The original documents are located in Box 8, folder "Congressional - Sunshine Law" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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THE WHITE HOUSE

WASHINGTON

December 9, 1975

MEMORANDUM FOR: VERN LOEN

THROUGH: PHIL BUCHEN P.W.B.

FROM: KEN LAZARUS ~~KL~~

SUBJECT: S. 5 "Sunshine Law"

We have been following the development of S. 5 and H. R. 10315, bills to create a so-called "Government in the Sunshine Act."

A number of independent regulatory agencies and several Executive Branch departments are in the process of presenting their objections to the measure before Representative Abzug's Government Operations Subcommittee.

Attached for your information is a copy of a letter and attachment commenting on H. R. 10315 from OMB to Representative Brooks, Chairman of the full Committee on Government Operations which was recently cleared by this office. This letter represents the closest thing to an "Administration" position on the matter at the present time.

Please continue to keep us advised of further developments in this regard.

Thank you.

Attachment

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 8, 1975

Honorable Jack Brooks
Chairman, Committee on
Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Office of Management and Budget on H.R. 10315, the "Government in the Sunshine Act." Members of our respective staffs have held discussions concerning this bill.

The bill would require generally that meetings of the members of multiheaded Executive agencies be open to public observation. A meeting could be closed to the public if its subject matter fell within one of the bill's exemptions, but the agency would be required to prepare and maintain a transcript of the proceedings.

The purposes of the bill are to increase public understanding of the reasons for governmental decisions and to enhance the public's faith in the integrity of government. We support those objectives, but we perceive serious problems with this legislation. Some of these problems stem from the bill's drafting and others from its underlying concepts. Our principal objections to the bill are discussed in some detail in the attachment to this letter. Our most important concerns are summarized briefly in the paragraphs below.

The bill's definition of the agencies it would cover is unclear, and would lead to unnecessary confusion and litigation. We believe that the affected agencies should be specifically listed. Likewise, the bill's definition of the meetings it would cover could lead to serious difficulties. The bill's definition would make the decision as to whether there will be a meeting dependent upon what happens at the meeting. We believe that only those gatherings held for the purpose of jointly conducting agency business should be included.

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Exception (9) of the bill permits the closing of a meeting when it would concern an agency's participation in a civil action in a Federal or State court. This exception should be broadened to include civil and criminal proceedings as well as actions before other agencies, foreign courts, and international tribunals, and arbitration proceedings.

The requirement that a vote be taken in order to close each meeting is unnecessarily burdensome upon those agencies which deal primarily with exempted matters. They should be permitted to close all such meetings by regulation.

We do not believe that the bill's exceptions are broad enough to protect the public interest in the case of agencies, such as the Federal Reserve Board and the Securities and Exchange Commission, which are charged with regulating financial institutions and securities and financial markets. A suggested amendment to correct this deficiency is set forth in the attachment to this report.

The bill's judicial review provisions also present difficulties. For example, they provide that district courts may entertain an action by any person to enforce the requirements of the bill by declaratory judgment, injunction, or other relief. It should be made clear that this bill does not authorize a court to set aside agency actions even if those actions were taken in a meeting improperly closed to the public. In our view, such a result would be unwarranted and would increase uncertainty, costs and delays in agency proceedings. The bill would also permit the assessment of attorney fees and litigation costs against individual agency members under certain circumstances. This provision would have the undesirable effects of inhibiting the willingness of qualified persons to accept agency appointments and inhibiting the performance of official duties by those in office.

In summary, we support the purposes of H.R. 10315, but we believe that those objectives can be and should be accomplished with far more certainty and far less disruption and delay in agency proceedings than this bill would provide.

The Office of Management and Budget is opposed to the favorable consideration of H.R. 10315 in its present form.

Sincerely,

James M. Frey
Assistant Director for
Legislative Reference

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Attachment

The bill presently defines the agencies it would cover by an expansive definition of uncertain scope. Such a definition may well be appropriate for purposes of the Administrative Procedures Act, but is most inappropriate, expansive and unnecessary in this bill. The agencies sought to be covered are not numerous and can be specifically listed, thereby avoiding the seemingly endless disputes and litigation concerning coverage that we and other agencies have found to be so costly and time consuming in analogous situations. A successful precedent for this approach is the Government Corporation Control Act of 1945, 31 U.S.C. 841 et seq. This Act has been amended on several occasions to add or delete from its scope particular corporations, a practice which would be appropriate for H.R. 10315. Absolute clarity of coverage not only avoids the cost of the obvious uncertainties but also simplifies the drafting of other provisions of the bill, and the process of formulating the list of agencies need not be a protracted one.

A meeting is defined by the bill to be a gathering of the members of the agency where deliberations on agency business occur. Other provisions of the bill provide for advance public notice of these meetings and an opportunity for the injunction of them if closed to public observation. The defintion of meeting is therefore crucial to the bill, for if there is not a meeting, the bill would not apply. It is also crucial that the requirements of a meeting be understood by the public and by the courts in advance of the actual holding of a meeting. This understanding is necessary if the agency is to bear its burden of justifying any decision to close a meeting in reliance upon the exceptions to the open meeting requirement. Unfortuately, the definition of meeting in the bill is dependent upon what occurs at a gathering. This paradoxical standard may be very difficult to demonstrate in advance, and may significantly frustrate the use of the exemptions in the bill. To the extent that the bill seeks to reduce any public suspicion concerning the manner in which the business of these agencies is conducted--an objective with which we agree--the unusual definition of meeting may well defeat this purpose by requiring agencies to demonstate the impossible in order to justify closing a meeting for a reason which the Congress would acknowledge as necessary.

We would urge that a definition of meeting take the more usual form--a gathering with a purpose. Purpose is a common element in judicial determinations and capable of expression and proof in advance of any meeting. Any

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concern that real agency business will be conducted at gatherings called for other purposes should be met by expressly precluding the conduct of agency business in such gatherings without compliance with this bill.

H.R. 10315 significantly improves S. 5 by the addition of a definition of "member". This definition can be simplified by the elimination of the Presidential appointment limitation if the agencies are listed in the bill. A definition of "official agency business" should also be added.

The agencies which would be covered by the bill are in the best position to provide comment upon the extent to which the exceptions to the requirement for meetings to be open to public observation meet their needs. Generally, however, since to some extent the exceptions in this bill track those in the Freedom of Information Act, the exceptions anticipate the existence of agency records as a requirement for closing. For instance, closing to avoid disclosing information contained in investigatory records is permitted upon the assumption that in all such instances there will be a record. The exceptions in the bill should insure that gatherings to discuss information not based on a record, but which if written would be such a record, may also be closed.

We believe that the exception for trade secrets and commercial or financial information should read exactly as the provision does in 5 U.S.C. 552(b)(4)--the Freedom of Information Act. The reason for the language in the bill is not clear but it will raise questions as to why the change was made and its impact. While we agree with the concern the bill expresses for the privacy of individuals, we are concerned that as presently stated the bill does not facilely interface with the Privacy Act. The bill would establish as a basis for closing a meeting a standard based upon "a clearly unwarranted invasion of personal privacy," as does the Freedom of Information Act, and a similar test for disclosures to third persons is carried through into the Privacy Act of 1974, 5 U.S.C. 552a(b)(2). This bill should not require the disclosure of information which would not be required to be disclosed to the public by the Privacy Act. We also do not agree that Federal employees surrender their privacy safeguards "with respect to [their] official duties or employment."

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The paragraph limiting the utilization of exception (7) should be modified to permit the closing of a meeting even if there has been an unauthorized disclosure of some information pertaining to such meeting. The limitation as now written not only sanctions unauthorized disclosures, but provides an incentive for such disclosures. The limitation should be applicable only when the agency makes or when it is required by law to make a disclosure.

This exception (7) permits a closing in order to avoid untimely disclosure of an action when it would be likely to seriously frustrate the proposed agency action. Often, it is not the action which would be frustrated, but the policy underlying it. For example, release of information indicating an agency's interest in the acquisition of a certain tract of land may not frustrate the purchase of that land, but the acquisition at twice the price as a result of the speculation fostered by the disclosure would frustrate the policy underlying the proposed land acquisition. This provision should be modified accordingly.

Exception (9) authorizes a closing when the meeting would concern an agency's participation in a civil action in Federal or State court and also for matters generally within the scope of 5 U.S.C. 554. Although exceptions for criminal activities are present elsewhere in the bill, to avoid any question the bill should be amended to cover criminal actions as well. This exception should cover civil and criminal proceedings as well as actions, and such actions and proceedings should not be limited to State and Federal courts, but should, as several other agencies have urged, cover actions before other agencies and in foreign courts and other international tribunals and in arbitration proceedings. Furthermore, the citation in the bill to the procedures in Section 554 of Title 5---adjudicatory proceedings--eliminates as a basis for closing meetings the exceptions to Section 554 which also should be bases for closings. Section 553 of Title 5--the informal rule making provision--is itself a "sunshine" provision since it opens to public comment and participation most agency rule makings. This has been one of the most significant and successful provisions of the Administrative Procedures Act. The proceedings which lead to

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the proposals which are subject to Section 553 should be permitted to be handled as they are now and it is recommended that the bill be modified to permit agencies to form the proposals subject to Section 553 without public observation if they choose to do so.

There are, of course, often statutes which require the withholding of certain information from the public. Exception (10) permits the closing of meetings which would disclose such information only for certain of these statutes. The effect of the bill in some instances would be to compel the disclosure in an open meeting of information specifically exempted from disclosure by another statute. We do not believe that H.R. 10315 should repeal existing law and require the disclosure of information specifically exempted from disclosure by statute. Such statutes have been enacted by Congress over the years to deal with situations where governmental concerns are overriding. The Freedom of Information Act did not repeal those provisions, and we see no justification for doing so now.

As to the procedures for closing meetings of these agencies, we believe that the number of members who are entrusted to take action on behalf of an agency in a meeting should be entrusted as well to determine whether such meeting satisfies the requirements of these exceptions and whether such meetings therefore should be closed. To require that for each such determination a majority of the entire membership must vote for such action would, we believe, impede the prompt conduct of the agency business, the necessity for which the bill in other areas provides. As presently drafted, H.R. 10315 permits any person whose interests may be directly affected to require a vote to close a meeting for reasons set forth in exceptions (3), (4) or (5). Similar concerns underlie exceptions (6), (7), (8) and (1) and should also permit any such person to require a vote to close a meeting.

In order to reduce the administrative impact and costs of the bill, any agency a majority of whose meetings may be closed to the public, should be able to provide for such closing by regulations, and not merely when the closing is for reasons set forth in exceptions (6), (7)(A), (8) or (9) as H.R. 10315 now provides.

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H.R. 10315 permits an action to be brought in Federal district court for any violations of this bill against the agency and against any of the individual members of an agency. The bill also provides that in certain instances reasonable attorney fees and other litigation costs may be awarded against the agency and against the individual members. This potential personal liability on behalf of the individual members in the performance of their official duties is not in our opinion in the best interests of our Government. The spector of a personal defense for the performance of official duties would have an inhibiting effect upon the performance of such duties and upon the willingness of talented people to accept appointments to these positions. These provisions should be deleted.

The Senate Report on S. 5 indicates that that bill did not provide a basis for enjoining, voiding or setting aside of any agency action taken at a meeting. Thus, judicial action to enjoin, void or set aside agency action even if taken in a meeting improperly closed to public observation, cannot be based upon S. 5 and in our opinion should not be. Since H.R. 10315 uses the same language as S. 5, we trust that this most important aspect is your understanding as well. At a time when the Congress and the Executive are actively reviewing Governmental activities in general and the regulatory process specifically to reduce costs and delays, a provision permitting injunctions and encouraging protracted litigation on purely procedural grounds must be avoided.

There are other provisions of H.R. 10315 which, in part, because of the draftsmanship unnecessarily increase administrative difficulties and attendant costs and delay. For instance, the bill as drafted requires the members to have a second meeting to read a transcript of a closed meeting to vote on releasability of portions of it. By requiring instead that the agency release upon request, such portions of the transcripts as are not exemptable, the same results are achieved without a requirement for a second meeting to review the first. Furthermore, such an approach utilizes procedures to which agencies are now

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accustomed; e.g., the Freedom of Information Act, permits delegation of initial decisions to an appropriate administrative official and allows agencies to establish administrative appeals within the agencies in instances of a denial of access to assist in reducing litigation.

There are many aspects to the judicial review provisions of the bill which seem unnecessary. For example, subsection (i) in its entirety does not appear to add anything to the bill or existing law except confusion engendered by speculation about its purpose. In the interests of some certainty to the subject matter covered by the bill, there should be a time limit on the judicial review provisions beyond which the various actions may not be brought. Also, the accelerated judicial review provisions have became more burdensome and difficult to attain as a result of the impositions of rigorous time demands in criminal proceedings and accelerated procedures in other civil actions and proceedings. Alternatives to these provisions should be considered.

The manner in which this bill would impact upon or conflict with other laws must be provided for more carefully than the bill currently provides. For instance, the repeal of other laws precluding disclosure of information has already been mentioned. The lack of interface provisions with the Federal Advisory Committee Act, 5 U.S.C. App. I, also requires a statutory resolution. Although the Senate Report on S. 5 recognizes the conflict between this bill and the Federal Advisory Committee Act in certain instances, S. 5 and H.R. 10315 do not provide by their terms, as they should, for a resolution of this conflict. If the agencies which would be covered by this bill are listed as we have recommended, agencies will not be covered both by this bill and the Federal Advisory Committee Act. However, when agencies which would be covered by this bill meet with advisory committees, the bill should provide for which provisions apply.

We also share the concern underlying the request of some agencies for a new subsection as follows that could be subsection (m) redesignating the present subsection (m) and (n) as (n) and (o) respectively:

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> "The requirements and provisions of this section shall not apply to the meetings of any agency which are likely to involve a discussion of information which, if disclosed, might, in the view of the agency involved, have an adverse effect on the financial markets in which securities are traded or on the professional participants in and self-regulators of the securities markets."

Section 5 of the bill would, as S. 5 would, prohibit ex parte communications in situations where agency determinations are required to be reached only on the record after an opportunity for hearing. We agree that such determinations should be based exclusively upon the administrative record, but we share the concern of many agencies including the Department of Justice that the provisions are overly broad as written and may be more appropriately handled by requiring agencies to set forth regulations in compliance with principles which would be set forth in the bill.

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THE WHITE HOUSE

WASHINGTON

November 7, 1975

MEMORANDUM FOR: PHILIP BUCHEN

THROUGH: MAX FRIEDERSDORF MF

FROM: VERN LOEN VL

SUBJECT: S. 5 "Sunshine Law"

This measure provides that meetings of government agencies and Congressional committees shall be open to the public.

The Administration's position as stated by OMB is that we do not object to the purpose of the bill, but oppose it as reported because of its imprecision and numerous technical deficiencies. For example, the bill fails to state clearly what activities are subject to its provisions or even what agencies are covered.

S. 5 passed the Senate on Thursday, November 6, 94-0, after rejecting by a vote of 36-57 the Javits' amendment to exempt Federal Reserve Board operations. The Federal Reserve was the only target agency which actively sought an exemption.

Among other agencies which would be affected are the FCC, the FDIC, the FHLBB and any other agencies headed by a Presidential appointee and run by a board of directors.

This is not only a "motherhood" bill, but places us in an institutional fight between the Executive and the legislative. Arthur Burns, I understand, is really worked up about it and will be contacting Jim Lynn.

Hearings began yesterday before Rep. Bella Abzug's Government Operations Subcommittee on Government Information and Individual Rights. Minority Members are Rep. Sam Steiger (R-Ariz.), Clarence Brown (R-Ohio) and Paul McCloskey (R-Calif.). There are eight Democratic Members of an extremely liberal stripe. The full committee is equally hostile.

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In view of the prohibition on contacting independent agencies, it would appear that we need some guidance as to what the Administration position should be with regard to each affected agency and what proper strategy can be utilized. Otherwise, the President may be called upon to veto a bill with no hope of sustaining.

It is too late for action in the House during the remainder of this session, but Administration witnesses should be directed to request time and suggest amendments at the subcommittee level. If it is not cleaned up in subcommittee or full committee, there is little hope on the House floor.

A copy of the bill, S. 5, will be forthcoming.

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Sunshine Bill

THE WHITE HOUSE

WASHINGTON

January 26, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: PHILIP BUCHEN

FROM: KENNETH LAZARUS

On Wednesday, January 21, the House Government Operations Subcommittee on Government Information and Individual Rights reported out their version of H. R. 11007, the so-called "Government in the Sunshine" bill. The Senate has already passed its companion measure. The fundamental concept embodied in this legislation is that all multiheaded agencies, e.g. regulatory agencies, must hold their meetings open to the public.

Significant difficulties, aside from its fundamental concept, remain in this bill. However, the draft which will go to the full House Government Operations Committee is a substantial improvement as a result of the efforts of Representative Pete McCloskey. Although in the minority by six to one during consideration of the bill, he forced many changes and his help will be needed again in full Committee. The attached letter memorializes his contribution and hopefully encourages his further assistance. Congressional Relations concurs in the recommendation that the letter be forwarded at this time.

This letter does not limit any future options which may be available to you. These will be explored further in a memorandum which is being prepared by Jack Marsh.

Attachment

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THE WHITE HOUSE

WASHINGTON

January 26, 1976

Dear Pete:

I have watched with interest your efforts at making the "Government in the Sunshine" bill a better product. Although the bill as reported out of the Government Information and Individual Rights Subcommittee still requires significant changes, had it not been for your hard work and patience the important changes that have been made would not have occurred.

I applaud your work and hope that you will continue in your efforts to improve the bill.

With warmest personal regards,

Sincerely,

Honorable Paul N. McCloskey
House of Representatives
Washington, D. C. 20515

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file

THE WHITE HOUSE

WASHINGTON

August 5, 1976

See if Kay has viewed

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: KENNETH A. LAZARUS

THROUGH: PHILIP W. BUCHEN

FROM: JAMES E. CONNOR JEC

SUBJECT: H.R. 11656 and S. 5 -- "Government in the Sunshine" Bills

Confirming phone call to Ken Lazarus earlier today the President reviewed your memorandum of July 30 on the above subject and disapproved your recommendation that he release a statement supporting the House action. He further requested that this matter be handled verbally.

Max Friedersdorf will take appropriate action.

cc: Dick Cheney
Max Friedersdorf
Robert Linder (with file)

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2 cys PWB

THE WHITE HOUSE

WASHINGTON

July 30, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: PHILIP W. BUCHEN

FROM: KENNETH A. LAZARUS

SUBJECT: H.R. 11656 and S. 5 -- "Government in the Sunshine" Bills

Both of the above-captioned bills would require that certain "multiheaded" agencies, e.g., FTC, SEC, CSC, FRB, etc. -- about 50 -- give advance notice of their meetings and hold them open to public observation unless they vote to close a session for reasons specifically enumerated in the bill.

On July 28, the House passed H.R. 11656 which incorporated all of the significant proposals which the Administration has made on this legislation. H.R. 11656 is now ready for Conference with its Senate counterpart S. 5, a bill which although it contains some very undesirable provisions, passed the Senate 94-0 on November 6, 1975.

The most important changes made in H.R. 11656, and the basic differences between it and S. 5 are:

-- the deletion of provisions permitting civil actions to be brought against the individual members of the agencies for asserted violations of the Act;

-- the deletion of a verbatim transcript requirement for all closed meetings;

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-- limiting the meetings covered to those held for the purpose of conducting business, thereby eliminating social events and casual encounters;

-- limiting an amendment to the Freedom of Information Act to avoid repealing certain other statutes which prohibit the disclosure of information;

-- limiting the venue provisions for enforcement of the Act;

-- precluding reversal of action taken at a meeting for violations of this Act.

At this juncture, H.R. 11656 is acceptable and S. 5 is not, although it would be most difficult to veto it and have it sustained. In order to urge the conferees to favor the House version, I recommend that you approve the press release which is attached supporting the House action.

Approve _____ Disapprove _____

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THE WHITE HOUSE
WASHINGTON

1/30

Ken took the
Sunshine Mat'l
up to him to
Klare Hergen's
Office. Will send
us copies of signed
mat'l. [redacted]

THE WHITE HOUSE

WASHINGTON

July 30, 1976

MEMORANDUM FOR: PHIL BUCHEN
JIM CANNON
MAX FRIEDERSDORF
PAUL O'NEILL

FROM: JACK MARSH

Recalling the senior staff meeting on Thursday morning and the discussion of the Sunshine Bill, what is the current status of this legislation?

It is my recollection at the staff meeting the consensus was there should be no position taken by the Administration on the Conference Report. Is this still the best course of action, or is there some other recommendation as to how to proceed?

Many thanks.

cc: Dick Cheney

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