Government in the Sunshine Act (1976)

By Brandi M. Snow

Other articles in Freedom of the Press issues and topics, Laws and Proposed Laws, 1951-2007

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Also known as the Open Meetings Act, its primary function is to ensure that decisions regarding the federal government that affect the public are open and accessible to the public.

President Gerald Ford and several of members of Congress at the signing ceremony for the Government in the Sunshine Act in the White House Rose Garden, September 13, 1976. The Sunshine Act occurred in response to an outcry for increased government transparency and accountability following the Watergate scandal. Its primary function is to ensure that decisions that affect the public are open and accessible to the public. (Photo via National Archive Catalog, public domain)

Federal "Sunshine Act" requires open meetings of bodies that head federal agencies

The Sunshine Act states that "every portion of every meeting of an agency shall be open to public observation." This mandate applies to the collegial bodies that head up federal government agencies.

Not only must the meeting be open, but the agency must also give notice of the meeting and its agenda no later than one week before the date of the meeting. Once this notice is disseminated, only very narrow circumstances permit for changes. With the notice, the agency is required to provide the name and phone number of an official designated to answer requests for information about the meeting. Upon passage of the act, each government agency was required to promulgate a set of regulations by which to implement the act's provisions.

Some meetings can be closed if they fall within 10 exemptions

The act recognizes that there are circumstances under which open meetings do not serve the public good. Ten exemptions from the requirements of the act exist. Examples of exemptions include circumstances in which information disclosed will reveal trade secrets or when the content of a meeting is likely to lead to accusations of

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 subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed 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.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). 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, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question.

criminal behavior, constitute an unwarranted invasion of personal privacy, or endanger the safety of law enforcement personnel.

When the members of the agency "properly determine" that the meeting or portions of the meeting will fall under one of the ten exemptions, they may vote to close the meeting. A legal officer of the agency must first advise the members that the circumstances legally meet one of the exemptions. A majority of the members must then agree, and within one day a written explanation of the agency's decision must be created and made public.

Transcripts of closed meetings must be accessible to the public

Once a meeting has been closed, the act requires the agency to keep a transcript, recording, or minutes of the closed meeting, and to make it promptly available in a place easily accessible to the public. Only those portions of the meeting that specifically fall under one of the ten exemptions may be excluded from the transcript. The full transcript, including that part closed to the public, must be maintained by the agency for at least two years after the date of the meeting, or one year after the conclusion of the agency's proceedings on the issue involved, whichever is the longer period of time.

All 50 states have enacted similar open meetings laws governing state and local governing bodies

Each of the 50 states has enacted a Sunshine or Open Meetings Act governing its own agencies.

Some of these state laws predate the federal law: California's Brown Act was enacted in 1953. Other state sunshine laws are much more recent; some were enacted only after passage of the federal law. While language varies from state to state, particularly with regard to listed exemptions, the provisions of state acts are similar to those of the federal act.

Notable differences include jurisdiction for challenges, specific requirements for notice of meetings, and procedures and reasons for closed meetings.

The Sunshine Act provides that jurisdiction is given to the federal district courts to enforce its requirements.

State acts, of course, give jurisdiction to their state or chancery courts.

Most challenges arise over which meetings are subject to the Sunshine laws

While use of the act's exemptions to close meetings has been challenged, it is actually the definition section at the beginning of the statute that has given rise to the most contentious legal actions. The issue arising there concerns which types of meetings are (and are not) subject to the act in the first place.

The act defines a meeting as "deliberations" of at least the number of members needed to take action on behalf of the agency "where such deliberations determine or result in the joint conduct or disposition of official agency business."

Not surprisingly, much has been made — primarily in the opinions of attorney generals — of the many possible readings of the definitions section. In particular, the questions of what constitutes "deliberation" and how can the "result" of such a meeting can be determined by an objective review offer fodder for controversy.

Courts have ruled on definition of 'meeting'

Significant cases have helped define the terms, including *FCC v. ITT World Communications, Inc.* (1984), in which the Supreme Court ruled that the Government in Sunshine Act applies only where a subdivision of an agency deliberates upon matters that are within that subdivision's formally delegated authority to take official action for the agency. In another case, *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* (2000), the D.C. Circuit Court of Appeals held that the commission's definition of "meeting" under its own rules was valid because it relied on the Supreme Court's interpretation in the *ITT* case.

The federal government in the Sunshine Act, like its state-enacted cousins and the federal Freedom of Information Act of 1966, has successfully raised the level of transparency and accountability in the decision-making of the collegial bodies of government agencies. Nevertheless, much remains to be determined concerning the scope of its many exemptions.

This article was originally published in 2009. Brandi Snow is an attorney in Clovis, California.

Brandi M. Snow. 2009. *Government in the Sunshine Act (1976) [electronic resource].* The First Amendment Encyclopedia, Middle Tennessee State University (accessed May 07, 2021). http://mtsu.edu/first-amendment/article/1244/government-in-the-sunshine-act

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THE GOVERNMENT IN THE SUNSHINE ACT

5 U.S.C. § 552b

§ 552b. Open meetings

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(f) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to--

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) 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) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;