying text.

124. Sunshine Act § 3(a)(f)(1), 5 U.S.C.A. § 552b(f)(1) (West Supp. 1977):

Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a

The record, minus exemptible material, must be made available promptly and must be easily accessible to the public.<sup>125</sup> Material which falls within an exemption may be deleted from the record prior to public disclosure. There is no requirement that the agency follow any set procedure in determining what material may be deleted; no recorded vote is mandated.<sup>126</sup> The agency need not edit the transcript or recording word for word; if exemptible material is interspersed throughout a portion of a record so as to constitute an integral part of the record, no part of that portion need be made available to the public.<sup>127</sup>

Earlier versions of the Act required that the agency provide the public with a paraphrase or summary of the deleted material, together with the reason for the deletion and the statutory authority for such action.<sup>128</sup> The present Act requires neither.<sup>129</sup> Public disclosure of a paraphrase or summary of the deleted material could conceivably have the same adverse effects as disclosure of the exempt material itself, such as harm to personal reputation or encouragement of financial speculation. However, disclosure of only the reasons for the deletion and the statutory provisions relied on would not impose on the agency any significant administrative burden, and would provide the public with an explanation for the action. Lacking even the barest explanation, it will be difficult for members of the public intelligently to challenge a deletion.<sup>130</sup>

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description of each of the views expressed on any item and the record of any roll-call vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

125. Sunshine Act § 3(a)(f)(2), 5 U.S.C.A. § 552b(f)(2) (West Supp. 1977). The Senate Report states that these materials must be "promptly placed in a public document room." SENATE REPORT 32.

Copies of the record are to be made available at the actual cost of duplication. Sunshine Act § 3(a)(f)(2), 5 U.S.C.A. § 552b(f)(2) (West Supp. 1977). A complete copy of the transcript or minutes, or a complete recording of each meeting (including exemptible material) closed to the public shall be kept by each agency for two years following the meeting, or until one year after the conclusion of an agency proceeding relating to the meeting, whichever occurs later. *Id.* The provisions of the Federal Records Act, 44 U.S.C. §§ 3301-14 (1970), which govern disposal of records, do not apply to the transcripts, recordings and minutes kept by an agency pursuant to subsection (f). Sunshine Act § 3(a)(k), 5 U.S.C.A. § 552b(k) (West Supp. 1977).

126. See Sunshine Act § 3(a)(f)(2), 5 U.S.C.A. § 552b(f)(2) (West Supp. 1977). Voting on each deletion was considered to be too time-consuming. 122 CONG. REC. H7872 (daily ed. July 28, 1976) (remarks of Rep. Flowers).

127. SENATE REPORT 31.

128. S. 260, 93d Cong., 1st Sess. § 201(e) (1974); H.R. 10315, 94th Cong., 1st Sess. § 3(f) (1975).

129. See Sunshine Act § 3(a)(f)(2), 5 U.S.C.A. § 552b(f)(2) (West Supp. 1977).

130. See 122 CONG. REC. H7886-89 (daily ed. July 28, 1976). By comparison, the provision in the FOIA allowing deletions from documents which must be publicly disclosed requires that the justification for the deletion be "explained fully in writing." 5 U.S.C. § 552(a)(2)(C) (Supp. IV 1974).

There are three significant considerations underlying the provisions requiring verbatim records. First, since the Sunshine Act does not, and could not reasonably, require agency certainty that discussion will actually disclose exemptible material, the discussion may turn out to be non-exempt when the meeting does take place. In this situation, the public should have the opportunity to learn what transpired. Even if there is exemptible material in the record, it may be contained in an identifiable segment which can be deleted while still affording the public access to the remaining portions of the record. Second, verbatim transcripts or recordings assure the public a meaningful remedy if the meeting was improperly closed—the record can subsequently be made available to the public.<sup>131</sup> Third, certain matters may remain sensitive only temporarily; keeping a verbatim record permits an agency to make the record available once the matters are no longer sensitive.

The legislative history of the Sunshine Act seems to indicate that once withholding of exempt material contained in a transcript no longer serves the policy underlying the exemption, the material becomes non-exempt and the transcript must be disclosed to the public.<sup>132</sup> This is consistent with the Act's policy of recognizing the public's entitlement to the "fullest practicable information" with respect to governmental decision-making processes.<sup>133</sup> Thus, for example, a transcript of a meeting concerning an adjudication closed under Exemption 7 would have to be made available to the public once the adjudication was over. Similarly, once information discussed in a meeting closed pursuant to Exemption 9(A) is no longer likely to lead to significant financial speculation, the transcript of that meeting must be disclosed.<sup>134</sup>

Opposition to the transcript requirement has centered around the concern that the possibility of eventual disclosure will inhibit discussion and thereby impair the quality of decision-making.<sup>135</sup> There is no reason why

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131. Sunshine Act § 3(a)(h)(1), 5 U.S.C.A. § 552b(h)(1) (West Supp. 1977). Verbatim transcripts and recordings will also be useful in litigation in determining if the meeting was improperly closed, since the court may examine any portion of the material in camera pursuant to subsection (h). *Id.*

132. See *House Hearings* 152 (remarks of Rep. Abzug: "I think that information which is exempt is exempt for so long as is necessary to carry out the policy underlying the exemption . . ."); cf. 121 CONG. REC. S19440 (daily ed. Nov. 6, 1975) (remarks of Sen. Chiles: "an agency will not have to review continually the sensitivity of the transcripts of its board meeting. A periodic review at reasonable intervals is all that is needed"). But see *House Hearings* 168 (remarks of Rep. Fascell: "Time does not change the exemption").

133. Sunshine Act § 2.

134. Transcripts of discussions closed pursuant to Exemptions 7 and 9 are those most likely to be required to be disclosed at a subsequent time. It is important to realize, however, that agencies are only required to maintain a transcript for a specified period of time. See note 125 *supra*. Thus, disclosure of transcripts of once-exempt discussions must (as a practical matter) be effected within that period.

135. See 1 HOUSE REPORT 34 (additional views of Rep. Horton); 2 HOUSE REPORT 33-34

this should be the case, however, if it is assumed that openness will not in itself reduce the quality of decision-making. Any discussions which are exempt from the open meeting requirement may be deleted from the transcript which is made available to the public, and agency members should be able to express their opinions on such matters with unrestrained candor. Even if the deleted portions of a transcript are later disclosed, this will only occur following a judicial determination that the material is non-exempt<sup>136</sup> or following an agency determination that there is no longer a need for withholding under any exemption. In short, discussion in closed meetings should not be any less candid than in open meetings since the material will not be disclosed to the public if it is exempt, and if it is disclosed it is material that properly and candidly could have been discussed at an open meeting.<sup>137</sup>

This is not to say that there will be no burden or possible adverse effects caused by these provisions, but only that they should be slight and that they are outweighed by the need for disclosure. This subsection returns to the public some of the openness taken away by the provisions which give agencies necessary flexibility in determining whether a meeting should be closed.

#### JUDICIAL REVIEW

Federal district courts are empowered to enforce the requirements of the Sunshine Act by injunctive, declaratory, or other appropriate relief.<sup>138</sup> The Act grants standing to "any person";<sup>139</sup> no specific harm to the person's interests must be shown in order to bring an action against an agency.<sup>140</sup> This liberal standing provision is consistent with the purpose of the Act—to open the government to the scrutiny of the public.

Actions may be brought prior to or within sixty days after the meeting

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(letter of April 5, 1976 from the Overseas Private Investment Corporation to Rep. Rodino), 41 (supplemental views of Rep. Hutchinson and Rep. McCloy).

The concern has also been raised that transcripts will facilitate information leaks. 2 HOUSE REPORT 41 (supplemental views of Rep. Hutchinson and Rep. McCloy). If the agency exercises due care in the maintenance of the transcripts, recordings or minutes, however, there should be no serious problem with information leaks. Maintaining a transcript and disclosing the parts which are non-exempt will actually reduce the possibility that information relating to the meeting will be distorted through speculation.

The cost of these provisions is also expected to be minimal, since it is anticipated that almost all of an agency's meetings will be open. 1 HOUSE REPORT 15.

136. See Sunshine Act § 3(a)(h)(1), 5 U.S.C.A. § 552b(h)(1) (West Supp. 1977); see note 147 *infra* and accompanying text.

137. See note 35 *supra*.

138. Sunshine Act 3(a)(h)(1), 5 U.S.C.A. § 552b(h)(1) (West Supp. 1977).

139. *Id.*

140. The FOIA, 5 U.S.C. § 552(a)(4)(B) (1970), and the Privacy Act of 1974, 5 U.S.C. § 552a(g)(1) (Supp. IV 1974), also grant standing without reference to specific harm.

out of which the alleged violation arises.<sup>141</sup> If public announcement of the meeting was made improperly, an action may be brought within sixty days following the improper announcement.<sup>142</sup> There is no requirement that a plaintiff give notice to the agency prior to filing suit.<sup>143</sup>

Defendant agencies have thirty days in which to answer a complaint.<sup>144</sup> The court may examine in camera portions of the transcript, recording or minutes of a closed meeting, and may take additional evidence if it finds it necessary.<sup>145</sup> The burden of proof is on the agency to sustain its actions.<sup>146</sup> The reason for this is twofold. First, the thrust of the Act is to open governmental decision-making to the public; if an agency conducts its business in closed meetings, it should have to justify the secrecy. Second, the agency in most cases is the only party which will have the information necessary for resolution of the dispute.

The district court may grant equitable relief as it deems appropriate including declaratory judgments, injunctions against future violations, or orders requiring disclosure of a transcript or a portion thereof which it has determined to be properly disclosable.<sup>147</sup> The court has no power to invalidate, set aside, or enjoin any substantive action taken or discussed at the meeting out of which the violation arose when the case before it arises solely from a Sunshine Act violation.<sup>148</sup> Although the invalidation of substantive action would be a powerful sanction which would provide an agency with an

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141. Sunshine Act § 3(a)(h)(1), 5 U.S.C.A. § 552b(h)(1) (West Supp. 1977).

142. *Id.*

143. An action may be brought in either the federal district court for the district in which the meeting was held, the district in which the agency maintains its headquarters, or the District of Columbia. *Id.* In earlier versions of the Act suit could also be brought in the district where the plaintiff resides or has its principal place of business. S. 5, 94th Cong., 1st Sess. § 201(g) (1975), H.R. 10315, 94th Cong., 1st Sess. § 3(h) (1975). The FOIA contains a provision similar to these early versions of the Sunshine Act. 5 U.S.C. § 552(a)(4)(B) (Supp. IV 1974). This type of venue would be more in keeping with the purpose of the Act and with citizen standing. Granting standing to "any person" and then requiring suit to be brought in most instances in Washington, D.C. seriously weakens the ability of the general public to litigate under this Act. *See House Hearings* 104, 199 (remarks of Rep. Abzug). *But see id.* 104 (statement of Prof. Jerre Williams, Chairman, Administrative Law Section, American Bar Association).

144. Sunshine Act § 3(a)(h)(1), 5 U.S.C.A. § 552b(h)(1) (West Supp. 1977).

145. *Id.*

146. *Id.*

147. *Id.* There are three instances in which a court could require disclosure of a transcript: (1) if the meeting was improperly closed; (2) if the meeting was properly closed but the material turned out to be non-exempt; and (3) if the meeting was properly closed, and the information was exempt at the time the transcript was publicly disclosed, but later became non-exempt.

If a transcript of a closed meeting is made as required, disclosure of the transcript is a suitable remedy for a violation of the Act. However, if an agency violates the provisions of the Act by failing to make a record of a closed meeting, there is no comparable remedy. The same is true if an agency fails to announce an open meeting, since there is no requirement that a transcript or minutes of such proceedings be kept.

148. Sunshine Act § 3(a)(h)(2), 5 U.S.C.A. § 552b(h)(2) (West Supp. 1977).

incentive to comply with the provisions of the Act, it would also increase uncertainty regarding agency actions and could seriously impede smooth administrative functioning.<sup>149</sup>

Under a second review provision, if a federal court is otherwise reviewing agency action, it may, if the issue is properly raised, review a violation of the Sunshine Act and afford appropriate relief.<sup>150</sup> To come within this provision, the agency action must be reviewable on other grounds.<sup>151</sup> In rare instances, a federal court inquiring into a violation under this paragraph may invalidate substantive agency action on the basis of the violation, but the violation should be a serious one before the court takes such action.<sup>152</sup> If the violation was unintentional and did not prejudice the interests of the party raising the issue, the court should grant other appropriate relief.<sup>153</sup> Under certain circumstances, attorney's fees will also be available to the prevailing party.<sup>154</sup>

#### RELATIONSHIP OF THE ACT TO THE FOIA AND PRIVACY ACT

The Sunshine Act states that "nothing herein expands or limits the present rights of any person" under the FOIA except with respect to the availability of transcripts, recordings or minutes.<sup>155</sup> These items are gov-

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149. Invalidating substantive agency action would be unduly harsh when there was no hint of impropriety as to the action itself and there had been substantial reliance on the finality of the action. Another possible sanction which would probably provide a strong deterrent to violation of the Act would be the removal from office of any agency official who had repeatedly and intentionally violated the Act. *Senate Hearings* 268 (prepared statement of Prof. Douglas Wickham, Univ. of Tennessee).

Numerous state open meeting statutes provide penalties for violations. J. ADAMS, *STATE OPEN MEETING LAWS: AN OVERVIEW* 14-17 (Freedom of Information Foundation Series No. 3, July 1974). Strong objections have been made to the imposition of any type of personal liability on agency officials. It has been contended that personal liability would inhibit performance of duties and discourage individuals from accepting agency appointments. 122 CONG. REC. H7870 (daily ed. July 28, 1976) (remarks of Rep. Horton). It has also been claimed that personal liability would amount to "a breach of the doctrine that action taken by United States employees as part of their official duties does not subject them to personal responsibility." 121 CONG. REC. S19378 (daily ed. Nov. 5, 1975) (Sen. Percy, quoting Justice Department memorandum).

A sanction that would be available only after repeated intentional violations should not inhibit officials in the performance of their duties, however. Moreover, such liability would not violate the doctrine of qualified immunity since, if an official had repeatedly and willfully violated the provisions of the Act, that official would not have been acting in good faith or within the scope of his employment. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974).

150. Sunshine Act § 3(a)(h)(2), 5 U.S.C.A. § 552b(h)(2) (West Supp. 1977).

151. *Id.*

152. CONFERENCE REPORT 23.

153. *Id.*

154. The court may assess against the losing party attorney's fees and litigation costs incurred by the party who "substantially prevails." Sunshine Act § 3(a)(i), 5 U.S.C.A. § 552b(i) (West Supp. 1977). Costs may not be assessed against the plaintiff, however, unless the court determines that the action was initiated for "frivolous or dilatory purposes." *Id.*

155. Sunshine Act § 3(a)(k), 5 U.S.C.A. § 552b(k) (West Supp. 1977).

erned by the Sunshine Act if they are required to be kept and made available by its provisions.<sup>156</sup>

Although the Act purports not to affect the FOIA except with regard to the availability of transcripts, there seem to be instances in which material which is authorized to be withheld under the FOIA would be required to be disclosed under this Act since the exemptions of the Sunshine Act do not parallel all the exemptions of the FOIA. For example, since the Sunshine Act has no exemption which is parallel to the inter-agency and intra-agency memorandum exemption of the FOIA,<sup>157</sup> discussion of information contained in such memoranda must be held publicly unless the information falls within one of the new statute's ten exemptions. Similarly, if discussion of a memorandum occurs in a closed meeting and the information discussed is not covered by one of the Act's exemptions, the portion of the transcript of that meeting containing the discussion must be made public.<sup>158</sup> The information contained in the memorandum would not be entitled to Exemption 3 protection, which extends to "matters specifically exempted from disclosure by statute . . .," since the exemption specifically excludes the FOIA from its coverage.<sup>159</sup>

The Privacy Act<sup>160</sup> is in no way affected by the Sunshine Act.<sup>161</sup> Records which are accessible to an individual under the Privacy Act cannot be withheld by an agency pursuant to the provisions of this Act even if they are contained in transcripts, recordings or minutes of properly closed meetings.

#### CONCLUSION

The Sunshine Act's recognition of the public's entitlement to the "fullest practicable information regarding the decision-making processes of the Federal Government"<sup>162</sup> has provided the public with a truly meaningful opportunity to observe firsthand the workings of collegial federal agencies. The use of the word "practicable" evidences Congress' awareness of the need to balance openness with other concerns, such as the needs for personal privacy and administrative efficiency and flexibility. In balancing these

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156. *Id.* Although the availability of transcripts, recordings, and minutes of closed meetings is governed by this Act, they are still subject to any other pertinent FOIA requirements, such as indexing. SENATE REPORT 39.

157. 5 U.S.C. § 552(b)(5) (1970). The Sunshine Act also has no exemption which is parallel to Exemption 9 of the FOIA protecting "geological and geophysical information and data, including maps, concerning wells." 5 U.S.C. § 552(b)(9) (1970).

158. See note 28 *supra*.

159. Sunshine Act § 3(a)(c)(3), 5 U.S.C.A. § 552b(c)(3) (West Supp. 1977).

160. 5 U.S.C. § 552a (Supp. IV 1974). For a thorough discussion and analysis of this legislation see *The Privacy Act of 1974: An Overview*, 1976 DUKE L.J. 301.

161. See Sunshine Act § 3(a)(m), 5 U.S.C.A. § 552b(m) (West Supp. 1977).

162. Sunshine Act § 2.

concerns Congress has done a commendable job of drafting a law which achieves its goals of providing the public with an important right while retaining significant flexibility and otherwise imposing as slight an administrative burden as possible.

There are certain provisions of the Act which will probably cause confusion and unnecessary litigation. Some provisions have struck a balance that will inevitably be viewed by some as going too far and by others as not going far enough. However, the flaws in the Act and the fears that accompany change must not be projected out of proportion so as to obscure the considerable accomplishments of this legislation.