The original documents are located in Box 18, folder "Government in the Sunshine Bill (1)" of the John Marsh Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

Chuck Daley

Full Committee
mtg. scheduled
for 26 FEB —

THE WHITE HOUSE
WASHINGTON

3 options

1. Pete McCloskey
Frank Horton
& other Govt. Ofcl.
[illegible] are coming
to WH (
2 P.M. - Roosevelt
Room -
Ed Schmults -
Ken Cole -

THE WHITE HOUSE
WASHINGTON

Laguerus
Regency
will arrive
Monday

THE WHITE HOUSE

WASHINGTON

February 4, 1976

MEMORANDUM TO: JACK MARSH

FROM: RUSS ROURKE

Ken Lazarus advises me that the President had apparently asked you to prepare a paper on this subject (this was during one of the morning staff meetings).

Ken suggests that you need only cut and paste the OMB memo to suit your own tastes.

They appear quite anxious to get this matter wrapped up.

R -

Can you get to it?

M

RUSS -- attached is the
OMB report. FYI.

cb

JAN 29 1976

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.

R - what memo? OMB prepared one

Attachment

bcc: Jack Marsh
Jim Lynn
Max Friedersdorf

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,

JERRY FORD

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

THE WHITE HOUSE
WASHINGTON

Date: 1/30/75

TO: Jack Marsh

FROM: Max L. Friedersdorf

For Your Information ✓

Please Handle

Please See Me

Comments, Please

Other Thanks, Jack. I obtained an extra copy of this from Lynn & am studying it.

THE WHITE HOUSE
WASHINGTON

January 30, 1976

TO: MAX FRIEDERSDORF

FROM: JOHN O. MARSH, JR.

_____ For Direct Reply

_____ For Draft Response

_X____ For Your Information

_____ Please Advise

Please return material to my office after reading it. Thanks.

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

JAN 28 1976

MEMORANDUM FOR: JACK MARSH

FROM: JIM LYNN

SUBJECT: House Action on Government in the Sunshine Bill

This responds to your January 21 memo on the above subject.

On January 21 the House Government Operations Subcommittee on Government Information and Individual Rights, chaired by Ms. Abzug, reported out their version of the "Government in the Sunshine Act" by a vote of 7-0. The bill has several changes from, but is essentially quite similar to, the version passed by the Senate last fall by a vote of 94-0. Many of the changes made were a direct result of Congressman McCloskey's efforts. We should be able to count on him and Messrs. Erlenborn and Horton in the full committee. The next regularly scheduled meeting is February 20, but an irregularly scheduled meeting is possible.

The fundamental concepts are that all multiheaded agencies, i.e., generally the regulatories, must hold their meetings open to the public with advance notice where possible; if closed for specific reasons, there must be a verbatim transcript as a remedy for an improperly closed meeting.

Most of the difficulties remaining with the bill, aside from its fundamental concepts, are problems of draftmanship. It is ambiguous and awkward, e.g., in its definition of "agency" and "meeting". Many of these ambiguous provisions also appear in the Senate bill in the same form. If the underlying concepts do not warrant a veto, then further Executive branch influence on the process will make the bill only slightly more acceptable. Significant improvement can probably be made in exchange for a pledge not to veto.

Tab A is the Sunshine bill as reported out of the House Subcommittee. Tab B is the OMB letter addressed to the House bill before the Subcommittee began markup. Tab C is a list of the major problems raised in the letter with a status indication as a result of the markup.

The major problems remaining are:

1. The bill has a definition of agencies to be covered in a very ambiguous manner of uncertain scope. We have urged that the agencies be listed.

2. The bill requires that a verbatim transcript be kept of all meetings closed to the public and that it be made available to the public to the extent that it does not fall within a basis for closing. There would be judicial review of any transcript withholding. The bill also recites that nothing in it provides authority to withhold information from Congress--as does the Freedom of Information Act. Unlike the FOIA, however, this bill would require the recording of information, not merely make it available if it is recorded. The threat of Congressional pressure for the release of transcripts even if not available to the public is of significant concern, especially to the FRB and the SEC. Although Congress is most reluctant to limit its own access to such information, the Subcommittee did recognize the difficulty of its posture and that this provision would be a publicly understandable basis for a veto which they seem anxious to avoid. Limiting transcript requirements in certain instances for the FRB and SEC would probably be the most acceptable resolution to the Congress, but they would probably want assurances against a Presidential veto.

3. The bill defines a "meeting" as a grouping of members which concerns agency business. We have urged a more traditional definition--a grouping with a purpose. This suggestion is to permit a more meaningful agency standard to demonstrate a valid closing instead of attempting to demonstrate in advance that all portions of a meeting will concern exempt matters. The present unusual definition coupled with very ambiguous legislative history would produce litigation of uncertain outcome.

4. Many of our recommendations were aimed at having the exemptions in the bill which are substantively similar to exemptions in the Freedom of Information Act read exactly the same in order to utilize existing case law in construing the bill. Mr. McCloskey successfully proposed a number of amendments to conform the language of the bill to the FOIA. One of his amendments went in the opposite direction, however. It would amend the FOIA in an attempt to reverse the Supreme Court holding in FAA v. Robertson (see Tab D). The third exemption to the FOIA reads "disclose information specifically exempted from disclosure by statute," and the

Supreme Court read this to permit withholding information pursuant to a statute which in general terms authorized the Administrator to withhold when he determines that disclosure is not in the public interest. The Sunshine bill would amend exemption (b)(3) to read "disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information."

5. The bill would permit civil actions to be brought against the individual members of the agency and require the members individually to bear the burden of proof in such actions. Furthermore, reasonable attorney fees and other litigation costs may be awarded to the party which substantially prevails. Such costs may be awarded to the plaintiff against individual members only where the violations by the members have been intentional and repeated. Such costs may be awarded against the plaintiff only where the court finds that the "suit was initiated by the plaintiff primarily for frivolous or dilatory purposes."

The award of attorney fees is similar to the FOIA and Privacy Act, except that they may here be assessed against individual members. Similar personal liability provisions were excised from the Privacy Act and the Freedom of Information Act Amendments of 1974, while those bills were in conference. Similar Executive branch opposition to this provision may well be successful. The liability on members in this bill, however, is different from the FOIA and Privacy Act in that the liability may be assessed only when the member has "intentionally and repeatedly violated" the bill.

6. The bill would require a second meeting of an agency to decide what portions of a transcript should be released; is structured so as to preclude delegations to agency staff for many functions under the bill; requires a majority of the total membership of the agency to vote to close a meeting even if the meeting is to be conducted by less than a majority of the agency; and generally proceeds with its requirements inefficiently and awkwardly.

With regard to your request for cost data on the Sunshine bill, the Privacy Act, and the Freedom of Information Act, we do not have nor do the agencies have that data at hand. We are attempting, however, to acquire such information as rapidly as possible and shall submit it to you when we get it. We shall also continue to work on amendments for use before the full Government Operations Committee.

As agreed between Ken Lazarus and Russ Rourke, the White House Counsel's office has submitted a note to the President suggesting that he sign a letter of appreciation to Congressman McCloskey.

Attachments

TAB A

[COMMITTEE PRINT]

JANUARY 13, 1976

[Reflecting amendments adopted by the Government Information and Individual Rights Subcommittee through December 17, 1975.]

94TH CONGRESS
1ST SESSION

H. R. 11007

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 4, 1975

MS. ABZUG (for herself, Mr. FASCELL, Mr. BROOKS, Mr. CONYERS, Mr. HARRINGTON, Mr. MACDONALD of Massachusetts, Mr. MCCLOSKEY, Mr. MAGUIRE, Mr. MOFFETT, Mr. MOSS, and Mr. RYAN) introduced the following bill; which was referred to the Committee on Government Operations

[Omit the part struck through and insert the part printed in italic]

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government in the Sunshine Act".

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding

the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

SEC. 3. Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

"(a) For purposes of this section—

"(1) the term 'agency' means the Federal Election Commission and any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, [and includes any subdivision thereof ~~composed of or including two or more members and~~ 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 concern the joint conduct or disposition of agency business; and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency, [and who is appointed to such position by the President with the advice and consent of the Senate.]

"(b) Except as provided in subsection (c), every por-

A MAJORITY OF WHOM ARE APPOINTED TO SUCH POSITION BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE.

tion 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, (1) subsection (b) shall not apply to any portion of an agency meeting, and (2) 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 (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) are, in fact, properly classified pursuant to such Executive order;

INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY

"(2) relate solely to the agency's own internal personnel rules and practices;

6

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

~~This paragraph shall not apply to any officer or employee of the United States or any branch, department, agency or establishment thereof with respect to his official duties or employment;~~

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

~~This paragraph shall not apply to any officer or employee of the United States or any branch, department, agency, or establishment thereof with respect to his official duties or employment;~~

"(7) disclose [information contained in] investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records [disclosure] 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, (E) in the case of a record compiled by a criminal law enforcement authority in the cause of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

~~"(6) 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 must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates;~~

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

~~"(7) disclose information which must be withheld from the public in order to avoid untimely disclosure of an action or a proposed action by—~~

~~"(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would be likely to (i) lead to serious financial speculation in currencies, securities, or commodities, or (ii) seriously endanger the stability of any financial institution; and~~

~~"(B) any agency where such disclosure would be likely to seriously frustrate implementation of the proposed agency action.~~

~~This paragraph shall not apply in any instance where the content or nature of the proposed agency action already has been disclosed to the public, or where the agency is required by law to make such disclosure prior to taking final agency action on such proposal;~~

"(7) 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, or (ii) significantly endanger the stability of any financial institution; [and]

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action. This subparagraph shall not apply in any instance where the content or nature of the proposed agency action already has been disclosed to the public by the agency, or where the agency is required by law to make such disclosure prior to taking final agency action on such proposal; or

"(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) specifically concern *the agency's issuance of a subpoena,* the agency's participation in a civil action ~~in Federal or State court~~, *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 deter-

mination on the record after opportunity for a hearing; or

"(3) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

"(d)(1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency 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 portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial portion of a 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 paragraphs (3), (4), or (5) of subsection (c), the agency shall vote by recorded vote whether to close such meeting, upon request of any one of its members. Within one day of any vote taken pursuant to [this] paragraph, the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question.

[“(2)] If a portion of a meeting is closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting, and their affiliation.

“(3) Any agency, a majority of the portions of whose meetings may properly be closed to the public pursuant to paragraphs (6), (7) (A), (8), or (9) of subsection (c), or any combination thereof, may provide by regulation for the closing of such portions in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1) [and (2)], of this subsection and subsection (e) shall not apply to any portion of a meeting to which

such regulations apply: *Provided,* That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meetings be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announce-

ment required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(f) (1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (9) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency, by recorded vote taken subsequent to the meeting and promptly made available to the public, determines to contain information specified in paragraphs (1) through (10) of subsection (c). In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, *and* the portion of subsection

(c) and any other statute said to permit the deletion. ~~and a summary or paraphrase of the deleted portion. Such summary or paraphrase need not disclose information specified in paragraphs (1) through (10) of subsection (c).~~ Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

"(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person [without charge]. AT NO GREATER THAN THE ACTUAL COST OF DUPLICATION THEREOF OR, IF IN THE PUBLIC INTEREST, AT NO COST.

"(g) Each agency subject to the requirements of this section shall, [on] WITHIN 180 DAYS AFTER THE ENACTMENT OF THIS SECTION or before the effective date of this Act], following consultation with the Office of the Chairman of the

Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. ~~Any~~ *Subject to any limitations of time therefor provided by law, any* person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

"(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section [by declaratory judgment, injunctive relief, or other relief as may be appropriate]. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section,

such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. [Before bringing such action, the plaintiff shall first notify the agency of his intent to do so, and allow the agency a reasonable period of time, not to exceed ten days, to correct any violation of this section, except that such reasonable period of time shall not be held to exceed two working days where notification of such violation is made prior to a meeting which the agency has voted to close; *during such reasonable period, to running of the limitation of time for bringing an action under this subsection shall be tolled.*] Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the defendant to sustain his action, *but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor.* In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, includ-

ing granting an injunction against future violations of this section, or ordering the agency to make available to the public the transcript or electronic recording [of any portion] of a meeting [improperly closed to the public] Except to the extent provided in subsection (i) of this section, nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

"(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceeding, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

"(j) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g), (h), or (i) of this section, except that costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section and against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the

case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

"(k) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(l) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such section to copy or inspect the transcripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

"(m) This section does not constitute authority to withhold any information from Congress, and does not authorize

the closing of any agency meeting or portion thereof otherwise required by law to be open.

"(n) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this ~~title."~~ *title.*

"(o) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.".

SEC. 4. The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552b. Open meetings."

immediately below:

"552a. Records about individuals.".

SEC. 5. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no *interested* person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or

other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any *interested* person outside the agency an ex parte communication relative to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

"(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

"(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

"(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

"(2) This section does not constitute authority to withhold information from Congress.".

(b) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of para-

graph (13) and inserting in lieu thereof "act; and"; and

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.".

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.".

SEC. [6] The provisions of this Act shall become effective one hundred and eighty days after the date of its enactment.]

SECTION 6. SECTION 410(b)(2) OF TITLE 39, UNITED STATES CODE, IS AMENDED BY INSERTING AFTER SECTION 552 PUBLIC INFORMATION," THE WORDS "SECTION 552(RECORDS ABOUT INDIVIDUALS), SECTION 552b OPEN MEETINGS),".

(a) EXCEPT AS PROVIDED IN SUBSECTION (b) OF THIS SECTION, THE PROVISIONS OF THIS ACT SHALL TAKE EFFECT 180 DAYS AFTER THE DATE OF ITS ENACTMENT.

(b) SUBSECTION (g) OF SECTION 552b OF TITLE 5, UNITED STATES CODE, AS AMENDED BY SECTION 3 OF THIS ACT, SHALL TAKE EFFECT IMMEDIATELY.

SECTION 8. SECTION 552(b)(3) OF TITLE 5 UNITED STATES CODE, IS AMENDED TO READ AS FOLLOWS:

"(3) REQUIRED TO BE WITHHELD FROM THE PUBLIC BY ANY STATUTE ESTABLISHING PARTICULAR CRITERIA OR REFERRING TO PARTICULAR TYPES OF INFORMATION."

[COMMITTEE PRINT]

JANUARY 13, 1976

[Reflecting amendments adopted by the Government Information and Individual Rights Subcommittee through December 17, 1975.]

94TH CONGRESS
1ST SESSION

H. R. 11007

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

By Ms. ABZUG, Mr. FASCELL, Mr. BROOKS, Mr. CONYERS, Mr. HARRINGTON, Mr. MACDONALD of Massachusetts, Mr. MCCLOSKEY, Mr. MAGUIRE, Mr. MOFFETT, Mr. MOSS, and Mr. RYAN

DECEMBER 4, 1975

Referred to the Committee on Government Operations

TAB B

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.

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,

(Signed) James M. Frey

James M. Frey
Assistant Director for
Legislative Reference

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 (1) 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 (2) 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

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 (3) 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 (4) 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 pre- (5) sently 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 (6) employees surrender their privacy safeguards "with respect to [their] official duties or employment."

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.

(7)

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.

(8)

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

(9)

(10)

(11)

(12)

(13) 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.
(14) 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
(15) 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
(16) 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 (10) 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
(17) 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.

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 (18) 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 (19) 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 (20) 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

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. (21)

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. (22) 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. (23) 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. (24) 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. (25) 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:

"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."

(26)

(27) 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.

TAB C

ISSUE	SUBJECT	MAJOR	REFERENCE	AMENDMENT	ADOPTED
1.	List the Agencies	Yes			
2.	Definition of Meeting	Yes		Offered by McCloskey	No
3.	Anticipate Records	No		Cover by Report	
4.	Track 552(b)(4)	No		Offered by McCloskey	Yes
5.	Interface with Privacy Act	No		Staff change	Yes
6.	Federal employee Privacy Surrender	No		Offered by McCloskey	Yes
7.	Use of Exemption (7) after leak	No		Offered by McCloskey	Yes
8.	In (7), frustrate policy	No		Report language to cover	
9.	Cover criminal actions in (9) to close	No			
10.	Not limit to State and Federal courts	No		Majority amendment	Yes

ISSUE	SUBJECT	MAJOR	REFERENCE	AMENDMENT	ADOPTED
11.	Expand (9) to Foreign courts as basis for closing	No		Majority amendment	Yes
12.	Permit exceptions to 554 to be used to close	No			
13.	Permit closing for 553	No		Offered by McCloskey	No
14.	Conform (1) to 552(b)(3)	Yes		Changed 552(b)(3) Instead	
15.	Require vote of majority of agency to close	Yes			
16.	Permit additional grounds for persons to demand votes to close.	No			
17.	Close more meetings by regulation	No			
18.	Personal liability of members	Yes		Offered by McCloskey	No
18a.	Award of attorney fees to conform to FOIA	No		Offered by McCloskey	No

ISSUE	SUBJECT	MAJOR	REFERENCE	AMENDMENT	ADOPTED
19.	Avoid basis to void action taken by agency	Yes	Listed as an issue since essential not to have.		
20.	Release only on request	Yes			
21.	Permit delegations of authority to release	Yes			
22.	Eliminate (i)	Yes			
23.	Time limit on judicial review actions	No		Majority Amendment	Yes
24.	Eliminate accelerated judicial review	No		Majority Amendment	Yes, from 20 to 40 days.
25.	Interface with F.A.C.A.	Yes		Offered by McCloskey	Yes
26.	Transcript problems	Yes		Offered by McCloskey	No
27.	Ex Parte Communications	No			

TAB D

JUL 17 1975

INFORMATION

MEMORANDUM FOR THE DIRECTOR

Subject: Supreme Court Decision on Exemption (b)(3) of the Freedom of Information Act.

On June 24, the Supreme Court in a 7 to 2 decision held that the type of statutory authority which permits the withholding of information from the public when an agency head determines that the disclosure would adversely affect an individual and is not in the public interest falls within the exemption in the Freedom of Information Act as a statute which specifically exempts information from public disclosure, Administrator, Federal Aviation Administration v. Robertson, et al., 43 LW 4833.

The Court held that a statute enacted prior to the Freedom of Information Act which gave the Administrator of the Federal Aviation Administration the authority to withhold information from public disclosure upon the request of a person to whom it pertained, was not repealed by implication by the Freedom of Information Act. Although acknowledging the overall congressional intent behind the Act and its 1974 amendments—to increase the amount of information made available to the public--the Court found the legislative history indicated that while the Congress was aware of the necessity to deal expressly with laws inconsistent with the proposed Freedom of Information Act, there was nothing to indicate an intention to repeal those inconsistent statutes by implication. Indeed, the citations by the Court indicated that the Act was not intended to limit those "... statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." (43 LW 4833, 4836.) At the time there were approximately 100 statutes (cited in the House Report on the Act) which would have been exempted from the Act by that which became 5 U.S.C. 552(b)(3). The Court held that the word "specific" in

that exemption "... cannot be read as meaning that the exemption applies only to documents specified, i.e., by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task" (id, at 4837). The Court held that the 1974 amendments were an endorsement of this construction of exemption (b)(3) of the Act (apparently overlooking the fact that the construction of this exemption was very much in doubt until this decision).

An immediate effect of this decision for OMB involves the Freedom of Information Act litigation brought by Mr. Richardson for certain budget documents pertaining to the CIA. When we initially denied this request we had obtained from the Director of Central Intelligence the determination that there should be no such disclosure since to do so would disclose intelligence sources and methods, and this determination was under conditions statutorily set forth in a manner similar to the authority of the Administrator of FAA.

Another immediate manner in which OMB will be affected concerns the discharge of our statutory authority and our presidentially delegated responsibility to make determinations to close meetings of OMB advisory committees and those Presidential advisory committees for which that function has not been delegated elsewhere. Because the exemptions of the Freedom of Information Act are (by Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. I) also the bases for closing the meetings of advisory committees, this decision may have some effect, although probably not major.

This opinion will not have any effect upon an individual's access to his records under the Privacy Act of 1974 (5 U.S.C. 552a) since that Act specifically states that "no agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section" (5 U.S.C. 552a(q)). To the extent that the information is personal information covered by the Privacy Act and falls within the scope of a statute which is covered by exemption (b)(3) of the Freedom of Information Act, an agency is not free to transfer (e.g., to another agency or individual),

pursuant to the Privacy Act's exemption from the requirement for individual consent, information the release of which "... would be required under [5 U.S.C. 552]" (5 U.S.C. 552a(b)(2)). Therefore, as the amount of information required by the Freedom of Information Act to be disclosed is reduced by exemption (b)(3), so is the agency's ability to transfer it under the Privacy Act.

Although this decision may be criticized for its reasoning, and the reaction may take the form of an amendment of the Freedom of Information Act, the more likely immediate impact will be the appearance of statutes concerning disclosures to the public drafted to authorize non-disclosure only when other laws specifically prohibit the disclosure of certain types of information, and not merely authorize it to be withheld upon general findings of public interest. This is, for example, the approach taken in S. 5, the "Government in the Sunshine Act".

(Signed) William M. Nichols

William M. Nichols
Acting General Counsel

TAB A

TAB A

[COMMITTEE PRINT]

JANUARY 13, 1976

[Reflecting amendments adopted by the Government Information and Individual Rights Subcommittee through December 17, 1975.]

94TH CONGRESS
1ST SESSION

H. R. 11007

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 4, 1975

MS. ABZUG (for herself, MR. FASCELL, MR. BROOKS, MR. CONYERS, MR. HARRINGTON, MR. MACDONALD of Massachusetts, MR. MCCLOSKEY, MR. MAGUIRE, MR. MOFFETT, MR. MOSS, and MR. RYAN) introduced the following bill; which was referred to the Committee on Government Operations

[Omit the part struck through and insert the part printed in italic]

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government in the Sunshine Act".

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding

the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

SEC. 3. Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

"(a) For purposes of this section—

A MAJORITY OF WHOM ARE APPOINTED TO SUCH POSITION BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE.

"(1) the term 'agency' means the Federal Election Commission and any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, and includes any subdivision thereof ~~composed of or including two or more members and~~ 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 concern the joint conduct or disposition of agency business; and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency, and who is appointed to such position by the President with the advice and consent of the Senate.

"(b) Except as provided in subsection (c), every por-

tion 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, (1) subsection (b) shall not apply to any portion of an agency meeting, and (2) 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 (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) are, in fact, properly classified pursuant to such Executive order;

INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY

"(2) relate solely to the agency's own internal personnel rules and practices;

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

~~This paragraph shall not apply to any officer or employee of the United States or any branch, department, agency or establishment thereof with respect to his official duties or employment;~~

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

~~This paragraph shall not apply to any officer or employee of the United States or any branch, department, agency, or establishment thereof with respect to his official duties or employment;~~

"(6) disclose [information contained in] investigatory records compiled for law enforcement purposes, but only PRODUCTION OF SUCH RECORDS to the extent that the [disclosure] 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, (E) in the case of a record compiled by a criminal law enforcement authority in the cause of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

~~"(6) 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 must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates;~~

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

~~"(7) disclose information which must be withheld from the public in order to avoid untimely disclosure of an action or a proposed action by—~~

~~"(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would be likely to (i) lead to serious financial speculation in currencies, securities, or commodities, or (ii) seriously endanger the stability of any financial institution; and~~

~~"(B) any agency where such disclosure would be likely to seriously frustrate implementation of the proposed agency action.~~

~~This paragraph shall not apply in any instance where the content or nature of the proposed agency action already has been disclosed to the public, or where the agency is required by law to make such disclosure prior to taking final agency action on such proposal;~~

"(7) 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, or (ii) significantly endanger the stability of any financial institution; [and]

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action. This subparagraph shall not apply in any instance where the content or nature of the proposed agency action already has been disclosed to the public by the agency, or where the agency is required by law to make such disclosure prior to taking final agency action on such proposal; or

"(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) specifically concern *the agency's issuance of a subpoena,* the agency's participation in a civil action ~~in Federal or State court~~, *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 deter-

mination on the record after opportunity for a hearing; or

"(3) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

"(d)(1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency 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 portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial portion of a 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 paragraphs (3), (4), or (5) of subsection (c), the agency shall vote by recorded vote whether to close such meeting, upon request of any one of its members. (3) Within one day of any vote taken pursuant to [this] (1) or (2), paragraph, the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question.

[(2)] If a portion of a meeting is closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting, and their affiliation.

(b) Any agency, a majority of the portions of whose meetings may properly be closed to the public pursuant to paragraphs (6), (7) (A), (8), or (9) of subsection (c), or any combination thereof, may provide by regulation for the closing of such portions in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1) [and (2)], (2) AND (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which

such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meetings be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announce-

ment required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(f) (1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (9) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency, by recorded vote taken subsequent to the meeting and promptly made available to the public, determines to contain information specified in paragraphs (1) through (10) of subsection (c). In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion *and* the portion of subsection

(c) and any other statute said to permit the deletion. ~~and a summary or paraphrase of the deleted portion. Such summary or paraphrase need not disclose information specified in paragraphs (1) through (10) of subsection (c).~~ Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

"(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person [without charge] AT NO GREATER THAN THE ACTUAL COST OF DUPLICATION THEREOF OR, IF IN THE PUBLIC INTEREST, AT NO COST.

"(g) Each agency subject to the requirements of this section shall, [on] WITHIN 180 DAYS AFTER THE ENACTMENT OF THIS SECTION or before the effective date of this Act], following consultation with the Office of the Chairman of the

Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. ~~Any~~ *Subject to any limitations of time therefor provided by law, any* person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

"(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section [by declaratory judgment, injunctive relief, or other relief as may be appropriate]. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section,

such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. [Before bringing such action, the plaintiff shall first notify the agency of his intent to do so, and allow the agency a reasonable period of time, not to exceed ten days, to correct any violation of this section, except that such reasonable period of time shall not be held to exceed two working days where notification of such violation is made prior to a meeting which the agency has voted to close; *during such reasonable period, to running of the limitation of time for bringing an action under this subsection shall be tolled.*] Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the defendant to sustain his action, *but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor.* In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, includ-

ing granting an injunction against future violations of this section, or ordering the agency to make available to the public the transcript or electronic recording [of any portion] of a meeting [improperly closed to the public] Except to the extent provided in subsection (i) of this section, nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

"(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceeding, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

"(j) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g), (h), or (i) of this section, except that costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section and against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the

case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

"(k) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(l) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such section to copy or inspect the transcripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

"(m) This section does not constitute authority to withhold any information from Congress, and does not authorize

the closing of any agency meeting or portion thereof otherwise required by law to be open.

"(n) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this ~~title."~~ *title.*

"(o) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.".

SEC. 4. The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552b. Open meetings."

immediately below:

"552a. Records about individuals.".

SEC. 5. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no *interested* person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or

other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any *interested* person outside the agency an ex parte communication relative to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

"(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

"(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

"(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

"(2) This section does not constitute authority to withhold information from Congress.".

(b) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of para-

graph (13) and inserting in lieu thereof "act; and"; and

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.".

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.".

SEC. [6] The provisions of this Act shall become effective one hundred and eighty days after the date of its enactment.]

(a) EXCEPT AS PROVIDED IN SUBSECTION (b) OF THIS SECTION, THE PROVISIONS OF THIS ACT SHALL TAKE EFFECT 180 DAYS AFTER THE DATE OF ITS ENACTMENT.

(b) SUBSECTION (g) OF SECTION 552b OF TITLE 5, UNITED STATES CODE, AS AMENDED BY SECTION 3 OF THIS ACT, SHALL TAKE EFFECT IMMEDIATELY.

SECTION 3. SECTION 552(b)(3) OF TITLE 5 UNITED STATES CODE, IS AMENDED TO READ AS FOLLOWS:

"(3) REQUIRED TO BE WITHHELD FROM THE PUBLIC BY ANY STATUTE ESTABLISHING PARTICULAR CRITERIA OR REFERRING TO PARTICULAR TYPES OF INFORMATION."

[COMMITTEE PRINT]

JANUARY 13, 1976

[Reflecting amendments adopted by the Government Information and Individual Rights Subcommittee through December 17, 1975.]

94TH CONGRESS
1ST SESSION

H. R. 11007

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

By Ms. ABZUG, Mr. FASCELL, Mr. BROOKS, Mr. CONYERS, Mr. HARRINGTON, Mr. MACDONALD of Massachusetts, Mr. MCCLOSKEY, Mr. MAGUIRE, Mr. MOFFETT, Mr. MOSS, and Mr. RYAN

DECEMBER 4, 1975

Referred to the Committee on Government Operations

TAB B

TAB B

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.

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,

(Signed) James M. Frey

James M. Frey
Assistant Director for
Legislative Reference

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.

(1)

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.

(2)

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

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 (3) 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 (4) 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 pre- (5) sently 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 (6) employees surrender their privacy safeguards "with respect to [their] official duties or employment."

The paragraph limiting the utilization of exception (7) should be modified to permit the closing of a meeting even (7) 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, (8) 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 (9) 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 (10) 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 (11) 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 (12) 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

(13) 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. (14) 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. (15) 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 (16) 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 (10) 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 (17) 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.

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. (18)

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. (19)

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 (20)

(21) 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.

(22) 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. (23) 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. (24) 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. (25) 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:

"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."

(26)

(27) 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.

TAB C

ISSUE	SUBJECT	MAJOR	REFERENCE	AMENDMENT	ADOPTED
1.	List the Agencies	Yes			
2.	Definition of Meeting	Yes		Offered by McCloskey	No
3.	Anticipate Records	No		Cover by Report	
4.	Track 552(b)(4)	No		Offered by McCloskey	Yes
5.	Interface with Privacy Act	No		Staff change	Yes
6.	Federal employee Privacy Surrender	No		Offered by McCloskey	Yes
7.	Use of Exemption (7) after leak	No		Offered by McCloskey	Yes
8.	In (7), frustrate policy	No		Report language to cover	
9.	Cover criminal actions in (9) to close	No			
10.	Not limit to State and Federal courts	No		Majority amendment	Yes

TAB C

ISSUE	SUBJECT	MAJOR	REFERENCE	AMENDMENT	ADOPTED
11.	Expand (9) to Foreign courts as basis for closing	No		Majority amendment	Yes
12.	Permit exceptions to 554 to be used to close	No			
13.	Permit closing for 553	No		Offered by McCloskey	No
14.	Conform (1) to 552(b)(3)	Yes		Changed 552(b)(3) Instead	
15.	Require vote of majority of agency to close	Yes			
16.	Permit additional grounds for persons to demand votes to close.	No			
17.	Close more meetings by regulation	No			
18.	Personal liability of members	Yes		Offered by McCloskey	No
18a.	Award of attorney fees to conform to FOIA	No		Offered by McCloskey	No

ISSUE	SUBJECT	MAJOR	REFERENCE	AMENDMENT	ADOPTED
19.	Avoid basis to void action taken by agency	Yes	Listed as an issue since essential not to have.		
20.	Release only on request	Yes			
21.	Permit delegations of authority to release	Yes			
22.	Eliminate (i)	Yes			
23.	Time limit on judicial review actions	No		Majority Amendment	Yes
24.	Eliminate accelerated judicial review	No		Majority Amendment	Yes, from 20 to 40 days.
25.	Interface with F.A.C.A.	Yes		Offered by McCloskey	Yes
26.	Transcript problems	Yes		Offered by McCloskey	No
27.	Ex Parte Communications	No			

TAB D

TAB D

JUL 17 1975

INFORMATION

MEMORANDUM FOR THE DIRECTOR

Subject: Supreme Court Decision on Exemption (b)(3) of the Freedom of Information Act.

On June 24, the Supreme Court in a 7 to 2 decision held that the type of statutory authority which permits the withholding of information from the public when an agency head determines that the disclosure would adversely affect an individual and is not in the public interest falls within the exemption in the Freedom of Information Act as a statute which specifically exempts information from public disclosure, Administrator, Federal Aviation Administration v. Robertson, et al., 43 LW 4833.

The Court held that a statute enacted prior to the Freedom of Information Act which gave the Administrator of the Federal Aviation Administration the authority to withhold information from public disclosure upon the request of a person to whom it pertained, was not repealed by implication by the Freedom of Information Act. Although acknowledging the overall congressional intent behind the Act and its 1974 amendments—to increase the amount of information made available to the public--the Court found the legislative history indicated that while the Congress was aware of the necessity to deal expressly with laws inconsistent with the proposed Freedom of Information Act, there was nothing to indicate an intention to repeal those inconsistent statutes by implication. Indeed, the citations by the Court indicated that the Act was not intended to limit those "... statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." (43 LW 4833, 4836.) At the time there were approximately 100 statutes (cited in the House Report on the Act) which would have been exempted from the Act by that which became 5 U.S.C. 552(b)(3). The Court held that the word "specific" in

that exemption "... cannot be read as meaning that the exemption applies only to documents specified, i.e., by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task" (id, at 4837). The Court held that the 1974 amendments were an endorsement of this construction of exemption (b)(3) of the Act (apparently overlooking the fact that the construction of this exemption was very much in doubt until this decision).

An immediate effect of this decision for OMB involves the Freedom of Information Act litigation brought by Mr. Richardson for certain budget documents pertaining to the CIA. When we initially denied this request we had obtained from the Director of Central Intelligence the determination that there should be no such disclosure since to do so would disclose intelligence sources and methods, and this determination was under conditions statutorily set forth in a manner similar to the authority of the Administrator of FAA.

Another immediate manner in which OMB will be affected concerns the discharge of our statutory authority and our presidentially delegated responsibility to make determinations to close meetings of OMB advisory committees and those Presidential advisory committees for which that function has not been delegated elsewhere. Because the exemptions of the Freedom of Information Act are (by Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. I) also the bases for closing the meetings of advisory committees, this decision may have some effect, although probably not major.

This opinion will not have any effect upon an individual's access to his records under the Privacy Act of 1974 (5 U.S.C. 552a) since that Act specifically states that "no agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section" (5 U.S.C. 552a(q)). To the extent that the information is personal information covered by the Privacy Act and falls within the scope of a statute which is covered by exemption (b)(3) of the Freedom of Information Act, an agency is not free to transfer (e.g., to another agency or individual),

pursuant to the Privacy Act's exemption from the requirement for individual consent, information the release of which "... would be required under [5 U.S.C. 552]" (5 U.S.C. 552a(b)(2)). Therefore, as the amount of information required by the Freedom of Information Act to be disclosed is reduced by exemption (b)(3), so is the agency's ability to transfer it under the Privacy Act.

Although this decision may be criticized for its reasoning, and the reaction may take the form of an amendment of the Freedom of Information Act, the more likely immediate impact will be the appearance of statutes concerning disclosures to the public drafted to authorize non-disclosure only when other laws specifically prohibit the disclosure of certain types of information, and not merely authorize it to be withheld upon general findings of public interest. This is, for example, the approach taken in S. 5, the "Government in the Sunshine Act".

(Signed) William M. Nichols

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