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Openness in Government — A Continuing Era

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THE FEDERAL BAR ASSOCIATION

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OPENNESS IN GOVERNMENT — A CONTINUING ERA

By Jeffrey S. Edelstein

This is the second symposium issue of the *Federal Bar Journal* on Openness in Government. Since the first symposium issue was published in 1975,[1] there have been a number of significant developments in the field of government information and privacy. The Government in the Sunshine Act became effective in March, 1977. As expected, it is having a dramatic impact upon the operations of federal agencies by generally requiring open meetings of multi-member agencies, proscribing ex parte communications, and amending the Freedom of Information and Federal Advisory Committee Acts. Recent judicial and administrative interpretations have been rendered concerning the Freedom of Information and Privacy Acts. The national security classification system has been revised by Executive Order 12065, signed by President Carter in June, 1978. The Privacy Protection Study Commission completed its congressionally-mandated report in July, 1977, making comprehensive recommendations regarding record-keeping practices for both the public and private sectors. A body of experience has now developed on the part of those administering, utilizing, and overseeing the laws and regulations in the area, thereby permitting informed reflection upon how well or poorly they are working.

The presentations in this issue were made at the Openness in Government IV Conference, sponsored by the Federal Bar Association and held on May 25-26, 1978, and the Government Information and Privacy Seminar, which took place as part of the FBA Annual Convention on September 14, 1978. Both events transpired in Washington, D.C. The presentations have been updated by the authors to reflect recent developments.

When the first Openness in Government Conference was held in 1975, there was no conception that it would become an annual tradition. However, due to the tremendous turnout which that first conference engendered and the sustained level of interest which has continued since then, the Federal Bar Association has made this an annual affair. In my view, there are several reasons for the durability of this conference series, and for the continuing public interest in the subjects of the articles in this issue.

There are few laws which have a broader effect upon the operations of the federal government than the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Advisory Committee Act, and related legislation dealing with government openness and privacy. These statutes cut across agency lines, and have a significant impact upon the way in which federal agencies engage in their business. In fact, the Government in the Sunshine Act deals with the very manner in which multi-member federal agencies engage in the decision making process.

The statutes under consideration in this symposium issue incorporate values which our society holds dear but which, at times, conflict. These values

know and participate intelligently in our democracy. Should the costs imposed by these statutes be disregarded? Few would doubt that the benefits accruing from effectuation of this right are worthwhile, but how can they be gauged? How can they be compared to the costs of these laws? and should they? Given that maximum feasible government openness would appear to be firmly entrenched as a legal and political value in our nation, how can the benefits of the legislation mandating it be maintained or increased while reducing unnecessary administrative costs and harm to agency missions?

From the debate which follows, a few matters emerge clearly, in my opinion. First, one's perspective may greatly depend upon one's institutional interest. Thus, David Cohen of Common Cause believes that compliance with the FOIA, the Sunshine Act, and other legislation is spotty among the agencies and must be improved, partly by stronger affirmative leadership from the President and agency heads. The Department of Justice and the FBI express the concern that the FOIA and Privacy Act are seriously impeding the federal government's operations in the criminal justice law enforcement area. Thomas Patten, a private practitioner who represents corporate interests, is troubled that the government does not protect commercial information imparted to it in confidence by corporations, while Anita Johnson, a public interest practitioner who represents environmental interests, is troubled that the government overly protects safety data involving drugs, pesticides, and toxic substances. Those overseeing the Government in the Sunshine Act believe that it has not yet been fully implemented, especially in spirit, by all of the agencies, those attempting to implement it are concerned about its ambiguities, inconsistencies, and interrelationship with other statutes; and those on the outside trying to make use of it find that it has done little to achieve its substantive goal — to increase the public's understanding of and confidence in the processes of government.

Second, this is no area for absolutist views. Neither complete government openness nor complete secrecy is desirable. Each of the laws and regulations under consideration in this issue recognize that public access to government information must be balanced with the public interest in effective government, as well as with the protection of legitimate privacy interests. Thus, for example, the Government in the Sunshine Act provides that its purpose is to provide the public with "the fullest practicable information regarding the decisionmaking processes of the Federal Government" while "protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Likewise, the purpose of Executive Order 12065 is stated to be: "to balance the public's interest in access to government information with the need to protect certain national security information from disclosure."

Third, compliance with these laws cannot be assessed solely in terms of numbers. Mr. Cohen reports that, according to a Common Cause study to evaluate agency compliance with the Sunshine Act, 36% of the 2,242 meetings held during the Act's first year of operation were entirely closed, 26% were partially closed, and only 38% were entirely open. On the basis of the

OPENNESS WORKS — LET'S GET ON WITH IT

By David Cohen

Openness in government, with broad citizen participation, is basic to democracy. Citizens can gain sufficient information to play an effective role only if the decision making process is an open one. Citizens and the media understand this essential point and have started to crack through government's wall of secrecy.

Their efforts have shown results. Open bill drafting sessions in the U.S. House and Senate are accepted as the usual way of doing public business. In March, 1977, the Government in the Sunshine Act took effect, requiring open meetings of 47 multi-member federal agencies.

Citizens put openness on the agenda for Congress and forced the Executive Branch to accept the Sunshine Law. Citizens refused to accept the patronizing insistence of many public officials, who had asserted that officials be given a free hand because they possess an expertise unavailable to the general public.

Because knowledge is influence, citizens must be able to inform themselves about the public issues that concern them. But a person does not have to be an expert to be knowledgeable. The important thing is to understand both the particular issue and how the system operates. With such knowledge, citizens can be in a position to hold government at all levels — local, state and federal — continuously accountable.

As a nonpartisan national citizens' lobby, Common Cause is committed to urging government to adopt and enforce an affirmative policy of anti-secrecy. We have helped to put the idea of government accountability on the political agenda — not as a mere political gesture, but as a means to alter access to our institutions and to shift power relationships. By accountability, we mean building competition into our political system, letting citizens know what's going on, correcting political abuses of power, guarding against lapses of integrity, and fostering institutional competence. All of these concerns are central to a democracy. Common Cause is working to make the political system accessible and understandable while protecting the basic values of freedom and fairness that are part of our American political culture.

Ideas are important to Common Cause's work. So are our members, who know that good intentions alone won't put those ideas across. They know that change doesn't come solely from within the government. It requires pressure from those outside of government who have the persistence and endurance of a long distance runner.

Secrecy encourages abuses of power; it diminishes the accessibility of both government officials and information; it thwarts citizen participation. Secrecy makes it difficult for the citizen to compete with the behind-the-scenes influences of the special interests, which are experienced in digging out information of special concern to themselves. The only one left in the dark is the

during Congressional consideration will try to wiggle out of its openness requirements now that it is law.

Poets speak of dabbled shade, partly sunny, partly gray. That's the situation now with the federal Sunshine Law. President Carter in 1977 missed an opportunity to assure that government would be more open and accessible to citizens when he failed to insist that agencies follow the spirit as well as the letter of the Government in the Sunshine Act when implementing its provisions.

When Common Cause monitored agency compliance with the Sunshine law during its first year of operation, we found that much of the decision-making in the 47 agencies covered by the Act will still carried on behind closed doors. We learned that 36% (813) of the 2,242 meetings held during the first year under the Act were entirely closed to the public. Twenty-six percent (583) of the meetings in that period were partially closed. Only 38% (846) of the meetings were entirely open.

The data indicates that agencies have a strong tendency to close meetings under one of the Act's ten exemptions despite the Act's presumption in favor of openness. These findings are plainly disturbing. Even where the subject matter of a meeting legitimately falls within one of the Act's ten exemptions from openness, the Act requires that the meeting must be open where the public interest requires. Unfortunately, most agencies have ignored the public interest and in its place substituted their own institutional interest.

The attitude among too many agency commissioners and their general counsels appears to be that secrecy is necessary to the effective resolution of conflicting views and interests. On the contrary, Common Cause believes secrecy neither enhances government efficiency nor necessarily promotes conflict resolution. Instead, secrecy nurtures suspicion, hinders accountability, and damages the integrity of those who govern. Secrecy eats away at the public trust and confidence.

The Common Cause study showed that agency meeting practices vary widely. Some agencies appeared to go beyond the literal requirements of the Act in an effort to conduct their business in the sunshine. For example, during the year of the study, 82% of the meetings held by the Civil Aeronautics Board were open to the public, even though many of the CAB's meetings might arguably have been closed under one of the Act's ten exemptions. Eighty-six percent of the meetings of the Interstate Commerce Commission during the same period were held in fully open sessions, and all of the 27 meetings of the Tennessee Valley Authority were open. Other agencies should learn from these examples that sunshine does not hinder either agency efficiency or resolution of conflicts.

Unfortunately, not all agencies shared this spirit. Fewer than forty percent of all meetings under the Sunshine Act were open to the public during the first year. In our view, this poor record of compliance with the Sunshine law results more from old agency attitudes and habits of operating in secret than

—Requiring agencies to give at least 10 days of public notice prior to each meeting.

An affirmative anti-secrecy drive is needed that will apply to all the agencies that fall under the Act. Congressional oversight should be aggressive and persistent. Such oversight would prod President Carter to set the overall direction by insisting on compliance with the principles and procedures of openness.

FREEDOM OF INFORMATION

The way the Freedom of Information Act is being implemented by the various agencies also leaves much to be desired. Although the law was carefully drafted to create an administrative process that citizens could use at minimal expense, that system, in many cases, does not seem to be working. While some agencies appear able to meet the deadlines with no difficulty, others seem able to comply with or deny requests only after considerable delay.

In theory, agencies are given ten days to respond to an initial request, after which an administrative appeal may be filed. This is a simple process which may take the form of a letter appealing the delay or the refusal of information. Agencies are then given 20 days to respond to the appeal. In practice, both deadlines are frequently missed, sometimes by days, sometimes by months. If the administrative appeal fails to elicit a response, the citizen's only recourse is to the courts, which involves considerable time, effort, and expense — exactly what the law was designed to avoid.

Shelly Weinstein, who has had substantial experience with the operation of the Freedom of Information Act and with public participation from inside the government, has described the situation in trenchant terms:

> "Information is the currency for power in the public market place. The bureaucracy has developed detailed regulations for the public to obtain information under the Freedom of Information Act. However, few, if any, federal agencies train or counsel all employees on their responsibility to the public under this Act. Beyond the officials who have authority for implementing the Freedom of Information Act, there is a prevasive lack of information, in addition to misinformation, among most federal employees on their responsibilities to the public."[1]

The percentage of freedom of information requests denied in part or in full varies widely among departments. A Congressional Research Service study found that in calendar 1977 the State Department fully or partially denied 40% of the requests it received, Treasury 31%, Justice 30%, Defense 17%, and the Environmental Protection Agency 7%.[7] Common Cause recently prepared a study of the Department of Energy (DOE) which found that, in the

FINANCIAL DISCLOSURE

The new federal Ethics in Government Act and 39 state financial disclosure laws are powerful testaments that public disclosure of financial holdings by top government officials is necessary to stop conflicts of interest. Thirty-four of the 39 state laws have been adopted or strengthened in the last five years.

The substantial experience in the states shows that these laws neither drive people out of public service nor discourage new people from entering, even though, whenever state disclosure laws have been passed, opponents have sounded the alarm that the laws will result in mass resignations by public officials. The experiences in Florida, Alabama, and Ohio are typical of the effect such laws have had in all 39 states:

—In Florida only seven members of local boards and one state representative have cited financial disclosure as the reason for resigning public office.

—In Alabama, compliance by state officials, who have now filed three times under the Alabama law, is close to perfect — only one of the approximately 2,800 state officials have resigned rather than file.

—A member of the Ohio Ethics Commission reports that "candidates have not been driven away by financial disclosure. . . . Likewise there have been no mass resignations by the other type of public official in Ohio — the appointed rather than the elected public servant — due to financial disclosure."

The rich state experience provides valuable lessons for administering the new federal law. At the present, misinformation, anxiety, and outright fear of the new law — particularly concern about the post-employment restrictions — are spreading in the federal government. The confusion about the law stems primarily from a provision requiring that top officials may not for two years after leaving office "aid, assist, counsel, advise, consult, or assist in representing" anyone before the federal government on a particular matter in which the former official was "personally and substantially involved" while in office.

Advocates of conflict-of-interest legislation support the view that federal employees should not be prevented from pursuing career opportunities in their areas of professional competence. The new law was designed to conform to this principle. Thoughtful and expeditious action in drawing up implementation regulations is therefore needed to reassure government officials that the law will be administered to stop real conflict-of-interest abuses and will not be carried to absurd extremes that will drive and keep capable people away from public service.

In an effort to clarify the Congressional intent in adopting the provision, Senators Abraham Ribicoff (D-Conn.) and Charles Percy (R-Ill.) and Representatives George E. Danielson (D-Calif.) and Carlos Moorehead (R-Calif.), members of committees that handled the Ethics bill, have sent a memo-

Government should also ensure that there is substantial citizen participation in the following aspects of government-funded or regulated programs:

— Planning and priority setting
— Implementation
— Supplementing services
— Monitoring and evaluation
— Advocacy.

Volunteers from all parts of society should be encouraged to apply for boards, commissions, advisory councils and committees.

We must also find ways to help citizens, both individually and in concert, to take advantage of opportunities to influence public policy that recent reforms have made available to them. There are several key measures which would significantly increase the role of citizens in seeing that government agencies operate in the public interest. These include:

1. Funding of citizen intervention in administrative proceedings and follow-up litigation.

2. Providing for citizen initiation of rulemaking proceedings, to be enforced by judicial recourse when necessary.

3. Creating a federal ombudsman or public advocate office.

4. Establishing grievance machinery to require the federal bureaucracy to pay attention to complaints.

5. Allowing citizens standing to enforce laws and regulations where an agency refuses to take action and providing attorneys' fees to successful plaintiffs.

Although legislation is needed to provide increased citizen access to the courts, important executive initiatives can be taken that would enhance citizen participation in agency rulemaking and administrative proceedings. Several agencies have taken such initiatives with some measure of success. These successful agency experiences can provide the basis for legislation mandating government-wide application.

LOBBY DISCLOSURE

When lobby disclosure legislation comes up in the new Congress, the special interests will once more be swarming through the House and Senate in an effort to defeat the bill. They are determined to keep the public in the dark about the money lobbying groups are spending to influence government decisions.

High-priced Washington lobbyists don't want a new law. Many interest groups, with the notable exceptions of organized labor and Common Cause, prefer the present law, because it allows them to hide what they are doing and how they spend their money. The present law allows many organizations that are involved in significant lobbying to escape reporting their activities.

During the 95th Congress, the House passed a strong bill to replace the

IS OPENNESS WORKING? A DISSENTING VIEW

By Quinlin J. Shea, Jr.

Some things never seem to change. Some people seem either to be impervious to reality, or to be unable or unwilling to accept it. Three years ago, at the first of these conferences, I sat and listened to former Representative Abzug tell us all how total dedication to openness in government was going to lead us to the promised land. The same was true, of course, of total dedication to the protection of personal privacy. No contradiction there, either! Now we have Mr. Cohen who comes along and tells us that just a little more openness — and of course a little more privacy — and the promised land really shall be achieved. The cold, hard and incontrovertible fact, particularly from the standpoint of the criminal justice law enforcement process within the Federal Government, is that we need a little less openness and maybe even a little less concern for personal privacy. The fact is that these two concepts as they are now enshrined in the law are seriously impeding the government's operations in the law enforcement area.

In 1975 I joined the Deputy Attorney General's staff and was told to make the Freedom of Information Act work within the Department of Justice — whether the Department's components liked it or not. At the outset, internally, I found total confusion, compounded by gross misestimates of what was going to happen as the result of the 1974 amendments to the Act. In addition, I very quickly discovered that, externally, the credibility of both the Department of Justice and the Executive Branch as a whole in the FOI area was somewhere below sewer level. We quickly sent a message that things were going to be different with the release of the famous "Pumpkin Films." That action was intended to be a symbol and it was taken as one by perceptive outside observers. Then a few of us took on the rest of the Department of Justice in a successful defense of the proposition that the Privacy Act had not in fact repealed the Freedom of Information Act, as to requests by individuals for records about themselves. During this entire period, I told everyone who would listen to me that we were going to bring the Department of Justice into substantive compliance with both statutes. I can tell you today that we have kept that promise, but that the price we have paid has been a terrible one. It is the fact that we have kept the promise, however, that entitles me to stand up at this conference and say flatly that these are two very poor statutes. Their wording is sloppy and imprecise. The procedural and substantive conflicts between them are significant. Attempting to comply with them is very difficult, time-consuming and expensive, often with no benefit to the public at all. The sad fact is that there really are no comprehensive, inter-related national policies on information, personal privacy, and law enforcement. It seems to me that the very fragmented system under which Congress operates results in staffers afflicted with acute tunnel vision getting together and virtually deciding what is to be the law in a particular narrow area — and that the system gives wholly inadequate consideration to collateral effects on the operations of

ginning to get it, *mirabile dictu,* from some staffers on subcommittees having oversight jurisdiction in the information-privacy area!

What do we see as essential changes? One of the biggest problems right now is in the area of sensitive law enforcement materials that do not constitute investigatory records. Your "How to Catch Crooks" manuals are one example. Another is the list of the radio frequencies by which our drug agents and border patrol agents communicate with each other. Still another is the one that my friends at the Treasury Department always ask me to mention, the formula for the ink used to print our currency. These are almost certainly *not* investigatory records within the meaning of exemption 7. In a recent decision by a panel of the Circuit Court in the District of Columbia, two judges concluded that the most sensitive portions of one agents' manual could be withheld. Judge Wilkie in dissent accused his brothers of voting their "druthers." He said "yes," Congress quite clearly intended such sensitive law enforcement materials to be exempt, but they are not in fact exempt under the actual language of the Freedom of Information Act. The same case was reargued before the entire Circuit Court. The government's position prevailed — the court was split 4-4 and there was no opinion. What a splendid victory for the cause of law enforcement! A United States District Judge in New York City concluded in another manual case that even the most sensitive portions were not exempt from mandatory release, but he denied access on the basis that the Court had equitable discretion under the Freedom of Information Act and could refuse to order release of nonexempt materials in appropriate circumstances. I note that this concept of equitable discretion is a minority view and one that is bitterly resisted by most proponents of openness in government. On appeal, the Court of Appeals for the Second Circuit held that the sensitive portions of the manual in question were in fact exempt from mandatory release. For us to have this much trouble defending our sensitive law enforcement manuals can only be described as ridiculous! The exempt status of such materials should be unequivocal. Fortunately, this is a problem that can be solved very easily. If exemption 7 of the Freedom of Information Act is going to continue to be the vehicle for protecting our sensitive law enforcement records, it should be changed so that it does not encompass merely investigatory records. It should encompass any records created, compiled, or maintained for law enforcement purposes. Then we would have *all* of our sensitive law enforcement records clearly within exemption 7.

Another serious problem is with exemption 7(A), which permits the withholding of records where release would interfere with law enforcement proceedings. When this language is coupled with the last sentence of 5 U.S.C. 552(b), requiring the release of any reasonably segregable portion of a record, the problem appears. The requirement so to segregate is not limited to closed or inactive cases — it literally applies to open and active cases as well. A major recent tax prosecution ended in the acquittal of the principal accused. I will go to my grave believing that, if the prosecutors had not spent the major por-

distinguish among requests based on the number of pages that must be reviewed or the nature of the records which have been requested! Furthermore, the way the FOIA is written, so that FOI requests and FOI litigation are supposed to take precedence over practically everything else in the whole world, suggests to me that someone is not being realistic — and, again, I don't think that I'm the one. I have a friend who's involved in processing "Black Lung" claims over at the Labor Department. I'm told that it can take two years or even longer to process such a claim. If anyone tells me that it is more important to process the average FOIA request than the average "Black Lung" claim, I'm afraid I'm going to disagree. Maybe Congress should simply take the time limits out of the Freedom of Information Act and put them into the statute under which "Black Lung" claims are processed!

I've said it before and I'll say it again and again if necessary. We in the Executive Branch and the Department of Justice in particular are ready—we are eager—to work with Congress in a mutual effort reasonably to reformulate the Freedom of Information and Privacy Acts. I submit, flatly, that there is no responsible alternative for Congress but to address the problems I have covered today and to do so in the near future. The ability of the Federal Government to engage in efficient and effective law enforcement must be restored and preserved. I suggest to you that that is where the public interest really lies.

provisions of the Act.[12] Nor do these figures reveal the number of FOIA suits that were dismissed, settled or otherwise resolved without a published opinion.[13]

Whatever the reasons for the present paucity of Sunshine Act litigation — the narrower scope of the statute, lack of awareness of, or interest in, the Act, a greater interest in obtaining tangible agency documents than in hearing possibly pre-orchestrated agency discussions, the difficulty of proving agency bad faith or non-compliance with the GISA, inadequate judicial remedies — the facts remain that there have been some court decisions interpreting the Act worth noting and that there are likely to be more as the GISA becomes better known and the pending or still unresolved issues come into sharper focus.

Therefore, after an overview of the statutory nuts and bolts, the bulk of this article will summarize existing judicial "tacks" or interpretations of the GISA and suggest other issues likely to need judicial review and clarification.

I. STATUTORY NUTS AND BOLTS[14]

A. *Public Policy*

The Government in the Sunshine Act is based on the policy that "the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government."[15] The purpose of the Act is "to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."[16]

Section 3 of the Act amends Title 5 of the United States Code, adding a new section 552b, entitled "Open Meetings". This section is divided into 13 subsections, [a] through [m].

B. *Definitions*

Subsection [a] defines the basic terms "agency", "meeting", and "member".

The scope of the GISA is not as broad as the Freedom of Information Act[17] or the Privacy Act[18] since the GISA is limited to those agencies covered by the FOIA and Privacy Act which are "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such

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[12]See U.S. Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles,* 93rd Cong., 2d Sess. 117-118 (1974).

[13]Moreover, the original FOIA did not provide for attorneys' fees to prevailing requesters. That provision was not added to the FOIA until the 1974 amendments. See 5 U.S.C. §552(a)(4)(E).

[14]This Sunshine Act overview is based on the "Overview and Summary" and related sections of *An Interpretive Guide to The Government in the Sunshine Act,* co-authored by Mr. Klitzman and Richard K. Berg and published in 1978 by the Administrative Conference of the United States (hereafter cited as "Sunshine Guide").

history prohibits agency members from disposing of business by circulation of memoranda or other papers instead of in meetings, *i.e.* by "notation procedure."[31]

D. *Exemptions to Close Meetings*

Subsection [c] allows an agency to close a meeting or portion of a meeting, or to withhold information about a meeting or portion if the agency determines that the meeting or portion, if opened, or the information, if released, would be likely to disclose exempted information protected from disclosure under one or more of the 10 exemptions of subsection [c].

An agency may close a meeting, or portions of a meeting, if the meeting is "likely to":

> (1) Disclose matters that are (A) specifically authorized under criteria established by Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such an Executive order;
> (2) relate solely to the internal personnel rules and practices of an agency;
> (3) disclose matters specifically exempted from disclosure by statute . . . ;
> (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;
> (5) involve accusing any person of a crime, or formally censuring any person;
>
> (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
> (7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records. . . ;
> (8) disclose information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
> (9) disclose information premature disclosure of which, would —
> (A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or
> (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action . . . ; or
> (10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding . . . ; 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 the [Administration Procedure Act].[32]

These exemptions are permissive, not mandatory, and the agency may still open or release information about an otherwise exempt meeting or portion.[33] In fact, subsection [c] also provides that agency meetings shall be open "when the agency finds that the public interest [so] requires."[34]

Sunshine Act exemptions 1, 2, 3, 4, and 8 are identical in language to the corresponding FOIA exemptions.[35] The case law and other authorities under

[31]Sunshine Guide, *supra* note 14, at 13. See also discussion of *Communications Systems*, *supra* note 9.
[32]5 U.S.C. §552b(c) (1976).

a formal agency adjudication, or possibly, rulemaking.[48] The discussion must relate to a "particular case" or cases for exemption 10 to be available.[49] The case need not be pending at the time of the discussion. However, it must be imminent.[50] "The qualification that the discussion concern a 'particular case' would be emptied of significance if the exemption were held available for any discussion of legal objections to a proposed course of action."[51]

E. *Procedures to Close Meetings*

Subsection [d] prescribes the procedures agencies must follow in closing meetings. They are particularly detailed and do not allow agencies much discretion in their implementation of the statutory requirements. The procedures are also cumbersome and appear designed to encourage agencies to open rather than to close their meetings.

Under *subsection [d][1]*, for example, agencies may decide to close meetings or withhold information about meetings only by recorded majority vote of the entire membership of the agency.[52] The statute does not permit proxy voting. A separate recorded vote must be taken each time the agency proposes to close or withhold information about a meeting, except that a single vote is allowed when a series of meetings held within a 30-day period concerns "the same particular matters."[53]

Subsection [d][2] allows a "person whose interests may be directly affected by a portion of a meeting" to request a closure based on exemptions [f], [6], or [7].[54] The agency need vote on the request only "upon the request of any one of its members."[55]

Subsection [d][3] requires that within one day of any vote to close or to withhold information about a meeting taken under subsections [d][1] or [d][2], the agency must "make publicly available" a written copy of the vote of each member.[56] If the vote is to close or to withhold information, the agency must also make available "a full written explanation" of the closing and a list of all expected attendees and their affiliations.[57]

Subsection [d][4] allows an agency, a majority of whose meetings may be closed under exemptions [4], [8], [9][A] or [10], to close its meetings by expedited procedures and to dispense with some of the procedural requirements of subsections [d][1], [d][3], and [e].[58] Approximately 20 of the 50 Sunshine Act agencies qualify for, and are using the [d][4] expedited procedures.[59]

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[48] 5 U.S.C. §552b(c)(10). For discussion of whether or not GISA exemption 10 applies to formal rulemakings, see Sunshine Guide, *supra* note 14, at 27-28.

[49] *Id.*, at 27.

[50] *Id.*

[51] *Id.*

[52] 5 U.S.C. §552b(d)(1) (1976).

[53] *Id.*

[54] 5 U.S.C. §552b(d)(2) (1976). Some agencies also provide in their regulations for requests to close meetings on other grounds, *e.g.*, the Federal Trade Commission, 16 C.F.R. §4.15(b)(2); or to open meetings, *e.g.*, the Securities and Exchange Commission, 17 C.F.R. §200.409(b).

years a complete verbatim copy of the transcript, recording, or minutes.[69]

A number of GISA regulations provide either for administrative appeals from determinations to withhold closed meeting transcripts, recordings, or minutes under subsection [f][2], or more generally, for administrative review of any agency action under the Act and regulations.[70]

H. *Judicial Review of Agency Rules*

Among other provisions, *subsection [g]* allows "any person" to bring a proceeding in the United States District Court for the District of Columbia to require the promulgation of regulations within the requisite period and a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations not in accord with the requirements of subsections [b] - [f].[71] To date, no such proceedings have been brought.

I. *Judicial Review of Particular Agency Actions*

Subsection [h][1] confers jurisdiction on the United States District Court to enforce the requirements of subsections [b] - [f] by declaratory judgment, injunctive relief, or the appropriate relief, including enjoining future violations or releasing nonexempted portions of the transcript, recording, or minutes of the improperly closed meeting.[72] Any person may bring an action to enforce these requirements prior to or within 60 days after such meeting is announced.[73] The agency must answer the complaint within 30 days after service and must sustain the burden of proof.[74]

Subsection [h][2] empowers any Federal court otherwise authorized to review agency action to examine agency violations of the Sunshine Act and to afford appropriate relief, including the invalidation of a substantive action, if the Sunshine violation is of a particularly "serious nature".[75] No court having jurisdiction solely on the basis of subsection [h][1], however, can invalidate agency action taken at a meeting at which a violation of the Sunshine Act occurred, no matter how serious the violation.[76]

J. *Attorneys' Fees and Litigation Costs*

Subsection [i] allows for the award of "reasonable attorneys fees and other litigation costs" to any party who "substantially prevails" in any action brought pursuant to subsections [g] or [h].[77]

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[69] *Id.*
[70] Sunshine Guide, *supra* note 14, at 76-78.
[71] 5 U.S.C. §552b(g) (1976).
[72] 5 U.S.C. §552b(h)(1) (1976).
[73] *Id.*
[74] *Id.*

II. JUDICIAL TACKS

Of the six identifiable Sunshine Act cases, only three have produced formal opinions interpreting provisions of the statute.

A. *Applicability of GISA to Parole Revocation Hearing and the Definition of "Agency"*

At issue in *Philadelphia Newspaper, Inc. and Anthony Lame v. United States Parole Commission*[83] was whether or not a parole revocation hearing of U.S. Parole Commission to be conducted by a local hearing examiner panel was subject to the GISA as an "agency" "meeting". Plaintiff sought a temporary restraining order to restrain the panel from proceeding with a closed hearing. Relying, among other arguments, on the Sunshine Act, plaintiff's attorneys argued that because the Parole Commission panel was a "subdivision" of the Commission, "delegated to do the agency's business", it was covered by the Sunshine Act definition of "agency" and had to comply with the procedural requirements of the statute.[84] Since the panel had decided to close the hearing without giving notice as required under the GISA, according to the plaintiff's argument, it had violated the statute, should be restrained from holding the closed hearing and should be ordered to open it.[85]

In response, the Government's attorney successfully argued that the Sunshine Act did not apply to the hearing examiner proceeding since the panel, although a "subdivision" of the Parole Commission, was composed solely of agency employees, not "members", of the "collegial body".[86] As noted above,[87] subdivisions made up entirely of employees other than members of the collegial body are not covered by the Act, even though they may be authorized to act on behalf of the agency.[88] In this case, the court found the hearing examiner panel would simply be making a recommendation to the Parole Commission which in turn, when making the final decision would be subject to the Sunshine Act.[89] The Act would only apply at that stage of the

[83] *Philadelphia Newspapers, supra* note 8.

[84] *Id.*, Transcript of Argument Re: Plaintiffs" Motion for Temporary Restraining Order, (Hereinafter cited "Transcript") at 24. The plaintiffs further argued that unless the panel subdivision was covered by the GISA, "it would amount to a license for any agency to delegate all but the exempt deliberative decisions to examiners and thus avoid the Sunshine Act completely." *Id.*, at 26. Although the argument fails when the subdivision is composed entirely of agency employees, the problem of delegation to a panel of "members" or to one member remains a real one. See *Pacific Legal Foundation, supra* note 10.

[85] Transcript, at 3, 6-7.

[86] *Id.*, at 9-10, 16.

[87] *Supra* at 116.

[88] Note, however, that where a collegial subdivision is made up in part of agency members and in part of staff, the answer is unclear whether or not the subdivision is covered by the GISA. Where agency members make up a majority of the

"acted in good faith in approving the quarterly rate adjustment", and had complied with the notice requirements of the GISA.[96] The court, however, did not explain further its reasons for refusing to invalidate the TVA Board's approval of the rate adjustment, only stating it would not do so "in view of the provisions . . . contained in 5 U.S.C. §552b(h)(2)."[97]

This statement is somewhat cryptic considering that the court clearly had jurisdiction under subsection (h)(2) to invalidate the TVA action and was not prevented from doing so by jurisdiction based solely on subsection (h)(1). Apparently, the *de minimis* nature of the allegations convinced the court that the technical Sunshine Act violation was not serious or intentional enough, or sufficiently prejudicial to the rights of the plaintiff, to warrant the invalidation of the rate adjustment.[98]

Nevertheless, the *Consolidated Aluminum* case suggests that in the absence of actual notice, and with greater prejudice to the rights of a party, a court might invalidate an agency action taken at a Sunshine Act meeting. Moreover, the case underscores the general inadequacy of *Federal Register* notice and the essential need to use additional means of notification.

C. *"Joint Conduct or Disposition" of Agency Business and the Use of Notation Procedure.*

The issue in *Communications Systems Inc. v. Federal Communications Commission*[99], the most thorough judicial interpretation to date of Sunshine statutory language, was whether or not the FCC violated the GISA when it disposed of a reconsideration petition by notation procedure, or the written circulation of an agenda item, rather than in an agency meeting.

"Because of the scarcity of decisions involving the recently enacted" GISA,[100] the court considered in some detail the claim by Communications Systems that the FCC violated the Act when it disposed of the petition without holding a meeting.

Affirming the FCC's action, the court cited as the "critical" statutory provision 5 U.S.C. §552b(b): "Members shall not jointly conduct or dispose of agency business other than in accordance with this section. . ." The court said it found "this language to be ambiguous since the *joint* conduct or disposition of agency business could refer to face-to-face communications or conduct that resulted from more remote communications such as by circulating written memoranda or voting sheets."[101]

To resolve the statutory ambiguity, the court turned to the legislative history of the "critical language," "joint conduct or disposition."[102] Quoting from Congressman Flowers who offered the original language, the court noted that "the amended subsection [b] [or 552b] would not preclude agencies from

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[96] *Consolidated Aluminum, supra* note 8, at 20-21.

[97] *Id.*, at 21.

[98] See H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 23 (1976).

the meeting, and that therefore, the discussion was not meaningfully open to public observation as required by 5 U.S.C. §552b(b). The Board denied that its discussion of the document was incomprehensible.

The case was dismissed on agreement of both parties. On January 18, 1978, the Federal Reserve Board clarified its policy governing release of documents discussed at open meetings.[111] Under the clarified procedures, any person requesting access to a Board document to be discussed at an open meeting must file a written request with the Board's Freedom of Information Office at least two working days prior to the meeting. The Board will then give such a request "priority treatment" and will make the document available by the time of the meeting, "unless there is insufficient opportunity to process the request or a determination is made to invoke an applicable exemption from disclosure."[112]

Despite the settlement of this particular case and the Board's revised policy, parties may continue to seek access to staff or background papers discussed at open meetings, particularly when meaningful public observation of an open agency meeting is diminished by oblique references to page or footnote numbers in unavailable documents.

It's been observed that "there is an unavoidable tension between FOIA exemption 5, which recognizes a legitimate government interest in protecting the agency deliberative process as such, and the Sunshine Act, which aims at maximum exposure of that process, at least on the collegial level."[113] This FOIA — Sunshine conflict is exacerbated by the fact that staff documents are arguably exempted from disclosure under FOIA exemption 5 for inter- or intra-agency memoranda,[114] while the Sunshine Act explicitly states that nothing in the open meeting provisions "expands or limits the present rights of any person under" FOIA.[115] As a result, many agencies have taken the position that internal agency memoranda, though discussed at open meetings, need not be released, or that their release is governed entirely by the FOIA. However, an agency is required to announce a Sunshine meeting only seven days in advance and since the processing of an FOIA request takes at least ten days, requiring the public to use FOIA procedures can basically negate document availability under the Sunshine Act.

However this conflict is resolved, it would appear that the spirit, if not the letter, of the GISA is violated unless agencies take affirmative steps to assure meaningful and comprehensible public observation. Such steps would include making available to the public before or at the time of the meeting, written summaries of staff documents or agenda items; and making staff members available to answer questions.[116] It remains to be seen, however, whether such actions will satisfy those who now seek access to staff documents discussed at open meetings.

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[111]See 43 Fed. Reg. 2444.

[112]*Id.*

[113]Sunshine Guide, *supra* note 14, at 98.

[114]5 U.S.C. §552(b)(5) (1966).

(d) enjoin the defendants from all future violations of the Sunshine Act and of their own implementing regulations, and of CEQ's statutory collegial status;

(e) grant plaintiff PLF recovery of its costs and expenses in bringing this action, including reasonable attorneys' fees;

(f) issue such other relief as may be proper.[123]

In support of its court motion for summary judgment dismissing Pacific Legal Foundation's claim, CEQ summarizes its argument as follows:

a) The Council on Environmental Quality is a body whose primary function is to advise and assist the President in the formulation of Administration policy on the environment and it is not required by its organic statutes, common law or the Sunshine Act to act collegially for most of its business. It has been required to act collegially only where it has issued or amended its regulations and has done so in every such instance. Thus, there is no merit to plaintiff's claim that the Council has failed to act with a lawful quorum. In addition, plaintiff has suffered no "injury" from this alleged violation and lacks standing to assert it.

b) The open meeting requirements of the Sunshine Act do not apply to meetings in which the Council collegially formulates advice to the President and any interpretation of the Sunshine Act extending its requirements to those meetings would raise serious constitutional issues under the separation of powers doctrine, which the Court should strive to avoid. Nor does the Sunshine Act apply to actions taken non-collegially by the Chairman or a single Council member.

c) Thus, the Council believes that it has complied with the Sunshine Act and the common law requirements for collegial action. However, even if this Court were to disagree with that position, it may not grant the remedy of invalidating past substantive agency actions because the public interest strongly favors preserving all such actions, including the regulations which have been issued and the policies which have been adopted or recommended. Nor may the Court issue an injunction against future violations in light of the Council's on-going rulemaking proceeding to clarify and supplement its own Sunshine Act procedures and significantly change its traditional way of doing business. These regulations are reviewable only in the Court of Appeals. In light of these arguments and equities against injunctive relief the Court in those circumstances should also refrain from granting declaratory relief.[124]

The CEQ cites the fact that under Section 203 of the Environmental Quality Improvement Act of 1970, most Council functions are assigned to the Chairman.[125] Pursuant to such authority, the Council apparently believes it can act in a non-collegial manner, despite its statutory collegial status in 42 U.S.C. §4342 and subsequent obligations under the GISA and its implementing regulations.[126]

The CEQ's non-collegial mode of operations, however, and delegations of authority to individual "lead members" is particularly questionable if it enables the agency to evade its collegial status and hence its legal obligations under the GISA. The Council's organic statute appears to give it little choice but to act like a collegial decision-making body when it conducts official agency business, particularly formal agency rulemaking.

The *Interpretive Guide to the Government in the Sunshine Act* notes:

where a function has been vested in the agency chairman, as by a delegation from the agency, or in a statute or reorganization plan, a gathering at which the chairman seeks the informal advice of his colleagues on the carrying out of that function would not be a meeting. This conclusion is consistent with the idea expressed above that 'official agency business' means a matter which the collegial body is able to act upon.[127]

[123] *Id.*, at 6.

[124] Memorandum of Points and Authorities in Support of Defendants' Motions for Summary Judgment, at 14-15.

In contrast, the NRC brief noted that the Atomic Safety and Licensing Boards is a subordinate arm of the Commission whose decisions are "reviewable not only by the Commission itself, but also by the Atomic Safety and Licensing Appeal Board."[136]

III. PENDING ISSUES

Aside from access to staff memoranda, the meaningfulness of public observation, and the applicability of the GISA to the Council on Environmental Quality, at least three other Sunshine Act issues have yet to be resolved and may require judicial review.[137] Moreover, as noted at the outset, there are likely to be more issues as more litigants become aware of the GISA and the issues come into clearer focus.

A. *Definition of "Meeting"*

Although a few of the decisions cited above alluded to the important definition of "meeting", no GISA decision to date has analyzed the term in any detail, including whether it encompasses the entire deliberative process, from tentative, exploratory brainstorming sessions, to informational staff briefings, to final agency discussions, or whether it covers only those "discussions which effectively predetermine official actions."[138] Conceivably, the pending suit against the CEQ may raise the meeting issue.[139]

B. *Scope of Exemption (9)(B)*

Of all the ten GISA exemptions this exemption remains the most elastic, and, hence, the most easily abused. The scope of exemption (9)(B), which allows an agency to close its meetings when disclosure would "significantly frustrate the implementation of a proposed agency action," represents one of of the more difficult interpretive questions which has developed under the GISA.

Legislative history suggests that the exemption is meant to apply to the regulatory action which must be imposed without notice in order to prevent forestalling action by the regulated community, *e.g.*, a proposed embargo on shipments of particular goods which, if announced in advance, would lead to export of the goods before embargo took effect.[140] Other examples include

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[136]See note 133, *supra*, at 6.

[137]Additional issues include questionable assertions of exemptions (8) and (9)(A) by the Export-Import Bank which closed 100% of its meetings in 1977-8, often asserting exemptions (8) or (9)(A), despite the fact that it does not regulate financial institutions but only makes loans, see Common Cause, "The First Year of Sunshine: Federal Agency Compliance with the Government in the Sunshine Act of 1976", August, 1978, at 12-13. Also, availability of closed meeting transcripts, automatically or only on request; misuse of the enforcement-related exemption 10 to close discussions of non-imminent enforcement proceedings; and whether an individual has an enforceable right to seek a closed or open meeting under sub-

The increased use of inter-agency task forces may nevertheless require close Sunshine monitoring, if not litigation, lest it become still another statutory loophole.

tion system including a proposal for requiring the automatic release of certain categories of information.[5] We describe the need for the balancing test as follows:

> . . . For a few narrow categories of information, mostly technical, public disclosure does not appear useful for policy debate. It could, however, be expected to give substantial assistance to potential adversaries. Such information, though it should be available to Congress on a secret basis, is entitled to a heavy presumption against public disclosure. Specifically, we refer to (a) weapons systems: details of advanced system design and operational characteristics; (b) details of plans for military operations; (c) details of ongoing diplomatic negotiations; and (d) intelligence methods: codes, technology, and identity of spies.
>
> Information not in these clear-cut categories should be made public unless a reasoned judgment is made that the probable costs to national security clearly outweigh the value of the information for public debate; and that judgment should be subject to independent review.
>
> . . . These efforts to specify categories of information that must be released and those that should be kept secret do not pretend to cover entirely the field of national security information. Much information will fall, properly so, into a middle category requiring case-by-case judgment. In such cases, the balancing of the value of disclosure to the public, as against the possible harm to the defense or foreign policy of the United States, is left initially to the classifying official. Weighing these factors should proceed on the principle that release is required unless one can reasonably judge that the probable costs to national security clearly outweigh the value of the information for public debate.
>
> . . . To justify the existence of a middle category should not require extended discussion. While we have argued at length against the system of unlimited official discretion, we do not believe that such discretion can or should be entirely eliminated. The legal designation of mandatory disclosure and presumptive secrecy categories is an appropriate way of dealing with a few specific kinds of information. Those are cases where the balance between the values of secrecy and disclosure can meaningfully be determined in advance, without reference to particular circumstances. However, the attempt to assign all National security information to one or the other of these categories would be extremely unrealistic and counterproductive. In most cases, a rational decision will require a sensitive weighing of the requirements of national security and of public debate in the particular situation. The initial decision must be left to responsible officials of the executive branch. Yet careful provision for the guidance of those officials is obviously essential.
>
> In the past the executive branch has not been accustomed to taking responsibility for the interest in public debate. That interest has not been central to the political environment in which the national security bureaucracy operates; nor has it been emphasized by the formal rules that apply to secrecy decisions. The executive order on classification does not instruct officials to balance the need for publicity against the need for secrecy; rather, their task is simply to determine whether secrecy would serve the broadly defined national security interest. In practice, it appears that public debate has been regarded as inherently prejudicial to the national security, and that documents have consciously been classified, under color of law, for the express purpose of preventing public debate. . . .[6]

Congress has expressed its support for a balancing test provision in creating Senate and House Intelligence Committees. The procedures for congressional disclosure of information, contained in the resolutions establishing those committees, provide that if the President objects to the release of information which the committee wishes to make public he must certify that the injury which would result from release outweighs the public value of the information. That provision reads as follows:

> (9) The committee may disclose publicly such information after the expiration of a five-day

In the statement by the President accompanying the release of the Executive Order no specific reference was made to the balancing provision although the statement did emphasize that "the public is entitled to know as much as possible about the government's activities" and that "the government classifies too much information, classifies it too highly and for too long. These practices violate the public right to know. . . ."[12]

The implementing directive issued by the Information Security Oversight Office did not provide any further guidance as to the meaning of the balancing test provision stating only that in making the test the agency should respect the desire of foreign governments to continue to protect information obtained from them or from foreign sources.[13]

Subsequent inquiries from agencies as to the meaning of the balancing test led to a letter from the President's Assistant for National Security Affairs, Zbigniew Brzezinski to Dr. James Rhoads who was then the Chairman of the Interagency Classification Review Committee. That letter read as follows:

> This is in response to your letter of November 28, in which you request my views on the implementation of the balancing test in section 3-303 of Executive Order 12065.
>
> The purpose of the balancing test provision is to permit the declassification of properly classified information in those exceptional cases where the public interest in protection of such information is outweighed by the public interest in its disclosure. The Order recognizes that cases meeting the criterion of section 3-303 will be rare, and that information considered for declassification that continues to meet the classification requirements of section 1-3 despite the passage of time must, in most cases, remain classified.
>
> This provision is not intended to modify the substantive criteria or procedures for classification; rather, it reflects this Administration's policy that properly classified information nevertheless may be classified under some circumstances. It is for these reasons that the provision was included in section 3-3 on declassification policy rather than in section 1, which details the relevant classification criteria.
>
> The Order does not establish a particular procedure to be followed in those exceptional cases where section 3-303 might apply. Instead, it provides that when questions arise, a senior agency official will make the determination whether the public interest in disclosure outweighs the damage to the national security, and, hence, to the public interest, that might reasonably be expected to result from disclosure. Each agency should establish its own procedures to ensure that individuals making declassification decisions identify those cases that should be referred to senior agency officials designated to make the discretionary determinations under section 3-303.[14]

As of the time of writing the only agency that has published specific regulations implementing the balancing test is the CIA. Those regulations state the following:

> c. In some cases the public interest may warrant declassification of information notwithstanding the national security damage reasonably expected to result from its disclosure, although continued protection from such disclosure of properly classified information is normally not only consistent with the public interest but required thereby. The need to balance such conflicting interests thus exists only when the public interest in disclosure appears so compelling as to outweigh the national security interest in continued protection. For example, it might be in the public interest to disclose classified information during a trial to ensure that a criminal is brought to justice or that the rights of a defendant are protected;

release could reasonably be expected to cause some damage to the national security. The balancing test provision was not required for that purpose.

The kind of situations in which a balancing test would appear to be in order are ones in which there is strong public interest and congressional debate on an issue and in which the information being withheld would play an important role in determining the outcome of the public debate. For example, information which related to the ability of the United States to verify the SALT agreement or to Soviet compliance with the provisions of SALT I would appear to fit the categories in which a balancing would be required under the Executive Order. To take another example, if there was information in the possession of the government which cast a different light on the Middle East peace agreement than that presented to the public, that information would also require balancing before it was withheld.

A decision to balance does not mean that the information must be declassified, but simply that the public's right to the information must be taken into account along with the injury to national security which might result from release before a decision was made not to declassify the information.

This brings me to the second question of how the issue is to be raised. The Executive Order is ambiguous, suggesting simply what should happen when the issue does arise. The Justice Department thus far has taken the position in litigation that the decision whether or not to balance is an administrative decision to be taken by the government on its own initiative and not subject to judicial review.

Obviously the government is always free to consider the public value of the information and to release information which has previously been classified. In response to a request under the Freedom of Information Act it is also free to release information which is properly classified and hence which could be withheld under the first exemption. Instead, the Attorney General's memorandum directing government agencies to take account of the public interest would appear to require that in all cases the public value of the information be considered before a decision is made under the Freedom of Information Act to withhold documents.[18]

The spirit and intent of the balancing provision of the Executive Order would appear to require that balancing be engaged in by a senior official whenever a person requesting a document under the Freedom of Information Act makes a reasoned presentation of evidence which suggests that there is strong public interest in the release of the information. This evidence might consist of a discussion of public interest in the topic of the request and the importance of the information sought for shaping an opinion on the issue currently being debated in the public arena. Upon the presentation of such evidence the Executive Branch ought to be required to engage in balancing since a decision to balance is not a decision to release but simply a decision to take account of the public value of the information and to test that against the

DEVELOPMENTS IN THE PROTECTION OF COMMERCIAL INFORMATION

By Thomas L. Patten

These remarks were originally prepared for the Openness in Government Conference held at the Federal Bar Association Convention. At that conference, the author found himself in the position of a distinct minority among the speakers. Briefly, the Government discloses too much and does not protect at all, let alone vigorously protect, that commercial information imparted to it in confidence. This situation has arisen from several court decisions interpreting the fourth exemption of the Freedom of Information Act[1] and an understandable reaction to the 1974 amendments to the Act.

Therefore, this article will state once again the grounds for demonstrating that the standard applied by courts in reverse FOIA cases under Exemption 4 to the Act is erroneous and without any support in the Act itself or its legislative history. Also described will be recent decisions which bear upon the ability to protect confidential commercial information.

The Reverse FOIA Problem

It is assumed that by now anyone who has occasion to peruse these remarks is familiar with the phenomena of the "reverse FOIA case."[2] The FOIA itself, of course, exempts from its coverage "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[3] Unfortunately, several courts, and particularly the United States Court of Appeals for the District of Columbia, have chosen to apply a standard other than that stated in Exemption 4. The particular rub comes in determining what is "confidential" information. A brief amount of history is thus appropriate to show the effect of what has actually occurred in the court decisions on this exemption.[4]

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[1] 5 U.S.C. §552(b)(4).

[2] For those who have been out of the country the past four years and somehow failed to hear about the problem, a reverse FOIA case is one brought by a submitter of information to the Government to prevent that information's disclosure to a third party who has requested it pursuant to the Freedom of Information Act. *See*, e.g., Wallace, *Proper Disclosure and Indecent Exposure: Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government*, 34 Fed. Bar Jour. 295, Note, *A Review of the Fourth Exemption of the FOIA*, 9 Akron Law Review 673 (1976); Note, *Protection from Government Disclosure - the Reverse FOIA Suit*, 1976 Duke L. Jour. 330 (1976).

[3] *Id.*, fn. 2.

[4] This problem (the application of the wrong standard under Exemption 4 by the courts) has been raised before by the author: Patten and Weinstein, *Disclosure of Business Secrets under the Freedom of Information Act: Suggested Limita-*

to obtain necessary information in the future; or 2) cause substantial harm to the competitive position of the person from whom the information was obtained.[12] Nowhere in the legislative history of the Act or Exemption 4 is there stated the requirement that disclosure of the information at issue would cause any competitive harm to the owner of that information let alone *substantial* competitive harm, before it could be termed "confidential" information. The *National Parks I* test for confidentiality was created out of whole cloth and flies directly in the face of both the plain meaning of the word "confidential" as used in the Exemption and the legislative history of the Exemption.

Obviously, to prove that the disclosure of some information which is not yet disclosed will cause a person substantial competitive harm is a near impossibility. To prove that that data would cause substantial competitive harm, in many cases, the owner of that data would have to show that his competitors are not using methods or ideas that are already better than the information he is trying to protect. To really prove that disclosure of information could cause substantial competitive harm it would first be necessary to define the relative competitive positions of the companies in the industry. It would then be necessary to prove what use the competitor would make of the information and that it would have an actual affect on the submitter's competitive position. This applies to proof of any harm to competitive position from disclosure. The D.C. Circuit, however, added the requirement of "substantiality" to the harm the submitter must incur. This test is a judicial amendment to the Act passed by Congress, without any support in the plain wording or the history of the Act.[13]

The unfortunate result of the D.C. Circuit's decision in *National Parks I* has been that courts have adopted this standard without any analysis whatsoever in all subsequent reverse FOIA cases regarding Exemption 4.[14] Perhaps futilely, then, the plea is once more made to the next court hearing a reverse FOIA case involving Exemption 4 to apply the standard that was intended by Congress and which is plainly stated in the Act: i.e., if the person submitting the information has maintained it in confidence and intends it to continue to be maintained in confidence, then the data is confidential as that term is used in Exemption 4.

Recent Developments Regarding Protection of Commercial Information

The most obvious and important development in this area is the granting of certiorari in *Chrysler v. Bacon,*[15] which has been briefed and argued and is

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[12] *Id.* at 770.

[13] Patten and Weinstein, *supra,* fn. 5 at 200.

where in the legislative history of the Act or in any law is there a basis for stating that the Government has within its discretion the right to disclose confidential business data including trade secrets. This was the view that was adopted in *Westinghouse.*[20]

The final issue raised by *Chrysler* is whether the Trade Secrets Act[21] is a mandatory nondisclosure statute which falls within Exemption 3 of the FOIA and thus bars disclosure of types of information which might otherwise be called Exemption 4 data. Further, the issue was raised as to whether a submitter of data to the Government has an independent cause of action to enforce this criminal statute barring disclosure of confidential business information.

These questions really are all different ways of stating the real issue of the *Chrysler* case, and that is: does a submitter of confidential information to the Government have a right to a hearing on the merits *in any forum* to prevent the disclosure of that data?

Another recent case which has treated one of the serious issues of reverse FOIA cases should be mentioned. It often happens that a person wishing to protect his data files a reverse FOIA suit against an agency in one jurisdiction while another person requesting that data files a suit to compel disclosure in another jurisdiction. Just this dilemma was presented by *GTE Sylvania Inc. v. Consumer Product Safety Commission*[22] and *Consumer's Union of the United States, Inc. v. Consumer Product Safety Commission.*[23] In the first case, television manufacturers filed a reverse FOIA case in the District Court of Delaware to prevent disclosure of information relating to accidents involving their television sets. The Delaware court issued preliminary and permanent injunctions against the agency *forbidding* disclosure. The Consumer's Union of the United States, who was the requester of the data, was not a party to this action. In the latter case, the Consumer's Union simultaneously instituted suit in the District Court for the District of Columbia to *compel* disclosure of the accident information. The manufacturers claimed that the Delaware action barred adjudication of the issue by the requesters in a different forum, putting forth the legal theories of *stare decisis,* collateral estoppel and comity. Significantly, the D.C. Circuit rejected these arguments and ruled that the Consumer's Union, who was not a party to the Delaware action, maintained its right to file its own action in another forum to compel disclosure.,

As has been previously argued,[24] the D.C. Circuit suggested that a requester of information under the FOIA is an indispensible party under Rule 19, FRCP, in any reverse FOIA action. The court did not reach the related question of whether a requester of information must also join a submitter as an indispensible party when the requester files suit to compel disclosure under the FOIA. The same principles announced by the D.C. Circuit would cer-

[20] *Westinghouse, supra,* n. 15.

Tayko, which was attached to the Air Force's response filed with the GAO to Shermco's protest of the award of the contract. The Air Force defended on the grounds that the documents, which evaluated the various bids and arrived at the decision to award to Tayko, were inter-agency or intra-agency memoranda exempt from disclosure under Exemption 5 of the FOIA.

The District Court for the Northern District of Texas, recognizing the general philosophy of full disclosure under the Act, ordered the Air Force to produce the documents on the grounds that the decision to award the contract to Tayko, even though it could not be consummated until after the GAO protest was decided, was a "final opinion" as that term is used in the FOIA.[28] The Court held that while the decision to award the contract to Tayko was still a "proposed award," for purposes of the FOIA the decision was final. The Court stated that the FOIA does not require an award as that term is used by the Air Force or the ASPR in order for a decision to be final. Having reached that conclusion, the Court held that the papers evaluating the various awards, which incidentally had been used by the Air Force in its defense of Shermco's bid protest, had to be disclosed.

To conclude, the most significant event regarding protection of confidential commercial data will be the Supreme Court's decision in *Chrysler,* which is due at any time. Other significant cases decided in the past year add hurdles to the submitter of confidential business data in his attempts to protect that data from disclosure. Depending upon the *Chrysler* decision, it is likely that some legislative action will take place either to revise the procedures under Exemption 4 or to create special exemptions from disclosure that would fall within Exemption 3. Certainly the field is still confused and uncertain and will likely remain so after the *Chrysler* decision so that future legislative action will be necessary.

mentioned. In other words, the privilege's basic purpose is to enhance the efficiency of government agencies in carryng out executive branch programs and activities, by encouraging better decision-making and policy-making within and among federal agencies, in two mutually complementary ways: (a) by assuring presidents, agency heads and other decision-makers that they can safely welcome a full spectrum of candid expressions from their staffs and/or peers, because they will be free to accept or reject all such input on its apparent intrinsic merit, not on whether a particular staff memorandum may make the official's action look better or worse, especially if the action is controversial or later proves unsuccessful; and (b) by giving the authors of such papers greater security for describing their ideas freely, with their honest analysis and best judgment on the issues, frank comments on the factors to be considered pro and con, and unfettered appraisal of the relative merits of alternative options, — all without worrying whether, at an early or later date, the disclosure of their expressions, perhaps selectively or in a different climate of popular attitudes, may stir political, social, or financial reactions or pressures against themselves or their bosses.[3] Although there has been considerable dispute about the importance of protecting full and frank debate within the government to help reach better decisions in certain contexts, few would deny that there are some situations in which the policy just discussed is significant.

Another policy supporting the privilege applies where the deliberative input consists of legal advice, for there is a clear policy favoring the goal of having government officials conduct their functions in accordance with the letter and spirit of the laws. This is sometimes described as a government of laws and not of men, a goal that obviously is advanced by encouraging officials to seek full and candid legal advice. The only other policy factors in favor of using the deliberative privilege are probably limited to the particular factual or program context in which the deliberative material appears; such factors, where they exist, tend to overlap the policies underlying other FOIA exemptions and perhaps other federal statutes, and to not readily lend themselves to useful general discussion.

On the other side, a major general expression of policy against using the deliberative privilege was recently set forth in the Government in the Sunshine Act: "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 responsibilities." (Section 2 of Pub. L. 94-409 September 13, 1976, 5 U.S.C. §552b, note.) Congress implemented this policy statement in prescribing open meeting requirements for meetings

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[3]As the Court of Appeals for the D.C. Circuit said in *Ackerley v. Ley*, 420 F.2d 1336 at 1341 (1969):

> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view — a process as essential to the wise

questions, many of them will hesitate to put their actual views on such matters on papers the release of which is forseeable and forseeably likely to singe them or their bosses in hot controversy. Nevertheless, only a minor fraction of the deliberative records in federal files fall at these two easy ends of the spectrum, where risk of a chilling effect from release is either obvious or obviously remote. The real problems are to appraise situations in the balance of the risk spectrum. Knowing where the ends of the spectrum are is of some help, but usually not dispositive.

(2) There is no known rule, regulation, formula, or litmus paper test that can be generally relied upon to measure with reasonable accuracy the probable harm to an organization's decisionmaking processes from the release of deliberative materials. In this respect, the problem may be roughly analogous to selecting stocks for purchase to achieve a predicted rate of appreciation. Just as that question is largely a matter of investor judgment, so the question of harm to an organization's decisionmaking processes is basically a matter of executive judgment. This does not mean, of course, that such judgment cannot be assisted. Just as an investor's judgment may be better or worse, depending on his experience, information, understanding, and practices, so, an executive's judgment on the prospect of harm from deliberative releases may be better or worse, depending on factors discussed below.

(3) The primary factors that will enhance the accuracy of an executive's estimate of the prospects of harm of the type here discussed are his common sense and good judgment, fortified by enough involvement with decision-making processes in government agencies and in other more or less bureaucratic organizations to be familiar with the range of motivations and practices of individuals functioning in such milieus. Obviously the present discussion cannot supply these resources of basic common sense, good judgment, and experience, except to suggest that the people who make the judgments have these qualifications or consult colleagues who have, and that they ponder sufficiently on particular cases to bring these qualities into play.

(4) Even where common sense, good judgment and experience are available and an effort is made to apply them, difficulty and uncertainty may remain. Checking the following special factors, some of which have been referred to tangentially above, may serve to stimulate and make more effective the application of common sense, good judgment, and experience:

(a) *What type of advice is involved?* For example, there is more likely to be a traditional expectation of, or reliance on, confidentiality as regards legal advice than as regards, say, technical advice on how an agency should proceed to reduce corrosion or vibration in mechanical equipment.

(b) *What is the program or activity context* in which the advice and the decision-making will occur? It should not be assumed that, throughout all the many types of agency activities and programs, there is a uniform degree of reliance by decision-makers and their advisors on the degree of protection that will be given to their deliberative communications. For example, there may be

distorted or misunderstood? If so, the risk of a chilling effect may be increased. For example, if a deliberative communication on a complicated or technical subject contains one aspect that is striking or sensational, this may afford a special basis for anticipating that release would lead to distorted reports or impressions about the position of the advisor or decisionmaker, perhaps with impairment of their reputations or careers.

(k) *Is there an unusual "track record" for the particular kind of decisionmaking* which is so highly successful (or highly unsuccessful) as to suggest that a change in the protection for deliberative expressions as part of the process of reaching such decisions would or would not involve much risk of harm? If the decisions in a certain program have been strikingly successful, this might be a basis for concluding that changes in the process for reaching such decisions would involve a substantial risk of harm; if the decisions have uniformly been bad, changes in the process for making them would seem to involve little risk of impairing them. (Changes, of course, could include either removal of existing protection for deliberations or protecting them where not previously protected.) But in practice, situations of these extreme types are quite rare; most agency programs have batting averages in decisionmaking somewhere between perfection and total failure, so that changes in their decisionmaking methods cannot either be rejected out of hand as a departure from a winning method or embraced as clearly harmless.

(l) *Where decisionmaking is oriented to interests partly or largely adverse to the agency,* will release of particular deliberative matter impair agency functions by disclosing agency strategies or weaknesses? This might include decisionmaking processes in, e.g., a broad variety of commercial and international negotiation situations, as well as various law enforcement activities.

In conclusion, the judgment that there would be no substantial risk of harm to agency decisionmaking processes in a given release of deliberative matter removes the ordinary policy justification for invoking Exemption 5's deliberative privilege. Nor is such harm easily established by the common argument that the release, though harmless in itself, may become an administrative precedent for future releases of similar documents which may be harmful; unless the future documents are so similar to the one released as to be substantially indistinguishable from it, and unless there has been a consistent pattern or practice of releasing such documents, the precedential significance of the release is at best minimal and has little bearing upon future release decisions which are basically confided by law to agency discretion.

But the opposite judgment, that there does exist such a risk of harm to the decisionmaking process, is not necessarily conclusive against release. For an agency is always free, on facts which it finds sufficient, to conclude that there is a specific public interest in disclosure which overrides the risk of harm to the processes involved, and accordingly to make a discretionary release of the deliberative matter.

Judicial review has also had an impact upon our ability to make timely responses. Personnel assigned to review, excise and disclose requested records are also required to participate in the preparation of detailed affidavits in defense of excisions from documents which have been challenged in litigation. Time spent performing this function results in time lost in responding to other requests. In one case we, with the concurrence of the Department of Justice, withheld three pages of requested material and then had to submit over one hundred and fifty pages of briefs and affidavits defending our actions.

The handling of administrative appeals wherein Department of Justice attorneys review our decisions, requires us to essentially duplicate the steps taken to initially respond to the requester. The FBI employee must once again gather together the records requested for the purview of the Departmental attorney and explain the processing of the individual documents.

Openness has confronted the FBI with a regrettable phenomenon with which we must contend. Our sources of information are not convinced that we are still guarantors of their confidential relationship with us. We have examples from a cross section of our society showing refusals to furnish information because of their perceived fear of disclosure under FOIA. These are not merely uncooperative professional confidential informants. We are speaking here also of private citizens, businessmen, and officials of municipal, state, Federal and even foreign governments. Our Agents in the field are finding that citizens are reluctant to divulge derogatory information because they are afraid disclosure of their comments could result in embarrassment or even civil suits directed against them.

Problems have also risen in regard to the interchange of information between state, local and Federal and even foreign law enforcement agencies, which is absolutely essential to our investigative process.

Director Webster has mentioned in speeches a "moratorium" on the disclosure of closed criminal investigative files as a concept that may be considered a proper solution to the problem of balancing the public's right to know and the protection of legitimate law enforcement needs, with the recognized need for exceptions, for example, those records involving cases of public interest.

The FBI has shown not only a good faith effort in responding to Freedom of Information Act and Privacy Act requests, but has also achieved valuable results in administering openness legislation. Working together with concerned public and private sectors, it is believed that a proper balance can and should be struck between the legitimate needs of the law enforcement community and the necessity for an informed public regarding its Government.

— Freedom of Information and Privacy Act programs continue to be singled out to bear the brunt of budget cuts to keep within budgetary limits. For example, the FBI's proposed budget for FY 1979 includes a decrease of 79 positions and $1.5 million despite a backlog of 5369 cases and a projected 14% increase in the number of requests for the coming year.

Lest I appear to be completely negative, let me assure you that I am not. I was particularly encouraged to read recent Justice Department testimony before the Criminal Laws Subcommittee of the Senate Judiciary Committee on the impact of the Freedom of Information Act on law enforcement. In describing the impact, the witness stated that while the law had caused serious problems for, and imposed severe burdens on the Department — the impact has not been as adverse as some persons would have you believe.

"It is the firm and unequivocal position of the Department of Justice that there is no inherent conflict between efficient, effective criminal law enforcement and the principles underlying the Freedom of Information and Privacy Acts."[8]

SUBCOMMITTEE OVERSIGHT HEARINGS

In the fall of 1977, the Administrative Practice and Procedure Subcommittee held four days of oversight hearings on federal agency implementation of the extensive 1974 Amendments to the Freedom of Information Act. The Subcommittee pursued four major objectives at the hearings: (1) to determine the degree of executive branch compliance with the 1974 amendments; (2) to evaluate whether federal agencies were complying with the Attorney General's May 1977 directive; (3) to focus on the policies and practices of those agencies most affected by the 1974 amendments — the law enforcement and national security agencies; and (4) to explore administrative or legislative actions which might be recommended to enhance future compliance with the statute.

I would like, at this point, to address some of the problem areas which were identified during those oversight hearings.

Exemption (b)(4) - Trade Secrets, Commercial or Financial Information

One of the biggest problem areas remains the (b)(4) exemption. It was disclosed at the Subcommittee's hearings that at the Federal Trade Commission (FTC), Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA) approximately 80% of all FOIA requests come from businesses. Thus, it was suggested that business use of the law should be limited or charges increased for commercial users. Because of the serious danger posed in distinguishing between requesters and limiting who may use the Act, these suggestions, in my view, are unenforceable.

This complex area is better addressed by clearly identifying trade secrets and confidential information, and improving agency procedures for making determinations of confidentiality and handling disclosures.

4. What should determine venue?
5. Should attorney's fees be awarded in reverse cases?

Irrespective of how the court decides in *Chrysler,* Congress will have to take legislative action to resolve many of the difficult procedural issues raised by reverse FOIA suits.

Exemption (b)(7) — Investigatory, Law Enforcement Records

Without here getting into an extended discussion of the legislative history of the (b)(7) exemption, suffice it to say that in 1974, Congress rejected the overly broad interpretation of the original investigatory file exemption and opted for a more narrow exemption which permitted the withholding of information only if disclosure would cause one of six enumerated harms.

However, interpretative, administrative and procedural problems persist.

(1) The Justice Department continues to argue that the 1974 amendments did not remove the per se exemption which existed previously for open cases and that the newly mandated harm test does not apply to such cases. That interpretation is clearly erroneous, for to accept the Department's Interpretation is to negate the purpose and legislative history of this provision.

(2) The Attorney General's May 1977 FOIA policy memo, which mandated fuller disclosure of information important to the public interest, even if the material in question was arguably exempt, was followed by directives from Deputy Attorney General Flaherty and Director to the Office of Privacy and Information Appeals, Quinlan Shea. These directives were intended to clarify the Department's policy with regard to the handling of third-party information in a requestor's file, administrative markings on documents, and the disclosure of illegal investigative activities. Initial compliance with these directives has been marginal, at best. Thus, vigorous Department enforcement of the policy announced in those directives is required.

(3) The Subcommittee's Investigation discovered that the(b)(7) exemption was being cited in situations which clearly fall outside its intended coverage. For example, the FBI claims exemption (b)(7)(C), invasion of personal privacy, in refusing to disclose information it determines to be outside the "scope" of the request. Perhaps there should be a "scope" exemption, but (7)(C), by its terms, is not such an exemption.

(4) Exemption (b)(7)(D) may be invoked to protect the identify of confidential sources and any *confidential* information furnished by that source. However, (7)(D) is being claimed by the FBI to conceal the identity of any law enforcement official, agent or organization providing the Bureau with information. By automatically characterizing public agencies and their employees as confidential sources, the FBI not only contravenes the purpose of this exemption, but also undercuts the status of its legitimate confidential source program generally.

The Department of Justice and the FBI have an especially weak record on compliance with the FOIA, recent policy directives notwithstanding. Rather

existing agency FOIA appellate process to permit appeals of fee waiver denials.

Prospective Revisions

The question is when and in what areas would Congress change the law to address the problems which have been identified. I noted previously that legislation would be appropriate in the area of "reverse" cases, but I would caution against expecting any quick response. It will take several years to develop an effective means of balancing the complex questions presented by the reverse FOIA lawsuit. As for the majority of the remaining compliance problems under the FOIA, it is the Subcommittee's position, as well as my own, that changes in the law are not required at this time. What is immediately required is improved administrative procedures.

I look forward to working closely with the agencies so that if legislation is clearly warranted, and I stress *if,* an appropriate response will not be delayed.

pointed out in Senate hearings, May 8th, that creating a monopoly for an industry, whether by withholding data or otherwise, may create *dis*incentive to innovate; without a monopoly, the manufacturer must innovate constantly to stay ahead of his competitors financially. A number of high-technology industries which operate without government-conferred monopolies are highly research intensive and innovative, such as the chemical industry and the electronics industry.

While both Senate and House subcommittees are still working on the drug bill, it is increasingly unlikely that either will report out a bill this session.

A lawsuit under the Freedom of Information Act, in which I am the plaintiff, *Johnson v. HEW,* was filed Nov. 23, 1977 in District of Columbia District Court, to secure release of animal test data submitted to FDA by Smith, Kline and French to secure approval of their drug Cimetadine. FDA has taken no position in the lawsuit on release of data; Intervenor Smith, Kline has argued for withholding data as trade secrets and confidential commercial information on the basis that it will suffer substantial competitive damage because these animal data permit marketing of drugs overseas where patent protection is unavailable, permit marketing of drugs by competitors after expiration of the patent period, and encourage patent infringement. Cimetadine is a new drug which seems promising for treatment of ulcers. However, it may have numerous effects on the endocrine system, effects which could be explored through close examination of Smith, Kline's long-term animal studies.

Pesticide manufacturers must submit proof of safety to the Environmental Protection Agency prior to marketing. The pesticide law directs EPA to withhold from the public information that is trade secrets or confidential commercial information. 7 U.S.C. §136h(b). EPA has adopted the policy that safety studies are releasable under that law. However, in three recent cases, *Mobay Chemical Corp. v. Costle,* 447 F.Supp. 811 (1978), *Chevron Chemical Co. v. Costle,* 443 F.Supp. 1024 (1978) and *Dow Chemical Co. v. Costle,* ____ F.Supp. ____ (E.D. Mich., Nov. 16, 1977), EPA's across-the-board determination that test data was releasable was overturned. In *Mobay,* the court suggested that EPA must make the determination on a case-by-case basis taking into account such factors as the extent to which the material is known to outsiders, the extent to which the particular data would be easily duplicated by others, etc. In *Chevron* the court directed EPA to formulate a general policy, but considering the factors normally considered in common law trade secret determinations.

The Federal Pesticide Act of 1978, pending in conference committee, explicitly directs EPA to release any information concerning the health and environmental effects of pesticides (section 15).

The Council on Environmental Quality has convened a Toxic Substances Strategy Committee to formulate agency-wide policy on toxic substances control. In an August 29 document, "Trade Secret Protection for Health, Safety Effects Data—Is it in the Public Interest?" a subcommittee made the pre-

JUST HOW BRIGHT IS THE SUNSHINE IN THE FEDERAL AGENCIES?

By Janet R. Studley

The Senate Subcommittee on Federal Spending Practices and Open Government is charged with the responsibility of overseeing the implementation of the Government in the Sunshine Act. (Public Law 94-409, 5 U.S.C. §552b). The Subcommittee's Chairman, Senator Lawton Chiles of Florida, has taken this responsibility very seriously. As the primary sponsor of the Sunshine Act in the Senate, Senator Chiles has a keen interest in seeing that the Federal agencies are indeed open to the public as contemplated by Congress.

Through its oversight activities, the Subcommittee has found that the Sunshine Act has not yet been fully implemented by all of the agencies. There is cause for concern because of the apparent lack of interest and initiative on the part of many agencies and the Administration in achieving the true spirit of open government. Several agencies have failed to appreciate the meaning of the Act and its unequivocal presumption in favor of openness. As a result, many simply focus their efforts on complying minimally with the letter of the law. Although there certainly are a number of agencies that have made significant efforts to recognize and promote the spirit of openness contained in this legislation, for most agencies, there is still room for needed improvement.

Government in the Sunshine Act, passed by Congress in 1976, was a revolutionary idea to the Federal bureaucracy. Federal agencies have increasingly had a tremendous direct impact on the lives of all citizens. Yet, they have historically operated anonymously, under a heavy cloak of secrecy. Hundreds of thousands of significant decisions have been made over the years by the agencies completely hidden from public view. The Federal bureaucracy had been quite comfortble operating under the old maxim, "out of sight, out of mind". This mode of operation, however, has been shown to lead to a breakdown in accountability. In view of the size of the agencies and their well guarded anonymity, it has become increasingly more difficult to attach responsibility for agency actions.

Although the concept of open government is relatively new to the Federal scene, it has enjoyed a long history in this country on the state and local levels. It has its roots in Colonial America's town meetings. Today, all fifty states have adopted legislation guaranteeing citizens the right to attend government meetings. Most states have constitutional provisions relating to open government. In passing the Sunshine Act, Congress had the benefit of the experiences and expertise of the states. Florida's experience served as a great example of how open government can work effectively. That state has one of the broadest Sunshine laws in the country. Judicial enforcement of Florida's law has resulted in virtually all governmental action occurring in public upon adequate notice.

The Sunshine Act was enacted in the wake of the Watergate scandal

be of at least a quorum of agency members. The portion of the definition that causes the most problems is the last part: that the deliberations "determine or result in the joint conduct or disposition of official agency business." It is not too difficult to determine if the conduct of disposition of agency business is joint. Use of the term joint simply excludes a situation where only one member is actually participating.

The difficulty arises in trying to define if a particular meeting or discussion determines or results in the conduct of agency business. It is a futile exercise to try to predict all of the possible fact situations that might occur involving a quorum of agency members. To do this would be to engage in endless line-drawing. Such an endeavor generally results in creating more confusion and can ultimately obscure and defeat the overall purpose and intent of the Sunshine Act.

Upon careful consideration of the purpose of the Act, its overwhelming emphasis on openness and its entire legislative history, it is clear that the term "meeting" should be given a very broad reading. The Department of Justice has gone on the record advising the agencies to interpret liberally this key term which is crucial, in the final analysis, to the effectiveness of the Sunshine Act.[3] Generally, anytime a quorum gathers and discusses matters involving the agency's official business, it should be considered a meeting. Of course, common sense should also temper the agency's judgement on what is a "meeting" under the Act. Brief, casual references to agency business are not contemplated by the term "meeting". Such informal remarks are not premeditated occurrences. Again, common sense would dictate that the drafters of the Act did not intend to encompass every off-the-cuff, passing remark made at a party or during a chance encounter in a hallway. In view, however, of the Act's purpose to open up the entire decisionmaking process, it seems that all briefings and exploratory or informational discussions involving a quorum should be considered meetings. It is precisely during these briefings and discussions that the members of an agency receive and often analyze the basic information on which a later decision may be based. At such sessions, different views are exposed and issues are clarified so that an agency's position can be formulated. These discussions are an integral part of the whole decisionmaking process as they can effectively determine ultimate agency actions. In defining what is a meeting, the most important thing to keep in mind is that this legislation carries an overriding presumption in favor of openness. Its purpose is to open up the whole decisionmaking process. Using this as a guide, it is advisable that when in doubt, err on the side of openness.

The Sunshine Act also requires that members jointly conduct or dispose agency business in public meetings, unless a particular meeting falls within an exemption *and* the public interest does not require the meeting to be open.[4] It is here that the Act establishes a strong presumption in favor of open meetings. The public has the right to attend meetings, to listen and to observe. This does not include the right to actively participate in the meeting or

to each decision to close. The public interest determination is separate from the determination as to whether a meeting falls within an exemption. The public interest test involves a balancing process to determine if the public good achieved by opening the meeting is outweighed by the advantage to be gained by closing it.

In making the determination of whether or not a meeting falls within an exemption, the agency members must decide if it is more likely than not that the discussion will be of a sensitive matter as described in the exemptions. If the possibility that a meeting will involve an exempt matter is not very great, the meeting of course should be opened. If perchance the discussion does become sensitive, the agency can always vote at that time to close the session. Our studies and those of Common Cause have shown that there is a tendency to close meetings. Once again, it must be remembered that when in doubt, err on the side of openness.

The ten exemptions are briefly discussed below:

The first exemption applies to matters that are;

(1) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and

(2) are in fact properly classified pursuant to such Executive Order.[10]

This recognizes the need for the President to act secretly in order to carry out his duties. In reviewing the closing of a meeting under this exemption, a court will examine documents *in camera* to determine the propriety of an agency's classification.

Exemption two concerns meetings which "relate solely to the internal personnel rules and practices of an agency." The purpose of this exemption is to protect the privacy of staff members and promote the internal efficiency of an agency. It applies only to an agency's *own* personnel rules and practices, and thus would not cover one agency's discussion of another agency's personnel matters.[11]

Exemption three permits closing where a statute other than the Freedom of Information Act or the Sunshine Act specifically requires the withholding of information or establishes particular criteria for withholding information. The statute must affirmatively require without exception that the material in question be withheld or establish specific criteria defining information to be withheld.[12] A permissive statute is not contemplated by this exemption. Thus, unless specifically prohibited, it's always in the public interest to disclose. There is no room for agency discretion.

The fourth exemption covers discussion of trade secrets and commercial or financial information that is privileged or confidential in character. It includes matters subject to certain evidentiary privileges (*e.g.*, attorney/client privilege).[13] This exemption is designed to protect the government's ability to obtain necessary information voluntarily given. It is also designed to avoid

when nothing else applies. The legislative history is clear that it is to be construed narrowly and used only when disclosure would seriously frustrate implementation of an agency action. It is intended to be used for the exceptional, rare case when an agency's action would be rendered ineffective by disclosure. It is not to be relied upon to justify closing a meeting based upon mere speculation of possible frustration of an agency's efforts. The legislative history on the point emphasizes the presumption of openness and the careful selection of the terms "significant" and "significantly" so as to limit closings. There are potential disadvantages and inherent possibilities for frustration present in *any* open meeting. Indeed, this exemption has been improperly invoked because an agency felt that public scrutiny would impair the agency's creative and imaginative thinking and inhibit free exchange of ideas. Repeated use of this exemption is highly suspect and cause for concern. Its use must be carefully watched to avoid abuse and defeat of the Act's purpose.

Exemption ten permits closing discussions of the agency's actual or potential participation in a civil action or administrative adjudication.[20] This exemption is to be used by an agency which has conducted investigations and has reached the point of deliberating as to whether to commence litigation or adjudicatory proceeding or whether to make a formal request to the Justice Department to bring an action. It includes discussions concerning issuance of a subpoena, participation in civil action, action in foreign courts, arbitration or formal adjudication involving a determination on the record after an opportunity for a hearing. This examption recognizes the need to allow agencies to discuss litigation strategy. The discussion must concern a particular case and not adjudication or litigation policies in general.

All of these terms and exemptions have been subject to varying interpretations by agencies operating under the Sunshine Act. There have been only a handful of lawsuits brought under the Act and out of them, only a few interpretive judicial opinions.[21]

The studies prepared by the Library of Congress and Common Cause reveal that the majority of agency meetings during Sunshine's first year of operation were closed to public observation. The figures are disturbing given the Act's emphasis on open meetings. These studies raise serious questions about the degree of agency compliance with the law. Although the data compiled in the two studies does not necessarily paint a complete picture on agency compliance, it does provide a good indication of how open or closed the Federal agencies really are. The conclusion to be drawn is that, although the agencies are more open today than ever before, most of them have not implemented the Sunshine Act to the fullest extent intended by Congress. This conclusion is supported not only by the statistical studies, but also by the Senate Subcommittee's oversight activities.

Congress is not the only branch of Government which has taken a firm stand on the importance and necessity of an open government. President Carter has at various times made committments to open up the deliberations

APPENDIX A

Mr. James C. Shultz
General Counsel
Civil Aeronautics Board
1825 Connecticut Avenue
Room 1006
Washington, D.C. 20428

Dear Mr. Shultz:

In conjunction with the Civil Division's responsibilities for the defense of litigation under the Sunshine Act, 5 U.S.C. §552b, I think it might be helpful to comment from time to time on matters which may raise potential litigation issues. This is the first such letter. I hope that you will consider the discussion in this letter as a part of our joint responsibility to insure that the Sunshine Act works and to avoid litigation whenever possible. Please feel free to distribute the letter to your staff so that our offices can cooperate and work together toward effective implementation of the Sunshine Act.

Recently promulgated agency regulations bring to light a number of matters of interest which may merit consideration within your office:

1. Several agencies define the term "meeting" as used in subsection (a)(2) of the Sunshine Act (5 U.S.C. §552b(a)(2)) in such way as to limit the joint deliberations which are subject to the Act. For instance we believe that in order to avoid ultimately fruitless litigation, a "briefing session" attended by at least the number of agency members required to take action on behalf of the agency, where the members attending have an opportunity to ask questions or seek clarification of matters of concern, should be included within the purview of regulations or practices applying the term "meeting". Where the deliberations to determine or result in the joint conduct or disposition of official agency business, and except as specified in subsection (d) or (e) of the Act, such deliberations are meetings subject to the Act. Should your agency have drawn a re narrow regulation, it leaves the agency's proceedings subject to continuous attack. Subsection (h)(1) of the Act (5 U.S.C. §552b(h)(1)) provides that suits challenging agency action may be brought prior to the action challenged or within 60 days after the meeting out of which the violation allegedly arises "except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this said section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting." I suggest that you insure that the term "meeting" is broadly defined in practice so that the statute of limitations can come into play and so that the potential for litigation can be reduced.

2. The Act requires that agency meetings shall be open to "public observation" (5 U.S.C. §552b(b)). Obviously public observation does not include

APPENDIX B

June 8, 1978

MEMORANDUM FOR THE HEADS OF
DEPARTMENTS AND AGENCIES

SUBJECT: "The Government in the Sunshine" Act: Implementation

The Government in the Sunshine Act requires certain Executive agencies to give notice of their business meetings and open them to public observation unless they must be closed for any of ten specific reasons. If the agency finds that the public interest requires, it must open its meeting to public observation even if there is a reason to close it. The same reasons which permit Executive agencies to close their meetings also permit advisory committees to close theirs.

To evaluate compliance with this Act, I have asked the Director of the Office of Management and Budget to record the number of meetings subject to the Act, to note whether those meetings are open or closed, and if closed, to state the reason for closing them. He will pass this information along to me and to the Congress, recommending whatever actions may be appropriate to meet the spirit as well as the letter of the law.

In litigation under the Act, the Attorney General and the affected agencies must not defend the closing of any meeting unless they can demonstrate that harm would have resulted if an open meeting had been held.

I urge the agencies covered by the Sunshine Act to respect it by opening to the public as many meetings as possible.

JIMMY CARTER

in the Sunshine Act's requirements that must be followed before, during, and after agency meetings. In short, as I argue below, the Sunshine Act has not fostered increased public understanding because it was never really designed to do so.

Prior to a meeting, the Act contemplates that the public will know (1) that a meeting will take place, and (2) what the meeting is about. And if a legislator wished to select the medium least well designed to convey that information to the public in a timely manner, he would almost certainly choose the Federal Register, which is exactly what Congress did. The Act does not require that the notice actually *appear* in the Federal Register prior to a meeting; rather, the agency must have *sent* the notice to the Federal Register either prior to the meeting or as soon after the meeting as is practicable. Congress probably did not take into account the average delay of several days between transmittal to the Federal Register and actual publication. Congress certainly did not foresee that the Federal Register later would find it necessary to impose a minimum charge of $95 per column for Sunshine Act and other notices. Oversight Committees might well wish to look into the amount of money that agencies have spent from their precious budgets to publish notices of meetings that have already occurred (or to publish notices of cancellations of meetings that have already *not* occurred). The reasoning, according to the legislative history, is that in these cases at least the public will have a record that the agency did (or did not) meet and it will be possible, in retrospect, to determine that an agency complied with the Act.

The agencies must post, prior to a meeting, a written document containing information believed to be pertinent to the meeting. Particularly where a meeting falls within one of the ten exemptions and may be closed to the public, the document must disclose the votes of Commissioners to close the meeting, state the basis for closing the meeting, cite to a reference to the appropriate exemption, indicate that the General Counsel has certified that the meeting may be closed, and disclose who (including the agency staff) is expected to attend the meeting. Curiously, nothing in the Sunshine Act requires any helpful explanation of what the meeting really is about. Indeed, where information that otherwise would be contained in the notice will disclose information exempt under the Sunshine Act, the information may be deleted from the notice. Few members of the public, including those of us who were formerly employed at a particular agency, can usually do little more than guess what a closed meeting is likely to involve.

The FTC, like some other agencies, has voluntarily gone beyond the requirements of the Act. Those who wish to be bombarded by a constant stream of press releases may be included on a mailing list of Sunshine Notices. The FTC also has established a telephone tape-recorded message which, like a weather report, is updated as scheduling changes are made. Such a device is important and helpful, because scheduling changes are so frequent that the $95 per column announcements in the Federal Register are often outdated by

that a permanent record must be kept. The significance of this requirement is somewhat diminished when the Act provides, for the same reasons that the meeting may be held in closed session, that much of the information contained in the permanent record maybe withheld from the public. It is, I would guess, quite an expensive proposition to make, edit, correct, and preserve these records, many of which will ultimately find their way to a federal records depository without having been disclosed to the public.

The legislators who brought you the requirement that notices be published in the Federal Register also happened to arrive (by coincidence, one supposes) at the hardest, most cumbersome, most expensive, and least helpful method of preserving records of closed meetings—a transcript. Not only is a transcript likely to contain confusing errors (did an agency "accept" or "except" a certain proposal), but it is an extremely cumbersome method to get at those few kernals of discussion in which the public is genuinely interested. In addition, the public should have learned in reading the Watergate tape transcripts (as trial lawyers have known for ages) that the extemporaneous ramblings of even articulate government officials rarely parse into clear, easily understood paragraphs on a written page. Although transcripts suffice adequately in the Congressional Record or in a courtroom trial, where custom is for persons to speak one at a time, it is no mean feat for even an experienced stenographer faithfully to record the simultaneous give-and-take between five Commissioners and the clack of an enthusiastic staff.

It is technically true that Sunshine does not require a transcript. An agency might try to preserve tape recordings of its closed meetings without transcription. But the logistical problems in editing out exempt material are staggering and, in the long run, probably require transcription. Moreover, because the tape recording itself would be an "agency record" within the meaning of the Freedom of Information Act, it is doubtful that courts for long would allow agencies to comply with FOIA requests by making and charging for additional copies of the edited tapes.

An easier method would be to maintain minutes of meetings. Such a method, of course, has proved perfectly adequate for private corporations and many governmental bodies for centuries. Minutes generally are easier to produce, easier to edit, easier to read, and, if honestly attempted, provide a more useful memorialization for absent members of the public. The Act does allow for minutes, but only for those agencies whose meetings are so regularly exempt from public observation that a special provision of the Sunshine Act may be adopted. See 5 U.S.C. §552b(d)(4). That special procedure thus applies, and minutes can be used, only in those cases where it is least likely that public access will ever be required.

Sunshine has thus brought about a cluster of procedures for open meetings (1) that do not adequately insure public awareness of the scheduling or content of an open meeting, (2) that do not insure that discussions at public meetings will be meaningfully understood, and (3) that are not preserved except for the few who actually attend an open meeting. As to closed meetings,

for serious efforts to amend the Act in constructive ways. Certainly, we can predict that agencies living under the Sunshine Act will continue to realize that following appropriate disclosures and other requirements have not injured their ability to act. As each agency learns to handle the procedural requirements of Sunshine in a routine manner, the inadvertent violations of the Act should be few. And public perception that agencies are making a good faith effort to comply should reduce the curtain of suspicion that led to much of the language in the original Act. In conclusion, it is to be hoped that congressional and other monitoring of Sunshine compliance will lead to amendments of the Act designed less to "catch" agencies in violation, and more toward the original intent of increasing the public's understanding of and confidence in the processes of government.

any person's rights under the FOIA,[11] and the report of the Senate Committee on Government Operations explicitly provides that "[a]ccess to the actual documents or other written matter discussed or referred to at a meeting subject to [GISA] will continue to be governed, as before, by the Freedom of Information Act."[12]

But matters are certainly not that simple. Soon after GISA was passed it was realized[13] that discussion of a document at a meeting open to public attendance would have a substantial impact on the document's status under several FOIA exemptions. Obvious examples of this come readily to mind. One example comes from the area of information involving trade secrets or other commercially proprietary data. Documents containing such information are protected from required release by exemption 4 of the FOIA, and there is a considerable body of law supporting the proposition that an agency's decision not to employ an FOIA exemption to withhold a document from the public may be tested in a lawsuit brought by the supplier of the information.[14] The wording of exemption 4 of the Sunshine Act is identical to exemption 4 of the FOIA and in the Sunshine Conference Report, the conferees noted that fact and wrote that they ". . . have agreed to this language with recognition of judicial interpretations of that section [of the FOIA]."[15] Logically then the right of the public to learn allegedly proprietary information should not depend on whether the information will be discussed in a meeting subject to GISA or is contained in a written document subject to the FOIA. In fact, however, it may. In most agencies subordinate officials decide whether to give a document proprietary status, while GISA[16] requires the agency heads themselves to vote to close a meeting even if it will solely involve a discussion of a document already accorded proprietary status. As noted above, agency heads, who will be increasingly used to Sunshine, may well reach a different discretionary[17] decision on how to treat information contained in proprietary documents even though the wording of the Sunshine and FOIA exemptions is the same.

There are other ways Sunshine can affect the status of proprietary information. First, it is by no means clear that there is a right to bring a "reverse Sunshine" suit to prevent an agency from discussing proprietary data at an

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[11]5 USC 552b(k).

[12]Senate Report *supra* at 39.

[13]This discussion is indebted to the illuminating consideration of this question in R. Berg and S. Klitzman "An Interpretive Guide to the Government in the Sunshine Act," 97-99 (1978) ("Sunshine Guide"). The Sunshine Guide was published by the Office of the Chairman of the Administrative Conference of the United States pursuant to the consultative responsibility assigned to that office by the Sunshine Act, 5 USC 552(g), and it is incomparably the best general discussion of the Act.

[14]There are now many appellate reverse FOIA decisions. *See e.g., Sears, Roebuck & Co. v. Eckerd,* 575 F.2d 1197 (7th Cir. 1978); *Chrysler Corp. v. Schlesinger,* 565 F.2d 1172 (3rd Cir. 1977), *cert. granted* ____ U.S. ____, 55 L.Ed. 504 (1978); *Sears, Roebuck & Co. v. GSA,* 553 F.2d 1378 (D.C. Cir.) *cert. denied* 434 U.S. 826 (1977). There remains considerable controversy whether the jurisdictional basis for such actions is the FOIA itself or the general federal question statute, 28 USC 1331. The importance of the jurisdictional question is that the jurisdictional statute controls whether judicial review is *de novo* or is based on the administrative record and employs an arbitrary and "capricious standard." *Eckerd,* 575 F.2d *supra* at 1202. *See also* Note "Developments Under the Freedom of Information Act - 1977" Duke L.J. 189, 210 n.144 (1978) (suggesting an intermediate "close control" test).

been publicly aired.[25] Accordingly, there would be no further reason for withholding from the public the documents expressing those views and recommendations.[26] The first action brought under the Sunshine Act dealt with this question, but it was settled and so there is no definite statement of the law.[27] It stands to reason, however, that if a document is fully discussed at an open meeting, a FOIA request for that document made after the meeting cannot logically be denied on the basis of exemption 5.[28]

This result has important implications for agency employees. While the bulk of internal agency memoranda are not sent to or read by the members of the collegial body heading the agency, the ones that do reach the top are often the most important. And it is likely that of the internal memoranda that do reach the agency heads, it will be the more important ones that are singled out to be the subject for collegial discussion at agency meetings. Since the Sunshine Act should make the majority of covered agency meetings open to public attendance,[29] these twice winnowed and often important internal memoranda will have to be made public. Inevitably the authors of future memoranda likely to reach the agency heads will take that into account in drafting their memoranda, and the frankness of those memoranda may suffer.[30] Nonetheless, the essence of the memoranda will be forced into the public record. It has long been realized that one of the incidental effects of the public attendance allowed by GISA will be to induce agency heads to prepare themselves more fully for meetings so as to avoid embarassment, and if GISA does lead to in-

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[25]Exemption 5 permits withholding of internal predecisional memoranda. It "is designed to encourage a free and candid exchange of ideas during the process of decisionmaking and to prevent predecisional disclosure of incipient policy or decisions that could disrupt agency procedures." *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

[26]The preceding discussion only applies to those portions of predecisional documents which are actually discussed at an open meeting. If the discussion does not reach a discrete subject, the FOIA status of the portions of the predecisional staff memorandum discussing that subject should not be changed. A difficult question would be presented if an open meeting were held to discuss a paper which presented conflicting staff positions, but only one side of the question was publicly discussed.

[27]*Consumers Union v. Board of Governors of the Federal Reserve System*, (DDC C.A. No. 77-1800). Consumers Union sued the Board to make available a document to be discussed in an open meeting. Consumers' argument was not based on the FOIA, however. Instead it argued that without the document, the meeting was not meaningfully "open," *i.e.* intelligible to the public. The Federal Reserve settled the case by agreeing to give "priority treatment" to requests for documents to be discussed at open meetings and to make them available "unless . . . a determination is made to invoke an applicable exemption from disclosure." *See* the Sunshine Guide at 97 n.4.

The difference between the result discussed in the text and the one sought by Consumers Union is that Consumers Union wanted the document in hand during the meeting while this note argues that the FOIA gives a right to the document once the meeting has occurred. As a practical matter, at least one agency has already decided that if a document had to be made available immediately after an open meeting, public distribution of the document to those attending the meeting costs the agency nothing and benefits the audience considerably. *See* testimony of Joseph M. Hendrie, Chairman of the Nuclear Regulatory Commission, before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Government Affairs, at 3 (August 4, 1978).

[28]*Cf. Cooper v. Dept. of the Navy*, 558 F.2d 274, 278 (5th Cir. 1977).

[29]Senate Report at 40; House Report Part I at 5. However, at least at the outset, Sunshine in federal agencies has proved to be as elusive as it often is in the skies over Washington. Common Cause reported that in the first year the Sunshine Act was effective (March 12, 1977 through March 11, 1978) 38% of agency meetings were fully open to public attendance, 26% were partially closed. The First Year of Sunshine Federal Agency Compliance with the Government in the Sunshine Act of 1976 at 7 (Common Cause, August 1978). Since Common Cause counted all agenda items considered without an intervening recess as one "meeting", its statistics are different from those would result from a count of action on each separate agenda item.

[30] "As lower courts have pointed out, 'there are enough incentives as it is for playing it safe and listing with

The Sunshine Guide dicsusses the application of this language to the question of whether agency procedures for handling requests from persons outside the agency for transcripts of closed meetings are governed by the FOIA or by the Sunshine Act.[41] The Guide reaches the sensible result that the language means that FOIA requests for agency transcripts[42] should be treated just like any other FOIA requests, except that the specific exemptions of the Sunshine Act are to be substituted for those of the FOIA.[43] One commentator has shown that the Federal Advisory Committee Act[44] and the Sunshine Act have a similar relation, that GISA provides that the Sunshine exemptions are to be used in deciding whether an advisory committee meeting may be closed to the public attendance, but that otherwise the procedures prescribed by the Advisory Committee Act must continue to be employed.[45]

The reasonably segregable test which originated in the courts[46] was incorporated into the text of the FOIA in 1974[47] and it now provides that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt."[48] This test has been strictly applied in FOIA cases and in some cases has led courts to conduct line by line analysis *in camera*.[49] The legislative history of the provision, and its location in the text of the FOIA, support the conclusion that it represents a procedural principle and was not simply an amplification of the exemptive provisions.[50]

But if the "reasonably segregable" test is an FOIA procedural requirement, then, as discussed above, it must be applied to any FOIA request for the transcript of a closed meeting. If the agency has initially reviewed the transcript for release on the base of a looser standard, application of the strict FOIA standard might require release of additional material. Very possibly the chance of such additional release of material would induce a person with an interest in any matter discussed at a closed agency meeting to submit an FOIA request in hopes of supplementing the portions of the transcript the agency voluntarily made available pursuant to GISA. As a practical matter, application of any standard to potential release of a transcript requires some person in the agency to read the transcript line-by-line. Since that

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[41]Sunshine Guide at 99-101. This Guide does not propose a particular formulation for agencies' use. It proposed that agencies conduct "fairly rough-and-ready differentiation between material which must be disclosed and material which may be withheld. However, agencies ought not to withhold entire portions of a discussion in reliance on isolated references to exempt material, but should apply a common-sense approach consistent with the Act's overall policy of 'fullest practicable' disclosure." Sunshine Guide at 77-73 (citation omitted).

[42]Obviously the only requests that offer any problem are requests for those transcripts or portions of transcripts which the agency determined contained exempt matter and so did not voluntarily disclose on its own initiative as required by 5 USC 552b(f)(2).

[43]Since the Sunshine exemptions are not identical to the FOIA exemptions, it was necessary to employ Sunshine, not FOIA, exemptions to rule on a request for a closed transcript. Otherwise a transcript properly withheld under GISA might have to be released. *See* Senate Report at 39.

[44]5 USC App. 1.

[45]D. Marblestone, "The Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act," 36 Fed. B.J. 65, 81 (1977).

[46]*See EPA v. Mink*, 410 U.S. 73, 93 (1973).

[47]Pub. L. 93-502, §2,88 Stat. 1561 (1974).

[48]5 USC 552b(b).

[49]*Mead Data Central, Inc. v. Dept. of the Air Force*, 566 F.2d 242, 259-62 (D.C. Cir. 1977); *Conway v. IRS*, 447 F

FEDERAL ADVISORY COMMITTEE ACT

*By Iona D. Calhoun**

The Federal Advisory Committee Act of 1972, or FACA, (Pub. L. 92-463), effective January 5, 1973, was one of the first sunshine acts. Subsequently, section 10(d) of FACA, concerning procedures for advisory committee meetings, was amended by Section 5(c) of Pub. L. 94-409, "Government in the Sunshine Act," effective March 12, 1977. The intent of Congress, in passing FACA, was to establish a system in the executive branch:

- to govern the creation and operation of advisory committees;
- to keep the number of committees to a minimum;
- to establish standards and uniform procedures to govern the establishment, operation, administration, and duration of committees;
- to keep the public informed with respect to the number, purpose, membership activities, and cost of advisory committees; and,
- to provide for comprehensive reviews of all advisory committees to avoid overlapping and duplicating functions.

Prior to FACA, there was no management system to keep track of advisory committees. However, they have been utilized by the executive branch since the first Presidential administration. In 1794, George Washington established a commission to investigate the Whiskey Rebellion in what was then the western frontier of the United States. In recent years they have represented most major federal programs from agricultural research to veterans medical care.

The Committee Management Secretariat, responsible for all matters relating to advisory committees, was established in the Office of Management and Budget (OMB) by FACA in late 1972, and was transferred to the General Services Administration (GSA) in November 1977 by Reorganization Plan No. 1 of 1977. Executive Order 12024, "Relating to the Transfer of Certain Advisory Committee Functions," delegated certain responsibilities of the President under FACA to the Administrator of General Services.

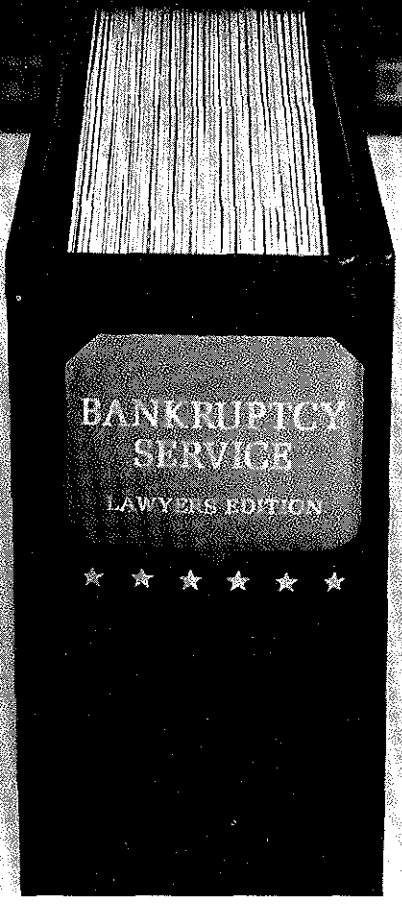
All committees — whether they are established by agency authority, statute, or Presidential directive — receive a rigorous annual review by the Secretariat to determine compelling need, balance of membership, and openness of meetings. The Secretariat also reviews each agency committee prior to its establishment, reestablishment, or renewal, as well as the follow-up reports prepared on the recommendations contained in public reports of Presidential advisory committees.

The most well known and visible evidence of FACA is the requirement for the President to transmit to the Congress an Annual Report on the activities, status, and changes in the composition of advisory committees. The sixth, and latest, was prepared for calendar year 1977, and the Secretariat anticipates the transmittal of the calendar year 1978 report by March 30, 1979. In February 1977, President Carter directed the Secretariat to coordinate a zero-base review of all committees, as that year's annual review. The Sixth Annual Report reflected the results of that review — the largest annual decrease since

*Charles F.Howton, Management Analyst, Committee Management Secretariat, General Services Administration; and Rebecca P. Thompson, Attorney-Adviser, Office of General Counsel, General Services Administration participated in preparation of this article.

FACA. First, the order of the district court leaves unclear the question of when provisions of FACA other than the "open Government" provisions apply to utilized committees. Second, the court of appeals decision raises problems with the implementation of Executive Order 12044, "Improving Government Regulations," (March 23, 1978). Paragraph (c) of Section 2 of that order requires agencies to "give the public an early and meaningful opportunity to participate in the development of agency regulations." If, in the course of rulemaking, an agency submits a proposed regulation to an established non-Federal committee and requests the Committee's opinion or advice on the draft regulation in a face-to-face meeting, at very least the "open Government" provisions of FACA would appear to apply. In contrast, an agency could diminish the probability of "utilizing" an existing committee during the implementation of Executive Order 12044 either by conducting hearings open to the public or by publishing draft regulations in the *Federal Register* for general public comment. An agency's receipt from an established committee of *unsolicited* comments on a draft regulation (whether orally or in writing) probably would not constitute "utilizing" a committee under the *Center for Auto Safety* standard.

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