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Continuing Legal Education

1979 CALENDAR OF EVENTS

12 Antitrust & Trade Regulation Law Conference, Stouffer's National Center Hotel, Arlington, Virginia

20 Conference on the New Federal Bankruptcy Code, Bonaventure Hotel, Los Angeles, California

26 Conference on the Multilateral Trade Agreement Act of 1979, 4 Seasons Hotel, Georgetown, Washington, D.C.

4th Annual Administrative Law Workshop, 4 Seasons Hotel, Georgetown, Washington, D.C.

28 Seminar on Congressional Campaigns & Federal Law, 4 Seasons Hotel, Georgetown, Washington, D.C.

U.S./Mexico Trade Law Conference, Fairmont Hotel, Dallas, Texas

11 3rd Annual Air Law Conference, Stouffer's National Center Hotel, Arlington, Virginia

14 Seminar on Equal Employment Opportunity Law, Don Cesar Beach Hotel, St. Petersburg Beach, Florida

15 FBA/WBA 2nd Annual Conference on Rules of Civil Procedure, Hyatt Regency Hotel, Washington, D.C.

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calendar year 1976 to 875 at the end of calendar year 1977, or a reduction of 284 committees. This came about by the abolishment, expiration, or merger of existing committees, and the creation of fewer new committees during that year. A similar review was conducted again during 1978, the results of which will be reflected in the Seventh Annual Report.

In addition to an introduction and statistical tables, the Annual Reports also contain:

- an alphabetical listing of committees in existence at the end of the year;
- a listing of Presidential advisory committees;
- a listing of all advisory committees, alphabetically by department and agency, in existence during the year;
- information on the committee management officers for each department and agency; and,
- the major documents pertaining to advisory committee management, including FACA, Executive Order 12024, December 1, 1977, OMB Circular No. A-63, Revised March 27, 1974 "Advisory Committee Management", and its transmittal revisions currently in effect, and the GSA Federal Property Management Regulations (FPMR) Amendment B-35, November 1, 1976, on the Annual Report.

Section 5 of Executive Order 12024 specifically directed that "Any rules, regulations, orders, directives, circulars or other actions taken pursuant to the functions transferred or reassigned as provided in this Order from the Office of Management and Budget to the Administrator of General Services shall remain in effect as if issued by the Administrator until amended, modified, or revoked." OMB Circular No. A-63 and the FMPR on the Annual Report are undergoing revision by the Secretariat to be incorporated with new policy and guidance into the GSA directives system. Preliminary administrative and legal work has been completed and an initial draft should be ready for agency coordination and comments during the latter part of 1979.

The most significant recent court decision on FACA is the decision of the United States Court of Appeals for the District of Columbia Circuit in *Center for Auto Safety v. Cox*, No. 76-1922 (D.C. Cir., decided June 9, 1978). In *Center for Auto Safety*, the Court of Appeals considered the applicability of the Federal Advisory Committee Act to the review by an organization of State and Federal transportation officials (AASHTO) of proposed regulations of the Federal Highway Administration. The Court of Appeals held that

> when the Administrator [of the Federal Highway Administration] in the course of developing regulations to govern the Federal-aid highway program discloses his proposed regulations to select groups and obtains their advice and recommendations, he utilizes those groups as advisory committees . . . .

The Court of Appeals remanded the case to the District Court to determine which provisions of FACA apply to these contacts. On July 11, 1978, the District Court for the District of Columbia issued its order, requiring FHWA to comply with certain of the "open Government" provisions of FACA when meeting with AASHTO officials, *Center for Auto Safety v. Cos*, No. 74-1662 (D.D.C.)

The decision and order in *Center for Auto Safety* raise several concerns regarding "utilized" advisory committees as covered in paragraph 3(2) of

apply the "reasonably segregable" test from the outset and incorporate that standard into the review preceding its voluntary Sunshine Act release of transcripts. This would largely eliminate double review of transcripts and would certainly simplify agency action on FOIA requests for transcripts which could then be handled in the same fashion that agencies now handle requests for material which has already been reviewed under the FOIA.[51]

It is likely that passage of time will offer further examples of these two Acts having effects on each other. However, the three effects discussed above: the increased willingness of agency heads to grant discretionary release of documents, increased public access to significant internal memoranda and strict editing standards for withholding of meeting transcripts, each demonstrates that the Sunshine Law is not a narrow law limited to the subject of open meetings, but that it is another major step in the decades-long process by which all aspects of the doing of the public's business are being opened to public view.

[51]Normally such reviews focus on whether passage of time has changed a document's previously determined FOIA status rather than on a re-examination of that status, and they take far less time to process than new FOIA requests.

making process caused by loss of candor may be counter-balanced by the improvement resulting from a higher quality of staff papers motivated by staff's desire to produce a product that can stand public scrutiny.[31]

Sunshine transcripts are the other major area where one of these Acts has a significant effect on the other. GISA[32] requires each agency to keep a complete transcript or electronic recording of every meeting not open to public attendance,[33] and it requires each agency to make such transcripts "promptly available" except for the "item or items" of discussion that the agency determines to contain information that may be withheld under one of the Sunshine Act exemptions.[34] The legislative history of the transcript requirement is somewhat tangled since the Senate version of the transcript requirement was first amended and then deleted in the House of Representatives and was finally reintroduced in the Conference Committee.[35] However, it is clear from the Senate Report that an agency must make non-exempt portions of transcripts promptly available "on its own initiative, rather than waiting until it receives a particular request."[36] Furthermore, that Report does discuss how an agency must go about editing transcripts of a closed meeting and segregating exempt from non-exempt portions so as to satisfy its duty to release non-exempt material.[37]

The Sunshine Guide provides a careful and thorough discussion of this latter question.[38] It reviews the entire legislative history of the transcript requirement and ultimately concludes that the Conference Committee intended to impose a less onerous editing responsibility than the "reasonably segregable" test imposed by the FOIA.[39] While the Guide seems to provide a correct answer to the question before it, which concerned the agency's duty under 5 USC 552b(f)(2), it may well be that the FOIA will be employed in such a fashion as to convince agencies to that the wiser course of action is for them to voluntarily adopt the strict FOIA test.

This outcome would be an unintended result of the provision of the Sunshine Act providing that GISA does not expand or limit rights under the FOIA ". . . except that the exemptions set forth in [GISA] shall govern in the case of any request made pursuant to [the FOIA] to copy or inspect the transcripts. . ."[40]

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[31]Furthermore, the candor may be expected to return with the passage of time as staff members and agency heads become more comfortable with working in the Sunshine. Similarly, possible "grandstanding" by agency members or staff members may decrease with time, and in any event while such posturing may waste time it should not otherwise have an adverse effect on an agency's ability to decide matters before it. The increased quality and professionalism that may result from exposing staff papers to public view would likely be permanent, and should improve the quality of agency decision-making.

[32]5 USC 552b(f)(1).

[33]Except that in the case of meetings closed pursuant to exemption 8, 9(A) or 10 (bank examination reports, information that could lead to financial or securities speculation and information concerning formal adjudication or litigation), the agency may maintain minutes instead of a transcript. 5 USC 552b(f)(1).

[34]5 USC 552b(f)(2).

[35]Conference Report at 19-20.

[36]Senate Report at 32. Some agencies seemingly have ignored this legislative history and provide that even non-withholdable portions of transcripts will not be made available until a written request is received. *See e.g.* 17 CFR 200.408(a) (SEC). The Sunshine Guide criticizes this practice. Sunshine Guide at 66-69.

[37]Senate Report at 31.

[38]Sunshine Guide at 69-73.

[39]*Id.* at 72.

[40]5 USC 552b(k).

informed in advance of an open meeting at which the information is to be discussed, or the information may be revealed fortuitiously as the result of discussion of some other matter. Once the information in a document has been publicly discussed at an open meeting, the continuing availability of exemption 4 for denial of an FOIA request is very questionable, since the information might be viewed as no longer "confidential."[19] At this point, requiring public release of the document upon request would have the beneficial effect of equalizing access to the information which would otherwise be available only to those who happened to be at the meeting at which the information was revealed.[20] However, this procedure would enable agencies to frustrate potential reverse FOIA suits, and so it is not likely to be favorably received by the courts. An agency attorney defending a reverse FOIA suit on the grounds that the agency had itself destroyed the confidentiality of information by discussing it in an open Sunshine meeting will likely receive rough handling, but his position would seem to be sound although perhaps not very palatable.

A more attractive case of the Sunshine Act drawing otherwise withholdable information into the public view is presented by documents withholdable under FOIA exemption 5. This point is discussed in the Sunshine Guide where it is described as a "controversial question."[21] While perhaps controversial, the matter does not seem very difficult. It is true that, as quoted above, the Senate Report said that access to documents will continue to be governed by the FOIA,[22] but the drafters of that report could not have intended that a subsequent FOIA request either could, or should, be processed as if the document had not been discussed at an open meeting.

Prior to an open meeting an agency may use exemption 5 to deny an FOIA request for internal memoranda such as staff recommendations.[23] There is no corresponding Sunshine exemption and so, absent the availability of a more specific exemption,[24] an agency meeting called to discuss a document containing staff recommendations must be open to public observation. Once such a document has been discussed at an open meeting, however, the two rationales for withholding the document from the public have disappeared, since conflicting staff views and the proposed decisions would have

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[18]The Sunshine Guide takes the position that an agency refusal to close a meeting on grounds other than exemptions 5, 6, or 7 "is probably judicially reviewable at the instance of one who can show he is adversely affected or aggrieved by the decision . . ." Sunshine Guide at 33. There is no explicit legislative history supporting this proposition and it runs counter to broad statements in the legislative history that the Act embodies a "rule of openness" and that closing a meeting "is permissive, not mandatory." Senate Report at 20.

Furthermore, subsection (d)(2) of the Act 5 USC 552b(d)(2) confers a specific right to request closure of meetings on the basis of exemptions 5, 6 and 7 to any person whose rights may be directly affected by the meeting. A case can be made that the section represents a Congressional determination of those private interests which have a right to protection from public discussion, and therefore there is no private right conferred by the other exemptions .However, if any agency extends this right to all of the exemptions through its own regulations, it would be strengthening the case for reverse Sunshine actions against it. *See e.g.* 16 CFR 4.15(b)(c), (FTC).

[19]*Cf. National Parks Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). As one court has implied in dicta "broadcast disclosure" destroys confidentiality and waives an agency's right to invoke the FOIA exemptions. *Cooper v. Dept. of the Navy,* 558 F.2d 274, 278 (5th Cir. 1977); *cf. Exxon v. FTC,* 384 F.Supp. 755, 762 (DDC 1974).

[20]There is no requirement that agencies keep transcripts of their open meetings. Sunshine Guide at 65-66.

[21]Sunshine Guide at 97-99.

[22]Text at n. 12 *supra.*

[23]5 USC 552b(B)(5).

[24]For example, if the staff recommendation dealt with how the agency should participate in a civil action, exemption 10, 5 USC 552b(c)(10), would be available.

The Government in the Sunshine Act[1] ("GISA" or the "Sunshine Act") was passed in 1976 to provide the public with "the fullest practical information regarding the decisionmaking processes of the Federal Government."[2] The general purpose behind the Sunshine Act is similar to that which underlies the Freedom of Information Act ("FOIA"),[3] and the Sunshine Act was viewed as "the logical extension" to the openness legislation begun by the FOIA.[4] But the basic subject matter of the two statutes is different since GISA focuses on agency "meetings"[5] while the FOIA focuses on agency "records."[6]

It was probably this difference in subject matter that led the drafters of GISA to include language in the text of the Act[7] and in its legislative history[8] that seems to stand for the proposition that the Acts have no effect on each other. In fact, however, each Act does have a significant effect on the operation of the other. In particular, there is one indirect effect that is difficult to quantify, but that this author believes is indisputable and likely to grow. Ultimately the Sunshine Act will change how collegial agencies exercise their FOIA discretion whether to release documents they could legally withhold. This will come about because the Sunshine Act has forced the heads of agencies governed by collegial bodies to conduct their business in the public eye. They have found that they have not suffered from public observation, and they are therefore likely to be increasingly less convinced by staff arguments about potential harm resulting from public release of potentially withholdable documents.[9]

In addition to that indirect effect, there are two other situations in which one Act directly affects the other. In each case it is probable that, while the result may not have been foreseen by the drafters of the Sunshine Act, the outcome will be an increase in the amount of government information available to the public.

First, it is clear that Sunshine Act meetings may change a document's status under the FOIA. At first blush it would seem that GISA is limited to opening meetings to public attendance,[10] and so that Act should not alter the status of written documents. GISA provides that it does not expand or limit

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[1]5 USC 552b.

[2]The Government in the Sunshine Act, Pub. L. No. 94-409, §2, 90 Stat. 1241.

[3]5 USC 552.

[4]S. Rep. 94-354, 94th Cong. 1st Sess. at 4 (1975) ("Senate Report").

[5]The keystone of the Sunshine Act is its requirement that, except as provided by the Act, ". . . every portion of every meeting of an agency shall be open to public observation." 5 USC 552b(b).

[6]5 USC 552(a)(3).

[7]5 USC 552b(k).

[8]Senate Report at 39; H.R. Rep. 94-880 Part 1 at 18 (1976) ("House Report Part I").

[9]It might be instructive to study agency litigation records to see if passage of GISA has led to a reduction in the number of FOIA actions brought against collegial agencies as compard to those brought against single-headed agencies not covered by GISA. A factor that might confuse such a study would be the expressed policy of the Department of Justice not to defend FOIA suits unless disclosure is "demonstrably harmful" even if the defendant agency determines that a document falls within the exemptions of the FOIA and wishes to withhold it. *See* letter from Attorney General Griffin Bell to heads of all federal departments and agencies (May 5, 1979).

[10]This generalization does not include the transcripts or minutes which must be kept of all agency meetings covered by GISA which are not open to public observation. 5 USC 552b(f)(1). As discussed below, GISA provides how public release of these documents is to be determined.

compliance.

By the type of cost/benefit analysis currently in vogue to measure the effectiveness of government regulations, the Sunshine Act can hardly be given high marks. On the cost side, the Act has created a paper jungle of Federal Register and other notices, forms, and expensive transcripts. Many dollars and work years are consumed in a procedural maze that would boggle the mind of a time/study analyst who desired to study the steps that must be taken prior to and after an agency meeting.

On the benefits side, we properly hold to the view, almost as an article of faith, that Sunshine is good policy in these days when the Federal Register exceeds 50,000 pages per year. But is it working? While it seems that the trade press has had an easier time covering agency actions, and no agency is crying out publicly that Sunshine has weakened its decision-making ability, it is not at all clear what measure or proxies the Congress and others will use to "measure" the benefits of Sunshine. The number of open meetings held, the attendance at those meetings, and even public polls about understanding government, seem inadequate indicators of whether Sunshine is working. Although the Act (together with an Executive Order on regulatory form) has almost certainly raised the consciousness of many government officials about the need to make their actions understandable, congressional oversight committees and public interest groups have hardly claimed any revolutionary benefits from Sunshine. To the contrary, their initial reaction has been one of slight frustration and disappointment.

The obvious question is "why?" The answer, I believe, is that the legislation was not really designed to achieve the desired benefits and expectations for change were unrealistically high. The problems in Sunshine, I submit, flow from the criticisms of the required procedures discussed in this article.

Perhaps because Sunshine was conceived and developed largely during the post-Watergate era of distrust of government and its officials, and because it was feared that government officials would resist these fundamental changes in administrative procedure, the requirements of the Act were designed to create a paper record from which compliance would be strictly monitored. In devising those technical procedures, the Congress and others may have lost sight of the primary goal of facilitating public understanding of the process itself.

Such a thesis explains the desire for a permanent Federal Register record of meetings held, even if notice to the public were to be untimely in many cases. Such a thesis also explains the desire to hold agency members accountable by recording their votes and reasons for closed meetings. And the thesis explains the requirement of a wasteful verbatim transcript so that, at some point in the future, it may be determined that the decisions to hold meetings closed to the public were not made in bad faith. In short, the Act lays the foundation for Congress and others to determine whether government officials have complied with the form of Sunshine. But, unfortunately, little has been done to further or measure the substantive goals of Sunshine.

As time and experience prove the correctness of this thesis, we can hope

wary may have learned the hard way that arriving for a meeting previously announced in the Federal Register can be a frustrating waste of a morning if the information about the meeting has not been independently corroborated, as by the telephone recording.

Some Sunshine Act provisions that govern conduct *during* a meeting are also curious. Open meetings must be "open to public observation." All seem to agree that, at the very least, meeting rooms must be equipped with microphones and other devices that will enable the public to hear. It is somewhat less clear, especially in the case of an overflow audience, that all public observers must be able to see. Absolutely nothing, however, in the Sunshine Act requires that the public be able to *understand* what is happening. Indeed, by continuing to protect under exemption 5 of the Freedom of Information Act all predecisional, intra-agency communications, the Congress appears to have decided on a policy basis that the need to encourage candor in written communications between the staff and agency members outweighs the need for the public to understand the subject matter of the meeting and possible alternative actions.

Aside from authorizing the withholding of FOIA exempt materials, the Act did nothing to require agency members to abandon the procedural and substantive jargon to which government lawyers and others are accustomed. Although the "choice of opening a 7-digit and proceeding with a number of Part III complaints versus a TRR followed by 205 and 206 actions" may ring like poetry in the ears of an experienced FTC attorney, it is unlikely to strike a responsive chord even to most of those who read this article. In like manner, a motion by an agency member "to incorporate the language in footnote 3 on page 6 of the staff memorandum" is not only meaningless, but irritating and frustrating to those in the audience (including agency staff) that are not familiar with a particular memorandum.

Again, the FTC, as one example, has voluntarily made impressive efforts to make its meetings intelligible. First, the present Chairman and his predecessor have required that some helpful documents be available to the public prior to a meeting. Second, Commissioners and staff have often gone out of their way, at the cost of lengthening meetings, to avoid jargon and to help the public to understand the debate on issues under consideration. It must be noted that, like the FTC's efforts to give notice about a meeting, these steps have been implemented out of a feeling of responsibility to the public, not from any requirements in the Sunshine Act.

Statutory requirements for *after* a meeting are, in some respects, the most puzzling of all. First, there is no requirement that any transcript, recording, or even detailed minutes be kept of open meetings. For the members of the press, or private attorneys and public interest groups located in Washington, D.C., this may be well and good. But for those who were disinclined to travel great distances to Washington, D.C., it is of little more than metaphysical interest that government officials in a room in Washington made a noise even though they were not present to hear it.

It is only when an exemption applies and a meeting is closed to the public

It is nearly two years since the networks first invaded the Commissioners' meeting room at the Federal Trade Commission to observe the first open meeting under Sunshine. As Lincoln might have predicted, the world has little noted nor long remembered what was said that day.

Now, nearly two years later, I am becoming increasingly convinced that the Sunshine Act is a sort of Rube Goldberg procedural device. That it is operating is clear; what it is accomplishing is less clear. One of the things that the Sunshine Act is *not* doing is making the operations and decisions of government appreciably more intelligible to the public. I cannot help but believe that the public interest groups and legislators who long pushed for a Sunshine Act must be a little disappointed at the small amount of light that has been generated by the grinding and churning that the Sunshine Act requires. The thesis of this article is that those who pushed for Sunshine were inadvertently blinded by a post-Watergate distrust of government and its officials, with the result that the legislation became more of a compliance mechanism designed to prove that agencies had followed the procedural requirements than an administrative reform of processes to aid the public's understanding.

As I think back to those hectic 180 days that agencies had to implement Sunshine, I remember those burning, intellectually challenging legal issues raised by the statute. Would a conference call involving three Commissioners constitute a "meeting" within the meaning of the Act (even though there had probably not been such a conference call at the FTC in more than 60 years)? Does the Chairman have inherent authority to order a disruptive member of the audience expelled or arrested (although the main problem would turn out to be keeping them awake)? Would two Commissioners constitute a quorum when, because of vacancies, the membership of the Commission was reduced from five members to three (a contingency that actually *had* occurred as recently as 1976)? Would a room to accommodate an overflow audience have to carry closed circuit televised coverage or would an audio speaker system suffice (crowds have to come to be the unusual exception rather than the rule)?

On such issues the bright recent law graduates hired by the Office of General Counsel became *lawyers!* In that 180-day period, the answers to these and other legal and logistical questions were found. Hardly a reasonable person could claim that the FTC, like many other agencies, had failed to comply with both the letter and spirit of the Sunshine Act. The Rube Goldberg machinery was firmly in place by that second week in March, 1977, including the handout charts to identify all of the "players" in the room (who, of course, had to sit in assigned places to be consistent with the seating chart).

Looking back, I have attempted to pinpoint the reasons, perhaps inherent in the Sunshine Act, that have led to the unexpectedly small increase in public understanding of the government's business. The solution can be found

Meetings should be held in a room that has ample space, sufficient visibility, and adequate acoustics. Again, in order to avoid needless ligitation over issues which do not go to the heart of the Act, the public should be permitted to take notes and *photographs* (without flash aids) and should be permitted to make sound recordings in a non-obstrusive manner. Each of these measures will enhance the public's ability to observe meetings and still permit the agency's business to proceed. If your agency has regulations not consistent with the foregoing, I suggest that you consider amending them. Of course, any person may attend a meeting without indicating his identity and/or the person, if any, whom he represents and no requirement of prior notification of intent to observe a meeting may be required.

3. A number of agency regulations explicitly provide that meetings will be open although an exemption may permit the closing of the meeting or portion thereof. I can add that a general practice of opening meetings to the fullest extent practicable will not only reduce litigation under the Act but will likely place us in a better posture in litigation, if and when any litigation occurs. I am certain that a vote of the membership of your agency on whether to close a meeting or portion thereof would, of course, take the public interest into account.

I hope that the foregoing discussion is of assistance to you. I would welcome any suggestions you may have for matters appropriate for discussion in future, similar letters.

Very Truly yours,

BARBARA ALLEN BABCOCK
Assistant Attorney General

expressed his full support to this important public policy. More recently, in June of 1978, the President issued a memorandum to the heads of departments and agencies of the Government in which he asked the Director of the Office of Management and Budget (OMB) to record the number of meetings subject to the Act, and to record other information regarding agency compliance with the Sunshine Act.[22] He further ordered the Director of OMB to pass this information along to him and to the Congress, along with recommendations of actions appropriate to meet the spirit and letter of the law. The President has urged the agencies to fully respect the Sunshine Act by opening up as many meetings as possible.

There is still a real need for strong executive leadership in the area of open government. The President's memo is a step in the right direction, but it must be followed by more executive action on the part of OMB to faithfully execute the Sunshine Act.

Open government should not simply mean marginal compliance with the law. It must become a pervasive attitude within the Federal government. Sunshine sets forth certain goals for taking the Federal decision-making process out of the dark. There is, however, a certain degree of difficulty in achieving these goals. It is a common part of human nature that old habits die hard. The traditional attitudes favoring secrecy are still alive and well in Washington. Because of the original secretive mindset the Federal agencies have historically adhered to, there is a critical need for active executive leadership and oversight in conjunction with the watchful vigilence of Congress to insure that this government will be truly open to the eyes of the public.

[22]See Appendix B.

formation is obtained.

Exemption five covers discussions which involve accusing anyone of a crime or formally censuring any person.[14] Such discussion must relate to specific individuals and, if a crime is involved, specific crimes. Further, the agency must be considering action of a formal nature against the person in question.

The sixth exemption permits closing where the discussion would reveal personal information, and disclosure would constitute a clearly unwarranted invation of personal privacy.[15] This balances the need for openness against the individual's right to privacy. The status and rank of the person will often determine whether, in the public interest, the meeting should be open. Balancing the public interest, an agency probably, however, should open a meeting, if, for example, the discussion involves a person's competence to perform a job and the person is a high government official and not an ordinary citizen. Also, since the purpose of this exemption is to protect the individual, the meeting should not be closed if that person prefers that the meeting be open. The words "clearly unwarranted" indicate the balance in favor of openness.

Exemption seven applies to investigatory records and other information compiled for law enforcement purposes. Such information is exempt only if disclosure would interfere with enforcement proceedings, deprive a person of a fair trial or impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose confidential information furnished only by a confidential source in the course of criminal or national security intelligence investigation, disclose investigative techniques and procedures, or endanger life or physical safety of law enforcement personnel.[16] The records must relate to specific persons. Another governmental agency may not be a confidential source.

The eighth exemption concerns information relating to reports on the condition of or operation of financial institutions prepared by, or for the use of an agency responsible for regulating or supervising financial institutions.[17]

Exemption nine consists of two parts. 9(A) applies only to financial regulatory agencies. It covers information the disclosure of which is likely to lead to significant financial speculation or to significantly endanger the stability of any financial institution. [18]

Subparagraph (B) applies to all agencies and protects information whose premature disclosure would be likely to *significantly* frustrate proposed agency action.[19] The exemption does not apply to information if the content or nature of the proposed action has been disclosed to the public by the agency or the agency's required by law to disclose it before its effective date of the action (e.g. rule-making). There is a very real danger that this exemption could be used or abused by agencies and treated as a catch-all exemption

[14] 5 U.S.C.A. §552b(c)(5).
[15] 5 U.S.C.A. §552b(c)(6).
[16] 5 U.S.C.A. §552b(c)(7).
[17] 5 U.S.C.A. §552b(c)(8).
[18] 5 U.S.C.A. §552b(c)(9)(A).
[19] 5 U.S.C.A. §552b(c)(9);(B).

ciently see and hear what is going on.

The right to observe also should allow for the public to take notes, photographs and make recordings in an unobstrusive manner. The Department of Justice has urged agencies to permit such activities in an effort to further the purpose of the Act and enhance the public's ability to observe.[5] These activities can be permitted and still allow the agency to conduct its business. Yet, some agencies by regulation do not permit such activities. Other agencies require permission in advance for use of recorders or cameras. This places an unreasonable burden on the public. It is the view of the Justice Department and the Subcommittee that the better practice is to permit such activities performed in a non-disruptive manner.[6]

The Act requires that agency meetings be open to public observation.[7] This implies the right to *meaningful* public observation. Based on the Subcommittee's oversight hearings and other activities, it is apparent that not all agencies are providing meaningful open meetings. Some agencies have conducted open meetings in a very closed manner. For example, at some open meetings, agency members and staff have spoken on agency matters in terms of a code. Staff papers and agency reports are fully discussed in public, however this discussion is by reference to page and paragraph numbers. While such an agency holds ostensibly "open" meetings, no members of the public can comprehend what is being discussed. By conducting open meetings in cryptic terms, these agencies have rendered Sunshine meaningless to the public. Several agencies have avoided or remedied this situation by distributing to the public copies of the staff documents and papers which are the subject of the open meeting. In the past year, some agencies have reevaluated their Sunshine policies and have begun to make more substantive information available to the public prior to or during open meetings. These agency practices have contributed greatly to the purposes and effectiveness of the Sunshine Act. By providing staff papers and other background information to the public, these agencies have allowed meaningful public observation of their decisionmaking process.

The Act permits meetings to be closed under any of 10 exemptions if the public interest does not require the meeting to be open to the public. The Sunshine Act becomes relatively meaningless if it merely appears to create openness as the norm when in reality these exemptions become the rule. Agencies wishing to close a meeting, however, have the burden of justifying their actions.

Moreover, the exemptions are, on the whole, permissive and not mandatory.[8] An agency should not automatically close a meeting just because it falls within an exemption. The Act requires that the public interest to be taken into account before a meeting can be closed.[9] Thus, there are two steps

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[5] 5 U.S.C.A. §552b(b).
[6] See Appendix A.
[7] 5 U.S.C.A. §552b(b).
[8] See S. Rep. No. 94-354, 94th Cong., 1st. Sess. (1975), p. 20.
[9] 5 U.S.C.A. §552b(c).

one of several legislative efforts aimed at increasing public confidence in government and in making those who govern more responsive and accountable to the public. Government in the Sunshine embodies the principle that, absent specific circumstances necessitating secrecy for the public good, democracy demands that government operate in the public. It is founded on the belief that the public has a right to know how government officials are conducting the public's business.

Although the Sunshine Act has been in effect for over two years, it is still a relatively new concept in Federal government. It is the most comprehensive anti-secrecy effort since the Freedom of Information Act. The agencies are still in a period of growth and learning with respect to compliance with and effective implementation of its provisions. In this discussion, I will give a brief overview of three major portions of the Act: definitions of key terms, the public interest determination, and the exemptions to the Sunshine Act.

The Act contains two primary key terms. The term "agency" is defined to include any federal agency as defined under the Freedom of Information Act which is headed by a collegial body composed of two or more members, a majority of whom are chosen by the President with the advice and consent of the Senate. Its term "agency" also includes any subdivision of such Federal agency which is authorized to act on behalf of the agency.[1] The definition of this term has not presented many problems in interpretation. There have been questions raised, however, on the applicability of the Act to certain interagency task forces whoch are composed of members appointed by the President with the advice and consent of the Senate. This is an issue which has yet to be fully developed. All government bodies, however, conducting the public's business should adopt and operate under the policies of openness and public access to the decisionmaking process contained in the Sunshine Act. The recommendations and decisions of many of these bodies or committees are often uniformly followed and implemented by other Sunshine agencies.

The definition of a "meeting" on the other hand has been the topic of some controversy. The Act defines a meeting to be the deliberations of at least the number of individual agency members required to take action on behalf of the agency where deliberations "determine or result in the joint conduct or disposition of official agency business."[2] This is perhaps the single most controversial term in the Sunshine Act. It is also one of the most critical terms for effective implementation of Sunshine. There has been much discussion on what precisely constitutes a meeting. Is a staff briefing or informational session a meeting? Is a "working lunch" with a special interest group held outside of the agency's headquarters which is attended by a quorum of agency members a meeting? One could go on ad infinitum describing each conceivable situation that might arise.

To determine if a gathering is a meeting, we must first look to the basic elements of the definition. The most basic criterion is that the meeting must

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[1] 5 U.S.C.A. §552b(a)(1).
[2] 5 U.S.C.A. §552b(aa)(2).

economic interests in the data could be adequated protected by means unrelated to disclosure, such as exclusive use periods.

CONCLUSION

There has been substantial recent progress in public and Congressional awareness of the need for test data disclosure. The next year should see removal of virtually all impediments on test disclosure. Hopefully,. this will mean a new era in public scrutiny of government and public participation in decisionmaking.

In order to market a drug, a manufacturer must submit scientific human tests to the Food and Drug Administration proving its safety and effectiveness. It has been FDA's policy for some time to release summaries of tests to the public, but not the test data themselves. The Food, Drug and Cosmetic Act prohibits release to the public of "any information concerning any method or process which as a trade secret is entitled to protection." 21 U.S.C. §331(j). The Freedom of Information Act gives an agency the discretion to withhold information if it is "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). FDA has withheld test data as either trade secrets or confidential commercial information.

In late 1975, the FDA Bureau of Drugs Director made a strong speech in favor of disclosure of test data. Among other things, he said that withholding data is inimical to true science, — which is by nature an open process — puts pressure on FDA for premature approval of drugs, and is "the single most important cause of the seething resentment that industry sometimes feels from FDA personnel." Assistant HEW Secretary Theodore Cooper testified in 1976 that scientific data "should not be regarded as trade secrets or proprietary information . . . because of the enormous social and economic costs of such a policy. This concept creates an impression of secrecy and enervates unnecessary and duplicative human research." A high-level HEW review panel urged disclosure of data in 1977 so that FDA professional staff may discuss their work with colleagues outside the agency, to increase the amount and quality of public participation in drug decisions, to increase accountability of the agency, to facilitate free exchange of scientific knowledge, and to facilitate drug innovation by preventing wasteful and dangerous duplication of studies.

The administration drug bill, S. 2755, mandates disclosure of test data now held secret. The bill mandates a public hearing on a new drug shortly before FDA formally approves it, and full data may be inspected by any person who is "not employed (directly or indirectly) by, and is not serving as the agent of or on behalf of, any person who would be able to use the information for commercial purposes." Section 111(j). FDA has continued to support this provision of the bill as an essential reform measure. The best statement of its reasons is found in a letter from Commissioner Kennedy to Senator Edward Kennedy of May 5, 1978. It says, among other things, that government policy should be based on publicly-available information.

Industry opposes data disclosure, at least publicly, on the basis that disclosure will harm incentives to innovate. FDA argues that adequate incentives for innovation are provided by the patent system, by company good will, and by a provision in the new bill which grants five years of exclusive marketing to the first innovator.

Dr. Gary Noll, an economist at the California Institute of Technology,

In the time I have remaining, I would like to touch briefly upon several areas where problems continue to hinder the effective operation of the Freedom of Information law.

Processing Delays and Case Backlog

The majority of federal departments and agencies are either complying with, or making a reasonable effort to comply with, the statutory response times of the FOIA. Yet there are persistent agency claims, most notably from the FBI, that the 10 and 20-day time limits in the law are unrealistic or impossible to meet, and have been responsible, in large measure, for their backlog of cases. The suggested solution is to extend the time limits in the law.

Quite frankly, I am not persuaded that extending the time limits will eliminate the backlog or improve the efficiency of an agency's FOI operation. And I am concerned about extending the time limits for all agencies, based on the unique circumstances of a few.

Much can be done administratively to ameliorate the situation before resorting to amending the law. Improved processing procedures, organizational structure and records management practices, as well as a more positive attitude toward the FOIA would help these agencies achieve fuller compliance with the administrative time limits of the law.

In short, before altering the statutory time limits which, incidently, are rarely enforced, Congress must be certain that no other viable alternative exists.

Fee Waivers

The 1974 amendments to the Freedom of Information law included a provision for waiver or reduction of search and duplicating fees when the agency determines that "furnishing the information can be considered as primarily benefiting the general public." Despite the amendment, excessive fee charges coupled with a refusal to waive fees remains an effective bureaucratic means of avoiding disclosures.

Last summer the Subcommittee undertook the first Congressional survey of agency fee waiver practices. Let me point out at the outset that the survey was limited because few agencies keep adequate information on their fee waiver practices. However, even though the data compiled in this survey is admittedly sketchy, enough serious problems with agency implementations of the fee waiver provision were brought to light to suggest the need for some remedial action.

In this, as in other areas of the Freedom of Information law, more precision and guidance is required. Clearly needed are uniform and specific criteria upon which to base fee waiver determinations in order to implement the public benefit language of the provision. Secondly, each agency should either establish separate appeal procedures for fee waiver denials or amend its

the situation:

— Agencies should promulgate regulations concerning the availability of information which is regularly collected.

— Procedures should be established for reviewing such information which balances not only the competitive interest and the government's ability to get such information in the future, but also the public's interest in knowing the information. This is particularly important in the health and safety areas where the decision-making process in federal agencies is of particular interest to the public.

In addition to these issues, considerable controversy continues to exist as to whether withholding information under (b)(4) is discretionary or mandatory.

According to the legislative history of this provision, the exemption is not mandatory. Yet agency representatives at our hearings maintained that it was.

A plethora of conflicting information statutes at each agency makes it difficult for those agencies to decide whether or not to release information. But it is clear that unless the intervening statute is specifically a (b)(3) statute, the agency has discretion to release any information which otherwise falls under the (b)(4) exemption.

For example, 18 U.S.C. §1905 is not a (b)(3) statute, and is inapplicable where disclosure is made pursuant to a valid agency regulation. Congress never intended to include this criminal statute within the (b)(4) exemption.

Similarly, there is evidence of an increased reliance upon the Privacy Act as a (b)(3) intervening statute, although it, too, is not such a statute. Any privacy interests which are to be protected must come under the (b)(6) criteria.

Reverse Cases

The (b)(4) exemption has spawned a new phenomena under the law — the "reverse" FOIA lawsuit. These actions were absolutely unanticipated, and raise a number of significant policy questions and procedural issues currently under review in Congress and in the Courts.[4]

1. Should there be notice of such action? If so, to whom? To the requester when the suit is filed? To the submitter when the decision to disclose is made?

2. Who should be parties to the suit? The requester or the submitter? Does the agency adequately represent the interests of the requester or submitter? Should the requester be required to join the suit or should he have the option not to do so?

3. What should be the standard and scope of review in such cases? Clearly the *de novo* review of the FOIA should not currently apply since such cases are not addressed in the law, but should it? Should the "arbitrary and capricious", "abuse of discretion" standard in the APA apply?

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[4]See hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 95th Cong. 1st Sess., on Oversight of the Freedom of Information Act (September 15, 16, October 6, November 10, 1977); "Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits," Twenty-Fifth Report by the Committee on Government Operations, H. Rept. No. 95-1382, 1978; Hearings before a Subcommittee on Government Operations, House of Representatives, 95th Cong. 1st Sess., on Business Record Exemption of the Freedom of Information Act, October 3, 4, 1977.

See also *Chrysler v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), Cert. granted sub nom. *Chrysler v. Brown*, 46 U.S.L.W. 2202 (Mar. 7, 1978). Supreme Court Docket No. 77-922, argued November 8, 1978.

Despite the current concern for numbers, dollars, figures, time limits, burdens, caseloads, delays, expediency, etc., the fundamental reason for which the Freedom of Information law was originally enacted was to effectuate a more important national interest — the public's right to know and participate intelligently in our democracy.

I acknowledge that the volume of requests, and the time and resources necessary to respond to those requests, were unanticipated and greatly underestimated. But I will not concede that the Freedom of Information law is a bad law, or that it should be repealed, or substantially altered, or moritoriums placed on compliance.

Administrative burdens or costs should never be permitted to determine the extent of this vital right. Can one realistically put a price-tag on the right to know and the ability to participate in an open and free society?

In enacting the Freedom of Information law, Congress recognized that public access to government information was essential and signaled that it was willing to pay the price to preserve our constitutional freedoms. And through its decisions in this area, the Judiciary has reinforced the importance of this law. The focus of our discussions this morning, therefore, should be the manner in which the law is being interpreted and implemented in the executive branch. What can be done by the administration, and if necessary, by Congress, to facilitate compliance with the spirit as well as the letter of the law.

This administration began with a commitment to openness. Expectations were high for a new executive branch attitude toward open government. However, in all candor, this administration has yet to prove itself.

A change in attitude should have begun to translate into altered procedures and perspectives within the bureaucracy. However, there is little indication of agency appreciation of the proper implementation of the FOIA:

> — There should have been an end to suggestions that the American people "refrain from asking government information unless they genuinely need it" or that we restrain our idle curiosity and inclination to test the law;[1] or that the law is a burden and a problem which requires immediate remedial action to reduce disclosures.[2]
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> — What is the impact of the Attorney General's memo of May, 1977 if the Justice Department files a statement with its Freedom of Information annual report in April, 1978, calling attention to the "tremendous costs and administrative burdens the statute places on the Department, to the detriment of its traditional mission and the public interest in effective law enforcement.

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[1]President Carter, Remarks and a Question-and-Answer Session with State Department Employees, February 24, 1977.

[2]Letter from Benjamin R. Civiletti, Acting Deputy Attorney General to Honorable Walter F. Mondale, Vice President of the United States and President of the Senate, April 18, 1978.

The FBI welcomes efforts towards openness in Government which permits objective appraisal by the public of how the FBI functions. Public disclosure aimed toward the goal of an informed citizenry is one to which the FBI is committed.

Requests are accepted from people in all walks of life. The subject matters of these requests are limited only by the imagination of the public. In calendar year 1976 we received 15,778 requests, in calendar year 1977, 18,026 requests and 18,084 requests for information were received during calendar year 1978. In calendar year 1978, the FBI made final responses to 19,982 requests under the Freedom of Information Act or the Privacy Act, releasing two and a quarter million pages to requesters. Many releases have been made which touch upon some of the public's most serious as well as general interests. Our public reading room contains over 600,000 pages of materials concerning major investigations of the assassinations of Dr. King and President Kennedy; Cointelpro; significant civil rights matters; major espionage cases; World War II; counterintelligence and sabotage cases; gangsters of the 1930's; and even historical matters preceeding that period. Any of these materials can be accessed and reviewed at no cost. The FBI's demonstrated response to the mandate of Congress in this agre is indicative of the success that comes from doing the job.

This response has, however, been achieved at a substantial cost. To allow this scrutiny of the FBI, we have expanded since 1974 our full-time staff handling Freedom of Information Act and Privacy Act (FOIPA) work from less than twenty people to more than 300 and have expended over 23 million dollars from 1974 through the end of 1978.

Despite our efforts, the FBI has faced delays in responding to requests in a timely fashion as prescribed by the statutes. Various factors, ranging from the sheer volume of work involved, to the extreme care necessary to process requests, the limited resources available for this program due to budgetary constraints, litigation matters involving the preparation of thousands of pages of affidavits with detailed explanations, and the handling of administrative appeals have contributed to the FBI's inability to make timely responses.

The FBI achieving a final response within the prescribed time frames was recognized by the General Accounting Office, in its study conducted regarding compliance with the FOIPA, as being an impossibility in many cases. Criminal and national security investigatory records must be processed with great care to protect valid law enforcement interests and sensitive issues of personal privacy. These legitimate concerns require the time necessary to make good judgments regarding the disclosure of information.

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*Original conference presentation by Allen H. McCreight.

change funding levels for certain agency activities.

(c) *What is the Decisionmaking Procedure or Methodology?* For example, a decisionmaking process that relies chiefly on input from persons who are peers of the decisionmaker or are essentially independent of him may have a different or lesser need for protection of deliberative dialogue than where reliance is chiefly on the decisionmaker's own deputies or immediate assistants.

(d) *How old is the record in question?* Obviously, the greater its age, the more likely that its release would not have a significant chilling effect upon deliberative decision-making processes. However, there is no set period or formula for this; for example, release of deliberative matter on subjects of a continuing (or cyclically) inflammatory nature have a recognized potential even decades later for affecting the career of the author, especially if public attitudes have changed.

(e) *What is the Status of the Decision?* The likelihood that disclosure of internal deliberative matter will lead to pressures upon or harassment of the advisors or the decisionmaker may be greater while the decision has not yet been made. But even decisions that are technically closed may be reopened, or may involve factors very similar to those in ongoing sequences of decisions. Moreover, some deliberations are directed to certain types of ongoing policy issues, particularly the broader ones of greater national importance, e.g., what should the nation's policy be with regard to management of natural resources, or as to the development and control of technology, etc., which are inherently unlikely to be meaningfully closed or settled except for particular aspects.

(f) *What is the Status of the Personnel?* How vulnerable is the career situation of the author and addressee of the deliberative communication? Are they dead, retired, or otherwise basically free of career concerns, or are they untenured, unestablished, or otherwise likely to be concerned with their security or advancement? Release of deliberative communications is less likely to have a chilling effect on the deliberative process to the extent the parties to such communications are perceived by themselves and others to be less vulnerable in their present and future careers.

(g) *Is there reason to expect a "warming" effect?* The risk of a chilling effect is minimized if the author or recipient would actually welcome the release of the material, in order, for example, to obtain desired publicity for themselves or for the views expressed. At the same time, such a motivation or expectation may itself have a distorting effect upon the deliberative decision-making process, by inducing a tendency toward posturing.

(h) *Are the issues inflammatory?* As previously discussed, presence of this factor means a greater risk that release of deliberative matter will have a chilling effect than if the issues were equally important but dull.

(i) *Are Powerful Pressures Likely?* If there are organized groups or major financial or political forces that seek to influence, reward, or punish decision-makers and advisors, this enhances the risk that release of deliberative matter will have a chilling effect.

(j) *Is there an undue risk that the deliberative communication will be*

visory committees, see 5 U.S.C. App. §10. Nevertheless, in passing this Sunshine legislation, Congress deliberately left FOIA, including Exemption 5, undisturbed, see 5 U.S.C. §552b(k), except for an amendment to FOIA Exemption 3 not here pertinent.

On May 5, 1977 Attorney General Bell wrote the heads of all federal departments and agencies, expressing concern over the volume of FOIA litigation, and announcing four criteria which the Department would consider in consulting with agencies and determining whether to defend agency denials in court. The third criterion, "whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted", in probably the most significant part of the letter, and although no particular FOIA exemption was mentioned, this "harm" criterion was primarily aimed at the unnecessary use of Exemption 5. Accordingly, the apparently conflicting policies of Exemption 5's deliberative privilege and of the Sunshine Act's declaration for exposing decisionmaking processes were brought into the arena of FOIA administration, with the result in particular cases expected to turn on chiefly on a judgment about the risk, in the particular circumstances, of injury to the decisionmaking process.

During the two years since the "harm" criterion was surfaced, there have been numerous occasions for the Department, and particularly its Freedom of Information Committee, to consider its application to concrete situations in various agencies. In most cases, the basic problem is to try to determine whether an asserted (or assumed) risk to the deliberative, decisionmaking process if the document is released is a more or less serious one, or whether such risk is remote and insubstantial. To resolve such questions as well as possible requires giving due respect to the agency views, based on its experience with the program and its appraisal of the circumstances to which the material pertains, but due respect is different from automatic, uncritical acquiescence. Our experience in reviewing assertions of chilling or distorting effects on an agency's decisionmaking processes if deliberative matter is released leads us to the following observations:

(1) A point of departure for handling difficult cases is to start with easy ones. And it is sometimes easy to determine whether there is more than a remote prospect of harm from releasing deliberative materials. To illustrate, an easy hypothetical case at the remote risk end of the spectrum would be a 25 year old memorandum recommending an increase to 8 months of the 6 month period between regular cleanings of the agency's typewriters, where the author and the decisionmaker have both retired and the agency has switched to a basically different kind of typewriter. Almost as easy, but at the other end of the spectrum, would be a recent staff memorandum discussing and recommending a position to be taken in administration, litigation or congressional hearings on such potentially inflammatory issues, as e.g., funding abortions for poor women, racial preferences, gasoline rationing, the military draft, tax assistance for private schools, illegal aliens, employment of homosexuals in sensitive jobs, or legalization of marijuana. Although it might be interesting or even valuable to discover the true attitudes of public employees on such

One of the basic principles of the Freedom of Information Act is that an exemption in the Act is merely an option to deny access, not a prohibition against release. A frequently encountered and often puzzling question in acting on requests for agency records is whether to grant or deny access to internal "deliberative"[1] materials which are legally withholdable under Exemption 5, 5 U.S.C. §552(b)5. Disputes over access to such material have been one of the most common subjects of FOIA litigation. The index to the August 1978 FOIA Case List shows decisions in over 170 cases concerning withholdings based in whole or part on Exemption 5. Almost all of these involved agency assertions of the deliberative privilege aspect of Exemption 5.[2] While these court decisions typically deal with legal issues of withholdability, the volume of litigation involving the deliberative privilege has been one of the factors in highlighting the policy issue of whether agencies use this privilege too often. Many observers, and the Justice Department, believe that this privilege has been asserted more often than necessary in the past.

The present discussion is concerned only with the question whether, assuming material is withholdable under the deliberative privilege of Exemption 5, it should or should not be withheld as a matter of policy or discretion. After a brief review of the major policy factors for and against invoking the deliberative privilege, limited guidance will be given for agency use in appraising the actual likelihood of the special kind of public harm which the deliberative privilege is designed to prevent: a chilling and distorting effect upon free and candid internal discussion in support of optimum decision-making in government agencies.

The main general policy factor in favor of the existence and use of the deliberative privilege is familiar: to avoid the chilling and distorting effect just

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*The author prepared this article as a statement of policy by the Office of Information Law and Policy, U.S. Department of Justice.

[1]Some court decisions and discussions, especially earlier ones on civil discovery which are the major background for Exemption 5 case law, use the term "executive privilege" or "evidentiary executive privilege" rather than "deliberative privilege". However, the latter term is becoming generally accepted in the FOIA context to describe this privilege. By whatever name, the privilege is the one which is designed to protect predecisional internal communications which are part of the decision-making or policy-making processes of federal agencies.

[2]This discussion deals only with the deliberative privilege. However, there is some confusion with respect to the privileges under Exemption 5, especially as regards their application to legal memoranda. Exemption 5 also embraces at least two other privileges: the attorney work-product privilege for materials prepared in anticipation of litigation, and the attorney-client privilege in the strict sense of a privilege that only protects confidential information imparted by the client to the attorney. See *Mead Data Control v. Air Force*, 566 F.2d 242 (D.C. Cir. 1977). The confusion centers on which privilege is applicable in protecting advisory legal opinions, because the term attorney-client privilege is also used more broadly as covering professional advice of an attorney to a client, regardless of whether the reason for protecting the advice is to protect specific confidential information from the client or to protect the general relationship of trust in which the client seeks the attorney's advice. Thus, advisory legal opinions by government lawyers to agency clients may be covered by the attorney-client privilege in the strict sense, by the broader attorney-client privilege (which is part of the deliberative insofar as the advice is in aid of the client's decision-making), or by both.

judgment rendered in the submitter's absence would severely prejudice the rights of the submitter in that his confidential information could be disclosed.

Another significant case involving protection of business information is *W. L. Wearly v. FTC.*[25] The District Court in New Jersey held in that case that the plaintiff need not produce certain confidential business information to the FTC in response to an administrative subpoena unless the agency guaranteed that the information would not be disclosed publicly under the Freedom of Information Act. The District Court reasoned that disclosure of confidential business information under the FOIA to members of the public constitutes the taking of property for private purposes without compensation in violation of the Fifth Amendment to the Constitution of the United States. The significance of this case is obvious in that it is the first time that a company has been successful in refusing to provide information to the Government in the first place on the grounds that it might be disclosed under the FOIA.

A similar claim of unconstitutional taking has been made in the case of *Amchem Products, Inc., et. al. v. Costle.*[26] There, nine pesticide manufacturers are challenging the constitutionality of provisions of the Federal Pesticide Act of 1978 which authorize the Environmental Protection Agency to publicly disclose research data on pesticides and to use these data, owned and submitted by one company, to support the issuance of pesticide registrations to other companies. The plaintiffs contend that portions of their research data constitute trade secrets, and that the Government's disclosure of these data, and use of the data for the economic benefit of competitors, constitute a "taking" of property without just compensation in violation of the Fifth Amendment. The case has been briefed and argued and is awaiting decision on the merits.

One of the more interesting cases decided in the past year on the protection of confidential business information is *Shermco Industries, Inc. v. Secretary of the Air Force.*[27] To those who have occasion to practice before the General Accounting Office, the *Shermco* case represents the same attraction that the "man bites dog" stories do in the newspaper. Shermco had a five-year contract to overhaul generators and had performed the first two years. The Air Force terminated the contract and solicited offers by requests for proposals from a number of contractors, including Shermco once again. After receiving offers, the Air Force awarded the contract to a company called Tayko, and Shermco filed a protest before the GAO complaining of the proposed award to Tayko. As is often the case, when the agency filed its response to Shermco's protest it attached the bid information of Tayko but did not send that same information to Shermco. Shermco made several requests to obtain the Tayko data which had been filed with the GAO, all of which were denied, Finally, Shermco sought the data under the Freedom of Information Act. This resulted in Shermco's suit to compel disclosure of the data, belonging to

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[25]Civil No. 77-1860 (D.C.N.J. Oct. 18, 1978).
[26]76 Civ. 2913 (S.D.N.Y.).
[27]No. CA3-77-1495 (N.D. Tex., May 2, 1978).

decided by the time these materials are published. *Chrysler* is the first reverse FOIA case to reach the Supreme Court and, as one might expect, there were substantial numbers of amicus briefs on both sides. As anyone familiar with these problems knows, there has been a substantial split among the circuits in the treatment of reverse FOIA cases regarding Exemption 4.[16] One of the issues raised by the *Chrysler* case and on which the circuits are at odds regards the nature of a reverse FOIA proceeding itself. Submitters who are plaintiffs in such actions usually desire the court to review the matter *de novo;* that is, compile its own record and decide the case without paying any deference to the agency's decision as to whether the information at issue should be disclosed. The argument in favor of *de novo* review, among others, is based on the premise that the issues are the same in a reverse FOIA suit as they are in an ordinary FOIA action (i.e., whether the data is confidential). Thus, a *de nova* review as is required in an ordinary FOIA action should also apply to reverse FOIA suits. In addition, the agency's own record, for a number of reasons not the least of which is the short time the agency has to compile its record, is usually quite sparse. In all the cases where other than *de novo* review has been had, the court has had to send the record back to the agency for further proceedings.[17] On the other hand, agencies and other interested parties have contended that judicial review in reverse FOIA cases should be confined to the administrative record pursuant to the Administrative Procedure Act because there is no express grant of *de novo* review in the FOIA for reverse FOIA actions.

Another issue raised by *Chrysler* is whether the exemptions, and particularly Exemption 4, is permissive or mandatory. It has been held on several occasions that the exemptions themselves are usually interpreted to be permissive, i.e., even if information falls within an exemption. The rationale for this position is that the FOIA expressly states that it "does not apply" to exempt information. This view also comports with the legislative history of the broad coverage of the exemptions themselves.[18] Certainly the majority view is that the exemptions generally speaking are permissive.[19] Opposed to this view, however, is the argument that Exemption 4 must be read as mandatory otherwise the protection intended to be provided by Congress would be frustrated. Exemption 4, contrary to the other exemptions, covers information which is not the Government's to withhold or disclose. It is information belonging to third parties who have submitted it to the Government in confidence. No-

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[16]Compare *Westinghouse Electric Corporation v. Schlesinger* and *Chrysler Corporation v. Brown, supra*, note 15, *cert. granted*, 46 U.S. Law Week 3552 (March 7, 1978). See also, *General Dynamics Corporation v. Marshall*, 572 F.2d 1211 (8th Cir. 1978).

[17]*See*, e.g., *Chrysler, Id.* and *General Dynamics, Id.* It has also been argued that *de novo* review is required under Section 10 of the Administrative Procedure Act, 5 U.S.C. §706, which provides that review of agency actions shall be *de novo* when agency fact finding procedures in an adjudicatory action are inadequate. See, *Citizens to Preserve Overton Park v. Wolby*, 401 U.S. 402, 415 (1971), see also, Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States, *Chrysler Corporation v. Brown*, U.S. S.Ct. Oct. term, 1977, No. 77-922, at 32.

[18]See H.R. Rept. 92-1419, 92d Cong., 2d Sess. (1972), Senate Rept. No. 93-854, 93d Cong., 2d Sess. 6 (1974).

[19]*Chrysler v. Schlesinger, supra*, n. 15, *General Dynamics v. Marshall, supra*, n. 15, *Pennzoil Company v. FDC*, 534 F.2d 627, 630 (5th Cir. 1976).

what information was intended to fall within its scope. The Senate Report states:

> This Exemption is necessary to protect the confidentiality of information which is obtained by the Government . . . , *but which would customarily not be released to the public by the person from whom it was obtained.* This would include business sales statistics, inventories, customer lists, and manufacturing processes.[5]

The House Report contains almost identical language and states that the Exemption would also include

> Information which is given to an agency in confidence, since a citizen must be able to confide in his government. Moreover, where the government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.[6]

The House and Senate Reports do nothing more than reflect the testimony of those persons who spoke out on the need for such an exemption to maintain the confidentiality for commercial information that had existed up to that time.[7] The principal concern was for an assurance that business secrets which traditionally had been sheltered against release to competitors would continue to receive confidential treatment under the new Freedom of Information law.[8]

It would seem from the preceding, and from a plain reading of Exemption 4 of the FOIA, that business and commercial information which had been submitted in confidence to the Government would continue to be treated confidentially and would fall within Exemption 4 of the FOIA. That plain and obvious view of the Act was adopted in the early decisions determining the coverage of Exemption 4. For example, in *Barceloneta Shoe Corp. v. Compton,*[9] the court held that solicitation of information by the Government under a promise of confidentiality exempted the information from disclosure. And even the District of Columbia Circuit initially read the exemption as it was obviously held to be read in *Grumman Aircraft Engineering Corp. v. Renegotiation Board,*[10] by holding that information which is customarily held in confidence by a company is confidential under Exemption 4.

Then came the aberration. In *National Parks and Conservation Association v. Morton,*[11] the D.C. Circuit recited the exact same legislative history described above. Then, inexplicably, it held that information is confidential under Exemption 4 if disclosure is likely to: 1) impair the Government's ability

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[5]Senate Report No. 813, 89th Congress, 1st Sess. 9 (1965) emphasis added.

[6]House Report No. 1497, 89th Cong. 2d Sess. 10 (1966).

[7]This continued protection of commercial information submitted in confidence was uniformly supported by the agencies of the Federal Government who presented their views on the Act. Freedom of Information: *Hearings on S1666 and S1663 before the Sub-Committee on Administrative Practice and Procedure of the Senate Judiciary Committee,* 88th Cong. 1st Sess. 199 (1964). *See particularly:* 244-245 (AEC Comments), 250, 251 (U.S.D.A.); 254, 257, 258 (Commerce Dept. Comments); 268-271 (Treasury Dept. Comments).

[8]*Id.* at 244-45, 250-51, 254, 257-58, 268-71.

[9]271 F. Supp. 591 (D.P.R. 1967).

[10]425 F.2d 578 (D.C. Cir. 1970).

[11]498 F.2d 765 (D.C. Cir. 1974), hereinafter *National Parks I.*

A third question is whether or not the decision to balance or not to balance is subject to judicial review. Since it is well-settled that in order to withhold information under the first exemption of the Freedom of Information Act the government must comply with the procedures as well as the substantive criteria of the Executive Order and that the court can and will determine for itself whether the procedures have been followed, there does not appear to be any question that there can be judicial review of a determination that a balance is not required.[19] The court determining whether a balance was in order will have to make its own judgment about the meaning and intent of the paragraph in the Executive Order in light of the kind of "legislative history" presented in this article.

Finally, there is the question of whether the court can engage in its own balancing. Given that the court can make a *de novo* determination of whether information is properly withheld under the first exemption.[20] The court will, once it determines that balancing is appropriate, need to make its own determination. This will mean that the court will need to consider evidence not only about the injury to national security which might result from the release of the information but also about the public value of the information.

The government seems determined to prevent the court from engaging in its own balancing by arguing that the decision to balance and the balance itself is not subject to judicial review. However, the Freedom of Information Act seems to require such judicial review and the Executive Order does not appear to have been written with any intent upon the part of the President to seek to avoid it.

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[20] *Ray v. Turner.*

health, safety, or welfare. However, general assertions of public interest [illegible] purporting to act on the public's behalf will not automatically result in further review under this provision, and weighing the public interest need not be conducted merely because a requester demands it.

d. When it appears that the public interest in disclosure of an item of information being reviewed for declassification may outweigh any continuing need for its protection, the case shall be referred for decision:

(1) To an official having Top Secret classification authority who shall refer it to the appropriate Deputy Director or Head of Independent Office with appropriate recommendations.

(2) The Deputy Director or Head of Independent Office concerned, in coordination with OGC, as appropriate, shall refer the matter and their recommendations to the DDCI for a determination as to whether the public interest in disclosure of the information in question outweighs any damage to national security that might reasonably be expected from such disclosure.[15]

In court cases in which the issue of a balancing test has been raised, the Justice Department on behalf of the CIA has taken the position that the decision whether or not to balance rests within the exclusive jurisdiction of the agencies and that the agency need not balance unless one of the specific categories cited in its regulations in fact applies.[16]

The Meaning of the Balancing Test.

The first issue raised by the balancing test is the factual circumstances under which the balancing test should come into play. In approaching that problem it is important to begin with the fact that neither the Freedom of Information Act nor the Executive Order on Classification requires that any information be withheld. The Freedom of Information Act simply permits withholding and the Executive Order established criteria for situations when information can be withheld and must be stored so as not to be disclosed in an unauthorized manner.

In fact, in practice senior officials of the government constantly make decisions to disclose information which fits the criteria for classification in that its release could reasonably be expected to cause damage to the national security. They do so because of the belief that public debate on the issue involved will more likely support their position if the information is made public.[17]

Thus the purpose of the provision in the new Executive Order must be to require the balancing test to be conducted in those "rare" situations in which there is a strong public value of the information. The kind of situations designated in the CIA directive quoted above do not appear to be those contemplated by the provisions of the Executive Order. For example, obviously in a situation in which failure to release information could reasonably be expected to place a person's life in jeopardy, information would be released even if its

[15]CIA regulations, HHB 70-2 13 Rev. 2 Jan. 1979, Sec. c & d.

[16]See for example supplemental affidavit of Eloise Page in *Afshar v. Department of State*, Civil Action No. 76-1421, (D.D.C., filed July 30, 1976), United States District Court for the District of Columbia.

[17]See generally *Top Secret*, Chapter 3, pp. 27-32.

prior to the expiration of such five-day period, the President notifies the committee that he objects to the disclosure of such information, provides his reasons therefor, and certifies that the threat to the national interest of the United States posed by such disclosure is vital and outweighs any public interest in the disclosure.[7]

The process of revising the Executive Order on classification began with the issuance by President Carter of a Presidential Review Memorandum calling for a revision of the decision designed to substantially reduce the amount of secrecy because of the public's right to know.[8]

In the deliberations following the issuance of the PRM the proposal for a balancing test was introduced but apparently not accepted at the working level.[9] Subsequently at a meeting of the Cabinet-level committee which considered the Executive Order, the Security Coordinating Committee, a decision in principle was made to add some kind of a balancing test to the order which would require that the public value of the information be taken into account in a decision whether or not information could be released. However, the draft of the Executive Order which was subsequently released for comment did not contain a clear provision calling for a balancing test.[10]

In response to the release of the Executive Order for comment, a group of public interest organizations joined in a letter urging a number of changes in the Executive Order including the addition of a provision calling for a balancing test. That portion of the letter reads as follows:

> . . . 3. require that in all cases officials always weigh the value and importance of the information to the public (or a member of the public) against the possible risk of disclosure; . . .
>
> . . . 4. *Balance the Public's Right to Know.* The public's right to know will often outweigh any "significant damage" to national security that might occur if information is disclosed. If we interpret the draft Order's statement of intent correctly, it is the position of the Administration that in such cases the information must be disclosed. To implement this policy a balancing test should be applied by those authorized to classify documents.
>
> We strongly urge such a test. We recommend that a third section (3) be added to Section 2 (a) to provide the following:
>
> (3) the damage to national security posed by the disclosure of the information is of such gravity that it outweighs any public interest in the disclosure.
>
> We note that this test has been adopted by both the House and Senate Intelligence Committees to guide their decisions to make public classified information.[11]

Subsequently, a decision was made to include a balancing test. However, it was to be limited to declassification review and only to some circumstances. The Executive Order itself left open what those circumstances would be and how the issue of a balancing test would arise.

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[7]S. Res. 400, 94th Cong. 2nd Session. An Identical provision is contained in the resolution establishing the House committee. See H. Res. 658, 95th Cong. 1st Session.

[8]Presidential Review Memorandum/NSC-29, June 1, 1977.

[9]This description of the process of drafting the Executive Order is based on interviews with participants in the process.

[10]Draft Executive Order on Classification as cited in the following: "Test of Proposed Executive Order Shows 13 Criteria for Classification," *Access Reports.* Vol. 3, No. 18 (Sept. 20, 1977), pp. 3-10. and U.S. Congress, Senate Committee on the Judiciary, *Freedom of Information Act.* Hearings before the Subcommittee on Administrative Practice and Procedure, September 15, 16, October 6, and November 10, 1977. 95th Congress, 1st Session, pp. 458-467.

[11]Letter sent by CNSS, ACLU, et. al., October 14, 1977.

Perhaps the most important provision in the new Executive Order on lassification[1] is the provision in section 3 which requires in certain circum-:ances the application of a "balancing test" in determining whether classified ıformation can be released.

> It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.[2]

Since under the terms of the Freedom of Information Act, national ecurity information can only be withheld if it meets the substantive and pro-:edural criteria of the Executive Order, this change in the procedures and :riteria of the Order constitute, in effect, an amendment to the Freedom of nformation Act.[3]

A number of questions are raised by this provision and its application ınder the Freedom of Information Act including the following:

1. Under what factual circumstances affecting the information requested hould the balancing test be applied?

2. Procedurally, how does the issue "arise"? Who decides whether the ssue has, in fact, been raised? Can someone in the public requesting docu-nents raise the issue?

3. Is the decision to balance or not to balance subject to review by the :ourts under the Freedom of Information Act?

4. Can the courts review, and if so, under what standards, a decision by :he Executive branch that the balancing test does not require release of the nformation?

Before turning to these questions, I present a brief "legislative history" of :he balancing test as it now appears in the Executive Order.

Development of the Balancing Test.

As far as I am aware, the first reference to the possibility of a balancing test on classification came in a book which I authored with Daniel Hoffman, *Top Secret.*[4] In that book we proposed a number of changes in the classifica-

[1]Executive Order on Classification 12065, Federal Register, vol. 43, no. 128, July 3, 1978.

[2]Sec. 3-303 of EO 12065.

[3]5 U.S.C. 552(b)(1). See *Ray v. Turner,* 587 F. 2nd 1187, (D.C. Cir. 1978), and *Halperin v. Department of State,* 565 F. 2nd 699, (D.C. Cir. 1977).

[4]Morton H. Halperin and Daniel N. Hoffman, *Top Secret,* (Washington, D.C.: New Republic Books, 1977).

real estate.[141]

Much more controversial, however, is whether exemption (9)(B) should apply to agency discussions of budget or legislative proposals. Despite extensive Congressional criticism, the Office of Management and Budget has continued to take the position[142] that a meeting to discuss the agency's budget proposals prior to transmittal by the President to Congress of the budget of which it is a part may be eligible for closure under exemption (9)(B) on the ground that "the premature disclosure of budgetary information may be 'likely to significantly frustrate implementation of proposed agency action.' "[143] The result has been an almost automatic closing of many agency meetings discussing almost any conceivable budget issue despite the absence of "significant" frustration, etc. It's likely that OMB will be continually pressed to modify its position by appropriate Congressional committees. Litigation may be necessary if OMB refuses to do so.

Equally, if not more, questionable, is agency use of exemption (9)(B) to close any and all discussions of legislative proposals and testimony. While there is some legislative history in the Senate debates supporting the proposition that an agency can assert (9)(B) to close a discussion of its legislative position, legislative history suggests that an agency's consideration of legislative positions may be closed *only if* a Congressional Committee or Member requested the views of the agency in confidence.[144] Discussions of congressional testimony should not be *per se* exempt under (9)(B).

C. *Applicability to Inter-Agency Task Forces and Other Working Groups*

It is becoming more common practice for agencies to participate in inter-agency task forces or working groups, sometimes made up of agency heads, to resolve regulatory issues concerning a number of agencies. Such task forces or working groups potentially can make meaningful decisions which are basically ratified by individual agencies. For example, an inter-agency working group may draft truth-in-lending or carcinogen-control regulations, which are later adopted in routine fashion by participating agencies. The inter-agency groups, however, are not necessarily covered by the Sunshine Act. The only legislative history on the matter indicates that:

> [i]nter-agency meetings between members of one agency and officials from other agencies would not come under the provisions [of the Act] unless a majority of the members of one or more of the agencies attended the meeting. Similarly inter-agency committees are excluded. . .[145]

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[141] *Id.*

[142] See OMB Circular No. A-10, §7 (revised Nov. 12, 1976).

[143] *Id.*

[144] Sunshine Guide, *supra* note 14, at 25, citing colloquy between Senators Percy and Chiles, 121 Cong. Rec. 35331.

[145] S. Rep. No. 94-354, 94th Cong., 1st Sess. 18 (1975). "The Department of Justice has [also] taken the position that members who serve on a collegial agency *ex officio* by virtue of their appointment with advice and consent to another position do not count toward the majority required by the definition because their appointment was not to *such* position, i.e., on the collegium." Sunshine Guide, *supra* note 14, at 2.

he agency delegates authority to individual members in rotation and subject o collegial review."[128] Moreover, the CEQ cannot reasonably maintain that he function of formal agency rulemaking "has been vested in the agency :hairman" since clearly the authority to engage in agency rulemaking resides n the Council, not the Chairman.

Hence, any Council discussion of agency rulemaking between two or nore members should constitute a covered Sunshine Act meeting, one which vould probably have to be open in the absence of an appropriate exemption. Otherwise, the CEQ will appear to have succeeded in avoiding the requirements of the Sunshine Act by the mere expedients of claiming to be a non-:ollegial body, to have delegated away its authority, and to have no meetings.

F. *Applicability of GISA to the Atomic Safety and Licensing Board of the NRC and the Definition of "Agency".*

Like the Philadelphia Newspapers case,[130] the *Hunt v. U.S. Nuclear Regulatory Commission,*[129] case raised the issue whether a subdivision of the :ollegial body made up entirely of agency employees is covered by the GISA. The plaintiff argued that the Atomic Safety and Licensing Board was either 'a subdivision of the NRC with authority to act on its behalf" or a collegial body itself.[131] In either case, the plaintiff maintained that the Board's meetings should be subject to the requirements of the GISA.[132]

In its brief on the merits and in support of its motion to dismiss the complaint, the NRC primarily argued that the Sunshine Act did not apply to meetings of the Atomic Safety and Licensing Board, a subordinate body of the NRC. "Plaintiff's argument," the NRC maintained, "is contrary to the clear meaning of the statute itself, the legislative history of the Act, the leading :ommentary on the Act, and the uniform interpretations of the Act by every federal agency to which it applies."[133]

The NRC successfully argued that "[s]ubdivisions 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."[134] The winning brief also cited the basis for excluding subdivisions made up of agency employees from coverage under the Act, as stated in the Senate Report:

> . . . [t]he agency heads are high public officials having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking.[135]

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[128] *Id.*
[129] *Hunt, supra,* note 10.
[130] *Philadelphia Newspapers, supra,* note 10.
[131] *Hunt, supra,* note 10; Plaintiff's Brief in Support of Injunction, at 6, 8.
[132] *Id.*
[133] *Hunt, supra,* note 10; Defendant's Brief on the Merits and in Support of Motion to Dismiss, at 1.
[134] Sunshine Guide, *supra* note 14, at 3.
[135] S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

In *Pacific Legal Foundation v. The Council On Environmental Quality*[117], the plaintiff, a non-profit, tax-exempt public interest organization, is seeking declaratory and injunctive relief under 5 U.S.C. §552b(h)(1) from alleged violations of the GISA by the CEQ. The plaintiff alleges that although the CEQ has been conducting "agency business" within the meaning of the Sunshine Act, 5 U.S.C. §552b(b), the CEQ "has held no public meetings since June 8, 1977, nor has it published or maintained for publication any of the materials on its meetings required by the Sunshine Act. Despite the fact that it is legally constituted as a three-member collegial body, 42 U.S.C. §4342, CEQ generally conducts business without a quorum, acting as if it were headed by a single person."[118]

In support of the complaint, the plaintiff attached as an exhibit a September 1978 memorandum from the three CEQ members to the staff concerning Council organization. The memorandum explained that:

> [t]he Council makes decisions in essentially two ways, reflecting its almost unique situation and role. For the most part, the Council functions as much as a federal department with the Chairman as agency head and the members functioning primarily at the assistant secretary level. This is supplemented by an arrangement under which Council members have defined lead areas of responsibility and represent the Council in these areas. Operating in this manner, the Council is not a collegial body and more resembles a federal department than a collegial regulatory agency. There are occasions, however, in which the Council does believe that collegial decisionmaking is appropriate and does function as a collegial body, in these instances, votes are made on paper, which is distributed sequentially to members for notation voting.[119] . . . [l]ead responsibility for basic substantive areas has been assigned to each member. The assignment and corresponding staff unit responsibilities are discussed in more detail below. Development of National Environmental Policy Act policies, regulations, and procedures and responses to such NEPA issues are generally the responsibility of all Council Members.[120]

The plaintiff argues that by acting as a single-headed agency rather than as a three-member collegial body, the CEQ is violating its enabling statute.[121] Regarding its injury, the plaintiff alleges:

> as a direct result of the defendants' violation of the Sunshine Act and CEQ's implementing regulations, and of their [alleged] illegal operation as a non-collegial body, [the] plaintiff has been injured by its inability to attend CEQ meetings which would otherwise be open to it and by its inability to examine materials of closed meetings which would otherwise be publicly available.[122]

Relief sought by the plaintiff includes:

> (a) declare the defendants to be in violation of the Sunshine Act and of their own regulations implementing that act;
>
> (b) declare the defendants to be in violation of CEQ's statutory status as a collegial body and in violation of the common law requirement that it act pursuant to a quorum;
>
> (c) declare as void and invalid all actions taken by CEQ not pursuant to a lawful quorum. . .

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[117] *Pacific Legal Foundation, supra,* note 10.

[118] *Id.*, Complaint for Declaratory and Injunctive Relief, at 1.

[119] Memorandum for the Staff on Council Organization, Council on Environmental Quality, September 11, 1978.

[120] *Id.*

[121] 42 U.S.C. §4342 (1970).

[122] See, *supra* note 118, at 5-6.

also cited the Conference Committee Report which states that the prohibition against members jointly conducting or disposing of agency business "does not prevent agency members from considering individually business that is circulated to them sequentially in writing."[104]

The court correctly concluded that:

> [i]t thus clearly appears from the legislative history that Congress intended to permit agency members to act on agency business that is circulated to them 'sequentially in writing.' The FCC was therefore not in violation of the Sunshine Act. . . when it used its notation procedure to dispose of Communication's petition.[105]
>
> This interpretation of the Sunshine Act is consistent with Congress' desire to open up the federal decisionmaking process "while protecting . . . the ability of the Government to carry out its responsibilities." Notation voting enables Government agencies to expedite consideration of less controversial cases without formal meetings and following the other strictures of the Act. If all agency actions required meetings, then the entire administrative process would be slowed perhaps to a standstill. Certainly requiring an agency to meet and discuss every trivial item on its agenda would delay consideration of the more serious issues that require joint face-to-face deliberation. Clearly Congress did not intend such a result." We accordingly affirm the action of the Commission. (Footnotes omitted.)[106]

It has also been noted, however, that "[t]o comply with the spirit of the Sunshine Act . . . agencies should refrain from excessive reliance on notation procedure."[107] Indeed, one unfortunate consequence of the Sunshine Act may have been to increase "the already common practice of many agencies to conduct business on paper — by commissioners initialing memos — rather than meeting together to decide" issues.[108] Evidence of increased use of notation procedure to dispose of non-routine items previously handled in meetings will, at the very least, damage an agency's public image, if not be judicially reviewable as an "abuse of discretion."[109]

The three remaining Sunshine Act cases raise issues which have yet to be resolved.

D. *Access to Staff Memoranda and the Meaningfulness of "Public Observation".*

Access to inter- or intra-agency memoranda, such as staff recommendations, considered at open agency meetings, remains a controversial Sunshine Act question. The issue was raised in *Consumers Union of the United States v. Board of Governors of the Federal Reserve System*[110] when the Consumers Union sought to compel the Federal Reserve Board to make available a document to be discussed in an open meeting. Consumers Union argued that without the document, it was difficult to understand what was being discussed at

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[103] *Id.* quoting 122 Cong. Rec. H. 7871.
[104] H.R. Rep. No. 94-1441, 94th Cong., 2d Sess., 11 (1976).
[105] *Communications Systems, supra* note 9, at 8.
[106] *Id.*, at 8-9.
[107] Sunshine Guide, *supra* note 14, at 13.
[108] Fitzhugh, *supra* note 1.
[109] 5 U.S.C. §706(2)(A)(1976).
[110] *Consumers Union, supra* note 7.

ɔurt also cited the definitions of "meeting" and "member" to conclude correctly that the GISA did not apply to the proceeding of the hearing examiner anel.[92]

ɜ. *Compliance with Notice Requirements and Invalidation of Agency Action*

In *Consolidated Aluminum Corp. v. Tennessee Valley Authority*, the ɔlaintiff, a consumer of electricity supplied by the TVA, sought to enjoin an ıpward rate adjustment, in part, because it had been decided upon at a TVA neeting allegedly in procedural violation of the GISA advance notice reɹuirements.[94]

Rejecting the argument, and the plaintiff's motion for a preliminary inunction, the court refused to invalidate under 5 U.S.C. §552b(h)(2)[95] the ΓVA Board's approval of the quarterly rate adjustment. After examining the ranscripts of two TVA Board meetings, the court concluded that the Board

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[90]*Id.*

[91]Besides concluding that the plaintiff did not have a strong likelihood of success on the merits, the court also accepted ınother Government argument for rejecting the motion for a temporary restraining order, namely, that there could not be rreparable harm to the plaintiff in the absence of the TRO. There would not be irreparable harm, according to the Government, because even if the parole revocation hearing were closed, the plaintiff would have rights under the FOIA to ɟain access to the papers, transcript or other record of the hearing. Transcript, *supra* note 84, at 11, 15. Query, however, ıow meaningful the right to access under the FOIA is in view of the often inordinate agency delay in responding to requests ınd other compliance problems in agency implementation of the FOIA, particularly with regard to prisoners. See, *e.g.*, 'Oversight of the Freedom of Information Act: Hearings before the Subcommittee on Administrative Practice and Proɛedure, Senate Committee on the Judiciary, 95th Cong., 1st Sess., 757-784, 987-1002 (1977).

[92]The court reasoned as follows:

> Specifically Section 552b, subsection (a)(2) says: ". . . the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business. . ."
>
> Subsection (3) of that section says: ". . . the term 'member' means an individual who belongs to a collegial body heading an agency."
>
> Therefore, it is clear to me the proceedings before a hearing examiner or hearing examiners who are not members of the Parole Commission cannot possibly constitute a meeting within that terminology.
>
> This is fortified by the observation of Subsection (b) of Section 552b that specifically says that only "members shall not jointly conduct or dispose of agency business other than in accordance with this section."

Philadelphia Newspapers, supra note 8, at 4.

[93]*Supra*, note 8.

[94]The thrust of the plaintiff's Sunshine argument was that the TVA failed to announce a critical board meeting at least one week in advance as required by 5 U.S.C. §552(e)(1). Moreover, the TVA announced a change in location of the meeting only the day before, a change which was published in the *Federal Register* two days *after* the meeting was held.

Despite these technical violations of the GISA notice requirement, however, the court found that the plaintiff had received actual notice of the meeting and indeed, "had notice of every stage in the process and availed itself of its opportunity to participate," including a written presentation which was one of the documents considered by the TVA Board before it approved the rate adjustments. *Id.*, at 15, 17-18.

[95]The subsection provides as follows:

> Any Federal Court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violations of this section arose.

ermines that the suit was brought "primarily for frivolous or dilatory purposes."[78]

K. *Annual Reports*

Subsection [j] requires each agency to make annual reports to Congress concerning compliance with the open meeting requirements of Section 3.[79] The three primary subcommittees in the Congress which conduct GISA oversight are the Senate Subcommittee on Federal Spending Practices and Open Government, Committee on Governmental Affairs; the House Subcommittee on Government Information and Individual Rights, Committee on Government Operations; and the House Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary.

L. *Relationship to FOIA*

Subsection [k] provides that nothing in the Sunshine Act "expands or limits the present rights of any person under" 5 U.S.C. §552, the Freedom of Information Act, except that the GISA rather than FOIA exemptions govern in the case of any FOIA request to inspect or copy the transcript, recording, or minutes of a closed meeting.[80]

M. *Withholding Information from Congress; Other Statutory Openness Requirements*

Subsection [l] provides that nothing in Section 3 authorizes the withholding of information from Congress, nor the closing of a meeting required to be open pursuant to another statute.[81]

N. *Relationship to Privacy Act*

Finally, *subsection [m]* declares that nothing in Section 3 of the Sunshine Act authorizes the withholding of information otherwise available to an individual under 5 U.S.C. §552a, the Privacy Act.[82]

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[78] *Id.*

[79] 5 U.S.C. §552b(j) (1976).

[80] 5 U.S.C. §552b(k) (1976); see also, Sunshine Guide, *supra* note 14, at 97-101.

[81] 5 U.S.C. §552b(1) (1976).

[82] 5 U.S.C. §552b(m) (1976). Two other sections of the Sunshine Act, other than the open meetings provisions of Section 3, might also be cited. Section 4 added a new section to 5 U.S.C. §557 basically prohibiting *ex parte* communications in formal agency proceedings between agency decisionmakers and interested parties. See 5 U.S.C. §557(d) (1976).

Section 5 of the GISA, meanwhile, in a conforming amendment, amended the Federal Advisory Committee Act, 5 U.S.C. App. I (1976), to change the grounds on which advisory committee meetings may be closed. The amendment replaced nine FOIA exemptions that were incorporated by reference into the FACA and were designed to deal with documents with the ten Sunshine Act exemptions which dealt with meetings. The principal effect — and indeed, intent of the change — is to prevent agencies from closing advisory committee meetings on grounds that the meetings will consider intra- or inter-agency memoranda. See H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 26 (1976). See also Marblestone, "The Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act," 36 *Fed. B.J.* 65 (1977).

Subsection [e] prescribes the procedures agencies must follow in announcing or changing meeting schedules and agendas.

Subsection [e][1] requires that the agency publicly announce, at least one week prior to the meetings, its time, place, and subject matter, whether it is to be open or closed, and the name and telephone number of an agency contact person to provide additional information.[60] The subsection also permits the agency to provide less than seven days notice of a meeting, provided a majority of the membership determines by recorded vote "that agency business requires" less notice and the agency makes the requisite public announcement "at the earliest practicable time."[61]

Subsection [e][2] allows the agency to change the time, place, subject matter, or open or closed status of a meeting following public announcement, provided it announces the changes "at the earliest practicable time" and, in the case of a change in subject matter or open or closed status, a majority recorded vote is cast.[62]

Subsection [e][3] provides that public announcement required under subsections [e][1] and [e][2] must also be submitted for publication in the *Federal Register*.[63] Furthermore, agencies are to use "reasonable means", "to assure that the public is fully informed of public announcements," including posting notices on bulletin boards, publishing them in special interest journals, and distributing them to a mailing list.[64]

G. *Other Procedural Requirements*

Subsection [f][1] requires that for every meeting closed under one or more of the exemptions of subsection [c], the General Counsel or chief legal officer of the agency must certify that the meeting may properly be closed, and must state each relevant exemption.[65] The agency must retain a copy of the certification and a statement from the presiding officer of the meeting stating the time and place of the meeting and listing the persons actually present.[66] The agency must also maintain a complete verbatim transcript or electronic recording of all closed meetings, except that it may instead maintain detailed minutes of any meeting closed under exemptions [8], [9][A], or [10].[67]

Subsection [f][2] requires the agency to make "promptly available" for public inspection and copying a copy of the transcript, recording, or minutes, except for information exempted and withheld pursuant to subsection [c].[68] The agency is also required under subsection [f][2] to maintain for at least two

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[60] 5 U.S.C. §552b(e)(1) (1976).

[61] *Id.*

[62] 5 U.S.C. §552b(e)(2) (1976).

[63] 5 U.S.C. §552b(e)(3) (1976).

[64] H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 19 (1976).

[65] 5 U.S.C. §552b(f)(1) (1976). For interpretive discussion of this requirement, see Sunshine Guide, *supra* note 14 at 59-63.

[66] 5 U.S.C. §552b(f)(1) (1976).

[67] *Id.*

[68] 5 U.S.C. §552b(f)(2) (1976).

trolling.[36] The Conference Report on the Sunshine Act specifically recognizes, for example, the judicial interpretations of FOIA exemptions 2 and 4.[37] GISA exemption 6 is similar to, but somewhat broader than, FOIA exemption 6.[38] Like FOIA exemption 7, GISA exemption 7 covers investigatory records, but it also protects oral discussion of information that would be an investigatory record, if written. Nevertheless, the Senate Report on the GISA suggests that exemption 7 "should be interpreted in a manner consistent with" the FOIA.[39]

Exemptions 5, 9, and 10 are unique to the Sunshine Act. Unlike FOIA exemption 5 which exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters"[40], GISA exemption 5 allows an agency to close a meeting if the discussion is likely to "involve accusing any person of a crime or formally censuring any person."[41] The absence of the FOIA inter-agency memorandum exemption in the GISA means that meetings may not be closed in order to protect the confidentiality of internal memoranda such as staff recommendations. If the meeting is closed on other grounds, the agency may not withhold from the public that portion of the transcript which includes discussion of internal memoranda unless the discussion is exempted under one of the GISA exemptions.[42] The status of internal memoranda such as staff recommendations discussed in open meetings remains a controversial issue. Raised in the first Sunshine Act law suit, which was dismissed by agreement of both parties,[43] the issue may be litigated again.[44]

Exemption 9 consists of two parts. Subparagraph (A) is available only to agencies which regulate currencies, securities, commodities, or financial institutions. Exemption 9(A) permits such agencies to close meetings in order to protect information the disclosure of which would lead to financial speculation or which would "significantly endanger the stability of any financial institution."[45]

Exemption 9(B) can be asserted by any agency. Its scope presents one of the most troublesome interpretive questions under the GISA, and it may have to be litigated in order to be certified.[46] Particularly at issue is whether or not 9(B) can be asserted to close agency discussions of budget proposals or legislative positions.[47]

Exemption 10 exempts from the openness requirement agency discussions which cover the issuance of a subpoena, participation in a civil proceeding, in

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[36]See, *e.g.*, *Ginsburg, supra* note 10; K.C. Davis, *Administrative Law in the Seventies*, §3A.00 - 1, at 23 (Cumulative Supp. 1977).

[37]H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 15 (1976).

[38]See 5 U.S.C. §552(b)(6); Sunshine Guide, *supra* note 14, at 21.

[39]S. Rep. No. 94-354, 94th Cong., 1st Sess. 22 (1975).

[40]5 U.S.C. §552(b)(5) (1976) reads in full: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[41]5 U.S.C. §552b(c)(5) (1976).

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

[43]See *Consumers Union, supra* note 7.

[44]*Id.*

[45]5 U.S.C. §552b(c)(9)(A) (1976).

[46]See, *infra*, at 131.

[47]*Id.* See also Sunshine Guide, *supra* note 14, at 23-26.

approximately 50 agencies, including, for example, the Federal Trade Commission and the Securities and Exchange Commission are covered by the Act; the Environmental Protection Agency, for example, is not.[20]

The open meeting requirements apply not only to meetings of the full collegial body but to meetings of "any subdivision thereof authorized to act on behalf of the agency."[21] Since "subdivision thereof", however, refers back to "collegial body", not to "agency", 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.[22]

The most significant — and most troublesome — definitional term in the GISA is the definition of "meeting." The Act defines "meeting" as

> the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection [d] or [e].[23]

The definition of "meeting" consists of a number of distinct elements.[24] First, the "meeting" must be of at least the number of the agency members required to take action on behalf of the agency, that is, enough to constitute a quorum.[25] Second, the required number of members must be in a position to exchange views.[26] The use of the word "joint" is intended to exclude instances where one or more agency members give a speech concerning agency business, and other members are in the audience.[27] On the other hand, no physical presence is required: a conference call or possibly a series of two-party calls would qualify as a meeting if the other requirements are met.[28] Finally, the meeting must consist of "deliberations [which] determine or result in the joint conduct or disposition of official agency business."[29]

C. *Presumption of Openness and Use of Notation Procedure*

Subsection [b] declares a presumption in favor of open meetings, noting that "except as provided in subsection [c], every portion of every meeting of an agency shall be open to public observation."[30] In also providing that "members shall not jointly conduct or dispose of agency business other than in accordance with this section," however, neither the Act nor its legislative

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[19]5 U.S.C. §552b(a)(1) (1976). For discussion of the applicability of the GISA to the Council on Environmental Quality, see *Pacific Legal Foundation*, *supra*, note 10.

[20]See Sunshine Guide, *supra* note 14, at 112-115 for a list of covered agencies and their published GISA regulations.

[21]5 U.S.C. §552b(a)(1) (1976).

[22]Sunshine Guide, *supra* note 14, at 3. See also discussion of *Philadelphia Newspapers*, *supra* note 8, and *Hunt*, *supra* note 10.

[23]5 U.S.C. §552b(a)(2) (1976).

[24]See Sunshine Guide, *supra* note 14, at 3-11, for discussion of the definition of "meeting".

[25]*Id.*, at 4.

[26]*Id.*

[27]*Id.*, at 5.

[28]*Id.*

[29]For detailed analysis of this key language, see Sunshine Guide, *supra* note 14, at 5-11.

[30]5 U.S.C. §552b(b) (1967).

JUDICIAL INTERPRETATIONS, AND PENDING ISSUES

By Stephen H. Klitzman

Law, Effective March 12, Called Unclear Agencies Brace for Litigation under New Sunshine Act

So declared the front-page headline in the *New York Law Journal* on March 1, 1977.[1] Over two years and thousands of agency meetings later, however, the Government in the Sunshine Act (GISA)[2] has yet to produce more than a couple of opinions, much less a legal onslaught.

With the Act's liberal standing provision permitting suit by "any person",[3] allowance of attorneys' fees and litigation costs,[4] and a number of unclear or controversial provisions,[5] the author of the *New York Law Journal* story must have felt he had an accurate lead paragraph when he predicted in 1977 that "the Government in the Sunshine Act . . . is likely to increase litigation of both substantive and procedural decisions made by federal agencies."[6]

Instead, a thorough search reveals a grand total of six Sunshine cases, including the following docket as of April, 1979: one district court dismissal,[7] two district court opinions, one a bench opinion,[8] one circuit court decision,[9] and two pending district court cases.[10]

In contrast, in the first full two years of effective operation of the Freedom of Information Act (FOIA),[11] the courts issued over twenty FOIA published opinions, including nine circuit court decisions, interpreting major

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[1]Fitzhugh, "Agencies Brace for Litigation Under New Sunshine Act," *New York Law Journal,* March 1, 1977, p. 1. (hereinafter cited "Fitzhugh").

[2]5 U.S.C. §552b, P.L. 94-409, 90 Stat. 1241 (1976).

[3]5 U.S.C. §552b(g),(h)(1),(2) (1976).

[4]5 U.S.C. §552b(i) (1976).

[5]See, e.g., the definition of "meeting" in 5 U.S.C. §552b(a)(2), or the scope of Sunshine exemption (9)(B), in 5 U.S.C. §552b(c)(9)(B).

[6]See note 1, *supra.*

[7]*Consumers Union of the United States, Inc. v. Board of Governors of the Federal Reserve System,* (D.D.C. Civ. No. 77-1800, Jan. 24, 1978), dismissed on agreement of both parties (hereinafter cited "Consumers Union").

[8]*Philadelphia Newspapers, Inc. and Anthony Lame v. U.S. Parole Commission,* (E.D. Pa. Civ. No. 78-1016, March 30, 1978) (bench opinion) (hereinafter cited "Philadelphia Newspapers"); *Consolidated Aluminum Corp. v. Tennessee Valley Authority,* (M.D. Tenn. Civ. No. 78-3210, June 30, 1978) (hereinafter cited "Consolidated Aluminum").

[9]*Communications Systems, Inc. v. Federal Communications Commission,* (C.A.D.C. Civ. Nos. 75-1992, 77-1804, Dec. 29, 1978) (hereinafter cited "Communications Systems").

[10]*Pacific Legal Foundation v. The Council on Environmental Quality* (D.D.C. Civ. No. 79-0116, complaint filed Jan. 10, 1979) (hereinafter cited "Pacific Legal Foundation"); *Hunt v. Nuclear Regulatory Commission,* (N.D. Okla. Civ. No. 79-C-122-C, April 18, 1979) (hereinafter cited "Hunt").

Legislative history of exemption 2 of the Sunshine Act, concerning "internal personnel rules and practices of an agency", was also cited in the Freedom of Information Act case of *Ginsburg, Feldman & Bress v. Federal Energy Administration,* (C.A.D.C. Civ. No. 76-1759, Feb. 14, 1978), *aff'd per curiam on rehearing en banc,* by equally divided court, Oct. 31, 1978; *cert.* petition filed Jan. 29, 1979, S.C. No. 78-492 *sub. nom., Ginsburg, Feldman & Bress v. Department of Energy,* (hereinafter cited "Ginsburg").

[11]5 U.S.C. §552 (1966), *as amended by* P.L. 93-502, 88 Stat. 1567 (1974).

sing requests and defending FOI suits is lunacy. As a minimum, when the government has an open and active investigative or litigative matter going, its file should be closed, except pursuant to the rules of discovery. The only judicially reviewable issue should be whether there is in fact an open and active proceeding. I have no problem with that. But to say that investigators, or attorneys getting ready to go to court should have to stop their primary activities — which we presume are in furtherance of the public interest — to see if anything can be released to a requester, who coincidentally is almost always the person they're trying to put away, is right out of *"Alice in Wonderland"!* Before leaving the 7(A) area, dare I even ask what public interest is served by the fact that we have to inform some organized crime hoodlum, or some drug trafficker, that we actually have him under investigation? Given the confession-and-avoidance nature of the Act, that is what we have to do, and I think that is also wrong.

In talking to you, Mr. McCreight used the word sources, not informants. There is a difference. This is actually one of the areas where the legisltaive history of the current Freedom of Information Act is pretty good. It seems to make it quite clear that virtually any conceivable source of information can be covered by exemption 7(D). Unfortunately, that message is getting lost in some courts because of all of the other expressions about construing exemptions as narrowly as possible. We are encountering frightening suggestions that such organizations as other law enforcement agencies cannot be sources within the meaning of 7(D)! This provision should be strengthened and clarified so that it is unquestionable that any and all confidential sources — whether they are individuals, or businesses, or local, state, other national and international police organizations, etc. — are within the protective ambit of 7(D). This is a very serious problem. Law enforcement exists on the exchange of information. Exchanges of information between law enforcement agencies should be controlled for a number of reasons, but the Freedom of Information Act is a very poor way to try to do the job. They should be controlled directly, not by this indirect and terribly cumbersome impediment to effective law enforcement. Criminals respect neither state boundaries nor the distinctions between federal and state law. If all law enforcement agencies' efforts to work closely together are not facilitated, we are not going to get the job done. We are being hurt badly by the existing law and it is high time for something to be done about it.

I prefaced one remark a few minutes ago, "If exemption 7 is still going to be the vehicle for protecting law enforcement records. . . ." I said if, because I feel very strongly that the law enforcement process is so important and so sensitive that records of this kind warrant separate, specific attention on the part of Congress.

There are other substantive points I could touch upon, but my time is almost up. In addition, there are some procedural points that need reworking. For example, as you know, the present FOIA time limits do not even

personal privacy and law enforcement come together, it is my strong personal view that the public interest is not now being served.

The burdens and costs these two Acts have imposed on the FBI, for example, are obvious. Think for just a minute about that figure of 350 people involved in this work. Incidentally, that is just in the FOIPA Branch at Bureau Headquarters. It does not include personnel in the Field Offices and elsewhere at Headquarters who also work in this area. The complete total is a not insignificant part of the overall personnel strength of the FBI. Anyone who tells me that this is really the way that the American public wants the personnel of the FBI to be used is simply out of touch with the real world. This is a time when crime — organized crime, white collar crime, political corruption and corporate involvement in it, drug trafficking, etc. — is a primary concern of the American public. And what do we find within the FBI? A large — in my view, unacceptably large — number of FBI personnel processing requests under the Freedom of Information and Privacy Acts. I suggest that the American people as a whole would far prefer that FBI agents be out putting "baddies" in the slammer, rather than processing requests from already incarcerated hoodlums and persons we are trying to put away. As you may know, many requests are filed by persons in these two groups! In fact, I can give you — or I could give you if it weren't for privacy concerns — a list of almost all of the prominent organized crime figures in this country. Almost all of them have asked for their files and persons in the FBI, the Drug Enforcement Administration, the Criminal Division, etc., are tied up in processing those requests. Isn't that a marvelous way to run the government's railroad!

We are complying with these two laws within the Department of Justice. We are supporting the concepts of openness and privacy, even when it hurts. We took more flack from within the government for Deputy Attorney General Civiletti's testimony in support of the concept of tightening up access to banking records, for example, than the Department has taken from within government in quite some time. The very legitimate question, however, is when are we going to stop hearing platitudes from speakers like Mr. Cohen and start getting some reciprocal responsibility in this most critical area? I may as well admit, though, I'm really talking, not about Mr. Cohen, but about the other end of Pennsylvania Avenue. There are some good signs. There are now at least a few persons on Capitol Hill who accept as facts the impact of these two statutes on criminal justice law enforcement and that this impact has been far more severe than they thought it would be. I will not risk ruining their careers by suggesting that any of these people would agree with all of the specific comments I am making this morning, but it is a fact that we are beginning to get a sympathetic ear. It continues to be a critical ear as well, but that is the proper nature of the oversight process. It should be both critical and skeptical, but when you're entitled to it, it should also be sympathetic. We are getting that dual reaction from members of Congress and also from some of the members of the staffs of various subcommittees that have substantive jurisdiction in the criminal justice law enforcement area. We are even be-

disclose what they do to stimulate lobbying at the national level. They were enormously surprised when the House adopted Common Cause-backed amendments approving those provisions, and they threatened a filibuster to prevent the bill from being considered in the Senate.

Citizens have a right to know precisely who is spending money to influence government decisions. It is time for Congress to pass a thorough lobby disclosure bill that covers both the Congress and the Executive Branch.

CONCLUSION

The lessons of recent years suggest that a healthy political system requires well-organized, effective citizen action as a bulwark against a government that bows to a variety of special interests.

Americans have always had a strong belief in the citizen-volunteer. The notion of an actively involved citizenry is rooted in America's political culture. "Don't leave everything to the government," runs this reasoning, "or government will have too much power, develop corrupt practices, or simply become paralyzed."

Fundamental political and policy decisions at all levels of government are about values. Citizens have a responsibility to speak out on these matters and not let the experts make decisions for us. While citizens do not have to be experts to participate in national decisions, they do have to understand the issues and know the obstacles facing change. With such knowledge, citizens can be in a position to hold accountable all levels of government — local, state and federal. This is why openness is so important.

There can be no turning back to secrecy and closed government. Citizens, the media, and dedicated government officials together constitute a force for openness.

Openness and access for the public are basic tools for strengthening our representative institutions. They make for informed citizens. They help test and surface new leaders. They lead to new ways in which the public participates in government. And that's what democracy is all about.

and substantially involved. The provision was addressed solely to the problem of 'switching sides' on specific cases or matters after an employee leaves the government. The intent was to foreclose active, specific involvement in representation on the part of certain former government officials. It is not in any way designed to restrict involvement in general matters which may have fallen under an employee's official responsibility while he was in government service."[5]

The memorandum goes on to note that "the proscribed conduct must occur in connection with a 'formal or informal appearance' before a court or agency." According to the memorandum,

". . . the 'aiding and assisting in representing' provision. . . applies only if all of the following conditions are met:

1. The former high-ranking official must have been 'personally and substantially' involved in that matter during government service;
2. It must be a particular matter involving specific parties;
3. The 'aiding and assisting in representing' must occur in connection with representation, which directly concerns a formal or informal appearance before an agency or court; and
4. The assistance or consultation must be something more than furnishing scientific or technological information, which is expressly excepted. . . ."[6]

Public officials — presidential appointees and civil servants — should be given prompt assurances that the regulations will enable them to pursue their careers after they leave government service. Implementation that is balanced and sensible rather than punitive or extreme will prevent conflict of interest abuses and make the Ethics law workable.

CITIZEN PARTICIPATION

Affirmative efforts to open up government also necessitate creation of avenues through which the views of citizens and their reactions to proposed policies can be transmitted to government. The goal of citizen participation should be to find out what people think *before* government makes decisions that affect their lives. Such citizen participation would strengthen the decision-making capacity of our representative institutions.

Identifiable interests ought to have an opportunity to be represented. Where such participation costs money, it deserves to be assisted with public funds, although we must also be prepared to address the important policy questions such assistance may raise about the role of the independent nonprofit sector and the possible impact of such subsidies upon it.

The challenge, then is to build active and effective participation into our political, legislative, and administrative systems. To facilitate the broadest possible participation by citizens, government at all levels should expand the use of all types of communication, including effectively constituted citizen boards, public hearings, door-to-door neighborhood contacts, newspapers, television, radio, questionnaires, and public opinion surveys.

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[5] *Congressional Record*, February 21, 1979, p. S1613.
[6] *Ibid.*, p. S1614.

fully denied 60% of the requests it received. This percentage of denials is greater than the percentage of denials by any other department since the 1974 Freedom of Information Act amendments were enacted.[3]

The poor record of the Department of Energy is emphasized by the results of freedom of information appeals made to the Department. Just as a competent judge is rarely reversed, the initial FOIA decisions should be infrequently overturned. Our study found that in the same period, from October 1, 1977 to October 1, 1978, 71% of the 45 appeals of freedom of information rulings were partially or fully granted. In contrast, only 36% of appeals were granted in full or in part for all federal agencies and departments in 1977.

The absence of any extended effort to train officials to administer the law will inevitably drive up the costs of information. No law can be cost-free. But an all-out effort should be made to keep costs down. Trained officials who make information available will run more efficient departments than officials who are untrained and are always denying requests.

As with sunshine implementation, there is a need for President Carter and his Cabinet officers to create within the Administration a positive climate of responsiveness to freedom of information requests. Affirmative leadership on the part of the President is essential to make clear that agencies are expected to respond promptly to such requests.

Attorney General Griffin Bell took an important first step in May, 1977, when he warned the Executive Branch that the Justice Department would not protect recalcitrance:

> "The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemption of the Act.[4]

If Energy Secretary James Schlesinger followed the standard set forth by the Attorney General and issued a general policy statement directing all DOE officials and employees to act according to the intent of the FOIA, which places burden of proof on those wanting to withhold information, the DOE's denial of legitimate FOIA requests would decline sharply. The Secretary should release to the public an annual report showing how the DOE has complied with the spirit of the FOIA.

The overall responsibility for ensuring adequate compliance with the Freedom of Information Act remains with the President. By insisting on compliance with the law, he can do much to clear away the bureaucratic roadblocks which hinder access to public records.

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[3]Common Cause, "Open for Business Only?: A Common Cause Study of the Department of Energy", 1979.

[4]Attorney General Griffin Bell, "Letter to Heads of All Federal Departments and Agencies — Re: Freedom of Information Act", (May 5, 1977).

For this reason, we have repeatedly called upon the President to issue a directive to agencies affirming the Administration's commitment to openness. In June 1978, fifteen months after the effective date of the Act and nearly two years after Common Cause first called for a presidential directive, President Carter issued a memorandum to agency and department heads *urging* — as opposed to *directing* — them to open their meetings to public observation unless the public interest requires otherwise. In order to evaluate agency compliance with the Act, the President 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." The ultimate impact of the President's memorandum remains to be seen. It is clear, however, that the Administration must be willing to follow through with its promise that the Justice Department will not defend the closing of any meeting under the Act "unless they (the agency) can demonstrate that harm would result if an open meeting had been held." Without vigorous oversight by the Office of Management and Budget, agencies will continue to ignore the spirit and letter of the Sunshine Act.

As a beginning, the OMB should review each agency's regulations to ensure that they meet not only the high standards of openness required by the Act but also the President's commitment to openness and accountability to government. The results of this review, including any recommended changes in agency regulations or possible amendments to the Act, should be made available to the public.

Congress also has an important role to play in ensuring that the Act is working as it should. Under the leadership of Senator Lawton Chiles (D-Fla.), the principal author of the Sunshine Act, the Subcommittee on Federal Spending Practices and Open Government has held a number of oversight hearings on agency compliance with the Act. The Subcommittee has examined whether exemptions are being properly used, whether the presumption of openness is being ignored, whether the Act's exemptions need to be more narrowly written, and whether the expedited closing procedure is being legitimately used by the 17 agencies that have invoked the provision.

There are a number of areas that Common Cause would like to see considered by the appropriate House and Senate subcommittees. They should examine (*in camera* to protect information that necessarily should be kept secret) the transcripts of closed meetings of selected agencies to determine whether the meetings were justifiably closed under one of the Act's ten exemptions. The results of the study should be made public.

The subcommittees should also consider whether amendments to the Act are needed to further the spirit of openness. Possible amendments the subcommittees should consider include:

— Requiring agencies using the expedited closing procedure to give notice of *all* their meetings in the *Federal Register;*

— Requiring agencies, when they close a meeting, to cite specific exemptions for closure in their announcement in the *Federal Register;* and

with special interest priorities.

We pride ourselves on being an open society. It's worth examining how open we really are and how far we still have to go.

Since 1970 we have seen basic improvements in reducing secrecy at all levels of government, with open meetings and freedom of information laws. These are positive changes. They have demonstrated that openness can work. Six years ago it was a radical step for the House of Representatives to adopt a rule requiring open bill-drafting meetings, and opponents predicted it would never work. Today, such open meetings are a matter of course, and most participants and observers agree that the quality of deliberations has actually been improved by openness.

But the battle has not yet been entirely won.

The Sunshine Law applying to the Executive Branch has been shown to work effectively in those agencies that are willing to abide by the spirit as well as the letter of the law. Strong, affirmative Presidential leadership is needed to ensure uniform adherence to the Act.

The Freedom of Information Act (FOIA) has been another important positive step, but there are still some problems with its implementation. In addition, citizen participation in government needs to be encouraged, a new lobby disclosure law has yet to be adopted, and the new Ethics in Government Act must be carefully implemented.

In general, the states are far ahead of Congress on the accountability issues, particularly on lobby disclosure. One reason is that Congress follows a double standard on many matters affecting openness and accountability. For example, it has adopted a Freedom of Information Act for the Executive Branch and regulatory agencies, but none that applies to Congress.

Support for openness must come from outside the government. Strong and independent citizens' movements and an aggressive media are important guardians of an open society. Their support is crucial to reinforce those public officials who are working for open government. Reforms will be carried out effectively only if citizens know what's going on in government. In that connection, it is important to remember that even after reforms are won, they must still be protected. The opponents of change count on a natural backsliding when those who worked for the reforms have gone on to new issues. Constant vigilance is essential, because silence and sleepiness will allow the hard-won gains to be undermined.

SUNSHINE

In the last five years, as a result of considerable public pressure, more than 30 states and the federal government have enacted or strengthened open meetings laws. States as diverse as New York, Mississippi, Texas, Massachusetts, and Hawaii have been a part of this wave of reform.

Open meetings laws are not self-enforcing. If the press and public are not alert, the federal officials who opposed the Government in the Sunshine Act

heartily agree with him that agencies should adhere to the spirit of the Sunshine Act, at the same time I heartily disagree that the data, alone, support his conclusion. The fact that an agency closes many meetings does not at all mean that it has ignored the public interest in favor of its "institutional interest;" in fact, as the Sunshine Act by its own terms recognizes, the public interest and the agency's institutional interest may well dictate closed meetings in appropriate instances.

Fourth, although secrecy has a proper time and place, it certainly should not be used for ulterior purposes. Government records should never be withheld, and agency meetings should never be closed, to cover up violations of the law by government, to conceal inefficiency or waste, to obscure agency error or abuse of authority, or to avoid embarrassment to an official or to the agency. The presumption of the FOIA, the Sunshine Act, and related legislation is in favor of accessibility and openness; access should not be denied to documents, and agency meetings should not be closed to the public, due to some intangible fear of conducting agency business in view of the public. In fact, the trend in this area seems to be toward requiring that identifiable harm will be caused, or that the public interest will truly be advanced, before secrecy is allowed. Hence, the Attorney General has stated to all federal departments and agencies that documents should not be withheld unless it serves the public interest to do so, and that the Justice Department will defend FOIA suits only when disclosure is demonstrably harmful, even though documents may technically fall within one of the exemptions of the Act. The new Executive Order involving national security information permits information to be classified as "Confidential" only when the unauthorized disclosure reasonably could be expected to cause identifiable damage to the national security. The Sunshine Act allows agencies to close meetings which qualify for one of the ten exemptions of the Act, except "where the agency finds that the public interest requires otherwise."

Fifth, there is undoubtedly room for improvement with respect to each of these statutes, in terms of both their content and their implementation. They are all relatively young. Each has dealt with previously uncharted territory. As with any new statutes, growing pains have been experienced in their implementation. Some of the problems may have been simply due to lack of precedent and experience under the new statutes. I believe, however, that other problems have been caused by weaknesses in the statutes themselves. These problems are most certainly correctable. Some of the problems, and possible solutions, are identified in the following articles.

In sum, government openness is here to stay. It is bringing enormous public benefits. Our challenge for the coming years is to ensure that it is made to work as well as possible.

ment's effective conduct of public business, and freedom of expression both within agencies and between citizens and their government. As those of us who have been involved in this area know all too well, reconciling these values within the context of a specific case can be a difficult and challenging job.

These openness and privacy statutes serve important purposes. They are instrumental in fostering an informed public, thereby promoting greater citizen participation in the affairs of government and greater understanding of the decisions reached by government. By allowing the public to better oversee government operations, they make the government more responsive and responsible. Abuses of the public trust can more readily be discerned and corrected. Accurate and adequate information facilitates constructive criticism of the government, and can assist in improving the quality of work. By reducing public suspicion and distrust which is bred by excessive secrecy, citizen confidence in government is promoted. The individual's right to privacy can be protected from unwarranted invasion.

Finally, this area of law and public policy is controversial and exciting. These laws are all relatively young; they are in an active state of interpretation and flux. As reflected in the ensuing presentations, opinions regarding the proper balance between government openness and confidentiality are strongly held and widely disparate. As a result, the exchange of views is active and robust.

The presentations in this issue raise a number of important issues and perplexing questions. One of the most basic, brought out in the colloquies between David Cohen and Quinlan Shea and between Janet Studley and Barry Cutler, is whether the government openness mandated by the various laws "works," is "working," or "can work." Of course, to answer the question, one must define what "working" means in this context. Presumably, the effectiveness of these laws can be measured by comparing their benefits — to the general public, to those with a particular interest directly affected by pending or final government action, to the Congress, and to those within the agency itself — against their costs. Unfortunately, as with environmental, energy, and other legislation, their costs are much easier to quantify than their benefits, making it difficult to analyze the equation and to reach a conclusion. Thus, we have Thomas H. Breeson of the FBI pointing out that from 1974 to the end of 1978, the FBI expended over $23 million implementing the Freedom of Information and Privacy Acts, with the number of full-time staff involved in this work increasing from less than 20 to over 300. Likewise, Quin Shea states that the Department of Justice spent over $14 million in 1977 implementing this legislation — with no appropriation from Congress to cover this cost except for resources appropriated in contemplation of other Departmental missions. The administrative burden of responding to requests for information under these laws and of implementing other legislation, such as the Sunshine Act, is cited by a number of authors. On the other hand, there are those like Irene Emsellem who feel that talk about numbers, dollars, burdens, caseloads, and delays are basically beside the point, which is that the fundamental reason for the Freedom of Information Act is to effectuate the public's right to

REVENUE ACT OF 1978

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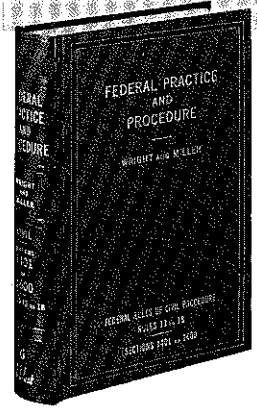

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