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THE FEDERAL "GOVERNMENT IN THE SUNSHINE ACT": A PUBLIC ACCESS COMPROMISE

On September 13, 1976, President Ford signed into law the "Government in the Sunshine Act."[1] This important new statute provides public access to deliberations of an estimated fifty regulatory agencies.[2] The federal government thus followed examples set by all fifty states[3] as well as the precedent of the Freedom of Information Act (FOIA),[4] the Federal Advisory Committee Act (FACA),[5] and the Privacy Act of 1974.[6]

The Act defines those agencies and types of meetings to which openness will apply and specifies ten kinds of meetings which need not be opened "unless the public interest requires otherwise." Procedures are prescribed for keeping meetings closed and for providing notice of open meetings. Verbatim transcripts must be kept for most closed meetings, while comprehensive minutes are to be kept of open meetings. Any person can sue an agency

1. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C.A. §552b (West 1977)); Presidential Statement, 11 WEEKLY COMP. OF PRES. DOC. 38 (Sept. 13, 1976). The law went into effect on March 13, 1977.

2. See generally text accompanying notes 57-61 *infra*.

3. ALA. CODE tit. 14, §§393-394 (1958); ALASKA STAT. §§44.62-310, .312 (Supp. 1976); ARIZ. REV. STAT. ANN. §§38-431 to -431.8 (Supp. 1976); ARK. STAT. ANN. §§6-604 to -605 (Supp. 1973); CAL. GOV'T CODE §§54950-54961 (West 1966 & Supp. 1976); COLO. REV. STAT. §29-9-101 (1973 & Supp. 1976); CONN. GEN. STAT. ANN. §§1-21 to -21(h) (West Supp. 1976); DEL. CODE tit. 29, §§10004-10005 (Supp. 1976); FLA. STAT. §286.011 (1975); GA. CODE ANN. §§40-3301 to -3303 (1975); HAW. REV. STAT. §§92-1 to -3 (1968); IDAHO CODE §§67-2340 to -2347 (Supp. 1976); ILL. ANN. STAT. ch. 103, §§41-46 (Smith-Hurd Supp. 1976); IND. CODE ANN. §§5-14-1-1 to -6 (Burns Supp. 1976); IOWA CODE ANN. §§28A.1-.8 (West Supp. 1975); KAN. STAT. §§75-4317 to -4320 (Supp. 1975); KY. REV. STAT. §§61.805-.850 (1976); LA. REV. STAT. ANN. §§42:4.1, :5, :6, :6.1, :7, :7.1, :8, :9, :10 (West Supp. 1977); ME. REV. STAT. ANN. tit. 1, §§401-410 (Supp. 1977); MD. ANN. CODE art. 23A, §8 (1973); MASS. ANN. LAWS chs. 30A, §§11A-B, 39, §§23A-B (Michie/Law. Co-op. 1977); MICH. COMP. LAWS ANN. §§15.261-.275 (Supp. 1976); MINN. STAT. §471.705 (Supp. 1975); MISS. CODE ANN. §§25-41-1 to -15 (Supp. 1976); MO. ANN. STAT. §§610.015-.030 (Supp. 1975); MONT. REV. CODES ANN. §§82-3401 to -3403 (Supp. 1975); NEB. REV. STAT. §§84-1408 to -1414 (1976); NEV. REV. STAT. §§241.01-.04 (1973); N.H. REV. STAT. ANN. §§91-A:1-:8 (Supp. 1975); N.J. STAT. ANN. §§10:4-6 to -21 (West 1976); N.M. STAT. ANN. §§5-6-23 to -26 (Supp. 1975); N.Y. LAWS §§90-101 (1976) (amended 1977); N.C. GEN. STAT. §§143-318.1 to .7 (Supp. 1975); N.D. CENT. CODE §44-04-19 (1960); OHIO REV. CODE ANN. §121.22 (Page Supp. 1976); OKLA. STAT. tit. 25, §§201-202 (Supp. 1977); ORE. REV. STAT. §§192.610-.690 (Supp. 1975); PA. STAT. ANN. tit. 65, §§261-269 (Purdon Supp. 1976); R.I. GEN. LAWS §§42-46-1 to -10 (Supp. 1976); S.C. CODE §§1-20.3 to .4 (Supp. 1976); S.D. COMPILED LAWS ANN. §§1-25-1 to -2 (1974); TENN. CODE ANN. §§8-4401 to -4406 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1976); UTAH CODE ANN. §§52-4-1 to -9 (Supp. 1976); VT. STAT. ANN. tit. 1, §§311-314 (Supp. 1976); VA. CODE ANN. §§2.1-343 to -346.1 (Supp. 1977); WASH. REV. CODE ANN. §§42.30.01-.14, 42.30.90-.92 (Supp. 1976); W. VA. CODE ANN. §§6-9A-1 to -6 (Supp. 1976); WIS. STAT. ANN. §§19.81-.89, .96-.98 (West Supp. 1976); WYO. STAT. ANN. §§9-692.10 to .16 (Supp. 1973).

4. 5 U.S.C. §552 (Supp. V 1975).

5. *Id.* app. I.

6. *Id.* §552a.

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to enforce provisions of the Sunshine Act. Courts are empowered to review meeting transcripts in camera and to use equitable powers for enforcement. Finally, significant revisions were made in the ex parte provisions of the Administrative Procedure Act and revised parts of the FOIA and FACA to conform with the new law.[7]

This note will draw on judicial experience under prior state and federal laws as well as the Act's legislative history to highlight those areas of the Act most likely to be contested and whose ultimate impact is most unclear. At the same time, the note will focus on specific provisions in the new law which reveal fundamental compromise in the approach of Congress toward open government. Accordingly, the policy conflicts underlying this compromise will be discussed,[8] followed by examination of the statute's definitions,[9] exemptions,[10] and enforcement provisions.[11] As the Act encompasses a broad range of issues, such procedures as providing notice and obtaining transcripts will be treated only where relevant to other issues surrounding the Government in the Sunshine Act.[12]

BACKGROUND

The notion of open government in America is at least as old as the government itself.[13] Nonetheless, even strong advocates of openness have

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7. 5 U.S.C.A. §552b (West 1977).

8. See text accompanying notes 42-55 *infra.*

9. See text accompanying notes 56-81 *infra.*

10. 5 U.S.C.A. §552b(c) (West 1977). See note 98 *infra* for a listing of the statute's exemptions.

11. *Id.* §552b(g)-(i). See also notes 15, 32, 80, & 186 *infra* for discussions of such constitutional issues as "the right to know," separation of powers, freedom of association, and standing.

12. For example, the transcript requirements, 5 U.S.C.A. §542b(f) (West 1977), are discussed with reference to the Act's enforcement sanctions. See text accompanying notes 167-190 *infra.* For a more extensive treatment of the Act's notice provisions, 5 U.S.C.A. §552b(e) (West 1977), see Note, *Government in the Sunshine Act: Opening Federal Agency Meetings,* 26 AM. U. L. REV. 154 (1976). The important provisions governing ex parte communications, 5 U.S.C.A. §557(d) (West 1977), can be more appropriately handled in the context of other sections of the Administrative Procedure Act. Finally, when exemptions from openness are discussed, the note will not dwell on those which have already received definitive review under the FOIA and have been left unchanged by the Sunshine Act.

13. Words written by James Madison have practically become a slogan for the new Act, as they were quoted throughout the debates. "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both." 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) (letter to W.T. Barry, Aug. 4, 1822), *quoted in* 122 CONG. REC. H7879 (daily ed. July 28, 1976) (remarks by Rep. Steelman), 122 CONG. REC. H7880 (daily ed. July 28, 1976) (remarks by Rep. Collins), and Comment, 53 ORE. L. REV. 339, 341 n.18 (1974); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution,* 26 GEO. WASH. L. REV. 1, 7 (1957). Thomas Jefferson supported the open government concept, stating: "Whenever the people are well-informed, they can be trusted with their own government . . . ." 122 CONG. REC. H7882 (daily ed. July 28, 1976) (remarks of Rep. Anderson). Patrick Henry also spoke against covering common

participated in secret meetings of some note,[14] and the constitutional "right to know" has not been firmly established in the context of public meetings.[15] Some states enacted rudimentary laws to protect citizen access in the late nineteenth century.[16] The press also took an active part in fostering these open meeting laws.[17] But only as government bureaucracy expanded on all

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business with "the veil of secrecy." 3 ELLIOTT'S DEBATES 170, *quoted in* Yankwich, *Legal Implications of, and Barriers to, the Right to Know*, 40 MARQ. L.J. 3, 5 n.11 (1956).

14. Both the Declaration of Independence and the Constitution were promulgated in secret conventions, and United States Senate debates were held in secret until 1794. 122 CONG. REC. 13,007 (1976) (remarks of Rep. King).

15. A number of commentators in the 1950's argued strenuously for the recognition of a constitutional "right to know," based on the first amendment. *See, e.g.*, H. CROSS, THE PEOPLE'S RIGHT TO KNOW vii (1953); Parks, *supra* note 13, at 1; Yankwich, *supra* note 13, at 6. The latter author wrote that "the right of a free community to the free flow of information is paramount. . . . And the right to circulate information is a part of the guaranty of free speech." Parks cited Grosjean v. American Press Co., 297 U.S. 233, 243 (1946), to show that the Supreme Court recognized "natural rights" to "impart and acquire information." Parks, *supra* note 13, at 10.

Nevertheless, judicial reluctance to embrace the "right to know" was observed in Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1204 (1962), and the Supreme Court more recently has handed down decisions expressly limiting the right. Pell v. Procunier, 417 U.S. 817 (1974) and Saxbe v. Washington Post Co., 417 U.S. 843 (1974) allowed state and federal prisons to deny media access to specific individual inmates. The Court relied on Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972), which contained the following language: "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . . . [T]he press is regularly excluded from . . . the meetings of other official bodies gathered in executive session, and the meetings of private organizations." *But see* Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 753 (1976).

16. Precedent regarding access to public records or documents was already well established among the states before open meeting laws began to be passed. H. CROSS, *supra* note 15, at 179. States first applied open meeting principles to their legislatures through constitutional provisions. However, the vast majority of states allowed executive sessions at the discretion of the legislatures, and only Idaho and New Mexico mandated fully open legislatures. *Id.* at 183-84. *Compare* TEX. CONST. art. 3, §16 *with* N.M. CONST. art. 4, §12.

Utah passed an early statute affecting municipal proceedings, UTAH CODE ANN. §15-6-9 (1933), and it was enforced in Acord v. Booth, 33 Utah 279, 93 P. 734 (1908). *See also* Dunn v. City of Cadiz, 140 Ky. 217, 130 S.W. 1089 (1910); Fitzgerald v. Pawtucket St. Ry., 24 R.I. 201, 52 A. 887 (1902).

Alabama is generally acknowledged to have passed the first statute applicable to all levels of state government. ALA. CODE tit. 14, §393 (1915).

17. Activities of the media have ranged from editorializing to lobbying to actually authoring and sponsoring sunshine legislation. Wickham, *Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus*, 42 TENN. L. REV. 557, 559 (1975). *See also Hearings on S.260 Before the Subcomm. on Reorganization, Research and International Organizations of the Senate Committee on Governmental Operations*, 93d Cong., 2d Sess. (1974) (remarks of Professor Wickham) [hereinafter cited as *Hearings on S.260*]. Other examples of media pressure exerted in favor of state government sunshine are given in Comment, *supra* note 13, at 343, and Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361 (1971). Important lobbyists for sunshine laws have included the Committee on Freedom of Information of the American Society of Newspaper Editors and the Freedom of Information Foundation.

levels and concern mounted over the nature of governmental restrictions[18] did more comprehensive statutes appear in several states.[19]

Spurred by national scandals in the 1960's and 1970's, more states promulgated sunshine laws.[20] Furthermore, some courts began to enforce more strictly the openness concept.[21] State sunshine statutes, however, often varied widely in scope and in judicial interpretation of legislative intent. Coverage,[22] exemptions,[23] and enforcement provisions ranged over a broad spectrum. For example, legislative committees were subject to the statutes less often than administrative agencies.[24] Additionally, some statutes opened all meetings in blanket fashion, while others exempted diverse types of discussions ranging from national security to parole.[25] No standardization has taken place, nor does uniformity among the states appear likely. Nonetheless, the fact that these state laws universally call for some form of open meetings indicates that the voters overwhelmingly support sunshine, and congressional opponents of the new federal law were forced to recognize this political fact.[26]

18. "[A]t all levels of government there have been attempts, in recent years, to deny access to the activities of public men and bodies." Yankwich, *supra* note 13, at 6. Cross cited two causes for the perceived dramatic increase in government secrecy: "(1) The backwash of world trends toward secrecy in government, and interference in news activities. (2) Habits of secrecy and censorship flowing from war." H. CROSS, *supra* note 15, at 12.

19. *See* Wickham, *Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. L. REV. 480 (1973).

20. Only 26 states had opened meetings of government bodies on a state-wide basis by 1962. *See* Note, *supra* note 15, at 1204. After a five-year lull marked by only three new laws, ten more states passed comprehensive bills between 1967 and 1972. The remaining eleven states adopted open meeting statutes by 1976, with New York the last to do so. *See* Hollow & Ennis, *Tennessee Sunshine: The People's Business Goes Public*, 42 TENN. L. REV. 527 (1975).

21. "The Government in the Sunshine Law, . . . having been enacted for the public benefit, should be interpreted most favorably to the public." Canney v. Board of Pub. Instruction, 278 So. 2d 260, 263 (Fla. 1973); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971). *See also* Dorrier v. Dark, 537 S.W.2d 888 (Tenn. 1976) (refusing to find any exceptions to openness unless specified by the legislature).

22. See text accompanying note 44 *infra*.

23. See text accompanying notes 111-142 *infra*.

24. Whereas every state law so far passed covers state administrative agencies to some extent, only half of the laws open legislative committees. *See* Summary of State Open Meetings Laws, compiled by Dr. John B. Adams for the Freedom of Information Foundation, *reprinted in* S. REP. NO. 354, 94th Cong., 1st Sess. 50-52 (1974). Dr. Adams devised a "rough index" of comprehensiveness with which to compare the various states. Although he designed the scale only for basic elements of open meeting laws, without considering exemptions, the scale does reveal the extremes among state policies. For instance, while Tennessee rated the only perfect score of "11," Maryland and Rhode Island each received only a single point. Both of those state laws covered administrative agencies and nothing else: no policy statement, no enforcement provisions, and no other meeting coverage was included. *Id.*

25. *See, e.g.*, TENN. CODE ANN. §8-4402 (Supp. 1976): "All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee constitution." *See also* N.M. STAT. ANN. §5-6-23 to -26 (1974). At the opposite extreme is the highly detailed law of North Carolina, N.C. GEN. STAT. §§143-318.1-.7 (1974). That law lists lengthy exemptions and specifically enumerates those agencies excluded from the Act's coverage.

26. "No one wants to be recorded against 'Sunshine.' I understand that and recognize

The United States Congress provided further impetus toward public access when it passed the FOIA in 1966.[27] That statute gave the public a right to examine government documents, subject to nine exemptions.[28] From the outset, however, the FOIA faced difficulties which crippled its effectiveness. First, government agencies fought hard against releasing much information. They charged high fees, delayed in procuring documents, and asserted broad interpretations of the exemptions, leading to extensive litigation.[29] Furthermore, the judiciary upheld some of the broadest interpretations of several exemptions.[30] Additionally, requests for documents, which dramatically in-

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the political realities." 122 CONG. REC. H9261 (daily ed. Aug. 31, 1976) (remarks of Rep. Moorhead). "[T]he most capable individual in Washington is the person who gives the names to our congressional bills. There is a warm and friendly spirit in the name 'Government in the sunshine.'" 122 CONG. REC. H7878 (daily ed. July 28, 1976) (remarks of Rep. Collins, an opponent of the bill).

27. Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified at 5 U.S.C. §552 (1970)). Federal efforts toward openness can be said to have originated with the adoption of the Federal Register Act, ch. 417, 49 Stat. 500 (1935) (current version at 44 U.S.C. §§301-317 (Supp. V 1975)). That statute had forced administrative agencies to publish their procedural rules in one federal register. It was perhaps spurred by an influential article which decried the "chaos" then existing in federal records. Griswold, *Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934). *See* O'Leary, *The Right to be Informed*, 54 MASS. L.Q. 63, 71 (1969).

28. 5 U.S.C. §552 (1970). The original Act listed the following exemptions prior to amendment in 1974: "(b) This section does not apply to matters that are —

"(1) specifically required by Executive order to be kept in secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) 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;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells."

See note 98 *infra* for a list of the amended exemptions to the Freedom of Information Act.

29. LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT (C. Marwick ed. 1976) [hereinafter cited as LITIGATION UNDER THE AMENDED FEDERAL FOIA]. *See also* SENATE JUDICIARY COMM., FREEDOM OF INFO. ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. No. 82, 93d Cong., 2d Sess. 1 (1974), which stated, "testimony at recent hearings . . . has suggested that the act has become a 'freedom from information' law, and that the curtains of secrecy still remain tightly drawn around the business of our government." *Id.* at 1.

30. *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973), which held that executive classification of documents based on national security could not be challenged under the FOIA. If a file or document was classified, it automatically fell within the original exemption 1. The original exemption 7, which excluded "investigatory files compiled for law enforcement

creased over the years, burdened both the agencies with the cost of searching and the courts with litigation.[31] Congress therefore examined the effects of the 1966 statute and, despite the costs, decided in favor of strengthening the Act's requirements of openness. The 1974 amendments to the FOIA thus narrowed certain exemptions and tightened the administrative process for releasing requested documents.[32]

Although the FOIA applied only to documents, Congress also adopted an open policy for some public meetings as early as 1972 and applied it to advisory committees through the FACA.[33] Congress opened many of its own

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purposes," was also read broadly by the courts. Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), held that an agency's investigatory files were protected even after the agency closed the case. *See also* Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974), which exempted spectrographic analysis of the Kennedy assassination bullet under original exemption 7.

31. "There have been few statutes in the nation's history which have generated so much litigation so quickly as the Freedom of Information Act." Rosenbloom, *More IRS information may become public due to amended freedom of information act*, 45 J. TAX. 258, 262 (1976). The author discusses particular burdens faced by the IRS, quoting a December 3, 1975 letter from Commissioner Alexander to Senator Kennedy. The Commissioner cited 44 cases which had been initiated against the IRS under the Act, and stated that 1.3 million pages of tabulations were being released to the public. *Id.*

For a description of another agency's more recent experience under the FOIA, see FDA, Public Information, Final Regulations, 42 Fed. Reg. 3094 (1977). In a wide ranging response to comments on the FDA's proposed FOIA regulations, the agency pointed out the following: "During fiscal year 1975, FDA received approximately 5,300 requests; in fiscal year 1976, the total number of requests ballooned to nearly 20,000. . . . A large proportion of the requests received by FDA are lengthy, voluminous, and complex. . . .

"Last year, FDA's uncompensated cost of responding to FOIA requests exceeded $1 million. Fees charged, which are supposed to reflect actual cost to the government, totaled only $78,340." *Id.*

32. LITIGATION UNDER THE AMENDED FEDERAL FOIA, *supra* note 29, at 9-10; Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502 §§1-3, 88 Stat. 1564 (1974) (amending 5 U.S.C. §552 (1970)).

The amendments set timetables for responses, required more indexing, forbade excessive fees, provided for attorney's fees, expedited FOIA cases, and strengthened the Act's sanctions. Congress also narrowed the scope of the national security exemption as well as the exemption for investigatory records. See notes 98 & 117 *infra*. President Ford called the amendments "unconstitutional and unworkable," objecting in particular to the in camera inspection procedures for classified documents, but Congress overrode the presidential veto. 120 CONG. REC. 36,622-33, 36,865-82 (1974) (remarks of Pres. Ford).

For discussions of the constitutionality of the 1974 amendments as they involved the doctrine of separation of powers, see Commentary, *Freedom of Information: Judicial Review of Executive Security Classifications*, 28 U. FLA. L. REV. 551, 552 n.15 (1976) (citing a study prepared by the Center for Governmental Responsibility of the University of Florida, *Analysis of President Ford's Veto of H.R.* 12,471, *reprinted in* 120 CONG. REC. 36,536-39 (1974)). The FOIA amendments went into effect on February 19, 1975.

33. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. I (Supp. V 1975)). Problems arose because advisory committee meetings could only be closed pursuant to the FOIA exemptions. *Id.* §10. Those exemptions were designed for documents, and it was later discovered that open meeting principles embodied separate problems. *See, e.g.*, Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976), which applied the FOIA's interagency memo exemption, exemption 5, to allow closing of Federal Advisory Committee meetings. The case presented a direct conflict between the

meetings to the public as well;[34] however, some congressmen have noted that Congress set less stringent standards for itself than it set for administrative agencies in the new Sunshine Act.[35]

As a result of these state and federal laws, Congress was amply prepared for the introduction of the Government in the Sunshine Act by Florida Senator Lawton Chiles in 1972.[36] After being reintroduced to the ninety-fourth Congress, Senate Bill 5 passed the Senate by a vote of 94-0,[37] although, significantly, the proposed law met stronger opposition in the House.[38] A sufficient number of congressmen were concerned enough about the bill to force a floor fight over such issues as citizen standing to enforce the Act, the verbatim transcripts, and the agencies covered.[39] Several amendments

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exemption's policy of encouraging "free and candid exchange of ideas," *id.* at 107, and the policies behind open meeting principles. *See also* Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir. 1976). The Sunshine Law was designed to change the *Washburn* result. 122 CONG. REC. H7867 (daily ed. July 28, 1976) (remarks of Rep. Abzug). For a recent extensive discussion of FACA, see Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977).

34. *See* WJXT-TV editorials of Jan. 29, 1971 and Feb. 12, 1972, hailing the introduction of electronic, recorded voting in Congress, *reprinted in Hearings on S.260, supra* note 17; at 286-87. In H.R. Res. 259, 93d Cong., 1st Sess. (1973), the House also adopted a rule requiring meetings of House Committees, including markup sessions, to be open to the public. S. Res. 9, 94th Cong., 1st Sess. (1975), opened markups and other sessions of Senate Committees. Conference committees were opened by S. Res. 9 & H.R. Res. 5, 94th Cong., 1st Sess. (1975). The actual standard of openness among various congressional committees has varied, however, depending upon the chairmen and the subject matter.

35. 122 CONG. REC. H7882 (daily ed. July 28, 1976) (remarks of Rep. Anderson): "I found that this 'sunshine' bill far exceeds any sunshine requirements which now apply to House committees." Representative Anderson cited House Rule XI 2g(l) which allowed a committee majority to close a meeting for any reason — a much laxer rule than the Sunshine Law. He also noted that under clause 2f of Rule XI, unlike the Sunshine Act, proxies are allowed; and under §2e, only the results of roll calls need be made available.

36. S. 3881, 92d Cong., 2d Sess. (1972), *reintroduced as* S. 260, 93d Cong., 1st Sess. (1973). *See also* SENATE SUBCOMM. ON REORGANIZATION, RESEARCH AND INTERNATIONAL ORGANIZATIONS, GOVERNMENT IN THE SUNSHINE — RESPONSE TO SUBCOMM. QUESTIONNAIRE, 93d Cong., 1st Sess. vii. (Comm. Print 1974). Note that the Senate Rules and Administration Committee deleted Title I of the bill, which had extended openness to congressional committee meetings. S. REP. No. 381, 94th Cong., 1st Sess. (1975). The Committee decided that opening senate committees should be done by amending the standing rules of the Senate, rather than by amending the legislative reorganization acts of 1946 and 1970. In the House, Representative Fascell of Florida introduced H.R. 9868 on September 26, 1975, and Representative Abzug reintroduced the Sunshine Act as H.R. 11656 on February 3, 1976.

37. This is not to say that the bill was unopposed in the Senate. *See* 121 CONG. REC. S 19,378-80 (daily ed. Nov. 5, 1975) (remarks of Sen. Robert Byrd); 121 CONG. REC. S 19,353-56 (daily ed. Nov. 5, 1975) (remarks of Sen. Cannon).

38. H.R. REP. No. 880 (Part I), 94th Cong., 2d Sess. 33, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2206 (additional views of Hon. Frank Horton): "Our differences with H.R. 11656 are few but important. They include (1) the verbatim transcripts requirement for closed meetings, (2) the definition of 'agency,' (3) the definition of 'meeting,' (4) the identification of persons expected to attend a closed meeting, (5) the prescribed venue for actions brought under this legislation, (6) the personal liability of individual agency officials, and (7) the unfettered disclosure of all ex parte communications."

39. The floor debate occurred despite certain debilitative amendments, passed by the House Judiciary Committee. Specifically, their report refined and relaxed the transcript requirement by removing the provision for written explanations of deletions, eased the

were passed which generally sought to lighten the burden which the Act placed on federal agencies. A Senate-House conference report, containing numerous compromises, easily passed through Congress.[40] Consequently, the Government in the Sunshine Act was signed by President Ford eight weeks before the presidential elections.[41]

POLICY

A clear statement of legislative intent is vital to the effectiveness of a sunshine law for two reasons.[42] First, the presumption of openness provided by a statement of intent is needed because so many conflicting policies inhere in the processes of government. These include protection of the right to privacy, avoidance of excessive administrative paperwork, and the need for secretive administrative enforcement procedures. Second, experience with state statutes has shown that judicial interpretation of legislative intent is often the key factor in determining the impact of open meeting legislation.[43] Many state courts, for instance, have interpreted nearly identical statutory language which covers the "official actions" of public bodies. Yet some courts have applied these words only to formal meetings, while others have found that the same words require all manner of informal agency discussions to be opened to the public.[44] The goals of the new federal law must be

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procedures for closing meetings, limited venue for suits under the Act, and deleted all personal liability of agency members. H.R. REP. No. 880 (Part II), 94th Cong., 2d Sess. 3-5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2212, 2212-15. *See* H.R. REP. No. 880 (Part II) at 20 for adoption of the amendments. Six proponents of the bill expressed identical concerns about these amendments on separate pages of the report. Representative Conyers made one such statement: "We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action." *Id.* at 48. *See generally* 122 CONG. REC. H7866-902 (daily ed. July 28, 1976).

40. In sum, the Conference Report handled the following matters: (1) decided how to include single headed agencies within the Act; (2) compromised on a definition of "meeting"; (3) adopted much of the House language describing exemptions from the Act; (4) established flexible notice requirements; (5) reinstated the Senate's transcript requirement, though exceptions were added; (6) adopted the narrower House venue provisions; (7) dropped the Senate's provision for individual liability of agency members; (8) retained most of the Senate provisions regarding ex parte communications. H. CONF. REP. No. 1441, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2244. The final House vote on the Conference Report was 387-0. 122 CONG. REC. H9261 (daily ed. Aug. 31, 1976). In the Senate, the bill passed by voice vote, 122 CONG. REC. S15,045 (daily ed. Aug. 31, 1976).

41. As he signed the bill, President Ford continued to express reservations about the Act. Presidential Statement, WEEKLY COMP. OF PRES. DOC., Vol. 12, No. 38 (Sept. 13, 1976).

42. Wickham, *supra* note 19, at 488: "There Must Be a Clear Statement of Purpose Contained in the Draft Legislation Itself . . . . The most important single principle is that the legislation as a whole should evidence a clear presumptive purpose of public access to governmental action and deliberation." According to Wickham, state laws which met this standard included those of California, Indiana, and Utah. See also note 45 *infra.*

43. See the discussion in Lawrence, *Interpreting North Carolina's Open-Meetings Law*, 54 N.C. L. REV. 777 (1976).

44. OHIO REV. CODE ANN. §121.22 (Anderson Supp. 1976) states: "All meetings of any board or commission of any state agency or authority . . . are declared to be public

understood, therefore, in order to resolve the fundamental conflicts underlying state and federal debates on these statutes.

The Act's "Declaration of Policy" seems to state both sides of the issue involved. According to this declaration "the public is entitled to the fullest practicable information," but Congress expressed an equal desire to protect "the rights of individuals and the ability of the Government to carry out its responsibilities."[45] Furthermore, dissenters from the House Government Operations Committee report described somewhat different goals: "(1) open government, (2) cutting costs of government, and (3) discouraging undue litigation."[46]

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meetings open to the public at all times. No resolution, rule, regulation or formal action of any kind shall be adopted at any executive session." The Supreme Court of Ohio held this to mean that informal deliberations could be closed to the public. Beacon Journal Publishing Co. v. City of Akron, 3 Ohio St. 2d 191, 209 N.E.2d 399, 404-05 (1965) (citing Turk v. Richard, 47 So. 2d 543 (Fla. 1950)). The *Turk* case had construed an early Florida law which required that "all meetings of any city or town council . . . shall be held open to the public." FLA. STAT. §165.22 (1941). Despite this absolute language, the Florida supreme court read into the law a definition of "meeting" which limited it to sessions in which formal action was contemplated.

Ironically, the new Florida Sunshine Act is on its face less absolute than the old law, yet it has been interpreted to cover even informal deliberations. The 1976 law provides: "All meetings . . . at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation, or formal action shall be considered binding except as taken or made at such meeting." FLA. STAT. §286.011 (1975). The supreme court in Board of Pub. Instruction v. Doran, 224 So. 2d 693, 698 (Fla. 1969), held that "[t]he obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." *See also* Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968), in which a California court construed similar language as opening up informal deliberations.

45. Pub. L. No. 94-409, §5(b), 90 Stat. 1241, 1247 (1976). Given this mild policy statement in the federal law, it is somewhat surprising that Professor Wickham expressed approval of the language. *Hearings on S.260, supra* note 17, at 266. Numerous state statutes contain more forthright policy statements. *See, e.g.*, UTAH CODE ANN. §52-4-1 (1977): "Declaration of Public Policy.

"In enacting this chapter, the legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."

46. H.R. REP. No. 880 (Part I), *supra* note 38, at 39-40, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2210-12. McCloskey found in particular that the bill was "a lawyer's dream." *Id.* He noted that attorney's fees incurred by a plaintiff were paid if he "substantially prevailed." *Id. See* 5 U.S.C.A. §552b(i) (West, 1977). The congressman also attacked the Senate's venue provision, later changed, which allowed suit to be brought in plaintiff's home district. Finally, he stressed ambiguities in the exemptions. *See also* 122 CONG. REC. 7874-78 (daily ed. July 28, 1976).

There can be no doubt that substantial litigation will arise under the Act, if the Freedom of Information Act is any example. Still, it should be noted that opening a meeting is a less burdensome task than searching for documents, and the transcript requirements should present no problem similar to those under the more complex FOIA. In addition, many state governments have not been flooded with litigation under their various open meeting laws; for example, Alabama, which has a relatively "open" law, has had very few published cases on the subject. *See, e.g.*, Hamrick v. Town of Albertville, 223 Ala. 216, 135 So. 326 (1931).

Nonetheless, proponents of the Sunshine Act made known their preference for openness in a number of ways. Throughout the hearings, they repeatedly stressed such benefits of open meetings as increased confidence in government, higher quality of agency work, and the elimination of leaks to a chosen few.[47] Additionally, these purposes were reiterated in the House Government Operations Committee report, which stressed the people's right to have their government accountable to them,[48] if not to participate actively in the decisionmaking process.[49] Provisions in the Act itself emphasize that exemptions are to be narrowly construed[50] and that the burden of proof lies with the agencies.[51]

Congress vigorously debated the bill's effect on "full and frank discourse among agency members."[52] Indeed, the ten exemptions in the Act stem in

47. *See Hearings on S.* 260, *supra* note 17, at 16-17 (remarks of Mr. Rowe); *Hearings on S.* 260, *supra* note 17, at 216-18 (remarks of Mr. Geller).

48. H.R. REP. NO. 880 (Part I), *supra* note 38, at 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 2183, 2184. "Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf." *Id.*

49. Although opening meetings to public observation does increase public participation in its most basic sense, Congress sought to reassure the agencies that the Sunshine Act mandated no other active participation. H.R. REP. No. 880 (Part I), *supra* note 38, at 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2189-90; S. REP. No. 354, *supra* note 24, at 1917. Administrators who had opposed the Act expressed serious concern about the potential delays and confusion which might result from constant vocal questioning of agency decisionmaking. *Hearings on S. 260, supra* note 17, at 272 (remarks of Prof. Berg).

Mandatory public participation has been tried at the state level. *See* NEB. REV. STAT. §84-1412(1) (1975): "the public shall have the right to attend and the right to speak at meetings of public bodies. . . . (2) A body is not required to allow citizens to speak at each meeting, nor may it forbid public participation at all meetings."

Nevertheless, federal agency regulations based on the Sunshine Law have reemphasized the prohibition on public participation; *see, e.g.,* Overseas Private Investment Corp., 22 C.F.R. §708.2(a) . *See also* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process,* 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings,* 81 YALE L.J. 359 (1972).

A related issue concerns use by the public of tape recorders and TV cameras. Some agencies have prohibited such devices from their meetings by regulation, presumably by analogizing to similar court rules in many states. *See, e.g.,* Overseas Private Investment Corp., 42 Fed. Reg. 5086 (1977) (to be codified in 22 C.F.R. §707.2(a)). However, where the question has been considered by state courts in the specific context of open meetings, agencies have not been allowed to prohibit unobtrusive recording devices. Nevens v. City of Chino, 223 Cal. App. 2d 775, 44 Cal. Rptr. 50 (1965) (holding that it was arbitrary and capricious to ban tape recorders from a public meeting).

50. 5 U.S.C.A. §552b(b) (West 1977). "[E]xcept as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation."

51. *Id.* §552b(h)(1). *See also* H. CONF. REP. No. 1441, *supra* note 40, at 17, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2253: "The fact that one portion of a meeting may be closed does not justify the closing of any other portion."

52. 122 CONG. REC. H7878 (daily ed. July 28, 1976) (remarks of Rep. Collins): "When they [agency members] talk frankly among themselves, they use more common sense." The press, lobby group pressure, and human nature, Collins felt, "will have them reacting to the pressures of whatever outsiders are present." *Id.* Some commentators have noted inhibiting effects on decisionmaking in open meetings. *See generally* PICKERELL, OPEN PUBLIC MEETINGS (1957); tenBroek, *Welfare in 1957 Legislature,* 46 CAL. L. REV. 331, 352-61 (1958).

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part from residual concern that absolute sunshine might inhibit administrators from expressing their views.[53] In order to refute such fears among various agency officials,[54] Senator Chiles relied on his own experiences in a state generally conceded to have taken an absolutist stance favoring sunshine.[55] Legislative history of the Act thus indicates a clear attempt to cast the balance in favor of public access, although considerations of cost and privacy were also significant. As a result, the basic policy disputes described above may remain a major limitation on the Act's effectiveness. Their impact will be felt throughout the ensuing discussion of the Sunshine Law's provisions.

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53. This is especially true of exemptions 8, 9, and 10, which seek to avoid "frustration" of various planned agency actions or litigation. However, there is no exemption comparable to the FOIA's exemption 5 (intraagency memos): that is, none of the present Sunshine Act exemptions have a specific intent to "encourage full and free discussion," at the expense of openness. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

54. Most agency officials at the hearings stood firm in their belief that government decisionmaking would be impaired by public attendance. *See, e.g., Hearings on S. 260, supra* note 17, at 200 (remarks of Mr. Garrett of SEC). One exception to this general agency opposition was FCC Commissioner Glen O. Robinson. Commissioner Robinson stated that "if, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals an agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust." *Hearings on H.R. 10315 and H.R. 9868,* 94th Cong., 1st Sess. 98 (1975), *cited in* H.R. REP. No. 880 (Part I), *supra* note 38, at 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2184, and *quoted in* 122 CONG. REC. H7866 (daily ed. July 28, 1976) (remarks of Rep. Abzug). Senator Chiles responded to agency opposition by relating his own positive experiences under the Florida act. *See also Hearings on S. 260, supra* note 17, at 216-18 (testimony of Henry Geller, former counsel to FCC, favoring the bill). For a discussion of one agency's immediate reaction to the new sunshine law, see *At FCC is there anything to see in the Sunshine?,* BROADCASTING, May 23, 1977, at 34-36.

55. Florida's "Government in the Sunshine Law," FLA. STAT. §286.011 (1975), has aroused considerable controversy due to its sweeping coverage. Several commentators have attacked it as overly simplistic, claiming that administrators can never be sure of the meaning of the law's broad language. Little & Tompkins, *Open Government Laws: An Insider's Views,* 53 N.C. L. REV. 451, 461 (1975). In addition, concern for privacy rights and administrative effectiveness has led some to believe that absolute openness is unworkable. Wickham, *supra* note 19, at 490. The law has been criticized for its failure to provide explicit notice provision. Note, *Government in the Sunshine: Promise or Placebo?, supra* note 17, at 375. *See also* Note, *Government in the Sunshine: Judicial Application and Suggestions for Reform,* 2 FLA. ST. U. L. REV. 537, 551 (1974).

Nevertheless, the Supreme Court of Florida strictly enforced the legislative mandate in such cases as Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973), and Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974), allowing an exception only for collective bargaining in Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972). It should also be noted that no significant changes have been found necessary by the legislature since 1967. However, Florida courts have recently shown a greater tendency to allow meetings to be closed, despite the sunshine law. *See* Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977); Marston v. Gainesville Sun Publishing Co., 341 So. 2d 783 (Fla. 1st D.C.A. 1976), *cert. denied,* 352 So. 2d 171 (Fla. 1977); Bennett v. Warden, 333 So. 2d 97 (Fla. 2d D.C.A. 1976), *cert. denied,* 350 So. 2d 463 (Fla. 1977).

Senator Chiles has commented favorably on his experiences under Florida's law, although the final version of his federal bill bears little resemblance to the Florida statute. See note 54 *supra.*

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DEFINITIONS OF "AGENCY" AND "MEETING"

Delineating exactly which governmental bodies are to be opened by a new law has always been a difficult problem of legislative draftsmanship.[56] The Government in the Sunshine Act based its definition of "agency" on existing language in the Administrative Procedure Act and the Freedom of Information Act.[57] Congress added a further proviso to the Senate's bill so that the Act would cover only those agencies "headed by a collegial body composed of two or more individual members," the majority of which are appointed by the President and confirmed by the Senate.[58] Still, the basic FOIA description is no model of clarity. Confusion has arisen over defining the executive branch and in deciding whether governmental bodies can be agencies for some purposes and not for others.[59]

Some congressmen suggested that the Act should enumerate the specific agencies which it was meant to cover, citing the approach used in the Government Corporation Control Act of 1945.[60] Both Senate and House reports

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56. *See* Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710, 714 n.13 (D.C. Cir. 1973), *rev'd*, 421 U.S. 168 (1975); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §1.01, at 1 n.1 (1958); Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 4-18 (1970).

57. 5 U.S.C.A. §552b(a)(1) (West 1977). The APA defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. §551(1) (1970). The FOIA definition incorporates the language of the APA as follows: "For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. §552(e) (Supp. V 1975).

58. 5 U.S.C.A. §552b(a)(1) (West 1977).

59. *See, e.g.*, Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), holding that the National Academy of Sciences did not fall within the executive branch under the definitions of either the APA, the FOIA, or the FACA. The court found the Academy to be not only outside the executive branch but also insufficiently independent to be a separate agency. The Academy also failed to qualify as a government-controlled corporation. Other public bodies which have claimed not to be agencies within the Sunshine Act's definition include the Legal Services Corporation, the Prevailing Rate Advisory Committee, and the Federal Reserve Board's Open Market Committee. Washington Post, March 14, 1977, at 4, col. 1; Wall St. J., March 8, 1977, at 1, col. 4 (continued at 33, col. 1). The Federal Home Loan Mortgage Corporation was held to be an agency as a government-controlled corporation in Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

See also Renegotiation Bd. v. Grumman Aircraft, 421 U.S. 168, 188 n.25 (1975), in which the Court mentioned in a footnote that "the Court of Appeals never considered the possibility that the Regional Board might be an agency for Class B purposes and not for Class A purposes."

The minority report of the House Government Operations Committee seized upon these kinds of cases, as did agency officials at the hearings, to demand a more precise definition of "agency" in the Sunshine Act. H.R. REP. No. 880 (Part II), *supra* note 39, at 37, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2238.

60. 31 U.S.C. §§841, 846 (1970). This approach would not necessarily resolve the ambiguities mentioned above by the dissenters. For example, if the Supreme Court followed through on its dictum in *Grumman* it could perhaps as easily hold a listed agency to be an agency only for some purposes, just as an agency which fits the FOIA definition may sometimes not be considered an agency.

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provided suggested lists, but a majority refused to be limited by such an operational definition.[61] Some state laws set forth lists of agencies to be covered,[62] but a majority prefer to open all agencies "authorized by law" or "supported by public funds."[63] The latter standard encompasses more governmental bodies, since it more often brings agency subdivisions within the scope of a sunshine law. The federal Government in the Sunshine Act specifically included "any subdivision . . . authorized to act on behalf of the agency."[64]

Since the Act expressly covered only the meetings of "collegial bodies," Congress faced the problem of distinguishing between collegial bodies and lower staff groups. Although some agencies had already allowed public access to certain staff deliberations, the legislators believed that mandatory openness on this level would unduly hamper administrative effectiveness.[65] Congress also expressly included particular single-headed agencies, such as the Postal Service and Amtrak, in the "collegial body" definition. Obviously, a single administrator does not meet with himself, but the conference report looked to the methods by which agency decisions were actually made. Accordingly, Congress included the Postal Service because meetings of a collegial body governed the agency, despite its day-to-day management by a single official.[66]

61. H.R. REP. No. 880 (Part II), *supra* note 39, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2222 ("the definition will govern the actual application of the bill rather than the list"). *See also* 122 CONG. REC. H7898-99 (daily ed. July 28, 1976) (amendment offered by Rep. Kindness, defeated by voice vote on the House floor). His list of agencies excluded the Commodity Credit Corporation, Federal Reserve Board, SEC, and Parole Board.

62. *See, e.g.*, DEL. CODE ANN. tit. 29, §10004 (1977) (amending DEL. CODE ANN. tit. 29, §5109 (Supp. 1975)); IND. CODE ANN. §5-14-1-1 to -6 (1971); UTAH CODE ANN. §52-4-2 (1971).

63. HAW. REV. STAT. §92-3 (1975); WASH. REV. CODE §42.30.060 (1971) (amending WASH. REV. CODE §42.32.010 (1961)). Oklahoma is among the states using the "public funds" standard. The federal law shares some of the limitations of the first two state methods. If the governmental body does not fit into one of the enumerated categories in the FOIA definition, then it need not open its meetings. Similarly the "collegial body" qualification lets some agencies out of the Act's coverage. See text accompanying note 66 *infra*.

64. 5 U.S.C.A. §552b(a)(1) (West 1977). *See also* H.R. REP. No. 880 (Part I), *supra* note 38, at 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2189, which stated: "A subdivision of an agency . . .is covered if it is authorized to act on behalf of the agency . . . even if their action is not final in nature." Note that only a majority of the membership of the subdivision is needed to close, not a majority of the agency's entire membership. H. CONF. REP. No. 1441, *supra* note 40, at 16, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2252. Tennessee has a similar provision. TENN. CODE ANN. §8-4402 (Supp. 1976).

65. In its proposed Sunshine Act regulations the Consumer Product Safety Commission pointed out that it had already granted substantial public access to staff meetings. 42 Fed. Reg. 5079 (1977) (to be codified in 16 C.F.R. §1012.1(c)). *See* International Paper Co. v. FPC, 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971). *See also* S. REP. No. 354, *supra* note 24, at 2-3, explicitly stating that discussions "between a Commissioner and any number of staff employees" would not be covered.

66. H. CONF. REP. No. 1441, *supra* note 40, at 10-11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2246 ("the intent and understanding of the conferees regarding this provision is that meetings of a collegial body governing an agency whose day-to-day management may be under the authority of a single individual . . . are included within the definition of agency"). The Commodity Credit Corporation seems also to have been

Some of the definitional problems encountered under the FOIA should be avoidable now that Congress has conformed the Government in the Sunshine Act to the Federal Advisory Committee Act.[67] Confusion may still be engendered by the addition of the "collegial body" standard to the Sunshine Law where the FOIA had none. Nevertheless, the congressional definition of "agency" seems to be relatively inclusive. Given the suggested lists of agencies covered, the broad provision concerning subdivisions, and the tie-in with FACA, this definition seems to be one of the more workable provisions when compared to the true complexities of the Sunshine Act which follow.

More difficult to grasp is the definition of "meeting"; thus, it is important to know the initial framework from which Congress considered the word. Meetings of governmental bodies can be defined by their purposes, their actual subject matter, or the kind of action taken.[68] These meetings can also be categorized by their legislative or quasi-judicial nature, their formal appearance, or the number of members present.[69]

In the debates over the Sunshine Act, congressional leaders considered a number of these possible conceptual bases, and with the exception of the quorum requirement Congress formulated another broad, inclusive definition. The conflict between purposes and subject matter was a major issue throughout the bill's passage. The Senate version sought to open deliberations which "concern the joint conduct or disposition of official agency business."[70] The bill's proponents consequently opposed a House substitute, which impliedly covered only meetings with certain announced purposes.[71] The conference report leaned toward the Senate version by including deliberations which "determine or result in . . . agency business."[72] This language comforted those who feared that agencies would otherwise be within bounds to call a meeting for one purpose while actually discussing other matters. Furthermore, by including deliberations in the Act, Congress recognized the so-called "rerun" problem: when a sunshine law opens up only final votes, the public

included within the definition despite Representative Kindness's protests that the Secretary of Agriculture actually directed its operations. 122 CONG. REC. H7877 (daily ed. July 28, 1976).

67. 5 U.S.C. app. I (Supp. V 1975). The federal Act may in this sense be broader than many state acts which have created particular problems regarding whether to include ad hoc groups similar to federal advisory committees.

68. See note 44 *supra*. Several states allow executive sessions if no final action is taken. Thirteen such states are listed in Hollow & Ennis, *supra* note 20, at 535.

69. *See, e.g.*, N.C. GEN. STAT. §143-318.4(8) (1973); Lawrence, *supra* note 43, at 808. See also note 87 *infra*. Among the states which allow closure of quasi-judicial meetings are Alaska, Massachusetts, and Oklahoma. *See, e.g.*, Stillwater Sav. & Loan Ass'n v. Oklahoma Sav. & Loan Bd., 534 P.2d 9 (Okla. 1975).

70. S.5, 94th Cong., 1st Sess. §4(a) (1975).

71. Consumer groups strenuously opposed this amendment. "How easy it will be to camouflage a business meeting behind some non-business sounding announced topic." Letter from Consumer Federation of America to Representatives Abzug and Fascell (July 28, 1976), *reprinted in* 122 CONG. REC. at H7868 (daily ed. July 28, 1976). Despite such protests, the amendment passed in the House by a vote of 204-180. 122 CONG. REC. H7890 (daily ed. July 28, 1976).

72. H. CONF. REP. NO. 1441, *supra* note 40, at 11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2247.

sees only rerun discussions without understanding how decisions were reached.[73]

Regarding the distinction between legislative and judicial meetings, Congress again declined a minority invitation to limit the Act.[74] Some of the exemptions seem to make the distinction anyway, but Congress nevertheless avoided inserting such nebulous phrasing into the definitions section.[75] Unlike some state laws, the Government in the Sunshine Act was intended to include conference telephone calls within its meetings definition.[76] Once again, Congress considered more heavily a meeting's nature and content, rather than mere trappings of formality.

In only one respect did Congress refuse to extend the coverage of its open meeting statute. Both the Senate and House provisions required a quorum of members present before openness was mandated.[77] Thus, on a seven-member commission, members could conceivably deliberate in pairs prior to any formal meeting, airing controversial views outside public scrutiny. Additionally, the

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73. The Superior Court of New Jersey summed up the problem as follows: "[T]he public had a right . . . to attend the meeting . . . at the time the vote was actually taken. The time was then ripe for each member of the board of adjustment to stand before all who wished to attend and publicly announce his vote. A formal 're-run' of the board's vote nearly four months later could not possibly be in the spirit of N.J.S.A. 10:4-1. . . . In this sense, compliance should not be construed to mean a patchwork attempt to rectify or supplement proceedings which are clearly deficient. . . ." Kramer v. Board of Adjustment, 80 N.J. Super. 454, 463-64, 194 A.2d 26, 31 (1963). *See also* Blum v. Board of Zoning & Appeals, 1 Misc. 2d 668, 671-72, 149 N.Y.S.2d 5, 8 (Supp. Ct. 1956). *Contra*, Collinsville Community Unit School Dist. No. 10 v. Witte, 5 Ill. App. 3d 600, 283 N.E.2d 718 (App. Ct. 1972); Goldman v. Zimmer, 64 Ill. App. 2d 277, 212 N.E.2d 132 (App. Ct. 1965), *rev'd sub. nom.* Goldman v. Moore, 35 Ill. 450, 220 N.E.2d 446 (1966); Reilly v. Board of Selectmen, 345 Mass. 363, 187 N.E.2d 838 (1963).

74. H.R. REP. No. 880 (Part I), *supra* note 38, at 37, *reprinted in* [1976] U.S. CODE CONG & AD. NEWS 2183, 2209-10 (additional views of Hon. Clarence J. Brown).

75. *See generally* notes 146-155 *infra* for a discussion of the "quasi-judicial" exemptions, exemptions 5, 7, and 10. Numerous attempts have been made to define quasi-judicial inquiries. According to Justice Holmes, "[a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. Legislation on the other hand looks to the future and changes existing conditions by making a new rule . . . ." Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). The problem with this definition lies in its application, and there is no set formula for distinguishing judicial from legislative agency proceedings. C. WRIGHT, LAW OF FEDERAL COURTS 56 (3d ed. 1976).

76. There was some debate on this point in the House. H. REP. No. 880 (Part II), *supra* note 39, at 38, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2239 (additional views of Hon. Carlos Moorhead): "How, one may ask, can a telephone conversation be viewed as a public meeting?" The answer would seem to be that modern technology has forced redefinition of basic terms. On the House floor, Representative Horton succeeded in eliminating phone conversations by an amendment which limited "meeting" to "a 'gathering' of agency members in a single physical location." 122 CONG. REC. H7889 (daily ed. July 28, 1976). The amendment passed by a vote of 204-180. *Id.* at H7890. However, the conference committee, as mentioned, favored the Senate Report and expressly included telephone calls. State interpretations are varied.

77. H. CONF. REP. No. 1441, *supra* note 40, at 10, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2246.

conference report expressly allowed sequential memos to circulate during the deliberative process without disclosure.[78]

The extent to which the quorum requirement narrows an otherwise expansive definition of meeting is difficult to predict. Some of the states having the most liberal laws retain the quorum requirement.[79] Moreover, Congress seemed to intend merely that the provision prevent chance encounters or social gatherings from coming within the meeting definition.[80] In practice, it would seem difficult and tedious for agency members to meet in small groups routinely in order to evade the legal sanctions of the Act.[81] Nevertheless, Congress has left an open invitation for them to do so.

These initial definitions, then, construct a broad framework for opening agency meetings. On balance, the statute at this point clearly favors a policy of openness. These preliminary sections, however, contrast sharply with the exemption provisions, where closed-door policies have their most telling effect in undermining the purported goals of the Sunshine Law.

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78. *Id.* at 11 ("members shall not jointly conduct or dispose of agency business in a meeting other than in accordance with new section 552b. This prohibition does not prevent agency members from considering individually business that is circulated to them sequentially in writing.").

79. *See, e.g.,* TENN. CODE ANN. §8-4402 (Supp. 1976); WIS. STAT. ANN. §19.81 (1975) (amending WIS. STAT. ANN. §66.77 (Supp. 1974)). Florida and Virginia are among those states *not* requiring quorums.

80. Professor Little has criticized those sunshine laws whose reach extends to the "luncheon table." As a city commissioner, he was prosecuted for discussing city business at such a meeting, and acquitted by a jury. Little & Tompkins, *supra* note 55, at 452 n.5, 464 n.58. On the other hand, Professor Wickham has expressed opposition to the quorum requirement. *Hearings on S. 260, supra* note 17, at 267. *See also* Wickham, *supra* note 17, at 563 n.35.

When a sunshine law intrudes extensively into the activities and conversations of public officials, constitutional issues may arise regarding the rights of these officials to free speech and free association. These problems are extensively treated in Little & Tompkins, *supra* note 55, at 476. The federal law would not appear to raise these issues with any great urgency, since the Act clearly does not intrude into social encounters, and, more importantly, does not carry any penalties for violation. It should be noted, however, that state laws with broader scope and severe penalties have been upheld against constitutional attack. *See* City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971): "The Legislature did not intend to muzzle lawmakers and administrative boards to an unreasonable degree. It would be contrary to reason and violate the right of free speech to construe the law to prohibit any discussion whatever by public officials between meetings. The evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit." *Accord,* Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976).

In addition, the United States Supreme Court in recent years has limited certain rights of public employees. *See, e.g.,* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (allowing Congress to forbid federal employees from engaging in partisan politics).

81. The officials would also have to take care that their nonquorum meeting is not construed as a meeting of a "subdivision," which would be covered. 5 U.S.C.A. 552b(a) (West 1977). *See* Bigelowe v. Howze, 291 So. 2d 645 (Fla. 2d D.C.A. 1974). Note, however, that some agencies can decide for themselves what constitutes a quorum. FTC v. Flotill Products, Inc., 389 U.S. 179, 181-82 (1967).

THE EXEMPTIONS

General Construction

The conflicts in policy which flow throughout the Government in the Sunshine Act become most visible in the list of ten exemptions. Balancing agency arguments and its own desire for openness, Congress set limits on openness beyond which it feared that personal privacy would be compromised or that government's functions would be impaired. Each agency lobbied for its own private exemption,[82] and some congressmen wondered if their efforts had ensured any meaningful public access.[83]

No exemption, standing alone, represents any sharp deviation from existing state laws. It can be argued that decisions made at the federal level, due to their greater impact, require more insulation from the public. Additionally, those state laws which contain almost no exemptions have been criticized for putting government into a straitjacket.[84] Yet the potential for abuse and the overlapping nature of the federal Sunshine Act's exemptions raise the possibility that the exceptions have swallowed the openness rule.

Proponents of the bill apparently were satisfied that judicial construction of exemptions under the Freedom of Information Act amendments had corrected many prior abuses by the agencies.[85] It therefore seemed logical to use some of the same exemptions in the new Act, but Congress also attempted to clarify certain basic issues of construction. Under the FOIA, for example, questions had arisen as to whether exemptions prohibited agencies from releasing information or merely allowed them to release or withhold documents at their discretion. Judicial interpretations leaned toward the latter per-

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82. "I know that many Members have been contacted by the Federal Reserve Board or by other agencies with respect to provisions of the legislation." 122 CONG. REC. H7874 (daily ed. July 28, 1976) (remarks of Rep. Fascell). "I have received another of the weighty missives that have arrived regularly from the Federal Trade Commission during the last year." 122 CONG. REC. H9260 (daily ed. Aug. 31, 1976) (remarks of Rep. Abzug). See also requests for special exemption by the OPIC (arguing that provisions allowing certain meetings to be closed by regulation should be extended to the national security exemption) and the Civil Service Commission (asking that exemption 2 for internal personnel management be extended to include governmentwide personnel rules). H.R. REP. No. 880 (Part II), *supra* note 39, at 32-35, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2234-37.

83. 121 CONG. REC. S19438 (daily ed. Nov. 6, 1975) (remarks of Sen. Weicker). *See also* Letter from Professor Francis Rourke, Johns Hopkins University, to Sen. Ribicoff (Sept. 7, 1973) (warning that a "list of specific exemptions from the requirement of disclosure tends to become a charter for justifying secrecy"), *reprinted in* RESPONSE TO QUESTIONNAIRE, *supra* note 36, at 54.

84. Wickham, *supra* note 17, at 564-67. See also note 55 *supra*.

85. *See, e.g.*, Vaughn v. Rosen (I), 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), which sought to make information flow through the courts in a more orderly fashion. The Court of Appeals for the District of Columbia required substantial government indexing of documents, with detailed explanation of exemptions claimed. The court also suggested the use of special masters to review voluminous documents and required stricter review procedures at the district court level. Note also the constant congressional references to and acceptance of judicial interpretations in the Sunshine Act's legislative history. *See, e.g.*, H.R. REP. No. 880 (Part I), *supra* note 38, at 10-11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2191-93.

missive construction, though courts applied somewhat inconsistent standards to the problem.[86] The new Sunshine Act contains language making it clear that "where the agency finds that the public interest requires otherwise" meetings will not be closed.[87] Even where a particular meeting is exempt, therefore, an agency will retain the discretion to open its doors.

New issues may now arise, however, regarding the burden of proof in some Sunshine Act cases. Both the Sunshine Act and the FOIA state: "[T]he burden [of proof] is on the agency to sustain its action,"[88] and under the FOIA an agency satisfied its burden as soon as it demonstrated that an exemption applied. The new law, however, seems to add the public interest to the list of elements which the agency must prove.[89] In other words, the Sunshine Act's new reference to the public interest might indicate that agencies that try to close their meetings must now prove, beyond the applicability of an exemption, that no interest supporting openness is present.

This result is not altogether consistent with one of the cases cited approvingly by Congress in numerous committee reports, *Charles River Park, "A" Inc. v. HUD.*[90] In that case, a Freedom of Information Act request was made for documents containing exempt trade secrets of a housing project operator.[91] HUD decided to release the documents even though the FOIA's trade secrets exemption applied, so the project operator brought a reverse suit to protect his secrets.[92] The court held that the agency did have discretion to release exempt documents.[93] The *Charles River* court, however, proceeded to balance interests between the agency and the reverse plaintiff, placing those interests on the same level as the interests of the original party who had sought disclosure.[94] Such balancing was proper under the FOIA burden

86. Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). *See also* Pennzoil v. FPC, 534 F.2d 627, 630 (5th Cir. 1976) (reading exemptions as compulsory would be "at war" with the FOIA). *Contra,* Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1250 (E.D. Va. 1974), *aff'd on other grounds,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied,* 97 S. Ct. 2199 (1977); McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974). *See* Note, *Protection From Government Disclosure – The Reverse FOIA Suit,* 1976 DUKE L.J. 330 (1976).

87. 5 U.S.C.A. §552b(c) (West 1977).

88. *Id.* §552b(h)(1); 5 U.S.C. §552(a)(4)(B) (Supp. V 1975).

89. 5 U.S.C.A. §552b(c) (West 1977). *See also* H.R. REP. NO. 880 (Part I), *supra* note 48, at 9, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2190-91: "The subsection contains 10 exemptions to the general rule of openness set forth in subsection (b), but provides that even if a meeting or information falls within one of them, it shall not be closed (or, in the case of information, withheld), if the public interest requires otherwise. . . . The burden of sustaining a closing or withholding is at all times upon the agency."

90. 519 F.2d 935 (D.C. Cir. 1975). *See* H.R. REP. NO. 880 (Part I), *supra* note 48, at 10, *reprinted in* [1976] U.S. CODE CONG & AD. NEWS 2183, 2191.

91. Charles River Park "A", Inc. v. HUD, 519 F.2d at 938-39.

92. *Id.* See cases cited at note 86 *supra,* for discussions of the problems of "reverse" suits under the FOIA. The name for this type of action derives from the fact that the plaintiff may attempt to use the Freedom of Information Act to prevent rather than compel disclosure. Alternatively, the plaintiff may be a private party who seeks redress for an invasion of privacy due to a FOIA disclosure.

93. Charles River Park "A", Inc. HUD, 519 F.2d at 941-42.

94. "[T]he FOIA is neutral with respect to exempt information." *Id.* at 942. "[T]he

of proof, but from the face of the Sunshine Act a plaintiff requesting openness apparently now continues to have an advantage over the agency or any reverse plaintiff even after an exemption is found to apply. Thus, although the Sunshine Act's language seems to increase the agencies' burden of proof, Congress did not clearly acknowledge the change.

On the other hand, another construction of the new public interest phrasing in the law may indicate only that Congress wants to apply a balancing test whenever an exemption is found, so that plaintiffs and agencies would effectively share the burden of proof. The Sunshine Act's legislative history is confusing, however, because Congress specifically mandated such balancing for some exemptions and not for others.[95] Thus, Congress was either redundant or not cognizant of this problem of the shifting burden of proof. In any event, the type of balancing test suggested has already been applied under the FOIA's privacy exemption in *Department of the Air Force v. Rose*,[96] a case involving disclosure of the Air Force Academy's disciplinary records. The plaintiffs seeking disclosure took it upon themselves to demonstrate "great public interest" by introducing into evidence newspaper clippings, the transcript of a press conference, and a White House press release.[97] An extension of that kind of public interest balancing to all of the exemptions might force both sides to introduce more evidence of that type. The statutory language regarding burden of proof does not compel this result, however, so the judiciary must first resolve the confusion surrounding congressional intent.

As discussed earlier, several of the FOIA exemptions remained intact under the new law, while others were adapted to the open meeting context.[98] Gone from the Sunshine Act are the exemptions for interagency

district court must balance the interests of the tax assessor and the public in accurate tax assessments against the interests of CRP in keeping the information confidential . . . ." *Id.* at 943. A more striking result arose in Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976), in which the court seemed to place a heavy presumption against disclosure, once an exemption applied. In that case, no one had actually requested disclosure when the agency decided to make the records available. A reverse suit was filed, and the court held that the agency had to meet the following tests: (1) the information must not harm the public generally; (2) the agency must seek out alternatives; (3) the information must actually *aid* in commission functions. *Id.* at 632. *See also* Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), *cert. denied,* 425 U.S. 971 (1976). Under the new Sunshine Act, since the public interests in openness are more clearly recognized, there is little reason for allowing greater secrecy merely because no member of the public has yet made a specific request for disclosure.

95. H.R. Rep. No. 880 (Part I), *supra* note 38, at 10-11, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2183, 2192-93. Balancing is specifically required for exemptions 5, 6, and 7.

96. 96 S. Ct. 1592, 1604 (1976).

97. *Id.* at 1602-03. The Court did not treat the issue of burden of proof, merely deciding that a public interest existed.

98. See note 28 *supra*, for the original FOIA exemptions. The amended list of FOIA exemptions, prior to the Sunshine Act, read as follows:

"(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

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"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) 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;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

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

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells." 5 U.S.C. §552(b)(1)-(9) (1970 & Supp. V 1975).

The Sunshine Act's list of exemptions reads:

"(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

"(2) relate solely to the internal personnel rules and practices of an agency;

"(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public, in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) involve accusing any person of a crime, or formally censuring any person;

"(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

"(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

"(9) disclose information the premature disclosure of which would—

"(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that exemption (9)(B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed

memos and oil well data.[99] Meanwhile, Congress merely duplicated the exemptions for executive security, personnel management rules, trade secrets, and investigatory records, so they will be discussed only briefly here.[100] Three new rules were added, largely concerning quasi-judicial problems,[101] and other exemptions were slightly amended.[102]

Differences between the two acts become quite important when a plaintiff sues for a transcript of a closed meeting already held. In that case, although the transcript is a document, the Sunshine Law takes precedence over the FOIA.[103] Otherwise, one should note that provisions of the Sunshine Act are not supposed to "expand or limit" rights existing under the FOIA.[104] Due to the similarity of the two laws, however, it will be difficult for the judiciary to avoid intertwining them.

A number of the Sunshine Act's exemptions will be treated here individually in order to consider significant new decisions which must now be made. As a group, the exemptions have inconsistent goals which often conflict with those of the Act. Two other problems which emerge from the exemption provisions may also hamper the new law's effectiveness. First, many of the exemptions overlap, needlessly creating potentially airtight defenses for agencies. Second, Congress repeated much FOIA language, and the rules for documents apply somewhat unevenly to open meetings. The ten exemptions share these difficulties to some extent, but specific problems will become clear as exemptions of particular interest are discussed.

Exemptions Unchanged from the FOIA

By transposing verbatim some of the FOIA exemptions, Congress produced contradictory results in the Sunshine Act. While this practice had the advantage of retaining useful FOIA case law, the draftsmen missed an opportunity to clarify some of the phrasing of the older statute. One of the exemptions, unchanged from the FOIA, permits meetings to be closed if they involve "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[105] Under the FOIA the judiciary

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action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

"(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." 5 U.S.C.A. §552b(C)(1)-(10) (West 1977).

99. 5 U.S.C. §552(b)(5), (9) (1970).

100. *Compare* 5 U.S.C. §552(b)(1), (2), (4), (7), (8) (1970 & Supp. V 1975) *with* 5 U.S.C.A. §552b(c)(1), (2), (4), (7), (8) (West 1977).

101. 5 U.S.C.A. §552b(c)(5), (9)(B), (10) (West 1977).

102. 5 U.S.C. §552(b)(3) (1970), *as amended* Pub. L. No. 94-409, §5(b), 90 Stat. 1241, 1247 (1976); 5 U.S.C.A. §552b(c)(3) (West 1977).

103. 5 U.S.C.A. §552b(k) (West 1977).

104. *Id.*

105. *Id.* §552b(c)(4). *See also* Davis, *The Information Act: A Preliminary Analysis,* 34

had struggled with this unwieldy language, overcoming the view that even noncommercial information was exempt, as long as it was privileged.[106] The Senate's Government in the Sunshine bill originally attempted to codify the sounder judicial approach, as expressed in *National Parks & Conservation Ass'n v. Morton*,[107] by rephrasing the dangling modifiers, "privileged and confidential."[108] Thus it would have been clear that only commercial or financial information could be exempt. The Senate also set more concrete standards for determining confidentiality.[109]

The House rejected the Senate's clarifications. Legislative history in the House also contains confusing, contradictory statements on the issue of confidentiality.[110] Nevertheless, the compromise conference report implied a continuation of the narrow *National Parks* approach. The report kept the old FOIA language but added the phrase, "with recognition of judicial interpretations of that exemption."[111] Thus meetings should not be closed merely because a witness plans to invoke a common evidentiary privilege, such as the doctor-patient or attorney-client privilege.[112] If the agency is permitted

U. CHI. L. REV. 761, 787 (1967); Katz, *Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1264 (1970).

106. Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975); Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971); Consumers Union of U.S., Inc. v. Veterans Admin., 301 F. Supp. 796, 802 (S.D.N.Y. 1969). *Contra*, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 594 (D.P.R. 1967); Tobacco Inst. v. FTC, Civil No. 3035-67 (D.D.C. Apr. 11, 1968) (no written opinion).

107. 498 F.2d 765 (D.C. Cir. 1974).

108. The original section 4(b)(6) of Senate Bill 5 exempted meetings that would "disclose trade secrets, or financial or commercial information obtained from any person, where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates." S.5, *supra* note 70, at §4(b)(6).

109. *Id.* The Senate's language mirrored the tests used by the District of Columbia Circuit Court of Appeals in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The court first asked whether any government interest was significantly threatened. Second, the court determined the actual competitive loss which the submittor of the information would suffer. *Id.* at 770.

110. The House committee reports made contradictory references to exemption 4. The Government Operations Committee Report stated without citing authority, that "[t]his exemption also includes matter subject to certain evidentiary privileges (doctor-patient, attorney-client) and confidential commercial or financial information." H.R. REP. No. 880 (Part I), *supra* note 38, at 10, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2192. Yet the House Judiciary Committee Report merely paraphrased the exemption in the opposite manner: "Privileged or confidential trade secrets and commercial or financial information obtained from a person." H.R. REP. No. 880 (Part II), *supra* note 39, at 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2218. Obviously, only the latter definition of the exemption comports with the recent judicial interpretations adopted by the Conference Committee. Thus, the earlier Government Operations Committee Report should be held to be inadvertant in a manner similar to the 1966 House Report on the Freedom of Information Act. *See* Davis, *supra* note 105, at 775.

111. H. CONF. REP. No. 1441, *supra* note 40, at 15, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS.

112. Note that the agency's attorney privilege is embodied in exemption 10. See note 151 *infra*.

to hear such testimony, then the public apparently has the right to listen as well.

Congress did attempt to facilitate the transposition of another exemption from the FOIA, that involving investigatory records. Since that exemption originally applied only to documents, the House felt compelled to include specifically "oral information which if written would be contained in such records."[113] The conference report's standard for determining what statements fall into that category, however, may prove difficult to apply. Additionally, questions may arise as to meetings held before an agency has officially begun an investigation. Congress recognized the problem of exempting testimony given at such meetings, but the House Judiciary Subcommittee dismissed the issue, stating that "the existing language was adequate to meet the situation."[114] Agencies may be able to close that type of meeting by citing exemption 10, which covers the "initiation . . . of formal agency adjudication"[115] or exemption 9, which seeks to prevent frustration of "proposed agency action."[116] Even under those exemptions, however, an agency may be forced eventually to reveal the information if no actual investigation takes place.

The other exemptions remaining from the FOIA, those for executive security[117] and personnel management rules,[118] present only technical problems regarding adaptation of FOIA case law to meetings. Principally, it is more

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113. 5 U.S.C.A. §552b(c)(7) (West 1977).

114. H.R. REP. No. 880 (Part II), *supra* note 39, at 15, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2225.

115. 5 U.S.C.A. §552b(c)(10) (West 1977).

116. *Id.* §552b(c)(9).

117. Regarding the executive security exemption, the leading cases are EPA v. Mink, 410 U.S. 73 (1973), and Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975), *cert. denied*, 421 U.S. 908 (1976). However, these cases were decided prior to the 1974 amendment, which narrowed the exemption and overruled *Mink*. *See generally* Note, *National Security and the Amended Freedom of Information Act*, 85 YALE L.J. 401 (1976); Commentary, *supra* note 32. There have been relatively few cases decided under the amended exemption. *See* Bell v. DOD, 71 F.R.D. 349 (D.N.H. 1976), *aff'd*, F.2d (1st Cir. 1977).

118. Agencies have sought to withhold information under that exemption by using two different rationales. First, there has been concern that circumvention of agency regulations might result from "disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." Department of the Air Force v. Rose, 96 S. Ct. at 1600 (citing Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972)). *See also* Rosenbloom, *supra* note 31. Second, the exemption was designed to "relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." Department of the Air Force v. Rose, 96 S. Ct. at 1603. The Supreme Court decided in *Rose* that the exemption did not cover case summaries of disciplined Air Force cadets, since the summaries were of genuine public interest.

Some congressmen believed that this management exemption in the Sunshine Act could cover collective bargaining, if it was not already covered by exemption 9. *See* H.R. REP. No. 880 (Part I), *supra* note 38, at 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2194. That would seem to be an inappropriate use of exemption 2, however, since collective bargaining is often of great public interest. See also text accompanying note 129 *infra*, discussing the relationship of exemption 2 to the personal privacy exemption, exemption 6, and personnel records.

difficult to segregate exempt from nonexempt discussions in the midst of meetings than it is to apply the standards to individual documents. Agencies must plan their discussions so as to deal with secret information in a specified block of time, or else the progress of their meetings will be delayed by repeated votes on closure.[119] The law at least addressed this problem by requiring transcripts of such discussions. Such transcripts can be used in part to correct situations in which meetings are closed by mistake.[120]

Personal Privacy and Personnel

Exemption 6, the personal privacy exemption, demonstrates the greatest disadvantages of the Sunshine Law's wholesale transposition of FOIA phrases. The original FOIA exemption covered the disclosure of "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[121] By modifying the language only slightly, Congress glossed over two issues of basic importance: (1) the extent to which personnel hiring and firing are covered by the law, and (2) the extent to which the Privacy Act determines the nature of personal privacy.

Exemptions for various forms of personnel hiring and management are among the most common exemptions from open meeting laws at the state level.[122] Although some writers have criticized such exemptions,[123] lawmakers seem to consider important both the privacy of public employees and the burdens of opening all management processes to the public. Congress could have delineated specific personnel situations to which the Sunshine Act applied.[124] Instead, the Act merely copied the FOIA idea of using two overlapping, ambiguous exemptions and balancing privacy rights against openness.[125] Both houses removed the words "personnel and medical files and

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119. The new law provides an easier procedure for use in limited situations. "A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public . . . so long as each meeting in the series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series." 5 U.S.C.A. §552b(d)(1) (West 1977).

120. *Id.* §552b(h)(1) (judicial review and in camera inspection). See text accompanying notes 188-190 *infra.*

121. 5 U.S.C. §552(b)(6) (1970).

122. Arizona, California, Nebraska, Nevada, Oklahoma, and Texas have broad personnel exemptions generally allowing closure of discussions involving appointment, discharge, or charges against public employees. See statutes cited note 3 *supra.* On the other hand, Florida and Tennessee have no personnel exemptions.

123. *See* Note, *supra* note 17, at 371. "In hiring practices . . . there is little reason to consider applicants' qualifications in closed sessions, since the public has a right to know if its prospective employees are qualified for positions to which they aspire."

124. *See, e.g.,* CAL. GOV'T CODE §54957 (West Supp. 1976), which states that the exemption for discussing the qualifications of employees "shall not include any person appointed to office by the legislative body of a local agency."

125. Both the Senate and House reports on the original FOIA noted the requirement of balancing interests in this area. S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965). H.R. REP. No. 1497, 89th Cong., 2d Sess. 11 (1966). *See also* Department of the Air Force v. Rose, 96 S. Ct. 1592 (1976). See text accompanying notes 88-97 *supra* and note 136 *infra.*

similar files" from the exemption,[126] and the minor modification in wording will have an unclear impact. Under the FOIA standard which contained those words, defendant agencies had said that specific inclusion of "personnel and medical files" meant that such files were per se exempt and that no balancing was required.[127] Congress seems to have codified judicial construction which rejected those claims.

Those deletions, however, leave the Act in the peculiar situation of containing no express standards to govern one of the most popular exemptions. Exemption 2, involving internal agency personnel rules and practices,[128] has generally been limited to include only insubstantial management rules such as lunch hours,[129] and nowhere else in the Act is the word personnel even mentioned. Notwithstanding this omission, some details and suggestions were provided by the House Government Operations Committee. Its report suggested that the public had a greater claim to openness when a high public official's competency was questioned than it did with a lower ranked employee.[130] In addition, the balance tips in favor of openness when an employee being discussed at a meeting requests a public hearing.[131]

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126. H. CONF. REP. No. 1441, *supra* note 40, at 12-13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2248-49.

127. The Supreme Court dismissed this claim, stating that "we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files." Department of the Air Force v. Rose, 96 S. Ct. at 1604.

128. See note 118 *supra.*

129. Although exemption 2 has been cited as a broad "personnel" exemption, *see* Comment, *Government in the Sunshine Act: Opening Federal Agency Meetings,* 26 AM. U. L. REV. 154, 160 n.27 (1976), the courts have not interpreted the section in that fashion. Specifically, the District of Columbia Circuit in Vaughn v. Rosen, 523 F.2d 1136, 1141-43 (D.C. Cir. 1975), held that personnel management evaluations are not exempt from disclosure by virtue of exemption 2 of the FOIA, due to legitimate public interest in their contents. The Tenth Circuit followed the *Vaughn* rationale and discussed similar personnel evaluations in the context of exemption 6 alone, ignoring exemption 2. Campbell v. United States Civil Serv. Comm'n, 539 F.2d 58 (10th Cir. 1976).

The Supreme Court has not directly addressed the question. *But see* Department of the Air Force v. Rose, 96 S. Ct. at 1603 n.8. Nevertheless, the current judicial approach of confining exemption 2 to management practices seems correct. The language of the exemption simply does not address the disclosure of an employee's qualifications or personal life, and the public's significant interest in personnel quality should remove such discussions from the coverage of exemption 2.

130. H.R. REP. No. 880 (Part I), *supra* note 38, at 11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2192-93 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). The committee's reference to these defamation cases is not clear, since *Gertz* made no distinction between high and low level public officials. "[T]he public's interest extends to 'anything which might touch on an official's fitness for office' . . . ." 418 U.S. at 344-45. The *Gertz* court only drew lines among public figures, based on power, influence, and ability to respond. Yet the House committee report seems to treat low level employees in a manner not very different from the average private worker. See also the examples given in S. REP. No. 354, *supra* note 24, at 21 (private facts include drinking habits and health).

131. H.R. REP. No. 880 (Part I), *supra* note 38, at 11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2193. Some state statutes also allow the employee under discussion to choose to open the meeting. See text accompanying notes 151-152 *infra.*

Weighing against the legislative history of the Sunshine Act, however, is the history of the original FOIA exemption. The FOIA's Senate Report, followed by most courts, refers only to specific files required by departments such as HEW and the Veterans Administration.[132] When they drafted this exemption in 1965, therefore, the senators clearly did not have in mind the open discussion of public employees' personnel records. The legislators did not so much as mention any hiring situations in their report and apparently considered merely the rights of all citizens to some confidentiality in files kept on them by the government. Thus the FOIA language simply does not fit the new situations arising in open meetings.

It can be argued, using various states as examples, that personnel data has no great claim to privacy, or that hiring should remain open while disciplinary matters should be kept secret.[133] Furthermore, the exemption is so ambiguous that it invites abuse. It should thus be construed at least as narrowly as before.

Similar problems of interpretation may arise regarding exemption 6 and the Privacy Act of 1974.[134] One of the Act's provisions requires the government to obtain an individual's permission before releasing information about that person to anyone else. A key exception was made for the FOIA to allow disclosure, yet no similar exception has been made for the Sunshine Law.[135] Legislative history fails to indicate whether the omission was inadvertent or deliberate.

Congress rejected the idea that everything covered by the Privacy Act would automatically fall within the FOIA personal privacy exemption. Instead, Congress confined the exemption to "personnel and medical and similar files."[136] Thus Congress may have changed its philosophy by deleting those

132. S. REP. NO. 1219, 88th Cong., 2d Sess. 14 (1964). *But see* Sears Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir. 1977), in which the court used an exemption 6 analysis in considering documents on employee qualifications and comments concerning promotions. The documents were held to be nonexempt.

133. See notes 122-124 *supra*. Even when an employee's background is exempt, the public may want to know the employee's views on procedural or substantive issues of general concern. Yet these types of questions are difficult to segregate at an actual meeting.

134. 5 U.S.C. §552a (Supp. V 1975).

135. 5 U.S.C. §552a(b) (Supp. V 1975) states: "No agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be —

. . . .

(2) required under section 552 of this title."

136. The compromise final version of the Privacy Act rejected a provision of the House bill which would have made disclosure of all individually identifiable information in government files a "clearly unwarranted invasion of personal privacy" and thus exempt from disclosure under the FOIA. 120 CONG. REC. S21817 (1974). As a result, the Freedom of Information Act continues to take precedence over the Privacy Act and some individually identifiable records are still required to be disclosed. *See* H. REP. NO. 1416, 93d Cong., 2d Sess. 13 (1974). *See also* Hanus & Relyea, *A Policy Assessment of the Privacy Act of 1974*, 25 AM. U. L. REV. 555, 581 n.135 (1976); Note, *supra* note 86, at 312 (both discussing the priority given to the FOIA's broad objective of disclosure).

words from the Sunshine Act. The Sunshine Law's purpose is identical to that of the FOIA. It would defy logic to say that the FOIA is superior to the Privacy Act but that the Privacy Act in turn takes precedence over the Sunshine Law.

Congressional deletion of "personnel" from the language of the privacy exemption thus creates new problems relating to the closing of meetings. Congress may have broadened the exemption by expanding it to anything private. On the other hand, Congress may have narrowed the exemption by failing to adopt a personnel clause similar to those found in many state statutes, and by leaving to the courts the chance to distinguish, for instance, between hiring and firing. Finally, it is possible that the courts may act as if nothing has changed and that they will merely try to apply old FOIA concepts to personnel situations. Although such a result creates unacceptable difficulties for the courts, it may be the most probable. Congressional quasi-adoption of FOIA language here may prove to be one of the more significant defects in the new Sunshine Law.

Financial Regulation

The Federal Reserve Board was one of those agencies which lobbied hardest against the Sunshine Act.[137] Although Congress rejected the Fed's proposal of complete exemption,[138] financial regulatory agencies achieved nearly the same effect. The Act includes several provisions which illustrate the problem of overlapping exemptions in the new law. As a result of agency pressure and inordinate fears of speculation, a new exemption 9 supplemented exemption 8, which had been retained from the FOIA. Exemption 8 already allowed closure of meetings involving operating reports of financial institutions.[139] Exemption 9 allows agencies to avoid "premature disclosure" which would be "likely" to lead to speculation or endanger institutional stability.[140] When combined with exemption 8 and other provisions in the statute allowing agencies to close a series of meetings by regulation,[141] exemp-

137. See text accompanying note 82 *supra. See also* Letter from Consumer Federation, *supra* note 71, at H7868 (protesting against the lobbying of Arthur Burns on this issue). Note that the Fed had also opposed the original Information Act for fear of undue interference with administration. However, Chairman Burns admitted at hearings on the Sunshine bill that agency business had not been hampered by the FOIA. 122 CONG. REC. H7877 (daily ed. July 28, 1976) (remarks of Rep. Abzug).

138. 122 CONG. REC. H7888 (daily ed. July 28, 1976).

139. 5 U.S.C.A. §552b(c)(8) (West 1977).

140. 5 U.S.C.A. §552b(c)(9)(A).

141. 5 U.S.C.A. §552b(d)(4) (West 1977) states that any agency, "a majority of whose meetings may properly be closed to the public pursuant to [the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudicatory proceedings or civil actions,] *may provide by regulation* for the closing of such meetings . . . ." (emphasis added). Note that the provision of subsection (d)(3), which requires explanations for the closure of a meeting, does not apply to (d)(4). As a result the agency regulations vary in their use of this section. For example, when the NLRB closed a series of meetings under the litigation exemption, the agency explained in detail how a majority of its meetings justified the closure. 42 Fed. Reg. 5105-06 (1977). On the other hand, the Federal Home Loan Mortgage Corporation closed its meetings

tion 9 gives financial regulators great leeway with which to escape sunshine. The House Government Operations Committee, however, did attempt to limit the exemption somewhat by enumerating those agencies able to claim it.[142]

Some critics have charged that openness in this area, as with trade secrets, would be abused by speculators and used primarily for industrial espionage.[143] Nevertheless, it can be argued that the public needs more access to agencies like the Federal Reserve Board which have the greatest overall impact. Thus problems with speculators present some of the most difficult questions for sunshine legislators. If sensitive meetings are closed, interested parties may benefit from leaks.[144] When such meetings are open to the public, however, agency goals may be affected by speculation stemming directly from the agency's public decision. Some states have refused to allow this threat of speculation to close agency meetings, but congressional exemptions in this area have considerable support. It is unfortunate that Congress laid itself open to charges of special influence, due to the nature of the debates on these exemptions and the obvious pressure of the regulatory agencies.

Quasi-judicial Matters

The "good name" exemption, exemption 5,[145] and the "litigation" provision, exemption 10,[146] both originated with the Sunshine Act and both apply to proceedings which might be labelled "quasi-judicial," an amorphous term describing broad exemptions.[147] These provisions combine and overlap with those covering personal privacy, exemption 6, and investigatory records, exemption 7,[148] because Congress became concerned with protection of private rights and agency administration. Although an agency may cite all four of these exemptions in order to close a single meeting, the possibility stirred surprisingly little debate in either house.

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by regulation simply by citing exemptions 4, 8, 9(A), and 10. The agency provided no record of past meetings having been exempt or any other explanation. Some sort of detailed justification is far more sensible if only to forestall lawsuits challenging an agency's conclusory regulations.

142. H.R. REP. No. 880 (Part I), *supra* note 38, at 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2193-94. Specifically mentioned in the context of exemption 8 were the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve Board. When speaking of exemption 9(A), the report merely refers to "such agencies as the Federal Reserve Board and the Securities and Exchange Commission." *Id.*

143. *See, e.g.*, FDA comments on its new regulations: "86 percent of the FOI requests received by FDA are from industry and private attorneys, while only 14 percent come from the general public . . . ." 42 Fed. Reg. 3093-94 (1977).

144. Senator Chiles strongly asserted this point at the hearings on his bill. *See Hearings on S.260, supra* note 17, at 217.

145. See note 98 *supra.*

146. See note 98 *supra.*

147. As mentioned earlier, Congress refused to redefine "agency" so as to exclude all quasi-judicial meetings. See notes 74-75 *supra.* Yet there seem to be few judicial functions which remain nonexempt under the four overlapping exemption provisions.

148. See note 98 *supra.*

Exemption 5, closing discussions which accuse a person of a crime,[149] relates closely to invasions of personal privacy. Congress called for the same type of balancing tests in both sections,[150] and numerous states contain similar "good name" statutes.[151] Exemption 10 exempts agency decisions concerning whether to participate in civil proceedings or to conduct formal adjudications.[152] This section in a sense parallels the FOIA's broad interagency memo exception.[153] The agency's attorney-client privilege, for example, is codified in exemption 10, just as the FOIA memo exemption protects the government from discovery in litigation.[154]

Two rationales support quasi-judicial exemptions. First, it is thought to be unseemly to malign an individual in such public proceedings, particularly where state laws allow an absolute privilege to slander.[155] Under this reasoning, the individual in question usually is given the choice of whether to defend himself in public or in private.[156] Second, legislators may believe that

149. 5 U.S.C.A. §552b(c)(5) (West 1977).

150. H.R. REP. NO. 880 (Part I), *supra* note 38, at 10-11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2192. In addition, this report states that "the agency must be considering a possible action of a formal nature against the person in question." *Id.* at 10, [1976] U.S. CODE CONG. & AD. NEWS at 2192.

151. Among the states having such laws are Alabama, Alaska, Iowa, Massachusetts, New Hampshire, South Dakota, and Wisconsin. In the Alabama statute, this is the only exemption. ALA. CODE tit. 14, §393 (1958).

152. 5 U.S.C.A. §552b(c)(10) (West 1977). *See* H.R. REP. NO. 880 (Part I), *supra* note 38, at 12-13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2194. Exemption 10 defers in some instances to the adjudicatory provisions of 5 U.S.C. §554 (1970) of the APA, apparently because Congress believed that disputes covered by that section are ultimately dealt with "on the record." S. REP. NO. 354, *supra* note 24, at 26. However, as a Federal Trade Commission staff analysis has pointed out, "nothing in the adjudicatory provisions of the APA (5 U.S.C. §§554, 556, 557) nor anything in the Sunshine Act, requires that adjudications be conducted in public or that adjudicatory records be made public." Office of the General Counsel, Federal Trade Commission, Staff Analysis: Implementation of the Government in the Sunshine Act, at 17 (Dec. 23, 1976) (unpublished) (citing K. DAVIS, *supra* note 56, §8.07). *But cf.* H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1186 (1961) (interpreting §5b of the FTC Act to require public adjudications at the Federal Trade Commission).

153. 5 U.S.C. §552(b)(5) (1970).

154. H.R. REP. NO. 880 (Part I), *supra* note 38, at 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2194. *See, e.g.,* the open meeting laws of Missouri, North Carolina, and Wisconsin for similar attorney-agency exemptions. *See also* Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 263 Cal. App. 2d 41 (1968) (inferring a litigation exemption from the statute). *Contra,* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968) (allowing no such exemption where the state open meeting law did not provide for it).

155. *See, e.g.,* Logan's Super Markets, Inc. v. McCalla, 208 Tenn. 68, 343 S.W.2d 892 (1961). *But cf.* Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967) (qualifying the privilege to slander due to a lack of judicial safeguards in the administrative proceeding). One should note that Florida allowed witnesses the absolute defamation privilege in Robertson v. Industrial Ins. Co., 75 So. 2d 198 (Fla. 1954), yet the state still opened quasi-judicial agency proceedings to the public. Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973).

156. *See, e.g.,* ALASKA STAT. §44.62.310 (1976). *But see* Pierce v. School Comm. of New Bedford, 322 F. Supp. 957 (D. Mass. 1971), holding that in Massachusetts, the person affected is not entitled to keep the meeting open. *See* MASS. ANN. LAWS ch. 30A, §11A (Michie/Law. Co-op 1973).

the agency itself needs insulation from public scrutiny, and the idea of encouraging full and frank discussion is most heavily considered in the context of litigation.[157]

Some states allow no quasi-judicial exemptions, placing greater emphasis on the public's need to know.[158] Congress seems to have gone to the opposite extreme in the new Sunshine Act, by closing most quasi-judicial agency deliberations and adopting both of the justifications mentioned above.[159] Personal privacy and agency decisionmaking both seem so well protected in the quasi-judicial area that the federal Sunshine Act's primary impact seems to be limited to the legislative, rulemaking functions of administrative law.

Other Secretive Statutes

Congress may have paid insufficient attention to the prevention of overlapping of exemptions, but the Sunshine Act's draftsmen did address the problem of fitting open meeting policies into the present complex scheme of federal secrecy statutes. Exemption 3 served this purpose under the FOIA.[160] It incorporated some of the many statutes permitting the withholding of information, but apparently the old exemption allowed too many documents to be withheld from the public.[161]

Congress has now amended this exemption in the FOIA and included it in the Sunshine Act, intending to overrule an interpretation of the original

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157. In this sense, the litigation exemption parallels exemption 9, which applies to meetings when openness might "significantly frustrate implementation of a proposed agency action." 5 U.S.C.A. §552b(c)(9)(B) (West 1977). Exemption 9 apparently covers agency discussions of real property purchases; *see* H. CONF. REP. NO. 1441, *supra* note 40, at 15, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2251; as well as collective bargaining with agency employees. H.R. REP. NO. 880 (Part I), *supra* note 38, at 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2194.

158. *See, e.g.*, Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973) (school board must consider disciplinary action in public). Texas once allowed no quasi-judicial exemption, but it narrowed its coverage in 1971 by allowing school boards to close disciplinary proceedings. TEX. REV. CIV. STAT. ANN. §6252-17(2)(h) (Vernon Supp. 1976).

159. In at least one instance the quasi-judicial exemptions set a lower standard for openness than previously existed under federal law. The FTC, which had found public hearings to be required by law in H.P. Hood & Sons, Inc., 58 F.T.C. 1184 (1975), has now modified its rules to state that oral arguments shall be public "unless the commission otherwise orders." 16 C.F.R. §3.52(f) (1976). This attitude seems not to comport fully with the caveat in the Sunshine law itself: "[Section 552b] does not authorize the closing of any agency meeting or portion thereof otherwise required by any other provision of law to be open." 5 U.S.C.A. §552b(l) (West 1977).

160. 5 U.S.C. §552(b)(3) (1970) originally stated that the FOIA did not apply to matters "specifically exempted from disclosure by statute."

161. Among the statutes sometimes held to be within the old exemption 3 were the following: 2 U.S.C. §437g(a)(3) (1970) (federal election disclosures); 18 U.S.C. §1905 (1970) (trade secrets); 22 U.S.C. §1934 (1970) (arms regulation); 26 U.S.C. §1603 (1970) (tax returns); 42 U.S.C. §1306(a) (1970) (medical reports); 42 U.S.C. §2000e-8 (1970) (investigation of employment practices); 42 U.S.C. §2161-66 (1970) (Atomic Energy Act); 50 U.S.C. §402 (1970) (National Security Agency). *See also* Annotation, 45 L.Ed. 2d 763 (1975). *Compare* Administrator, FAA v. Robertson, 422 U.S. 255 (1975) *with* Stretch v. Weinberger, 495 F.2d 639 (3d Cir. 1974) *and* Charles River Park "A" v. HUD, 519 F.2d 935 (D.C. Cir. 1975).

exemption made by the Supreme Court in *Administrator, FAA v. Robertson.*[162] The *Robertson* case concerned reports on airline operation and maintenance which the Federal Aviation Administration withheld despite an FOIA request.[163] The Federal Aviation Act allowed such action when the material was adverse to a party and disclosure was not in the public interest.[164] Agency administrators thus retained broad discretion to refuse disclosure. Since the Supreme Court found that Congress had sanctioned such withholding statutes in the FOIA's exemption 3, the Court upheld the FAA administrator's unfettered discretion to keep the documents from the public.[165]

Some congressmen felt that the Court took the right approach,[166] but a majority wanted to prevent abuse of these discretionary laws from defeating the goals of openness. Resolving these differences, the Senate and House compromised on an amendment to exemption 3. Any statute can now be cited by an agency seeking to close a meeting, if the statute requires withholding of information and eliminates discretion or it is at least specific enough to limit agency choice in the matter. To strengthen the amendment further, the conference committee expressed its intent to overrule specifically the *Robertson* case.[167]

Problems are certain to arise in deciding what is sufficient to achieve exemption. Dealing with suggestions made in the committee reports regarding various statutes could prove more confusing than enlightening.[168] Nonetheless,

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162. 422 U.S. 255 (1975).

163. *Id.* at 258.

164. *Id.* 49 U.S.C. §1504 (1970).

165. 422 U.S. at 266. The Court said, "no distinction seems to have been made on the basis of the standards articulated in the exempting statute or on the degree of discretion which it vested in a particular government officer." *Id.* at 263-64.

166. Commenting on the House amendment, Representative Moorhead stated: "an unwise attempt to reverse the Supreme Court's decision in Administrator, FAA v. Robertson . . . has been altered." 122 CONG. REC. H7873 (daily ed. July 28, 1976) (remarks of Rep. Moorhead).

167. H. CONF. REP. No. 1441, *supra* note 40, at 25, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2761.

168. According to the various committee reports, the following statutes should not fall within exemption 3: Freedom of Information Act, 5 U.S.C. §552 (Supp. V 1975); Trade Secrets Act, 18 U.S.C. §1905 (1970); Social Security Act, 42 U.S.C. §1306 (1970); Federal Aviation Act, 49 U.S.C. §1504 (1970). *See* H.R. REP. No. 880 (Part I), *supra* note 38, at 9-10, 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2190-92, 2204-05; H. CONF. REP. No. 1441, *supra* note 40 at 14, 25, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2261.

Suggestions were made that the following should remain exempt: Federal Elections Act, 2 U.S.C. §437g(a)(3) (1970); Civil Rights Act, 42 U.S.C. §§2000e-5(b), -8(e) (1970); Atomic Energy Act, 42 U.S.C. §§2161-2166 (1970); and a different section of the Federal Aviation Act, 49 U.S.C. §1461 (1970). In addition, Representative Abzug stated her belief that 8 U.S.C. §1202(f) (1970) (immigration) would remain exempt as would 13 U.S.C. §9 (1970) (census information).

The Privacy Act, 5 U.S.C. §552a (Supp. V 1975), had already been considered by Congress not to fall within exemption 3. *See* 121 CONG. REC. S18,145-51 (daily ed. Oct. 9, 1975) (correspondence between Senator Kennedy and Attorney General Levi).

The amended exemption 3 thus seems to approximate the standard suggested in Stretch v. Weinberger, 495 F.2d 639 (3d Cir. 1974), a case disapproved in part by Ad-

short of amending innumerable statutes, the new exemption probably achieves the best result. It overrules the worst aspects of *Robertson,* which could have effectively allowed certain officials to ignore the FOIA and the Sunshine Act. Yet the new exemption, unlike the suggested Senate version, makes allowance for statutes which give all parties concerned a chance to present a case for disclosure or withholding under specific, known guidelines.

Summary of the Exemptions

The new Government in the Sunshine Act adopts a number of exemptions which had been enacted by various states. Although the federal language is often less clear than state law, the new Act seems to allow closure of meetings involving personnel matters, attorney-client privilege, eminent domain, reputation, investigations, collective bargaining, and national security.[169] Indeed, there are few if any state exemptions which cannot be found in the federal statute.[170]

This fact raises criticisms made in the past by those who claimed that tolerating even one exemption would lead to dozens more.[171] Although due consideration should be given to the federal government's unique problems, the Sunshine Act's long list of exemptions will needlessly permit many meetings to be closed. Agency lawyers are accustomed to citing several overlapping exemptions at once, perhaps hoping that a court will be pursuaded toward secrecy by emanations from the penumbra of such lists.[172] In regulations published thus far, agencies have quickly tried to close series of meetings under section (d)(4) of the Act, not always with very much explanation.[173] Evasion of the openness principle is only encouraged by the long list of ambiguous, overlapping exemptions.

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ministrator, FAA v. Robertson, 422 U.S. 255 (1975). *See* Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act,* 76 COL. L. REV. 1029 (1976); Note, *Developments Under the Information Act,* 1976 DUKE L.J. 366, 395 (1976). Initial court decisions construing the new exemption have not revealed dramatic changes from the old exemption's results. Seymour v. Barabba, 1977-1 Trade Cas. ¶ 61,468 (D.C. Cir. 1977) (census data exempt); Irons v. Gottschalk, 548 F.2d 992, 994 n.3 (D.C. Cir. 1976); Kruh v. GSA, 421 F. Supp. 965 (E.D.N.Y. 1976).

169. See generally text accompanying notes 111-142 *supra.*

170. Some states exempt parole boards from their open meeting statutes; *see, e.g.,* ALASKA STAT. §44.62.310 (Supp. 1975). The U.S. Parole Board was mentioned by the House Judiciary Committee as an agency covered by the new sunshine law. H.R. REP. No. 880 (Part II), *supra* note 39, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2222-23. Parole Board meetings could sometimes be closed under one of the quasi-judicial exemptions, exemptions 5 and 10. *But cf.* Philadelphia Newspapers, Inc. v. United States Dep't of Justice, 405 F. Supp. 8 (E.D. Pa. 1975) (forcing disclosure under the FOIA of letters used by a Parole Board in making its decision).

171. *See, e.g.,* Editorials of WJXT-TV, Jacksonville, Fla., April 27, 1971, *reprinted in Hearings on S.260, supra note* 17, at 286-88.

172. *See, e.g.,* Polin v. Commissioner, 77-1 U.S.T.C. ¶9359 (N.D. Okla. 1977), in which the IRS claimed that certain documents were covered by no less than five different exemptions.

173. See note 141 *supra.*

JUDICIAL REVIEW AND ENFORCEMENT

Like every other aspect of state sunshine laws, enforcement measures vary throughout the country. Some laws contain no enforcement provisions at all.[174] More typically, however, state statutes call for criminal penalties or fines for official violators of open meeting rules.[175] Injunctions to prevent further violations and other forms of equitable relief are also common.[176] A controversial enforcement tool adopted by some states entails invalidation of actions taken at illegally closed meetings.[177]

These different possible approaches are based on the widely diverging views as to the purposes of open meetings. If one discloses government information merely to satisfy public curiosity as to the basis of decisions, then the information fulfills its function whether obtained before or after the decision in question.[178] As long as the public eventually discovers what transpired at a meeting, confidence in government may increase. On the other hand, if public scrutiny is needed to influence agency decisions or to check on agency efficiency, then deterrence of violators becomes more important.[179] Under this view, the policy goals of sunshine laws are frustrated as soon as the public is improperly locked out of a meeting. An examination of FOIA cases reveals that both approaches are necessary. Some members of the public seek information in order to write historical studies and obtain statistics, while others hope to scrutinize agency safety claims, discover "secret law," or otherwise have a direct impact on agency decisionmaking.[180]

Invalidation of secret actions and penalization of violators reflect the latter deterrent approach. States which allow rerun votes to cure a defective meeting, however, apparently feel that the public does not benefit from so much judicial interference in agency procedures. The release of transcripts embodies a compromise policy, and, not surprisingly, this is the primary federal approach.

The Sunshine Act allows any person to sue an agency, either before or within a specified time after a closed meeting.[181] Suit may be brought in district court in Washington, D.C., or in the district of the agency headquarters, or wherever the meeting in question was held.[182] The burden of

174. The Arkansas, Hawaii, Kentucky, Ohio, Wisconsin, and North Dakota statutes contain no enforcement provisions. *See* Little & Tompkins, *supra* note 55, at 459.

175. *See, e.g.*, CAL. GOV'T CODE §54959 (Supp. 1976) (misdemeanor); IND. CODE ANN. §5-14 (Burns 1974) (imprisonment); N.M. STAT. ANN. §5-6 (Supp. 1975) (fine).

176. *E.g.*, IOWA CODE ANN. §28A (1965) (injunction or mandamus).

177. *See* Toyah Independent School Dist. v. Peco-Barstow Independent School Dist., 466 S.W.2d 377 (Tex. Ct. App. 1971) (allowing invalidation). *Contra*, Dobrovolny v. Reinhardt, 173 N.W.2d 837 (Iowa 1970); Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975). *See also* Note, *Legislation: Oklahoma's Open Meeting Law*, 29 OKLA. L.J. 189, 199 (1976).

178. See generally text accompanying note 46 *supra* for a discussion of the policy goals of the new federal law.

179. *Id.*

180. Fourteen different uses of FOIA information are listed in *Litigation Under the Amended Federal FOIA*, *supra* note 29, at 73-74.

181. 5 U.S.C.A. §552b(h) (West 1977).

182. *Id.*

proof lies with the agency, but no individual agency member can be liable for a violation.[183] Furthermore, no Sunshine Act violation alone can cause invalidation.[184] Verbatim transcripts must be kept of most meetings, so courts can review them in camera and enjoin future violations.[185] Plaintiffs can avoid court costs if they "substantially prevail."[186]

Both the FOIA and the Privacy Act contained broader venue provisions, allowing suit to be brought where the plaintiff resides.[187] In addition, the FOIA allowed penalties to be assessed against willful official violators.[188] Courts also have inferred from the FOIA that pending proceedings can sometimes be enjoined to ensure agency release of prior requested information. Congress refused to follow these precedents in the Government in the Sunshine Act.[189]

The original Senate bill contained some of the stricter provisions from the FOIA,[190] but the House amendments reduced potential venues, abolished individual official liability, and, most importantly, changed the transcript requirement to mandate only comprehensive minutes.[191] Some members of the House also questioned the constitutionality of the bill's provision on standing, but the provision remained unchanged.[192] The conference committee compromise reinstated the transcript requirement, but otherwise adopted the House approach.[193]

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183. *Id.*

184. *Id. See also* H. CONF. REP. NO. 1441, *supra* note 40, at 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2258: "The conferees do not intend the authority granted to the federal courts . . . to be employed to set aside agency action taken other than under section 552b solely because of a violation of section 552b in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation unless that violation is of a serious nature."

185. 5 U.S.C.A. §552b(h) (West 1977).

186. *Id.* §552b(i). *See* Nationwide Bldg. Maintenance v. Sampson, Bldg. Maintenance, 559 F.2d 704 (D.C. Cir. 1977) (definition of "substantially prevailed" in suit for attorney's fees).

187. 5 U.S.C. §552(a)(4)(B) (Supp. V 1975); *id.* §552a(g)(5).

188. *Id.* §552(a)(4)(F).

189. Representative Flowers did state, however, that a court could invalidate an agency action if the agency had violated the Sunshine Act in such a way as to "material[ly] prejudice . . . the party involved." 122 CONG. REC. H7872 (daily ed. July 28, 1976).

190. S.5, *supra* note 70. For example, the Senate bill allowed an action to be brought "where the plaintiff resides or has his principal place of business, or where the agency has its headquarters." *Id.* §4(g). "Costs may be assessed against an individual member of an agency . . . ." *Id.* §4(i).

191. *See* H.R. REP. NO. 880 (Part II), *supra* note 39, at 3-7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2212-17. *See also* 122 CONG. REC. H7870-80 (daily ed. July 28, 1976). Representative McCloskey argued strenuously against the transcript requirement, stating that transcripts were a useless burden and pointing out that no state required them. *Id.* at H7876. Representative Abzug replied by stressing the need to compensate for the Sunshine Act's otherwise weak enforcement provisions. *Id.* at H7891.

192. Representative McCloskey proposed the retention of the APA's "person aggrieved" standard. "It is unwise to throw the courts open to anyone, anywhere, who is of a mind to throw a wrench into the workings of the government." 122 CONG. REC. H7876 (daily ed. July 28, 1976). See also the remarks and amendment of Representative Moorhead, defeated by a vote of 258-134. *Id.* at H7895.

Neither house allowed invalidation of agency action solely for sunshine violations, although Congress recognized that a plaintiff could bring up such procedural defects after challenging the merits of an action.[194] Since agency officials cannot be individually liable, the Act's deterrent effect is accordingly limited. The knowledge that transcripts will exist, however, even with only a slim chance of their being released, may be sufficient to cause adherence to openness. Furthermore, once a violation has occurred, a court can use its contempt powers to back up injunctions.[195] The Sunshine Act's compromise enforcement provisions nonetheless lean toward providing only the after-the-fact openness discussed above.

Any deterrent effect of the law will thus depend primarily on the transcript requirement, which is relatively untested. Agency officials may possibly say more than they realize at a particular meeting, and someone with time to pore through such materials may ferret out important information not otherwise available. Transcripts could have unexpected strengthening effects for the Act's enforcement.

CONCLUSION

Government openness is a deceptively simple concept with a tradition of agency detachment, variegated state laws, and contradictory underlying

The Sunshine Act thus retains a standing provision which is identical to that of the Clean Air Act, 42 U.S.C. §1857h-5(b)(1) (1970), and has already engendered conflict among the circuit courts of appeals. The District of Columbia Circuit declared that this kind of standing provision did away with the need for injury in fact or a stake in the outcome, citing Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). The court adopted the "private attorney-general" rationale to gloss over the constitutional basis for standing. *See* Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C. Cir. 1975).

The Tenth Circuit, in National Resources Defense Council v. EPA, 481 F.2d 116, 121 (10th Cir. 1973), read into this provision the traditional article III standing requirements. *Accord,* National Resources Defense Council v. EPA, 507 F.2d 905 (9th Cir. 1974). *See also* Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), stating that Congress can resolve the standing question "save as the requirements of Article III dictate otherwise." *But see* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?,* 78 YALE L.J. 816 (1969).

The two *National Resources* cases seem to comport more fully with the Supreme Court's views, as expressed in Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Kentucky Welfare Rights Org., 96 S. Ct. 1917 (1976). The Court has implied that Congress can only provide standing to assert "public interest" rights in addition to, not instead of, alleging one's own direct interest in the case. Under the Sunshine Act, it should not be difficult to allege such an interest, even without personally being denied admittance to a meeting. An individual should be able to claim injury, for instance, merely by the press being excluded from a meeting wrongfully, since the Act was intended to grant access to information as well as the right to know.

193. H. CONF. REP. No. 1441, *supra* note 40, at 22, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2257-58.

194. 5 U.S.C.A. §552b(h) (West 1977).

195. *Id.* It should be noted that, even under a broad statute like Florida's, sunshine law prosecutions are rare. *See* Note, *supra* note 55, at 548 (citing 118 CONG. REC. S12,803 (Aug. 4, 1972)). For the bitter memories of an unsuccessful prosecution, see Little & Tompkins, *supra* note 55, at 464.