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Calendar No. 343

94TH CONGRESS
1st Session

SENATE

REPORT
No. 94-354

GOVERNMENT IN THE SUNSHINE ACT

REPORT

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

TO ACCOMPANY

S. 5

TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC, AND FOR OTHER PURPOSES

JULY 31, 1975.—Ordered to be printed

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Mr. CHILES, from the Committee on Government Operations, submitted the following

REPORT

[To accompany S. 5]

The Committee on Government Operations, to which was referred the bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

SUMMARY OF THE LEGISLATION

S. 5, the "Government in the Sunshine Act," is founded on the proposition that the government should conduct the public's business in public. The bill requires congressional committees and all Federal agencies subject to the legislation to conduct their meetings in the open, rather than behind closed doors. As a result of this legislation, the public will, for the first time, have the right to observe most of the meetings held by all congressional committees, and by 47 Federal agencies.

The bill also establishes for the first time a clear, statutory prohibition against private ex parte communications between agencies and outside parties on matters being adjudicated by the agency. This provision assures that decisions required by law to be made solely on the basis of a public record will not be influenced by secret discussions that some of the parties to the proceeding, or the public, do not know about.

The bill will help increase the public's faith in the integrity of government, enable the public to better understand the decisions reached by the Government, and better acquaint the public with the process by which agency decisions are reached.

S. 5 in no way changes the substantive laws governing Congress or any agency. It in no way increases the right of the public to actively

participate in any meeting. What it does do is end the secrecy in which many Government decisions are now made.

OPEN CONGRESSIONAL MEETINGS

Title I amends the rules of the House and Senate governing committee meetings, except hearings, by requiring such meetings to be open except in certain specified circumstances.

Sections 101 and 102 require the Senate and the House to hold mark-ups and other committee meetings, other than hearings, in public unless the committee or subcommittee votes to close the meeting on one of five specific grounds. These exceptions cover such matters as national defense and foreign policy, personnel matters, criminal or civil investigations, personal privacy, and trade secrets. The meeting may be closed only if a quorum of the committee votes to close the meeting. Section 104 imposes the same requirements on the meetings of joint committees. Presently, the Senate rules provide that mark-ups and other voting sessions of most committees are closed, unless the committee votes to open them in specific instances, or unless the committee votes to adopt on its own a general, open meeting rule. In the House, such meetings are open unless the committee votes to close them, but the applicable rule does not limit the reasons which a committee may invoke to close the meeting.

Title I does not affect the rules now governing committee hearings because the law already requires them to be open unless committees close them on one or more specified grounds.

Section 103 requires that all meetings of conference committees be open unless either the House or Senate managers determine by a majority vote that the meeting should be closed. The bill does not specify the grounds that may justify closing the meeting of a conference committee. Presently there are no rules governing open conference committees. The House has already passed a rule identical to section 103, but its implementation is contingent upon the Senate passing the same rule.

Section 105 explicitly states that title I is enacted pursuant to the rulemaking authority of both Houses. It recognizes the right of either House to alter the rules as they apply to such House, or to enact other rules.

OPEN AGENCY MEETINGS

Section 201 applies to the Federal Election Commission and the 46 other Federal agencies headed by two or more Commissioners or similar officers appointed by the President with the advice and consent of the Senate. The bill requires meetings between heads of such agencies to be open to the public. A list of the agencies covered by this section is included in the section-by-section analysis of subsection 201(a).

Section 201(a) establishes the basic principle that all meetings between the heads of these collegial agencies must be open to the public. The term "meeting" is defined to include agency deliberations where at least a quorum of the agency's members meet to conduct or dispose of official agency business. Chance encounters which do not involve substantive discussions, and social events at which business is not discussed, would not be covered by the section. Nor does the bill cover

discussions between less than a quorum of the Commission, or discussions between a Commissioner and any number of staff employees.

Subsection (b) provides that meetings can be closed by the agency only by a majority vote of all agency members. As in the case of committee meetings, the bill requires that a meeting may be closed only on one of ten specified grounds. These grounds are based in most respects on the exceptions contained in the Freedom of Information Act. At the same time, an agency may decide that it would, on balance, be in the public interest to conduct in the open even those meetings which fall under one of the exceptions. Closed meetings are never mandated.

To insure that the public knows about agency meetings, and has a chance to attend, the bill requires advance notice of each meeting and its subject matter. If any agency closes any meeting it must announce its decision ahead of time, along with an explanation of its action, and make a verbatim record of the meeting. After the meeting, it must release to the public every major portion of the meeting that did not in fact involve sensitive matters. The bill also provides that if an agency must close a majority of its meetings because its discussions involve certain specified types of sensitive information, the agency may follow expedited procedures when announcing the meeting, or deciding to close it to the public.

The remaining provisions in section 201 establish procedures for enforcing the section's open meeting provisions in court.

EX PARTE CONTACTS

Section 202 establishes an across-the-board statutory prohibition of ex parte contacts between agency decisionmakers and all persons outside the agency where the purpose of the contact is to discuss the merits of any matter being formally adjudicated by the agency. The new rule will prevent secret communications between the agency and an outside person interested in the outcome of a proceeding. The section, applicable to all agencies in the executive branch, whether or not they are multiheaded, replaces the very limited provisions in the Administrative Procedure Act now governing ex parte communications.

Section 202 applies to formal agency adjudications and rulemaking proceedings which are adjudicative in nature (so-called formal "on-the-record" rulemaking). In such cases all communications between agency officials and any outside person must either be on the public record, or have been preceded by reasonable notice to all parties. Whenever any communication occurs in violation of this section, the material submitted, or a record of the oral conversation held, must be placed in the public record of the proceeding. Whenever any person knowingly engages in such illegal communications with agency officials about a pending case, the agency may, in its discretion, take action on the merits against such party. This last provision reflects case law approving similar remedial action which agencies have taken on their own. See, e.g., *Jacksonville Broadcasting Corporation* v. *FCC*, 348 F. 2d 75 (1965).

Section 202 strengthens ex parte provisions now in the Administrative Procedure Act in a number of ways. It extends the persons governed by it to include all those agency employees involved in the de-

cisionmaking process, including commissioners. Currently only hearings examiners are covered. It broadens the type of agency proceedings covered so as to include not only formal adjudications, but also formal rulemaking proceedings governed by the same rules as formal adjudications. It specifies that the prohibition against ex parte communications shall start at an early point in the proceedings. It applies to all communications "relevant to the merits of the proceedings." It precisely spells out for the first time the corrective steps that an agency official must take if an ex parte communication does take place. And it specifically provides for sanctions that an agency may impose against any person violating the rules on ex parte communications.

Background and Purpose of the Legislation

This bill represents the logical extension of legislation passed by Congress over the last decade designed to open the government's decisionmaking process to the public.

In 1955 the House of Representatives created a Special Subcommittee on Government Information chaired by Rep. John E. Moss (D.-Calif.). The investigative and legislative hearings held by that panel contributed significantly to the creation and enactment in 1966 of the Freedom of Information Act, 5 U.S.C. 552. In 1972, while major oversight hearings were underway regarding the administration and operation of the Freedom of Information Act, in particular, and government information policy in general, another attempt to open the people's business to public view culminated in the enactment of the Federal Advisory Committee Act, 5 U.S.C. App. I. In addition to its other provisions, this statute establishes the presumption that the meetings of advisory committees and study panels should be open to the public.

In 1974 the Congress enacted new legislation amending and strengthening the public's right to gain access under the Freedom of Information Act to information in the government's possession.

This bill is fully in accord with the principles and aims of the previous legislation.

One important effect of the bill will be to increase the public's confidence in government. Mr. Lou Harris, a leading pollster, summed up the current public mood during committee hearings on the Government in the Sunshine legislation as follows:

> At this point in our history, the people are roundly fed up with what they feel is incompetence, inefficiency, corruption, lack of real public interest, and just plain lack of decency in the governing circle of this country. I do not say that idly, Mr. Chairman. Most of all, people are firmly wedded to the notion that if the Federal Government were opened up, rather than gross inefficiencies and lack of candor resulting, to the contrary, an opening of the Federal decisionmaking process would indeed lead to wiser, sounder, more creative and better decisions. (Hearings on S. 260, 1974, p. 163.)

The committee is confident that the public will be favorably impressed by the integrity, competence, and dedication of the great majority of agency heads. Open meetings will thus help increase the

public's confidence in government by permitting the public to observe firsthand the responsible way agency heads carry out their duties.

On the other hand, where the government is not functioning as well as it could public exposure should help insure that the quality of work remains at the highest possible level. The committee believes that it would be far less damaging to government if the facts, regardless of their nature, were disclosed openly to the public and the press, rather than emerging only indirectly through speculation or scandal.

Press speculation or partial leaks of information are often more damaging than the actual facts. (See, e.g., Hearings on S. 260, 1974, pp. 16, 217, 295.) Where the press must rely on leaks for its information there will inevitably be inaccuracies as well as partisan or self-serving statements.

As John Gardner, Chairman of Common Cause, said when testifying in strong support of S. 5:

> Secrecy is fatal to accountability. Citizens cannot hold government officials accountable—if they do not know what government officials are doing. All of the great instruments of accountability that the citizen must depend on—Congress, the courts, the electoral process, the press—may be rendered impotent if the information crucial to their functions is withheld. (Hearings on S. 260, 1974, p. 51.)

The public is naturally more distrustful of government conducted in secret. This suspicion arises in large part from the fact that meetings are closed, not from any specific evidence that improper or illegal activities are taking place behind closed doors. Regardless of what the public actually learns about the government, the fact that this bill opens meetings formerly closed should in itself remove an important source of any distrust the public may have of government.

In addition, this bill should enhance greatly the public's understanding of the decisions reached by the government. The Freedom of Information Act enables the public to review many of the domuments on which government decisions are based. These represent a record of what has already transpired. Yet up to now the public has not had a full opportunity to learn how or why government official make the important policy decisions which they do. All too often the meetings at which such decisions are made are closed to the public. Interested persons must content themselves with elementary minutes, or background papers tangentially related to the official agenda. Formal statements in support of agency actions are frequently too brief, or too general, to fully explain the Commission's reasoning, or the compromises that were made. As a result, the public may not understand the reasons an agency has acted in a certain way, or even what exactly it has decided to do. By requiring important decisions to be made openly, this bill will create better public understanding of agency decisions.

The committee believes that this openness will significantly increase cooperation between the public and government agencies. It will enhance the public's comprehension of the difficult choices agencies must often make. and provide a greater appreciation of the problems they face. Moreover, openness will better demonstrate what facts and policy considerations the agency found important in reaching its decision, and what alternatives it considered and rejected. As citizens listen to debate

between the heads of an agency, they will be able to identify precisely the issues that are of most concern to the agency.

Greater public understanding of the exact nature and reason for agency decisions should also promote greater compliance. Members of the public directly affected by an agency's action will no longer have to guess what exactly is expected of them as a result of a particular decision. They will know not only what the agency decided, but the purpose and intent of the agency's actions.

Finally, as all elements of the public gain an equal opportunity to learn about the issues and problems confronting agencies, wider and more informed public debate of the agency's policies becomes possible. Increased public interest and discussion cannot help but contribute to improve decisionmaking process.

One of the leading scholars on administrative law, Professor Kenneth Culp Davis of the University of Chicago Law School, summarized his strong support of the Government in the Sunshine legislation as follows:

> Open meetings would at first cause consternation and opposition. But gradually open meetings would be accepted. Making more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on one side and media and pressure groups of the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced. (See *Government in the Sunshine: Responses to Subcommittee Questionnaire*, Government Operations Committee Print, 1973, p. 67.)

The success Congress and the committee have recently had in opening its activities to the public confirms the effectiveness and practicality of S. 5.

In the first year after the House in 1973 adopted a rule requiring committees to hold their bill-drafting meetings in public, unless the committee voted to close the meeting, 80 percent of all mark-ups were open to the public. Previously, every committee but one conducted its mark-ups in private (Hearings on S. 260, 1974, p. 47). In 1974, the number of open committee mark-ups in the House increased to 88 percent. In 1975 the House confirmed the success of such open government legislation by re-enacting its rule on open committee meetings. At the same time it strengthened one of its provisions.

This committee believes that its own experience with open mark-ups has clearly been a success. Since the committee adopted a rule requiring open mark-ups, it has not voted to close a single one. Conducting mark-ups in public has not interfered with the orderly and efficient conduct of business.

The Senate Committee on Banking, Housing and Urban Affairs, and the Committee on Interior and Insular Affairs have had similar rules since 1973. These committees also conclude without hesitation that the open-meeting rule has neither interfered with their work, nor inhibited free and open discussions. (Hearings, pp. 92–94, p. 104.)

Over the last 2 years the Government Operations Committee, the Banking, Housing, and Urban Affairs Committee, and the Interior Committee have dealt effectively in open sessions with such important and often controversial legislation as the Congressional Budget and Impoundment Control Act of 1973, the Energy Reorganization Act of 1973, the Housing and Community Development Act of 1974, the Export-Import Bank, and legislation concerning energy allocation, land use policy, consumer protection, and surface mining and mineral leasing.

Open meeting laws are also a widely accepted and successful part of State law. Forty-nine States now have open meetings laws, and thirty-five States have constitutional provisions relating to open government.

State laws on open government have developed largely since 1950, when only one law was in effect. In the last few years especially, such legislation has gained wide acceptance at the State level. Nine new laws were passed during 1972–73. In 1974, ten States strengthened existing legislation. Moreover, no open meeting law has been repealed except to be strengthened. Several States have also recently amended their constitutions to add more comprehensive provisions on open government.

Forty-nine States open state-level agencies. Forty-four States provide for open meetings of county and city level nonlegislative agencies, as well as city councils and county boards. Currently, State legislatures in 35 States open committee deliberations to the public. In contrast, only 17 States opened committee meetings to the public as a matter of course in 1972. The appendix to this report contains a summary of the open meeting laws in all 50 States.

The State of Florida has the most comprehensive open meetings law in the country. The Florida law opens to the public all discussions and deliberations of government where "official acts are to be taken." Since its passage in 1967, Florida's "Sunshine Law" has been well received by the judiciary. The courts have neither significantly limited the broad scope of the law, nor riddled it with exceptions. Indeed, the judicial acceptance of this strong open government law has fostered the development of similar laws in other States.

Governor Reubin Askew of Florida, testifying on the Florida law before the committee, stated that ". . . Predictions that too much sunshine would lead to unnecessary embarrassment of public employees, costlier land acquisitions, and other problems have not been borne out by the Florida experience." A major study of the Florida law by the Center for Governmental Responsibility polled city councilmen across the State and found that 77 percent favored the law, though several exemptions, similar to those in S. 5, were proposed.

The committee received views in support of open meeting laws from the Attorney General's Office in a number of other States as well. The Attorney General of California told the committee that open meeting requirements have generally had a "salubrious effect" in that State. The Attorney General of Washington believes the law in that State "has been beneficial to the citizens" of the State and "has led to increasing awareness by those deliberative bodies affected by it for the need to adequately prepare themselves for meetings." The Attorney General

of North Carolina concludes that the State's open meetings bill "has substantially improved the governmental process," and that it has "helped increase public confidence in government."

The all but universal trend at the State level in favor of Government in the Sunshine legislation is clear evidence that such legislation is both practical and beneficial. Such widespread adoption of the legislation would not have occurred had the States found them unsuccessful or unworkable. One recent commentary on such State laws in fact concluded that "contemporary arguments by commentators in opposition to such laws are virtually nonexistent." (45 Mississippi Law Journal 1151, 1162.)

In short, this committee is convinced that past experience with open meeting legislation constitutes strong grounds for believing that the Federal Government will benefit significantly from general legislation requiring meetings in both the executive and legislative branches to be open.

Section 202, prohibiting ex parte contacts, answers a similar need to insure openness in the way the Government decides formal adjudication and rulemaking proceedings.

Ex parte contacts made secretly between one party to the proceeding and an agency official prevent other interested parties from countering the arguments presented. It may also make it impossible for the public to understand why an agency decided the case as it did. Such contacts make it difficult for Congress to exercise effective oversight of the practices and policies of regulatory agencies. In short, ex parte contacts are totally inconsistent with the principle of open government.

Although the undesirability of ex parte contacts has long been recognized, the Administrative Procedure Act contains no general provision specifically prohibiting them. Section 202 amends the Administrative Procedure Act to clarify and reemphasive the extreme seriousness with which ex parte contacts should be viewed. It provides clear notice to all concerned that ex parte contacts are not only illegal, but may actually result in the agency finding on the merits against a party who knowingly violates the provision.

The need for regulation of ex parte contacts in adjudicative proceedings was first dramatized by the exposure of improper influence in the granting of broadcast licenses by Federal agencies in the 1950's. The 1961–62 Administrative Conference attempted to deal with the problem by recommending that each agency promulgate a code of behavior governing ex parte contacts. While a number of the agencies did formulate such rules, they vary greatly in the types of contacts covered. Furthermore, rules adopted by an agency may be modified or repealed by the same agency at any time. Such rules lack the authority and permanence of a general statutory prohibition of ex parte contacts.

In 1963 Administrative Law Section of the American Bar Association undertook a study of the Administrative Procedure Act, including a review of its ex parte provisions. In 1970 the House of Delegates of the American Bar Association endorsed enactment of a broad rule prohibiting ex parte contacts. Between 1970 and 1974 an Association committee drafted language implementing this resolution. Section

202 of the bill follows closely the wording developed by the American Bar Association.

In 1884 Woodrow Wilson stated:

> Light is the only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments—light blazed full upon every feature of legislation—light that can penetrate every recess or corner in which any intrigue might hide; light that will open to view the innermost chambers of Government.

The committee fully agrees.

History of Legislation

The legislation was initially introduced as S. 3881 on August 9, 1972, by Senator Lawton Chiles.

While there was informal consideration of the bill during the 92d Congress, no legislative action was taken. As a consequence of these discussions, a more developed and comprehensive proposal was drafted and offered by Senator Chiles in the 93d Congress. Introduced on January 9, 1973, with several cosponsors, the measure (S. 260) contained two titles, one pertaining to congressional committee proceedings and one governing executive branch agency meetings. A new section regarding ex parte communications was added to the latter title.

In the summer of 1973, the Subcommittee on Reorganization, Research, and International Organizations, chaired by Senator Ribicoff, solicited the views of public administration experts, legal scholars, representatives of the media, and professional organizations. (See *Government in the Sunshine: Responses to Subcommittee Questionnaire*, Senate Government Operations Committee Print 1973). An overwhelming majority of the responses to the questionnaire strongly supported Government in the Sunshine legislation.

Two days of hearings on S. 260 were held by the subcommittee on May 21 and 22, 1974, under the direction of Senator Chiles. An additional day of hearings was held on October 15.

The bill was reintroduced by Senator Chiles as S. 5 on January 15, 1975.

On May 12, the Subcommittee on Federal Spending Practices, Efficiency, and Open Government, meeting in open session, unanimously adopted an amended version of S. 5. The full committee met in open session on June 18 and July 9, and the bill, as further amended, was ordered reported by the full committee on July 9th by a unanimous vote.

In preparing this legislation the committee has consulted with a large number of legal experts both within the government and the private sector. It received comments on the legislation from 43 agencies of the government.

During its consideration of S. 5 the committee made a large number of amendments to the bill in response to suggestions by members of Federal agencies, Congress and the public. These amendments further insure that the Government will be able to open their activities to the

public without imposing unnecessary procedural burdens on the Government, or interfering with the Government's effectiveness. The following is a summary of some of the more important amendments adopted by the committee.

Sections 101 through 103 have been revised to conform in most respects to S. Res. 9 and S. Res. 12 and the provision in the Congressional Budget Act of 1974, Public Law 93–344, enacted by Congress in 1974. A number of the procedural requirements contained in the original bill were eliminated.

Section 201 was amended in a number of ways. The scope of section 201(a) was limited so that is applies only to those multiheaded agencies headed by Officials appointed by the President with the advice and consent of the Senate. The definition of "meeting" was redrafted to exclude many discussions which are informal in nature. Subsection (b) was amended to provide agencies with additional flexibility to close meetings where necessary. A number of paragraphs were added specifying additional grounds justifying a closed meeting, and the scope of other paragraphs, such as the one governing adjudication, was broadened. Another amendment provides that an agency may withhold information about a meeting for the same reasons that may require the agency to close the meeting in the first place. Other wording added to subsection (b) clarifies the right of an agency to close a meeting where it determines that the meeting can be reasonably expected to involve sensitive matters. Absolute certainty is not required on the part of the agency. The section is not intended to require such a showing of certainty in any judicial proceeding invoking this section.

Amendments to subsection (c), (d) and (e) relieve agencies of a number of the procedural requirements contained in the original bill. One amendment to subsection (c) authorizes agencies in certain cases to issue general regulations specifying in advance the meetings that must be closed. Another amendment gives agencies the right to change on short notice the agenda of their meetings, or to revise their prior decisions to open or close meetings. The public announcement an agency must make of its meetings was expanded to include notice in the Federal Register either before or after the meetings is held.

Instead of requiring an agency to maintain a transcript or electronic recording of all its meetings, subsection (e) was amended to require a verbatim record of only those meetings closed to the public. Meetings discussing cases in adjudication were exempted from the requirement of a verbatim record in all cases. Other changes provide that agencies will not have to edit the transcripts in great detail, nor provide written explanations of any deletions it makes in the transcripts released to the public.

Other amendments to section 201 prevent district courts from overturning agency action taken at a meeting improperly closed to the public, and strictly limit the ability of a court to assess the costs of litigation against an individual agency member.

The wording in section 202 governing ex parte contacts was changed in several ways. One amendment limits the authority of an agency to rule on the merits against a party committing an ex parte violation. As now worded, an agency may rule against such a party only where the violation was knowing. Similarly, wording was added making a

communication by one person, on behalf of another, ex parte only where it was done with the knowledge of the other person. Another amendment deletes a provision in the original bill that exempted ex parte communications from certain types of persons who were neither parties, intervenors, nor Government officials. The provision granting the district court jurisdiction to enforce the requirements of the section was deleted.

Finally, provisions were added to section 203 clarifying the relationship between this bill and the Freedom of Information Act and the Privacy Act.

Section-by-Section Analysis

INTRODUCTORY SECTIONS

Section 1. This section states that the bill may be cited as the "Government in the Sunshine Act."

Section 2. This section establishes as the policy of the United States the principle that the public should have the fullest practicable knowledge about the decisionmaking process of the Government. It is the purpose of the bill to implement this policy without infringing upon the rights of individual citizens and the ability of the Government to carry out its responsibilities. The provision thus reaffirms the principle that openness is desirable in a democratic Government. It is the intent of this bill that governmental bodies conduct their deliberations in public to the greatest extent possible. At the same time, the section explicitly recognizes that the bill must also protect the ability of the Government to carry out its responsibilities, and protect the rights of individuals, such as the right of privacy, or the right to a fair and impartial trial. The bill's provisions have been drafted in full recognition of the fact that Government, if it is truly to serve the public, must not only be open, but also effective and fair.

Section 3. This section defines "person" in the same way as the Administrative Procedure Act, and should be interpreted in the same way as that act. The definition includes an individual, but excludes an agency.

Title I—Congressional Procedures

SECTION 101—SENATE COMMITTEES

Section 101(a). Paragraph (1) strikes the portion of section 133(b) of the Legislative Reorganization Act now governing executive sessions of Senate committees. The present rule provides that markups and other voting sessions of the committee will be closed unless the committee votes to open them in specific instances, or unless the committee votes to adopt on its own a general open meeting rule.

Paragraph (2) amends the Legislative Reorganization Act to provide new rules governing all meetings of a Senate committee or subcommittee discussing committee business, with the exception of hearings. The section establishes a presumption in favor of openness of all Senate committee meetings in accordance with the general policy of the bill. Openness should be the rule and secrecy the exception. The new rule requires that all committee meetings, other than hearings, shall be open unless a majority of the members of the committee or

subcommittee present decide by record vote to close the meeting, or a portion of the meeting, on one of five specified grounds.

These five grounds are designed to cover those instances when it may be necessary for a committee to meet in closed session. Even if a matter does come within one of these five provisions, the committee must decide in each particular case whether the need for secrecy outweighs the general need for openness in Government. Since this judgment must be made in each case, with full recognition of all the facts, the rule requires the committee to vote on each meeting separately. The committee may not adopt general rules closing certain types of meetings. If a committee discussion of a particular matter is extended over several days, the committee should vote at the beginning of each day's meeting whether to close the meeting. Where only a portion of a committee meeting needs to be closed to the public, the committee should arrange for the remainder to be open.

The five grounds which a committee may invoke to close a meeting are listed in clauses (1) through (5) of the new rule.

Section 101(a)(1) exempts matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States.

This exemption is similar to that in the Freedom of Information Act, as amended (5 U.S.C. 552(b)(1)). The meaning that the terms "national defense" and "foreign policy" have under that act should provide guidance to Congress in implementing this provision. However, since the section applies to the Congress, not the executive branch, the exemption does not expressly rely on the status any material may have under executive branch rules of classification.

Section 101(a)(2) exempts matters relating solely to committee staff personnel or internal staff management or procedure. The provision recognizes that discussions involving such matters as the hiring of a particular individual to serve on the staff of the committee should be be closed so as to enable a candid discussion of the individual's qualifications.

Section 101(a)(3) exempts matters which will tend to charge an individual with crime or misconduct; injure the professional reputation of any individual, or expose any individual to public contempt or obloquy; or represent a clearly unwarranted invasion of an individual's privacy.

Any committee must be aware of the effect publicity arising from one of its meetings may have on an individual's reputation. Special care must be taken not to unfairly injure an individual's reputation by unconfirmed or misleading statements. However, the language of the exemption should not be read as justifying the closing of every committee meeting that may in some way affect an individual's reputation. Such restrictiveness would not be in accord with the intent of either the bill or this clause. In each case, the committee will have to balance the possible harm to the individual against the need for openness in Government. The possibility that one member of the committee might make a casual remark concerning some individual might not constitute grounds for closing a meeting, whereas formal consideration of committee action in some way censuring an individual might justify closing the meeting.

In deciding whether to close a particular meeting, different standards should apply to private individuals and public officials. The public has a right to know fully about the actions of Government officials

in their public capacity. What is considered an invasion of privacy of a private citizen may be justified when the official conduct of a public employee is involved.

Section 101 (a) (4) exempts discussions that would disclose the identity of an informer or law enforcement agent, or that would disclose information relating to the investigation or prosecution of any civil or criminal violation of law that must be kept confidential in the interests of effective law enforcement.

It is expected that this provision will be applicable primarily to meetings concerning such aspects of a committee investigation as the issuance of a subpena. Premature disclosure of the committee's decision to issue the subpena could destroy its effectiveness.

Section 101 (a) (5) exempts matters disclosing trade secrets or commercial or financial information where such matter is required to be kept secret by a statute, or where the information was obtained on a confidential basis and disclosure would cause undue injury to a person's competitive position.

Trade secrets and commercial or financial information must meet the same tests under this exemption. The information can not be generally applicable to an industry, but must "pertain specifically to a given person." The information discussed at the meeting must directly involve such sensitive matters, not merely be peripherally related to them.

The criteria established in clause 5(A) is applicable only to statutes which specifically requiring trade secrets or commercial or financial information to be kept confidential. General statutes which permit government officials to withhold information in the public interest do not meet this test. For example, it does not include the general type of statute involved in *Administrator, FAA* v. *Robertson*, 95 S. Ct. 2140 (1975).

Clause 5(B) establishes an alternative basis for closing meetings under this provision. Two criteria must be met. First, the government must have obtained the information under a pledge of confidentiality. Secondly, the information must be kept confidential in order to prevent undue injury to the competitive position of the person to whom the information specifically relates. In deciding whether the competitive injury would be "undue," the committee will have to balance the legitimate public interest in attending the meeting against the degree to which disclosure would substantially and unfairly injure a person's business interests.

Section 101(b). This subsection is a conforming amendment repealing the present provision in the Standing Rules of the Senate governing the meetings, other than hearings, of all standing committees.

Section 101(c). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new provision governing Senate committees enacted by section 101(a) of the bill.

SECTION 102—HOUSE COMMITTEES

This section amends the rules of the House of Representatives now governing all meetings, other than hearings, by adopting exactly the same rules as section 101(a) adopts for the Senate. The present rules of the House provide that all such meetings, except those involving internal committee budgets or personnel matters, will be open unless

the committee votes to close them. Since the rules do not specify the grounds that justify closing a meeting, a committee may close a meeting for any reason.

Section 102 would require House committees to close their meetings only under the same specified circumstances as permit a Senate committee to close its meetings under section 101(a). Public understanding of the rules governing open meetings in the Congress will be enhanced if the same open-meeting rules govern committee meetings in both Houses. However, this provision is included with full recognition of the right of the House of Representatives to establish its own rules governing committee meetings. Section 105 of the bill specifically reserves the right of the House of Representatives to adopt different rules should it wish to do so.

SECTION 103—CONFERENCE COMMITTEES

Section 103(a). This subsection adds a new provision to the Legislative Reorganization Act to govern conference committees. The rule provides that conferences between the Senate and the House will be open to the public unless the managers of either the Senate or House in open session decide to close the meeting on that particular day by a rollcall vote of the majority of such managers present.

The provision is identical to a resolution the House has already approved this year, House Rule XXVIII, clause 6. The House action must await Senate action before it can become effective. While the provision establishes a presumption of openness, either House reserves the right to close a meeting of a conference committee should it so wish.

Section 103(b). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new rule on House-Senate conferences.

SECTION 104—JOINT COMMITTEES

Section 104(a). This subsection amends the Legislative Reorganization Act by adopting rules governing joint committee meetings. The rules are identical to the rules section 101(a) establishes for the meetings of Senate committees and section 102(a) establishes for the meetings of House committees. They should be interpreted and administered in the same way.

Section 104(b). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new rules governing the meetings of joint committees.

SECTION 105—EXERCISE OF RULEMAKING POWERS

This section specifies that the rule changes contained in title I are enacted pursuant to the rulemaking authority of the Senate and the House of Representatives.

It recognizes that under the Constitution either House retains the full right to subsequently change the rules established by title I insofar as they apply to such House, regardless of the actions of the other House. It is in no way the intent of the committee to interfere with the right of the House of Representatives to adopt other rules governing the opening of committee meetings should it so wish.

TITLE II—AGENCY PROCEEDINGS

SECTION 201—OPEN MEETINGS

Section 201(a). This subsection extends the principles of open government to Federal agencies by requiring meetings between the various heads of a multiheaded agency to be open to the public. The Declaration of Policy in section 2 applies with equal force to title I and title II. Subsection (a) also defines the specific agencies, and the specific types of meetings, subject to the open meeting requirement.

AGENCIES INCLUDED

Subsection 201(a) defines "agency" as in the Administrative Procedure Act. A governmental body may fall within the Administrative Procedure Act definition, and thus fall within section 201, assuming it qualifies under the other tests established by the subsection, even if that agency is not actually governed by the other provisions of the Administrative Procedure Act.

Section 201 does not apply, however, to all agencies. To be subject to the section's open meeting provisions, the collegial body comprising the agency must consist of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate. Because of the unique nominating and confirmation process governing appointments to the Federal Election Commission, this agency is included by specific reference. The term "collegial body comprising the agency" does not refer to a single individual who heads an agency with the assistance of staff, nor to the staff of an agency. The term is limited solely to the two or more individuals serving on the commission or board which heads the agency, though it does include meetings of such a body when agency staff or outside individuals are also present.

The subsection does not cover bodies typically known as advisory committees. However, it does include other bodies comprised of part-time Government employees which meet from time to time to review agency activities and give guidance to staff, approve staff actions, review and approve the agency's proposed budget, and so on. Such a board would constitute "the collegial body comprising the agency" even though day-to-day supervision is provided by a single Administrator.

Any body that is subject to this bill shall not at the same time be subject to the provisions of the Federal Advisory Committee Act. Similarly, any body that is now governed by the Federal Advisory Committee Act, or which is determined in the future to be governed by that act, is not governed by this bill. The committee will rely on the continuing oversight of the Subcommittee on Reports, Accounting, and Management to insure that any body that is properly subject to the Advisory Committee Act will continue to follow the provisions of that act.

The following is a list of agencies that in the committee's judgment are covered by this section. It is based on consultations with the Department of Justice. In the final analysis, however, the wording of section 551 of title 5 and this subsection, rather than this list, must govern:

Board for International Broadcasting;
Civil Aeronautics Board;

Commodity Credit Corporation (Board of Directors);
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Reserve Board;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors);
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Parole Board;
Railroad Retirement Board;
Renegotiation Board;
Securities and Exchange Commission;
Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights;
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

S. 5 does not mandate open meetings in the case of single-headed agencies, such as the Departments of Defense, Commerce, or Treasury,

because of the different nature of such agencies. Multiheaded agencies operate on the principle of give-and-take discussion between agency heads. There is a tradition of public dissent; though the agency takes a final action, it does not necessarily speak with one voice. The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking.

The single-headed agency operates differently. Only the single head is ultimately responsible for agency actions, while the staff functions as extensions of the head. Opening staff meetings presents many complications, not the least of which is determining which of the innumerable staff meetings that occur every day should be open. While these difficulties may not be insurmountable, they require a different approach than used in section 201.

It is the committee's hope that each agency not covered by section 201 will closely examine its internal procedures and take on its own every step it can to open up its decisionmaking process, including meetings, to the public. This might include, for example, opening to the public meetings between agency officials and outside parties, and providing the public with more information about why an agency took a particular decision, and the alternatives it considered.

Section 201(a) covers all multiheaded agencies, because the principle of openness applies to all such agencies regardless of the particular nature of its responsibilities. While many of those covered are regulatory, others have more general policymaking roles. The decisions of one may involve no less important policy questions than the decisions of the other. Opening one type of meeting to the public is as important as opening another type. The notion of including some multiheaded agencies in section 201 and excluding others would do violence to the fundamental purpose of the legislation, which is to open Government to the people wherever and whenever possible.

Section 201(a) provides that all meetings of the individual Commissioners, board members, or the like, except those discussions exempted by subsection (b), must be open to the public. Included within this requirement are meetings of agency subdivisions authorized to take action on behalf of the agency. The open meeting requirement applies to panels of a Commission, or regional boards, consisting of two or more agency heads and authorized to take action on behalf of the agency. To be a subdivision of an agency covered by this subsection, the panel need not have authority to take agency action which is final in nature. Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the subsection to open their meetings to the public.

Some agencies do not vest all power in the multiheaded body, but reserve certain functions for the chairman alone. In such cases, meetings of the chairman with staff members, or even with other individual agency heads, acting solely as informal advisers, would not have to be open.

Interagency meetings between members of one agency and officials from other agencies would not come within the provisions of this section unless a majority of the members of one or more of the agencies attended the meeting. Similarly, interagency committees are excluded from this section.

DEFINITION OF MEETING

The definition in subsection (a) of the meetings required to be open to the public is a critical part of the section. A 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 official agency business. In addition to business meetings of the agency, it includes hearings and meetings with the public.

To be a meeting the discussion must be of some substance. Brief references to agency business where the commission members do not give serious attention to the matter do not constitute a meeting. A chance encounter where passing reference is made to agency business, such as setting a time or place for the agency heads to meet, would not be a meeting. A luncheon attended by a majority of the Commissioners would not be a meeting subject to the bill simply because one Commissioner made a brief, casual remark about an agency matter which did not elicit substantial further comment. The words "deliberation" and "conduct" were carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of this section.

The definition of meetings includes the conduct, as well as the disposition, of official agency matters. It is not sufficient for the purposes of open government to merely have the public witness final agency votes. The meetings opened by section 201(a) are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny.

To constitute a meeting for purposes of this section the requisite number of agency heads must at least be potentially involved in the discussion. The use of the word "joint" is intended to exclude instances where one or more agency member gives a formal speech concerning agency business, and other members of the commission are in the audience. The word also excludes instances where a single agency head, authorized to conduct a meeting on behalf of the agency, or to take action on behalf of the agency, meets with members of the public, or staff. In all cases, the meeting must involve at least two agency members for the deliberations to be joint.

The deliberations must also involve "official agency business." Discussions among all the agency heads about a purely social gathering do not concern official business of the agency, and would not come within the terms of the subsection. On the other hand, the mere setting of the gathering is not determinative whether a gathering is a meeting for purposes of this subsection. Discussions held in the board room or the Chairman's office are not the only gatherings covered. Conference telephone calls and meetings outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the require-

ments of this subsection. The test is what the discussion involves, not where or how it is conducted.

The reference to the number of individual agency members required to take action means a quorum. In some cases this may mean a simple majority. In other cases, such as a hearing or a meeting conducted by agency members on behalf of the agency, it may be less than a majority of the agency, and as few as two agency members. In three-member agencies, two members will constitute a quorum. This situation will require special sensitivity and judgment. It is not the intent of the bill to prevent any two agency members, regardles of agency size, from engaging in informal background discussions which clarify issues and expose varying views. When two members are less than a quorum, such discussions would not in any event come under the section's open meeting requirements. When two members constitute a quorum, however, the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions. Members of such agencies must use their judgment in these situations, again with the awareness that this bill carries a presumption of openness. Their discussions should remain informal and preliminary to avoid the open meeting requirement.

EFFECT OF SUBSECTION 201(a)

Any meeting falling outside the definition in subsection (a) is not subject to any of the other provisions of the bill. If a meeting does come within the terms of section 201(a), it must be open to the public unless it involves matters described in subsection (b). Except as otherwise provided in the bill, the agency must provide the public with certain information about the meeting, whether or not it is open to the public, and keep a verbatim record of meetings closed to the public unless they involve cases of adjudication. These requirements are described elsewhere in the section.

When a meeting must be open, the agency should make arrangements for a room large enough to accommodate a reasonable number of persons interested in attending. Holding a meeting in a small room, thereby denying access to most of the public, would violate this section and be contrary to its clear intent.

Nothing in subsection (a) requires an agency to permit the public to actively participate in the meeting. Other statutes and agency regulations and policies continue to govern such participation. Section 201(a) only gives the public the right to attend meetings, to listen and to observe.

Section 201(b). The requirements of section 201(a) establish a presumption in favor of open meetings. Subsection (b) allows an agency to close a meeting under certain circumstances, but these are exceptions to the underlying rule of openness. Agencies wishing to close a particular meeting will have the burden of justifying their actions. This approach reflects the philosophy of the bill that most government business can and should be conducted in the public eye. Workable limitations on openness are provided, but this section assures that openness is no longer to be conceived as an exception to the rule of secrecy.

Subsection (b) establishes 10 grounds on which an agency may vote to close meetings or portions of meetings to the public despite the rule of openness established by subsection (a). These exemptions apply equally to agency subdivisions authorized to take agency action. Closing a meeting on these grounds is permissive, not mandatory. The agency should not automatically close a meeting because it falls within an exception. The phrase "Except where the agency finds that the public interest requires otherwise," emphasizes that an agency may still decide that the public good achieved by opening the meeting outweighs the advantages to be gained by closing it.

In addition to closing a meeting, an agency may, on the same 10 grounds, withhold information about the meeting otherwise required by subsections (c) and (d) to be disclosed. For example, an agency need not disclose the subject matter of a closed meeting, or supply a list of those persons attending the meeting, and their affiliation, if that would disclose the very information that the meeting itself was closed to protect.

As with sections 101, 102, and 104, this section provides specific exemptions rather than grants of broad, discretionary authority to agencies to close their meetings. This is in accordance with the bill's policy that most meetings should be open, and closed meetings an exception. These exemptions should not be used to circumvent the spirit of openness which underlies this legislation.

The 10 exemptions apply when the agency "properly" determines that a closed meeting is appropriate. Improper determinations are subject to enforcement proceedings detailed in subsections (g) and (h). In making its determination, the agency's must fairly conclude that the meeting "can reasonably be expected" to fall within one of the 10 exemptions. Thus an agency wishing to close a meeting need not meet the test of absolute certainty, for it might not be possible to know exactly what information the meeting will disclose. Rather, there must only be a reasonable likelihood, based on the nature of the issue, past experience with the similar discussions, and the expressed intent of agency members to raise a sensitive matter. Where the possibility that a meeting will involve exempt matters is fairly remote, the meeting should begin as an open one. If the discussion does become sensitive, the agency may always vote to close the session.

The 10 grounds provided in the act for closing a meeting are as follows:

Section 201(b)(1). This paragraph covers meetings which disclose information specifically required to be kept secret by an Executive order in the interests of national defense or foreign policy, and which is properly classified pursuant to such Executive order.

The wording exactly follows the 1974 amendment to the Freedom of Information Act, 5 U.S.C. section 552(b)(1). The phrases "national defense" and "foreign policy" should be given the same meaning as in the Freedom of Information Act.

Subsection (e) requires an agency to keep a transcript or electronic recording of a meeting closed to the public, and subsection (g) allows a court to examine the record or other information before ordering its release or opening a meeting. A court should therefore be able to determine whether an agency is acting properly if it relies on this pro-

vision to close a meeting to the public. A holding analogous to that in *E.P.A. v. Mink, et al.*, 410 U.S. 73 (1973), in which the court declined to permit in camera inspection of classified documents, would be contrary to the intent of this exemption. It is expected that courts will at their discretion examine documents in camera to determine the propriety of the agency's action. Such examination need not be automatic, but in many situations will definitely be necessary. Before ordering in camera inspection, the court may at its discretion allow the Government the opportunity to establish by means of testimony or detailed affidavits submitted by a head of the agency that the meeting, or information related to it, is clearly exempt from disclosure under this section.

Once an agency properly classifies information relating to national defense or foreign policy pursuant to an Executive order, another agency cannot legally declassify it. If an agency subject to this section receives information properly classified by another agency, and public disclosure of the information is prohibited, the meeting must be closed. The agency would have no discretion, for the law provides that in such a case the agency must accept on its face the classification placed on the material by the originating agency. At the same time, the agency may request the classifying agency to review the classification and remove the restrictions prior to the meeting.

Section 201(b)(2). This paragraph exempts meetings which concern solely the agency's own internal personnel rules and practices. The purposes of this clause are to protect the privacy of staff members and to facilitate the agency's internal administration. It is not intended to cover an agency's discussion of personnel matters relating to any other agency, or to individuals working for private employers. This wording parallels the Freedom of Information Act, 5 U.S.C. 552(b)(2). This exemption does not include directions to agency personnel concerning their responsibility vis à vis the public, such as manuals explaining job functions. It includes only internal management matters.

In some cases it will be appropriate for an agency to open a meeting concerning matters of general public interest even though it involves internal personnel rules and practices. For example, an agency might open a discussion of the propriety of an employee's actions disclosing agency information to the public.

Section 201(b)(3). This paragraph applies to meetings which disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of the personal privacy of an individual. This may include a discussion of an individual's drinking habits or health, or review of a grant application which requires assessing an individual's professional competence. Or it may include reviewing an individual's finances to determine his eligibility for financial aid.

It is not intended that agencies will close all meetings that involve personal information about individuals. Such restrictiveness is not in accord with the policy of either the bill or this exemption. Moreover, public officials and private individuals should be subject to different considerations. For instance, a meeting might be closed under this paragraph if it concerned the competence of the president of an entity regulated by the agency. Yet if the discussion centered on the alleged

incompetence with which a Government official has carried out his duties it might well be appropriate to keep the meeting open, since in that case the public has a special interest in knowing how well agency employees are carrying out their public responsibilities. This paragraph must not be used by an agency to shield itself from political controversy involving the agency and its employees about which the public should be informed.

The main purpose of this exemption is to protect an individual's privacy. It would clearly not be appropriate, therefore, to invoke this paragraph when the individual involved prefers the meeting to be open. The procedures an individual may follow if he wishes a meeting to be closed under this paragraph is detailed in subsection 201 (c) (1).

Section 201(b) (4). This paragraph covers meetings which accuse an individual or corporation of a crime, or formally censure such person. The term "formally censuring any person" includes formal reprimands. An agency may discuss a company's alleged crimes, such as the submission of fraudulent documents, and consider whether to refer the case to the Department of Justice for prosecution. An agency regulating financial or security matters may wish to censure a firm for failing to live up to its professional responsibilities, or an agency may consider whether to formally censure an attorney for his conduct in an agency proceeding. Opening to the public agency discussions of such matters could irreparably harm the person's reputation. If the agency decides not to accuse the person of a crime, or not to censure him, the harm done to the person's reputation by the open meeting could be very unfair.

This paragraph insures that where serious charges of this nature are formally discussed by the agency, the agency has the latitude to close the meeting, even if the discussion does not come within the precise terms of paragraph (5), governing investigatory files, or any other part of subsection (b). The provision should not be interpreted as grounds for closing every meeting placing a company in a bad light. To be applicable, the meeting must consider formal agency action accusing a person of a crime or formally censuring a person.

Section 201(b) (5). This paragraph applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. A meeting could be closed, however, only to the extent that disclosure of records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; disclose investigative techniques and procedures; or endanger the life or physical safety of law enforcement personnel. This exemption is the same as the comparable provision in the Freedom of Information Act, as amended in 1974, 5 U.S.C. section 552(b) (7), and should be interpreted in a manner consistent with that act. It is included in recognition of the fact that premature public disclosure of certain matters concerning an investigation could jeopardize these investigations and hinder the ability of the agencies to fulfill their statutory duties.

The investigatory records to be disclosed must have been "compiled for law enforcement purposes," involving specific persons. General records such as annual surveys are not included in this exemption. The provision would be applicable to certain discussions of the legal strategy and tactics to be used in a specific investigation, such as the issuance of a subpena where public knowledge of the discussion might lead to the destruction of documents. It would apply to a discussion identifying a particular individual as a confidential source who supplied specific information. It would not, however, apply to the information supplied by the confidential source in a civil law enforcement investigation which does not disclose the identity of the source. If agency consideration of the matter has advanced to the point where it specifically discusses the initiation, conduct, or disposition of a particular case of adjudication, paragraph (9), rather than this paragraph, will apply. As in the case of the rest of subsection (b), an agency may not be held to a showing of obsolute certainty before invoking this provision. The meeting may be closed if the agency properly determines, on the basis of its general experience and knowledge of the particular facts, that the meeting can reasonably be expected to fall within the terms of the paragraph.

Section 201(b)(6). This paragraph applies to meetings which 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.

The trade secret exemption draws on current case law and commentary regarding exemptions for trade secrets and commercial or financial information found in other laws, especially the Freedom of Information Act, 5 U.S.C. section 552(b)(4). Rather than repeat the original wording contained in the Freedom of Information Act, paragraph (6) reflects as clearly as possible the present direction of the law.

Paragraph (b)(6) involves three tests. First, the information must be either (*a*) a trade secret, or (*b*) financial or commercial in nature. For example information relating to oil or gas reserves collected by an oil company, a technological invention of commercial value, and the level of a company's anticipated price rises, would all be covered by this paragraph.

Second, the information, whether a trade secret or financial or commercial information, must have been directly or indirectly obtained from a person as defined by section 3 of the bill. It includes information one agency has obtained from a person and in turn provided to another agency.

The third test is posed in the alternative. The first criteria is satisfied if there was no legal way for the agency to obtain the information, whether by voluntary or involuntary means without a pledge of confidentialitv. This requirement is not satisfied if an agency could have subpenaed the information, or if a statute required the person to furnish it to the agency, whether or not the agency actually subpenaed the information. Pledges of confidentiality do not satisfy this clause

where the agency could have gone to court and obtained the information without giving such a pledge. The purpose of this test is to avoid impairing the Government's ability to obtain necessary information, where governmental access to information must depend on the voluntary cooperation of private individuals and businesses.

The third test may also be satisfied, and a meeting closed, if the information must be kept secret in order to prevent substantial injury to the competitive position of the person to whom the information relates. This may include information an agency can obtain involuntarily from a person. The "competitive position" affected by public disclosure must be that of the person "to whom such information relates." It does not apply to persons who can only make a general demonstration of commercial interest in the information to be disclosed. On the other hand, it does include a person possessing a trade secret which he has not yet used, but which he is likely to put to commercial use in the future.

Section 201(b)(7). This paragraph applies in certain specific instances where premature disclosure of information would destroy an agency's ability to perform its functions effectively. Subparagraph (A) applies to such agencies as the Federal Reserve Board, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and similar agencies that regulate currencies, securities, commodities, or financial institions. The term "financial institutions" is intended to include banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, exchanges dealing in securities or commodities, such as the New York Stock Exchange, investment companies, investment advisers, self-regulatory organizations subject to 15 U.S.C. § 78s, and institutional managers as defined in 15 U.S.C. 78m(f). These agencies often discuss sensitive financial matters. When premature discussion of issues by these agencies would either (*i*) lead to serious financial speculation, or (*ii*) seriously endanger the stability of a financial institution, the meeting may be closed. A Federal Reserve Board discussion of the precarious financial state of a member bank could be closed under this provision. A securities and Exchange Commission discussion whether to suspend trading in a certain stock would also be included. Certain extremely sensitive financial actions cannot be disclosed until several months after they are taken. The wording therefore applies to an agency discussion of action already taken, as well as to a proposed action. This exemption, as all others, is prefaced by the phrased "can reasonably be expected" to disclose certain information. An agency seeking to close a meeting would therefore not have to conclude to an absolutue certainty that serious speculation would occur.

Subparagraph (B) applies to actions by any agency when premature disclosure of its plans would seriously frustrate effective implementation of its actions. An example would include discussion of the strategy an agency will follow in collective bargaining with its employees. Public disclosure might make it impossible to reach an agreement. Or an agency may consider imposing an embargo on the foreign shipment of certain goods. If this were publicly known, all the goods might be exported before the agency had time to act, and the effectiveness of the proposed action destroyed. The discussion could involve

agency approval of a proposed merger, if premature public disclosure of the proposal would make it impossible for the two sides to reach an agreement.

Subparagraph (C) applies to premature disclosure of an agency's plans to purchase a particular piece of land for itself. Public knowledge of the proposed action might drive up the price of the parcel under consideration, or lead to considerable land speculation.

The last sentence in paragraph (7) provides that an agency may not close a meeting pursuant to this paragraph if it has already publicly announced the content or nature of the action under consideration. Since the paragraph only applies when an agency feels it must act in secret, it would be contrary to the intent of this provision for an agency to rely on it when the public is already aware of the actions being considered, or where the Administrative Procedure Act or other statute requires the agency to publicly announce its proposal before taking final action. Thus, if an agency has already announced a proposed rule, or generally disclosed the nature or content of its proposed action, or if it must do so under the requirements of the Administrative Procedure Act before finally adopting the rule, discussion of the proposal to issue a rule, or take other action, could not be closed under this paragraph. Discussion of a complaint that has already been issued, or which must be issued, before final agency action is taken may be closed under other paragraphs, but not this one. The proviso in the last sentence of the paragraph will be applicable even if an agency has not already disclosed the exact wording of the proposal, or disclosed every detail of a proposed action. If the agency has already disclosed enough of the content or nature of the rule to give the public an idea of what the agency is proposing, it may not invoke paragraph (7).

The words "serious" and "seriously" qualify both subparagraphs (A) and (B). Without such a qualification, the provision could be read as endorsing a closed meeting even though, for example, the amount of speculation it might produce would be insignificant, or implementation of a proposed action would only be minimally "frustrated" by an open meeting. "Serious" means that there must be a balancing test, just as elsewhere in this bill, to determine how the public interest is best served.

Section 201(b)(8). This paragraph applies to meetings which disclose information contained in or relating to examination, operating, or condition reports on financial institutions. These reports are prepared by or for the use of such banking agencies as the Federal Reserve Board, Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board. This provision is identical to exemption (b)(8) of the Freedom of Information Act and should be interpreted in the same way.

Section 201(b)(9). This paragraph applies to meetings concerning the agency's participation, or preparation to participate, in a civil action in Federal or State court, or the initiation, conduct, or disposition of agency adjudication governed by section 554 of title 5, United States Code, or similar provision.

The first portion of the paragraph applies to an agency discussion of its participation in a civil action in Federal or State court. This

includes discussions concerning whether the agency should either bring an action itself or ask the Department of Justice to bring it. The second portion of the paragraph refers to formal adjudications conducted by the agency itself. The paragraph refers to an adjudication "otherwise involving a determination on the record after opportunity for a hearing" in order to include formal agency adjudications on the record not governed by section 554 of the Administrative Procedure Act. The paragraph only covers proceedings which follow sections 556 and 557 of the Administrative Procedure Act, or similar procedures.

The committee felt that it would be inappropriate for several reasons to require agencies to open meetings discussing specific cases of adjudication. Public disclosure of an agency's legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action. Public discussions of the guilt or innocence of a particular individual in agency adjudication could unfairly injure a person's reputation, or make it impossible for him to receive a fair or impartial hearing. Adjudications of the type covered by this paragraph must already be decided solely on the information in the record. Unlike other cases, the entire record on which the agency must make its decision in adjudication is open to inspection by any member of the public. Section 202 of the bill, prohibiting ex parte contacts, will help insure that such decisions are in fact based solely on the record. Finally, many aspects of the adjudicative process, such as the trial before an administrative law judge or appellate arguments before the commission are generally open now to the public.

To fall within the provisions of this paragraph the discussion must concern a particular case of adjudication. If the agency discusses a particular series of cases, each of which meets the requirements of this paragraph, the meeting may also be closed. The paragraph would not apply when an agency discusses its adjudication policies in general, such as the policy that should be adopted towards all those that may violate a particular law.

Although a proceeding may technically involve an agency adjudication or proceeding in district court, it may still be possible for the agency to open its deliberations to the public. For instance, the agency may only be discussing a legal point. Or the discussion may involve a formal rule making proceeding where general agency policy, rather than the facts of a particular case, are determinative. Ho'ding such meetings in the open would increase public understanding of the laws the agency administers, and the agency's interpretation of them. In other cases, a particular aspect of the adjudicative process may be required by other law to be open. In such event, this provision would not permit an agency to close a meeting otherwise required to be open.

Section 201(b)(10). This paragraph applies to meetings which involve information required to be kept secret by another statute. In such case, the agency must close its meetings notwithstanding the permissive nature of section 201(b).

Statutes which permit Government officials to withhold information on general discretionary grounds such as "in the public interest" are not included here. Thus, the statute involved in *Administrator, FAA* v. *Robertson*, 95 S. Ct. 2140 (1975), would not qualify for this exemption. Nor would the provisions of the Freedom of Information Act

apply since that statute permits but does not require the agency to keep any information from the public. The provision only refers to statutes which require specific types of information to be withheld from the public, or which describe by particular criteria the type of information that must not be disclosed. For example, individual's income tax return could be discussed in private under this provision, pursuant to 26 U.S.C. 6103. The limitations on the public disclosure of information imposed on agencies by the Privacy Act, 5 U.S.C. 552a(b), would also apply. The statute governing disclosure of information about complaints received by the Equal Employment Opportunity Commission, 42 U.S.C. 2000e–5(b), would come within this paragraph.

Section 201(c). Subsection (c) establishes the procedures an agency must follow if it wishes to close a meeting under subsection (b). The subsection will be inapplicable when an agency meeting remains open. In those cases where an agency meeting must be closed, this subsection permits closure in a way that will not interfere with the efficient or expeditious conduct of agency business.

Paragraph (1) provides that a meeting may be closed only by a majority vote of the entire membership of the agency. The vote of a simple majority of a quorum would not suffice to close the meeting. Subdivisions of the agency are subject to the same requirements. Each vote must be recorded and must be made public by the agency within one day. Where a meeting of agency heads is convened to discuss the matter, no proxies are allowed. The voting procedures specified in paragraph (1) are equally applicable to the other votes an agency may be required to take pursuant to this bill. Closing an agency meeting, or denying the public information about it, is a significant decision. It should not be taken without the concurrence of a majority of the entire body, and in accordance with the other procedures specified in this paragraph.

If an agency needs to close only certain portions of a meeting, its vote must be in specific reference to those portions. It is recognized in section 201 that an agency may have to close a portion of a meeting, but that the remainder of the meeting may remain open. In such cases the closed portions of the meeting are governed by the same procedures as if it were a separate meeting. Thus references throughout section 201 to meetings that an agency wishes to close are also intended to refer to a portion or portions of a meeting which an agency wishes to close.

Generally, a separate vote must be taken on each meeting, or portion of a meeting, the agency wishes to close. A single vote can be taken, however, to close a series of meetings, where all the meetings will be held within a 30-day period and involve the same "particular matters." The latter phrase means more than general similarity of content. It must involve the same agenda item, such as a particular bank application, a proposal to suspend trading in a particular security, or the like. This provision was added so that the agency would not have to vote repeatedly on whether to close the same discussion which stretches over more than one meeting. The procedures governing the closing of meetings also apply should an agency wish, pursuant to subsection (b), to withhold information about the meeting otherwise required by subsections (c) and (d) to be disclosed.

Agency members will not normally need to meet to decide whether to close a subsequent meeting or to decide upon the agenda for the meeting. It is anticipated that the agencies will instead use notation voting, or similar procedures, to determine whether to close the meeting. As is currently the case, the agenda may be prepared by informal means which do not require the convening of all the agency heads. Nothing in this subsection is intended to prohibit such procedures. If, however, a matter of unusual importance has generated great public interest, the agency heads may choose to have a separate preliminary meeting to decide whether to close a meeting. Where the agency has such a preliminary meeting, it too would have to be open unless closed pursuant to subsection (b). Such a meeting would be subject to the same notice requirements, and exceptions, as any other meeting.

In some cases a person may believe that an agency meeting directly affecting him would constitute an invasion of personal privacy (section 201(b)(3)), accuse him of criminal charges (section 201(b)(4)), or disclose information affecting him in an investigatory file (section 201(b)(5)). The subsection specifically recognizes the right of a person in such circumstances to ask the agency to close the meeting. If one member of the agency concludes that the person may be directly and adversely affected by holding the meeting in public, the entire agency must vote on whether to close the meeting. The purpose of this clause is to insure that an agency considers any person's legitimate concern that an open meeting may harm him in a direct and personal manner. It should help guarantee, for instance, that an agency does not inadvertently overlook the possibility that a particular discussion, if held in public, would constitute an invasion of personal privacy or disclose the identity of a confidential source.

Section 201(c)(2). Paragraph (2) requires an agency to publish a full written explanation of its decision to close any meeting within one day of the vote to do so. A list of persons expected to attend the closed meeting, and their affiliations must accompany the explanation except as provided by subsection (b). The explanation should not only refer to the specific paragraph in subsection (b) which the agency is invoking, but explain why the specific discussion falls within the paragraph cited, the relative advantages and disadvantages to the public of holding the meeting in closed or open session, and why the agency concluded on balance that the public interest would best be served by closing the meeting. The explanation and the accompanying list need not disclose information described in subsection (b), where such disclosure would have the same undesirable effect as opening the meeting itself. In all but the most extraordinary circumstances, however, the agency should be able to give some specific explanation of its action. In such case, the agency must do so in as detailed terms as possible.

Section 201(c)(3). Paragraph (3) provides that any agency which will be closing a majority of its meetings under paragraph (6), (7)(A), (8), or (9) of subsection (b) may do so by regulation, and under expedited procedures. The agency can qualify under this subsection if it must close a majority of its meetings under any one of these paragraphs, or under two or more of these paragraphs. Paragraph (3) will largely apply to agencies which regulate financial institutions,

securities, or commodities, and which will often have to conduct their sensitive business in private, and on short notice. It will also apply to agencies whose primary or sole task is to conduct cases of adjudication. Agencies which may possibly issue regulations pursuant to these provisions include the Federal Reserve Board, the Securities and Exchange Commission, and the National Labor Relations Board.

The records of agency meetings over the past several years should indicate whether an agency may properly close a majority of its meetings under this paragraph. Even if it could close a majority of its meetings, an agency should examine whether it will really need to close such a large number of its meetings under the specific paragraphs cited in subsection (c)(3). Full recognition must be given to the fact that this bill establishes a new principle of openness that is equally applicable to all agencies.

The issuance of any regulations pursuant to subsection (c)(3) shall be governed by subsection (f). The regulations should fully document, on the basis of the past history of agency meetings, the likelihood that it will have to close a majority of its meetings pursuant to paragraph (6),(7)(A), (8) or (9). The regulation should also specify in detail the types of meetings to which the regulations apply and which exemption is relied upon as the grounds for closing each type of meeting.

An agency that has properly issued such regulations may announce in advance of a particular meeting that it proposes to close the meeting pursuant to its regulations. The agency then need only vote at the beginning of the meeting itself that the meeting should in fact be closed.

An agency which operates under regulations authorized by this paragraph need not comply with the remainder of subsection (c), or the notice requirement imposed by subsection (d), with respect to any meeting closed by regulation. One-week notice to the public of the meeting would not be necessary. The agency must, however, provide a public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity. This announcement should be similar to that required by subsection (d). Disclosure of information about a meeting governed by subsection (c)(3) is also subject to subsection (b), so that information otherwise required to be disclosed in the public announcement of the meeting, may be withheld if it falls within the provisions of subsection (b). As used in this subsection, the term "earliest practicable opportunity" has the same meaning as in subsection (d). If an agency subject to this paragraph wishes to change the subject matter of a previously announced meeting, it may do so at the earliest practicable opportunity, just as in the case of a meeting governed by subsection (d).

Section 201(d). This subsection requires advance public notice of all agency meetings. Such information must be made available by an agency in order to make the public's right to attend a meeting meaningful.

The subsection requires the agency in most cases to publicly announce the date, place, subject matter of a meeting, and whether open or closed, at least one week beforehand. The identification of the subject matter must be adequate to inform the general public thoroughly, referring, for example, to a specific docket number, the name of the

applicant, the identity of the proposed rule, and the like. Reference to a generic subject matter, such as "consumer complaints," or "applications for new routes," does not meet the requirements of this subsection.

If a majority of the entire membership of the agency votes that agency business requires a meeting to be held with less than 7 days notice, the required public notice must still be provided at the earliest practicable date. This provision allows agencies to schedule a meeting where consideraion of an emergency matter can not be delayed 7 days. It recognizes that the public interest in obtaining rapid agency action may at times override the public interest in receiving advance notice of meetings. This clause does not, however, allow an agency to wait until the last moment to schedule a meeting, when agency business truly requires it, if the meeting could have been scheduled in time to give the public a week's notice.

When notice of a meeting is provided less than 7 days in advance, it must still be provided "at the earliest practicable opportunity." In most cases this should still permit several days notice to the public. If the need is genuine, however, the announcement may be made only hours in advance of the meeting. In the unusual case, the announcement may have to be issued simultaneously with the convening of the meeting. Or a meeting which has already started as an open one, may suddenly have to be closed if some sensitive matters unexpectedly arises. Even if, in such circumstances, the public does not in fact learn of the meeting until after it has occurred, the announcement must be made to provide a record of such meetings.

After a meeting is scheduled and public announcement provided, the subject matter of the meeting or the decision to open or close the meeting, may be changed if two conditions are satisfied. First, a majority of the entire membership of the agency must vote that agency business requires the change, and that earlier announcement of the change was not possible. Second, an agency must publicly announce the change at the earliest practicable opportunity. The same considerations as discussed above apply to the timing and nature of such announcements.

This procedure anticipates cases when agency business requires that a matter be added to an agenda on a few days or even a few hours notice. For example, a motor carrier may apply for an emergency temporary operating license in order to provide fuel, food, clothing or the like to those who need it immediately. Agency action within days or hours may be necessary. In such a case, the matter could be added to the already announced agenda of the meeting, or the agency could call a separate meeting to consider the matter. The decision to close a meeting previously open to the public might also occur on short notice, or even at the meeting itself, when a new subject or new facts arise. The provision is designed to provide the flexibility necessary to insure expeditious agency action.

Whenever an agency provides public announcement of its meetings, it should use a variety of means to insure that the information reaches the public as quickly and reliably as possible. Agencies may wish to issue a weekly calendar of scheduled meetings. Such calendars could be mailed to those who express special interest in being informed about the agency's activities. Agencies should also use public bulletin boards, press releases, and recorded telephone messages de-

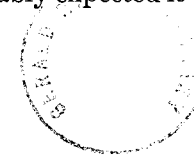
scribing the status of agency meetings scheduled for the next 7 days. There is no requirement that announcement of the meeting or any changes made concerning such meetings appear in the Federal Register prior to the meeting. However, this should be done whenever possible. In any event, the information must be printed in the Federal Register as soon as possible following the first public announcement. Even if this does not occur until after the meeting, such notice will provide a record of all agency meetings in a single publication widely available to members of the public.

The subsection also requires an agency, when announcing its meetings, to include the name and telephone number of an agency employee whom the public may contact for more information about the meeting. This is a practice already followed with success by some agencies in connection with meetings between agency officials and members of the public.

Section 201(e). This subsection requires that a complete verbatim transcript or electronic recording be made of each meeting the agency votes to close, unless it is a meeting concerned solely with adjudicative matters covered by subsection 201(b)(9). Where an agency makes an electronic recording of the meeting, rather than a written transcript, the tape should be coded, or other records kept, adequate to identify each speaker. The agency must on its own initiative promptly provide to the public the complete transcript or electronic recording of any item on the agenda where no significant portion of its discussion would disclose information falling within subsection (b). If only one or two brief references to sensitive matters were made in a lengthy discussion of an item on the agenda, the record of the discussion, minus the one or two references, must be made public. Agencies need not edit a transcript or electronic recording of the Commission's discussion of a particular matter word by word so as to make abbreviated portions of the record of the meeting available to the public. Where sensitive matters are an integral part of the record of the discussion of a matter, no part of the record need be made public. The reference to each item on the agenda, or the testimony of each witness, includes each easily identifiable segment of a meeting. Even if an agency does not in fact have a formal agenda for the meeting, or receive testimony, the phrase would include the agency's discussion of each separate issue or other equivalent matter which it takes up at the meeting.

The subsection does not require the agency to follow any specified procedure in determining whether to make the record of a meeting available to the public. It does not require, for example, that a record of the vote be provided the public, or even that a formal vote on the matter be taken.

The requirement that agencies keep a transcript or electronic recording of a closed meeting constitutes an integral part of the open meeting requirements of the bill. Subsection (e) should be used to inform the public about the bulk of the discussion of any item on the agenda where the consideration of sensitive matters occurs in an easily identifiable segment of the discussion occupying only a small portion of the time devoted to the entire agenda item. Or it may be that an entire discussion does not in fact involve any sensitive matters jusifying the closing of a meeting, even though the agency reasonably expected it



would when it closed the discussion. In yet other instances a meeting will be closed because it involves matters which are sensitive at the time, such as the regulation of financial institutions, that would cause financial speculation if disclosed prematurely. Later, however, the discussion's sensitive nature may disappear. An agency must then publicly release the record of its meeting at a later date when paragraph 7 no longer applies. Finally, subsection (e) will permit interested members of the public to learn what transpired at a meeting which a court later holds was improperly closed.

The transcripts and recordings that may be made public must be promptly placed in a public document room. The agency must do this on its own initiative, rather than waiting until it receives a particular request. Where a meeting was unnecessarily closed to the public it should take the agency a week or less to make the record available to the public. The room for storing the transcript or electronic recording must be easily accessible to the public in an unrestricted area of the building. In the case of electronc recordings some provision must, of course, be made to permit members of the public to listen to them, and to identify each speaker. Copies of transcripts, or transcriptions of the tapes identifying all speakers, must be provided at the actual cost of duplication or transcription. If a person requests a copy of a tape, rather than a transcription of it, this should also be provided at the actual cost of copying.

When people ask for copies of the records of meetings available to the public, agencies should follow procedures similar to those adopted under the Freedom of Information Act, 5 U.S.C. section 552(a)(4)(A). Regulations should be promulgated, pursuant to subsection (f), which specify a uniform schedule of fees. The fees should be limited to reasonable standard charges for duplication, which may include appropriate pro rata labor costs. Fees should not be used to discourage requests for copies of the record of a meeting. Documents should be furnished at a reduced or zero charge when the agency determines that such action is in the public interest, or will primarily benefit the general public.

The transcripts or tapes must be maintained by the agency for 2 years, or for 1 year after the conclusion of the proceeding to which they relate, whichever occurs later. If an agency discusses the initiation of a proposed investigation at a closed meeting, the record should be retained until the investigation, and any agency adjudication arising from it, is completed and final agency action taken.

Section 201(f). This subsection requires each agency to promulgate regulations implementing the requirements of subsections (a) through (e) within 180 days after enactment of the act. The regulations should, for example, describe how the agency will publicly announce its meetings, establish procedures for closing meetings where necessary, specify how the public can obtain records of formerly closed meetings, and at what cost. Any agency that invokes the provisions of subsection 201(c)(3) must issue implementing regulations pursuant to this subsection.

If an agency does not promulgate regulations within 180 days, any person may bring a proceeding in the U.S. District Court for the District of Columbia to compel issuance of the regulations. Any per-

son has the right to challenge the adequacy of the regulations that are issued by the agency in the District of Columbia of Appeals. A person may invoke this provision, for instance, to challenge the applicability of subsection (c) (3) to a particular agency. If an issue is too speculative or remote, the Court of Appeals may refuse to entertain the suit. Any person has standing to bring an action since the bill is designed to protect the right of the general public to attend agency meetings. Thus, standing to bring action under this section cannot be limited to only those persons who may be directly affected by particular agency action taken at the meeting. Any person with sufficient interest in the matter to want to bring suit under this section will be able to do so.

Section 201(g). This subsection gives the U.S. district courts jurisdiction to enforce the requirements of subsections (a) through (e) by declaratory judgment, injunction, or other appropriate relief. Any person may bring an action in the district where he resides or has his business, or where the agency is headquartered, prior to or within 60 days after, the meeting to which the violation relates. If the agency fails to announce the meeting when required by subsection (d), the suit may be brought within 60 days after the date that any public announcement is actually made. If an agency provides no public announcement at all, the 60-day requirement is inapplicable.

Before instituting a suit, the plaintiff must first notify the agency and give it a reasonable period of time, not to exceed 10 days, to correct the violation, or to prevent it from occurring in the first place. If the plaintiff is seeking to open a meeting which has not yet been held, he need not give the agency more than 2 days to act. Under certain circumstances, reasonable notice will be less than the maximum possible period. Where the meeting will be held in less than 2 days, for example, a reasonable length of time might be only several hours. While a person waits for a response to his request that the agency correct an asserted violation, the 60-day statute of limitations shall be tolled.

It is important that actions brought under this subsection be handled expeditiously in order for public participation to be meaningful. Accordingly, the defendant must serve his answer within 20 days after service of the complaint.

The burden of proof is on the agency to sustain its conduct. This is in accord with the presumption of openness established in the bill. Those who wish to operate in secrecy should have to justify it. Furthermore, in most cases the agency will be the only party in possession of information that might justify closing the meeting. The burden must therefore be on the agency to produce any facts that may support its action. In deciding cases, the court may examine in camera any transcript or recording of a closed meeting, and take additional evidence as needed. In appropriate cases, it may also permit attorneys for all parties to examine the record of the meeting and argue the case in camera.

Under subsection (g) the court may grant appropriate equitable relief. This may include ordering an agency to open a meeting it had planned to close, ordering the release of the record of an improperly closed meeting, or issuing a declaratory judgment.

The subsection specifically provides that it does not confer any jurisdiction on district courts to invalidate agency action taken at an illegally closed meeting. This provision is also intended to prohibit the district court from enjoining any action taken at an improperly closed meeting, or compelling the agency to take any action, where the action in question is not directly related to the requirements of this bill. Any relief the district court does grant pursuant to this subsection is subject to the requirement that it be with due regard for orderly administration and the public interest, as well as the interests of the parties. Normally it should not be necessary for a court to enjoin the holding of a meeting in order to correct violations of this section. The court may do so, however, where, for example, the agency's violation is flagrant, or where the matter does not demand immediate action, and the public interest in the matter is great.

As in the case of subsection (f), any member of the public has standing to bring suit under this subsection. The subsection authorizes suit to be brought against an individual member of the agency, as well as the agency itself. This provision is required by subsection (i), which permits a court to assess costs against an individual member of an agency in certain extraordinary cases. As in other instances when a Government official is named as a defendant in a suit, the Federal Government should defend individual agency members sued under this subsection.

Section 201(h). This subsection allows any Federal court otherwise authorized by law to review other agency action to also review an agency's compliance with this section. If the action an agency took at a closed meeting was not otherwise reviewable by the court, this subsection would not make that action, or the agency's compliance with this subsection reviewable. Review of agency compliance with this section may be conducted under this subsection at the request of any person who may otherwise properly participate in the judicial review proceeding pursuant to 5 U.S.C. section 702, or other applicable law. For example, a company challenging the validity of an agency rule, may include in its challenge the fact that the agency adopted the rule in a meeting improperly closed to the public.

The reviewing court can afford any relief it deems appropriate. This may include ordering the release of a transcript of an improperly closed meeting. It may also include reversing an agency action on the grounds that it was taken at a meeting improperly closed to the public. It is expected that a court will reverse an agency action solely on such grounds only in rare instances where the agency's violation is intentional and repeated, and the public interest clearly lies in reversing the agency action.

Section 201(i). This subsection allows the court to assess against any party the reasonable attorney fees and other litigation costs incurred by any party who substantially prevails in an action brought pursuant to subsection (f), (g), or (h). Other litigation costs may include reasonable fees for attorneys and expert witnesses. This portion of the subsection is based on similar provisions in the Freedom of Information Act (5 U.S.C. 552(a)(4)(E)) and the Privacy Act (5 U.S.C. 552a(g)(2)(B)).

Cost may be assessed against an individual agency member, rather than against the agency itself or the United States, only when the

agency member has intentionally and repeatedly violated section 201. Costs may only be assessed against the plaintiff under this subsection when he has brought a suit for frivolous or dilatory reasons. The committee feels these provisions will, on the one hand, help assure compliance with the section, and, on the other hand, prevent unnecessary litigation against an agency already in compliance.

Section 201(j). This subsection requires agencies subject to section 201 to annually report to Congress on their compliance with the section. The report must include the number of meetings open and closed to the public, reasons for closing the meetings, and a description of any litigation brought against the agency under this section.

SECTION 202—PROHIBITION OF EX PARTE COMMUNICATIONS

Section 202(a). This subsection amends the provisions of the Administrative Procedure Act governing adjudication and formal rulemaking (4 U.S.C. 557) by establishing a broad prohibition against ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act, whether or not the agency is subject to section 201 of the bill. Such a prohibition is presently implied by section 556(e) of the Administrative Procedure Act which states that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision." Yet the act contains no general statutory prohibition against ex parte contacts. If a court now wishes to invalidate an agency proceeding because of ex parte contacts, it must rely on constitutional standards, rather than specific provisions. See e.g., *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F. 2d 221 (1959). Section 202 provides for the first time a clear, statutory prohibition of ex parte contacts of general applicability.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section do not repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The rule forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption includes, for example, requests by one party to a proceeding for subpenas, adjournments, and continuances.

Paragraph (1) forbids contacts between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The wording "interested persons" is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. As used in this section, "person" has the same meaning as elsewhere in the Administrative Procedure Act.

The rule applies to interested persons who "make or knowingly cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of knowingly causing an ex parte contact.

Contacts are prohibited with any agency members, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional proceess. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The ex parte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relevant to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have any effect on the way the case is decided. It excludes general background discussions about an entire industry which do

not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not directly discuss the merits of a pending adjudication it is not prohibited by this section.

A request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

Paragraph (2) is the inverse of paragraph (1). It prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1).

Paragraph (3) states that if an ex parte communication is made or received by an agency official, he must place on the proceeding's public record: (A), any illegal written communication, (B), a memorandum stating the substance of any illegal oral communication, and (C), any oral or written statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the materials relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. Agency officials who make an ex parte contact are under the same obligation to record it publicly as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

Paragraph (4) states that the officer presiding over the agency hearings in the proceedings may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected because of the violation. This provision accompanies section 202(d), which authorizes an agency to consider a violation of this section as grounds for ruling against a party on the merits. Paragraph (4) insures that the record of the proceeding contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion. As in the case of

subsection (d), the presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus a showing should be required where, among other factors, there is a reasonable likelihood that the illegal contact will be shown to have been made knowingly, but not where the violation was clearly inadvertent.

Paragraph (5) requires that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communication before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency, if it wishes, may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

Section 202(b). This subsection is only a conforming amendment. It deletes from the Administrative Procedure Act the limited provision in section 554(d) now governing ex parte communications. This part of the present law is no longer necessary upon adoption of section 202(a).

Section 202(c). This subsection adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act. The term includes an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. As in subsection (a), "public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Section 202(d). This subsection amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provision apply to both formal parties, and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in an illegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes." For

example, the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

The subsection specifies that an agency may rule against a party for making an ex parte communication only when the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, the committee concluded that an agency should not definitively rule against a party simply because of an inadvertent violation.

It is expected that an agency will rule against a party under this subsection only in rare instances. However, the committee felt it very important that an agency have this option available where the circumstances justify it, and where the agency must emphasize the seriousness with which it views violations of the ex parte rules.

SECTION 203—EFFECT ON OTHER LAWS

Section 203(a). This subsection provides that nothing in section 201 increases or decreases the public's access to documents or other records under the Freedom of Information Act, 5 U.S.C. section 552. Access to the actual documents or other written matter discussed or referred to at a meeting subject to section 201 will continue to be governed, as before, by the Freedom of Information Act.

The availability of transcripts or electronic recordings required by section 201(e) are exempted from this general rule. Section 201(e) imposes a separate responsibility on an agency to keep verbatim records and to make them available to the public on its own initiative unless they concern matters falling within subsection (b) of section 201. If an agency properly withholds the transcripts or electronic recordings under section 201(e), it need not disclose the material pursuant to a Freedom of Information Act request, even though the nature of the information is such that it would otherwise have to be disclosed under that act.

Except to the extent section 201(e) is inconsistent, the other provisions of the Freedom of Information Act will continue to apply to the transcripts or electronic recordings of meetings, and to any request made under the Freedom of Information Act for access to such records. Thus, the transcripts or electronic recordings must be indexed in accordance with the Freedom of Information Act and publicly disclosed except to the extent section 201(b) would apply to such information. An agency response to a request under the Freedom of Information Act for a transcript or electronic recording of a meeting would be subject to the time limits for agency action established by that act. A member of the public may invoke the enforcement provisions of that act to insure that agency treatment of the transcripts or electronic recordings comply with its provisions.

Section 203(a) also provides that the storage of transcripts or electronic recordings required by section 201(e) are not subject to the Federal Records Act, chapter 33 of title 44, United States Code. Such material need not be kept beyond the period specified in section 201(e). The committee expects, however, that in accordance with the principles established in the Federal Records Act, the agency will choose to permanently retain transcripts or electronic recordings of meetings of special interest. This subsection also specifies that nothing in title II authorizes the withholding of any information from Congress.

Section 203(b). This subsection states that section 201 may not be used to deny requests by an individual for information under the Privacy Act, section 552a of title 5, United States Code, including information which might be contained in transcripts or electronic recordings of properly closed meetings. The principles of the Privacy Act govern whether or not an agency may withhold information from the public in general. The applicability of the Privacy Act should in no way be limited by enactment of this bill.

SECTION 204—EFFECTIVE DATE

This section provides that title II will become effective 180 days after enactment. The provisions of 201(f), requiring the promulgation of regulations within 180 days from enactment, become effective immediately. This will assure that agencies will have promulgated the necessary regulations, and have established the necessary procedures, to allow complete compliance with section 201 once it does become effective. The 180-day period will also give the agencies an opportunity to review their regulations governing ex parte contacts and to revise them in accordance with section 202 of the bill.

Estimated Cost of the Legislation

It is estimated that title I, opening meetings of congressional committees, and section 202 of title II, regulating ex parte contacts in formal agency procedings, will impose no additional cost.

While it is difficult to estimate the probable cost of section 201, it is anticipated that most of the added cost will be for additional clerical and administrative work required by the section. The committee estimates that this additional cost will be minimal.

Open meetings will require no tape recorders, no transcripts and no editing of tapes. The only cost to an agency of an open meeting will be the very small cost of providing the necessary public announcement. An agency closing a meeting will have the additional cost of making a transcript of the proceeding, or the cost of making an electronic recording. The estimated cost of section 201 will therefore depend on the number of meetings closed to the public. Since most of the agency meetings should be open to the public, the committee expects that the total cost of transcripts for closed meetings will be relatively minor. The cost of the verbatim record will be further reduced if an agency relies on an electronic recording. The cost of electronic equipment has been estimated to be only a few thousand dollars per agency. The cost of providing copies of the transcripts or tapes to the public will be borne by the member of the public requesting the copy.

In a few cases, section 201 may require an agency to hire one additional employee to handle the added cherical and administrative work.

ROLLCALL VOTE IN COMMITTEE

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, the rollcall vote taken during committee consideration of this legislation is as follows:

Final Passage: Ordered Reported: 8 yeas—0 nays.

Yeas:

Chiles
Nunn
Glenn
Ribicoff
Percy
Javits
Roth
Brock
(Proxy)
Jackson
Muskie
Metcalf
Weicker

Nays:

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

(2 U.S.C. 72a note)

LEGISLATIVE REORGANIZATION ACT OF 1946 AS AMENDED THROUGH MARCH 7, 1975

* * * * * * *

TABLE OF CONTENTS

TITLE I—CHANGES IN RULES OF SENATE AND HOUSE

RULE-MAKING POWER OF THE SENATE AND HOUSE

SEC. 101. * * *

* * * * * * *

COMMITTEE PROCEDURE

(2 U.S.C. 190a)

SEC. 133. (a) * * *

(b) [Meetings for the transaction of business of each standing committee of the Senate, other than for the conduct of hearings, shall be open to the public except during executive sessions for marking up bills or for voting or when the committee by majority vote orders an executive session.] Each such committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded. The results of rollcall votes taken in any meeting of any such standing committee of the Senate upon any measure, or any amendment thereto, shall be announced in the committee report on that measure unless previously announced by the committee, and such announcement shall include a tabulation of the votes cast in favor of and the votes cast in opposition to each such measure and amendment by each member of the committee who was present at that meeting.

* * * * * * *

SENATE COMMITTEE RULES

(2 U.S.C. 190a–2)

SEC. 133B. * * *

OPEN SENATE COMMITTEE MEETINGS

SEC. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.

OPEN CONFERENCE COMMITTEE MEETINGS

SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to a clearly unwarranted invasion of the privacy of an individual;

(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.

OPEN JOINT COMMITTEE MEETINGS

SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.

CHAPTER 5, TITLE 5, U.S. CODE

§ 551. Definitions.

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to [act.] *act; and*

(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.

* * * * * * *

§ 554. Adjudications.

(a) * * *

* * * * * * *

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. [Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

[(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

[(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.]

Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *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 party who has knowingly committed such violation or knowingly caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) * * *

* * * * * * *

(d) 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—

(1) no interested person outside the agency shall make or knowingly 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 relevant to the merits of the proceeding;

(2) no member of the body comprising an 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 knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(3) 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, a communication in violation of this subsection, shall place on the public record of the proceeding:

(A) written communications transmitted in violation of this subsection;

(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; the agency, administrative law judge, or other employee presiding at the hearing many, 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 by virtue of such violation;

(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they 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 at the time of his acquisition of such knowledge.

STANDING RULES FOR CONDUCTING BUSINESS IN THE SENATE OF THE UNITED STATES

* * * * * * *

RULE XXV

STANDING COMMITTEES

* * * * * * *

7(a) * * *

[(b) Meetings for the transaction of business of each standing committee of the Senate, other than for the conduct of hearings (which are provided for in section 112(a) of the Legislative Reorganization Act of 1970), shall be open to the public except during closed sessions for marketing up bills or for voting or when the committee by majority vote orders a closed session: *Provided*, That any such closed session may be open to the public if the committee by rule or by majority vote so determines.]

RULES OF THE HOUSE OF REPRESENTATIVES

FIRST SESSION, NINETY-FOURTH CONGRESS

* * * * * * *

RULE XI

RULES OF PROCEDURE FOR COMMITTEES

* * * * * * *

Committee Rules

2. (a) * * *

* * * * * * *

Open Meetings and Hearings

[(g)(1) Each meeting for the transaction of business, including the markup of legislation, of each standing committee or subcommittee thereof shall be open to the public except when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of the meeting on that day shall be closed to the public. *Provided, however*, That no person other than members of the committee and such congressional staff and such departmental representatives as they may authorize shall be present at any business or markup session which has been closed to the public. This paragraph does not apply to open committee hearings which are provided for by clause 4(a)(3) of Rule X or by subparagraph (2) of this paragraph, or to any meeting that relates solely to internal budget or personnel matters.]

(g)(1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.

APPENDIX

SUMMARY OF STATE OPEN MEETINGS LAWS[1]

	Date of latest action	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Opens state agencies
Alabama	1915				yes
Alaska	1972	yes	yes	yes	yes
Arizona	1974	yes	yes	yes	yes
Arkansas	1967	yes			yes
California	1974	yes			yes
Colorado	1974	yes	yes	yes	yes
Connecticut	1971				yes
Delaware	1955				yes
Florida	1967				yes
Georgia	1972		yes	yes	yes
Hawaii	1959				yes
Idaho	1961				yes
Illinois	1973	yes			yes
Indiana	1971	yes			yes
Iowa	1967				yes
Kansas	1972	yes	yes	yes	yes
Kentucky	1974	yes	yes	yes	yes
Louisiana	1972				yes
Maine	1973	yes	yes	yes	yes
Maryland	1954				yes
Massachusetts	1970				yes
Michigan	1968		yes	yes	yes
Minnesota	1973		yes	yes	yes
Mississippi	1975				
Missouri	1973		yes	yes	yes
Montana	1963	yes	yes	yes	yes
Nebraska	1972	yes			yes
Nevada	1960	yes			yes
New Hampshire	1973		yes	yes	yes
New Jersey	1974	yes		yes	yes
New Mexico	1974			yes	yes
New York	no law				
North Carolina	1971	yes	yes	yes	yes
North Dakota	1957				yes
Ohio	1961		yes		yes
Oklahoma	1959				yes
Oregon	1973	yes	yes	yes	yes
Pennsylvania	1959				yes
Rhode Island	1974				yes
South Carolina	1972	yes	yes	yes	yes
South Dakota	1965		yes	yes	yes
Tennessee	1974	yes	yes	yes	yes
Texas	1973		yes	yes	yes
Utah	1953	yes	yes	yes	yes
Vermont	1973	yes	yes	yes	yes
Virginia	1974				yes
Washington	1973	yes			yes
West Virginia	1975				
Wisconsin	1959		yes	yes	yes
Wyoming	1973	yes			yes

[1] Compiled by Dr. John B. Adams for the Freedom of Information Foundation, Columbia, Missouri

Opens county & local agencies	Opens county boards	Opens city councils	Forbids closed exec. sessions	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violations	2 "Score"
yes	yes	yes				yes	5
yes	yes	yes			yes		8
yes	yes	yes		yes	yes	yes	10
yes	yes	yes		yes	yes	yes	8
yes	yes	yes		yes		yes	7
yes	yes	yes	yes	yes	yes		10
yes	yes	yes					4
yes	yes	yes					4
yes	yes	yes	yes	yes	yes	yes	8
yes	yes	yes		yes	yes	yes	9
yes	yes	yes					4
yes	yes	yes					4
yes	yes	yes		yes		yes	7
yes						yes	4
yes	yes	yes		yes		yes	6
yes	yes	yes			yes	yes	9
yes	yes	yes		yes	yes	yes	10
yes	yes	yes				yes	5
yes	yes	yes		yes		yes	9
							1
yes	yes	yes		yes			5
yes	yes	yes		yes			7
yes	yes	yes	yes	yes		yes	9
							unscored
yes	yes	yes		yes			7
yes	yes	yes					7
yes	yes	yes			yes	yes	7
yes	yes	yes				yes	6
yes	yes	yes				yes	7
	yes	yes			yes		6
yes	yes	yes		yes	yes	yes	8
							no law
yes	yes	yes		yes			8
yes	yes	yes	yes				5
yes	yes	yes					5
yes	yes	yes			yes	yes	6
yes	yes	yes		yes			8
yes	yes	yes				yes	5
							1
yes	yes	yes		yes			8
yes	yes	yes					6
yes	yes	yes	yes	yes	yes	yes	11
yes	yes	yes				yes	7
yes	yes	yes				yes	7
yes	yes	yes				yes	8
yes	yes	yes		yes			5
yes	yes	yes		yes		yes	7
							unscored
yes	yes	yes				yes	7
yes	yes	yes			yes		6

2 "Score" means the total number of "yes" answers. It provides a rough index of the law's comprehensiveness.

STATE OPEN MEETINGS STATUTES

Alabama—Title 14, Ch. 70 § 393 (1915)
Alaska—§ 44.62.310 (1972)
Arizona—§ 38-431 (1974)
Arkansas—§ 12-2801 (1967)
California—§ 11120 Gov. Code (1974)
Colorado—3-33-1 (1974)
Connecticut—§1-21 (1971)
Delaware—29 § 5109 (1955)
Florida—§ 286.011 (1967)
Georgia—§ 40-3301 (1972)
Hawaii—§ 92-1 (1959)
Idaho—§ 59-1024 (1961)
Illinois—Ch. 102, § 41 (1973)
Indiana—§ 57-601 (1971)
Iowa—Ch. 28A (1967)
Kansas—§ 75-4317 (1972)
Kentucky—HB 100-1974 session
Louisiana—Title 42 § 6 (1972)
Maine—Title 1, Ch. 13, § 401 (1973)
Maryland—Art. 41, § 14 (1954)
Massachusetts—Ch. 30A, § 11a (1970)
Michigan—4.1800 (1968)
Minnesota—471.705 (1973)
Mississippi—(1975 Law)
Missouri—610.010 (1973)
Montana—Art. II of 1972 const. 82-3402 (1963)
Nebraska—84-1401 (1972)
Nevada—241.010 (1960)
New Hampshire—Title VI, Ch. 91-A (1973)
New Jersey—10: 4-1 (1974)
New Mexico—Ch. 91 of 1974 session
New York—(No Law)
North Carolina—143-318.1 (1971)
North Dakota—44-04-19 (1957)
Ohio—121.22 (1961)
Oklahoma—25 § 201 (1959)
Oregon—Ch. 172 of 1973 session
Pennsylvania—(1974 Law)
Rhode Island—(1974)
South Carolina—Article 2.2, § 1-20 (1972)
South Dakota—1-25-1 (1965)
Tennessee—Ch. No. 442 of 1974 session
Texas—17 § 6252 (1973)
Utah—52-4-1 (1953)
Vermont—1 U.S.A. 312 (1973)
Virginia—2.1-340 (1974)
Washington—42.30.010 (1973)
West Virginia—(1975 Law)
Wisconsin—SB 462 of 1974 session
Wyoming—9-692.10 (1973)

TEXT OF S. 5 AS REPORTED

A BILL To Provide That Meetings of Government Agencies and of Congressional Committees 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,

Section 1. Short Title.—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. Definitions.—For purposes of this Act the term, "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

TITLE I—CONGRESSIONAL PROCEDURES

Sec. 101. Senate Committee Meetings.—(a) The Legislative Reorganization Act of 1946 is amended—

(1) by striking out the first sentence of section 133(b);

(2) by adding after section 133B the following:

"OPEN SENATE COMMITTEE MEETINGS

"Sec. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Paragraph 7(b) of Rule XXV of the Standing Rules of the Senate is repealed.

(c) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133B the following:

"133C. Open Senate committee meetings.".

SEC. 102. House of Representatives committee meetings.—Clause 2 (g)(1) of Rule XI of the Rules of the House of Representatives is amended to read as follows:

"(g)(1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.".

SEC. 103. (a) CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(a) of this Act, the following new section:

"OPEN CONFERENCE COMMITTEE MEETINGS

"SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to the public except when the managers of either the Senate or the House of Representatives in open session determine, by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.".

(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133C, as added by section 101(c) of this Act, the following:

"133D. Open conference committee meetings.".

SEC. 104. (a) JOINT COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133D, as added by section 102(a) of this Act, the following new section:

"OPEN JOINT COMMITTEE MEETINGS

"SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Titile I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133D, as added by section 103(b) of this Act, the following:

"133E. Open joint committee meetings.".

SEC. 105. EXERCISE OF RULEMAKING POWERS.—The provisions of this title are enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

TITLE II—AGENCY PROCEDURES

SEC. 201. (a) This section applies, according to the provisions thereof, to the Federal Election Commission and to any agency, as defined in section 551 (1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate. Except as provided in subsection (b), all meetings of such collegial body, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public. For purposes of this section, a 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 official agency business.

(b) Except where the agency finds that the public interest requires otherwise, (1) subsection (a) shall not apply to any agency meeting, or any portion of an agency meeting, or to any meeting, or any portion of a meeting, of a subdivision thereof authorized to take action on behalf of the agency, and, (2) the requirements of subsections (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency, or the subdivision thereof conducting the meeting, properly determines that such portion or portions of its meeting, or such information, can be reasonably expected 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;

(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;

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

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only 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 ajudication, (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 course 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;

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

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

(B) any agency where such disclosure would seriously frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

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

(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 participation in a civil action in Federal or State court, 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 title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

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

(c)(1) Action under subsection (b) shall be taken only when a majority of the entire membership of the agency, or of the subdivision thereof authorized to conduct the meeting on behalf of the agency, votes to take such action. A separate vote of the agency members, or the members of a subdivision thereof, 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 (b), or with respect to any information which is proposed to be withheld under subsection

(b). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters. and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed. Whenever any person whose interests may be directly affected by a meeting requests that the agency close a portion or portions of the meeting to the public for any of the reasons referred to in paragraphs (3), (4), or (5) of subsection (b), the agency shall 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.

(2) If a meeting or portion thereof 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 meeting, or portion thereof, together with a list of all persons expected to attend the meeting, and their affiliation.

(3) Any agency, a majority of whose meetings will properly be closed to the public, in whole or in part, pursuant to paragraphs (6), (7)(A), (8), or (9) of subsection (b), or any combination thereof, may provide by regulation for the closing of such meetings, or portions of such meetings, so long as a majority of the members of the agency, or of the subdivision thereof conducting the meeting, votes at the beginning of such meeting, or portion thereof, to close the meeting, and a copy of such vote is made available to the public. The provisions of this subsection, and subsection (d), shall not apply to any meeting to which such regulations apply: Provided, That the agency shall, except to the extent that the provision of subsection (b) may apply, provide the public with public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity.

(d) 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 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, or of the members of the subdivision thereof conducting the meeting, determines by a 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 opportunity. The 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 announcement required by this paragraph if, (1) a majority of the entire membership of the agency, or of the subdivision thereof conducting the meeting, determines by a vote that agency business so requires, and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change at the earliest practicable opportunity. Immediately following the public announcement required by this par-

agraph, notice of such announcement shall also be submitted for publication in the Federal Register.

(e) A complete transcript or electronic recording adequate to fully record 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 (b). The agency shall make promptly available to the public, in a place 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, where no significant portion of such discussion or testimony contains any information specified in paragraphs (1) through (10) of subsection (b). Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. 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.

(f) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the enactment 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 (a) through (e) of this section. 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 (a) through (e) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(g) The district courts of the United States have jurisdiction to enforce the requirement of subsections (a) through (e) 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. 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. 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, including 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 (h) of this section, nothing in this section confers jurisdiction on any district court to set aside or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

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

(i) 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 (f), (g), or (h) of this section. Costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentially and repeatedly violated this section, or against the plaintiff where the court finds that the suit was initiated by the plaintiff for frivolous or dilatory purposes. In the case of apportionment of costs against an agency, the costs may be assessed by the court against the United States.

(j) The agencies subject to the requirements of this section shall annually report to Congress regarding their 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.

SEC. 202. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) 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—

"(1) no interested person outside the agency shall make or knowingly 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 relevant to the merits of the proceeding;

"(2) 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 knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(3) 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, a communication in violation of this subsection, shall place on the public record of the proceeding:

"(A) written communications transmitted in violation of this subsection;

"(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

"(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

"(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; 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 by virtue of such violation;

"(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they 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 at the time of his acquisition of such knowledge.".

(b) The second sentence of section 554(d) of title 5, United States Code, is amended to read as follows: "Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.".

(c) 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 paragraph (13) and inserting in lieu thereof "act; 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.".

(d) 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 party who has knowingly committed such violation or knowingly caused such violation to occur.".

SEC. 203. (a) Except as specifically provided by section 201, nothing in section 201 confers any additional rights on any person, or limits

the present rights of any such person, to inspect or copy, under section 552 of title 5, United States Code, any documents or other written material within the possession of any agency. In the case of any request made pursuant to section 552 of title 5, United States Code, to copy or inspect the transcripts or electronic recordings described in section 201(e), the provisions of this Act shall govern whether such transcript or electronic recordings shall be made available in accordance with such request. The requirements of chapter 33, of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in section 201(e). This title does not authorize any information to be withheld from Congress.

(b) Nothing in section 201 authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to that individual under section 552a of title 5, United States Code.

SEC. 204. The provisions of this title shall become effective one hundred and eighty days after the date on which this Act is enacted, except that the provisions of section 201 requiring the issuance of regulations to implement such section shall become effective upon enactment.

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Calendar No. 343

94TH CONGRESS
1st Session

SENATE

REPORT
No. 94-381

GOVERNMENT IN THE SUNSHINE ACT

SEPTEMBER 18 (legislative day, SEPTEMBER 12), 1975.—Ordered to be printed

Mr. CANNON, from the Committee on Rules and Administration and on behalf of the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 5]

The Committee on Rules and Administration, to which was referred title I of the bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes, having considered the same, reports favorably thereon with an additional amendment, and recommends that the bill as further amended by the Committee on Rules and Administration do pass.

The Committee on the Judiciary, to which was referred section 202 of Title II of the bill (S. 5), has been unable to act thereon due to the press of other legislative business, but agrees to report the bill with the reservation of the right to file on the floor of the Senate proposed amendments to this legislation at a later date.

S. 5 would provide that, except under certain specified circumstances, all meetings of multiheaded Government agencies and of congressional committees would be open to the public.

This measure was reported by the Committee on Government Operations on July 31, 1975, with an amendment in the nature of a substitute. On August 1, 1975, by unanimous consent, the bill was referred to the Committee on Rules and Administration for consideration of title I only, with instructions to report back no later than September 15. This reporting date was subsequently extended to September 19.

Title I, which is the subject of this Committee's consideration, would—

(1) Amend the Legislative Reorganization Act of 1946 to open to the public most meetings of Senate standing, select, and special committees (including all subcommittees), as well as meetings of joint committees and conference committees of the Congress;

(2) Repeal the present rule Senate on the subject (paragraph 7(b) of Rule XXV); and

(3) Amend Rule XI of the Rules of the House of Representatives to open to the public most meetings of House standing, select, and special committees (including all subcommittees).

The Committee on Rules and Administration is reporting S. 5 with an additional amendment, the effect of which would be to strike Title I from the bill. While the Committee generally agrees with the concept of more openness in Government as expressed in S. 5, it believes that in respect to congressional committees such purpose would more properly be achieved by direct amendment of the Standing Rules of the Senate rather than by amendment of the Legislative Reorganization Act of 1946. Consequently the Committee is reporting Senate Resolution 9 with an amendment in the nature of a substitute for that purpose. (For details of that proposal see the report of the Committee on Rules and Administration to accompany S. Res. 9.)

The Committee on Rules and Administration has recommended that in respect to congressional committees the purposes of S. 5 be accomplished by direct amendment of the Standing Rules, rather than by amendment of the Legislative Reorganization Act of 1946, for the following reasons:

Section 5 of Article I of the Constitution provides that "Each House may determine the Rules of its Proceedings, * * *." In the Committee's judgment such a fundamental change in Senate procedure as further opening of committee meetings should be accomplished by simple resolution directly amending the Senate rules, thus obviating the necessity of participation by the House of Representatives or the President in a matter which is solely within the jurisdiction of the Senate itself.

The Legislative Reorganization Act of 1970 enacted certain provisions bearing on the procedure and organization of both Houses of Congress. In many instances that Act effected changes in the Standing Rules of the House of Representatives, while it left comparable or identical provisions relating to the Senate standing as provisions of public law, and not as comparable changes in the Standing Rules of the Senate. The Committee on Rules and Administration has undertaken a review of all such provisions of the Legislative Reorganization Acts (1946 and 1970) with the objective of ultimately incorporating all appropriate provisions into the Standing Rules themselves.

The Committee on Rules and Administration did not address itself to the matter of open meetings of joint committees of Congress, believing that subject should await experience gained under the new procedure in respect to standing committees, but by a vote of 7 to 1 it agreed to table Senate Resolution 12, which would have opened up conference committees. The vote to table Senate Resolution 12 was as follows;

YEAS—7	NAYS—1
Mr. Cannon	Mr. Hatfield
Mr. Pell [1]	
Mr. Scott	
Mr. Byrd	
Mr. Griffin	
Mr. Allen	
Mr. Williams [1]	

[1] Proxy.

It should be noted that since the Committee on Rules and Administration was directed by the Senate to confine its consideration only to Title I of S. 5, the Committee is thereby precluded from reporting the technical or conforming amendments in the other portions of S. 5 which would be required as a result of its recommended deletion of Title I. Thus, should the recommendation of the Committee on Rules and Administration be approved by the Senate, authority for making such necessary conforming amendments should be included within that approval.

ROLLCALL VOTE ON S. 5

On the motion by Mr. Robert C. Byrd that Title I of S. 5 be stricken and the remainder of the bill be reported favorably, the Committee voted as follows:

YEAS—7	NAYS—1
Mr. Cannon	
Mr. Hatfield	
Mr. Pell [1]	
Mr. Scott	
Mr. Byrd	
Mr. Griffin	
Mr. Allen	
Mr. Williams [1]	

[1] By proxy.

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 94–880
2d Session } { Part I

GOVERNMENT IN THE SUNSHINE ACT

MARCH 8, 1976.—Ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 11656]

The Committee on Government Operations, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

AMENDMENTS

The two committee amendments, each of which is of a technical and conforming nature, are:

Page 7, line 3, before "closed" insert "to be".

Page 16, line 12, after "party" insert "or interested person".

EXPLANATION OF AMENDMENTS

The first amendment changes from the present to the future tense a reference to a meeting that has not yet been held.

The second amendment conforms one subparagraph of the ex parte communications provisions of the bill to the remainder of those provisions. The prohibition on such communications to an agency decisionmaking official applies to anyone who is an "interested person". Subparagraph (D) of the proposed section 557(d)(1) of title 5, United States Code, refers in its original form only to a "party", and the amendment adds "interested person" so as to make this subparagraph conform to the rest of section 4.

57–006 O

PURPOSE

The purpose of H.R. 11656 is to provide that meetings of multi-member Federal agencies shall be open to the public, with the exception of discussions of several narrowly defined areas. The bill also prohibits ex parte communications to and from agency decisionmaking officials with respect to the merits of pending proceedings.

The basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived." Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.

In a theoretical sense, the agencies in the executive branch are already accountable to the people through the President, who is indirectly elected, and the Congress, whose members are directly elected. This theoretical accountability, though, leaves agency commissioners far removed from the public view in their day-to-day activities.

Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process first-hand. In the words of FCC Commissioner Glen O. Robinson, who testified before the Government Information and Individual Rights Subcommittee on this legislation:

> Chief among the benefits [of the legislation] is increasing public understanding of administrative decisionmaking processes. * * * I do not know whether that understanding will lead to greater confidence in administrative decisionmaking. * * * Quite possibly, it could lead to less confidence. But either of these outcomes * * * can be beneficial: if, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals and agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust. (Hearings on H.R. 10315 and H.R. 9868, p. 98.)

The legislation requires that when an agency closes a meeting under one of the exemptions in the bill, it must make a recording or verbatim transcript of the closed portion and release to the public any part of the recording or transcript that does not contain exempt information. A second purpose of this requirement is to assure that a citizen has a meaningful remedy when a meeting has been illegally closed, namely, the release by the court of the transcript of the illegally closed portion.

The purpose of the provisions of the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.

Summary of Major Provisions of the Legislation
Open Meetings

The open meeting provisions would apply to the approximately 50 Federal agencies that (1) are presently covered by the Freedom of Information Act and the Privacy Act, and (2) are headed by a body of two or more members, a majority of whom are chosen by the President with the advice and consent of the Senate. The measure is also expressly made applicable to the Federal Election Commission and the Post Service. Meetings covered under the bill include not only sessions at which formal action is taken, but also those at which a quorum of members deliberates regarding the conduct or disposition of agency business. A chance encounter or social gathering would not be a meeting within the meaning of the bill so long as no agency business is conducted or disposed of.

The bill requires that every part of every meeting be open to the public unless it falls within one of the bill's 10 specific exemptions. In case of doubt as to whether a portion of a meeting is exempt, the presumption is to be in favor of openness. Even if a matter falls within an exemption, the discussion must be open where the public interest so requires.

No meeting or portion thereof may be closed unless a majority of the entire membership votes to take such action. Such a vote need not itself occur during a meeting and could properly be taken by circulating a written ballot or tally sheet. If such a vote is taken during a meeting, the discussion and vote must of course be open to the public unless within one of the exemptions.

A copy of each vote on closing a meeting must be made available to the public whether or not the meeting or portion is closed. This will inform the public as to the full voting record of each agency member on openness questions. When a vote on the issue of closing fulfills the requirements for closing, a full written explanation of the action and a list of all persons expected to attend the meeting must also be made public.

Agencies are required to public announce, at least one week prior to a meeting, its date, location, and other relevant information.

The keeping of a complete, verbatim transcript or electronic recording of each portion of a meeting closed to the public would be required (except for discussions dealing with adjudications or agency participation in civil actions), and any portion of each transcript or recording whose release would not have the effect set forth in one or more of the exemptions would have to be made available to the public. Information may be deleted only if it falls within an exemption and disclosure is not required by the public interest, and deletions would be replaced by a written explanation of the reason and the statutory authority for each. Written minutes of open meetings will also be required to be kept and made publicly available.

Any person could challenge in court the closing of a meeting or any other violation of the openness requirements of the bill, and the burden

of sustaining the closing or other action in question would be upon the agency. The court could grant any appropriation relief, including but not limited to enjoining future violations of the act or releasing the transcript of an improperly closed meeting.

Ex Parte Communications

Section 4 of the bill would enact a general prohibition on ex parte communications between agency decisionmaking personnel, including commissioners and administrative law judges, and outside persons having an interest in the outcome of a pending proceeding. These provisions would apply to executive agencies without regard to whether they are headed by a collegial body or a single individual.

The communications prohibited by the ex parte section would include only those relative to the merits of the proceeding. Thus, an inquiry of an agency clerk as to the procedural status of an adjudication or rulemaking matter would not be unlawful under the bill. A violation of the prohibition could result in sanctions up to and including loss of the proceeding on the merits (as under existing case law). *See, e.g., Jacksonville Broadcasting Corp.* v. *FCC*, 348 F.2d 75 (D.C. Cir.), *cert. denied*, 382 U.S. 893 (1965).

History of the Legislation

This legislation represents a further, logical step in the continuing process of opening governmental decisionmaking to the public at the Federal and State levels.

The Freedom of Information Act, making documents of executive departments and agencies generally available to the public, was enacted in 1966 (Public Law 89–487, 80 Stat. 250) and codified as section 552 of title 5, United States Code, the following year (Public Law 90–23, 81 Stat. 54).

In 1972, Congress enacted the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770, 5 U.S.C. App. I), designed to open to the public the meetings of advisory committees, study panels and ad hoc committees in the executive branch.

In 1974, after eight years of experience under the Freedom of Information Act and several series of oversight hearings and studies, Congress enacted strengthening amendments to that statute (Public Law 93–502, 88 Stat. 1561).

In March 1973, the House adopted H. Res. 259, generally requiring meetings of House committees (including markup sessions) to be open to the public. On November 5, 1975, the Senate adopted S. Res. 9, opening to public observation markups and other sessions of Senate committees. The adoption of S. Res. 9 also completed the necessary action to open meetings of conference committees (the House action in this regard had been taken earlier in 1975 by H. Res. 5, but the effectiveness of the House provision had been stayed pending the adoption of a similar rule by the Senate).

The present legislation relates only to open meetings of agencies in the executive branch. It made its first congressional appearance in

1972 (H.R. 16450, 92d Cong., 2d Sess.) and was reintroduced in the 93d Congress with a total of almost 50 co-sponsors. In the present Congress, various versions of the legislation in the House have a total of 85 co-sponsors.

The Senate Government Operations Subcommittee on Executive Reorganization held hearings on S. 260, a counterpart to H.R. 11656, in 1974, and passed S. 5, a similar measure, on November 6, 1975, by a vote of 94–0.

Hearings

The Government Information and Individual Rights Subcommittee held hearings on H.R. 10315 and H.R. 9868, earlier versions of this legislation, on November 6 and 12, 1975. Witnesses included representatives of executive agencies, the press, the bar, and the public.

Committee Vote

At a meeting of the full Committee on Government Operations on March 2, 1976, a quorum being present, H.R. 11656, as amended, was approved and ordered reported by a vote of 32 ayes to 7 nays.

Statement Pursuant to Clause 7(a) of Rule XIII

The committee estimates that the ex parte provisions of the legislation will result in no additional costs.

The committee anticipates that most of the costs incurred in connection with the open meeting provisions will be for the clerical and administrative work they require. The committee estimates that such costs will be minimal.

Under the bill, most agency meetings will be open to the public and will therefore not require transcripts or electronic recordings. In most instances, minutes are already taken at such meetings, so the only additional expense will be that of duplicating one or more sets of the minutes to be made available to the public. (Ordinarily, a member of the public desiring his own set of the minutes will bear the expense of copying.) The only other cost of an open meeting under this legislation is that of the public announcement; this too, should be negligible.

An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. Thus, the more frequently an agency closes meetings, the greater will be the cost. Considering the approximately 50 covered agencies as a whole, the committee estimates that relatively few portions of meetings will be closed and that the costs associated with closings will therefore be minimal. This cost will be further reduced if an electronic recording device, rather than stenographic notation, is used. The cost of electronic recording equipment estimated at a few thousand dollars per covered agency. The cost of transcription will be borne in large measure by members of the public requesting copies of transcripts.

The committee's estimate comports with that provided by the Comptroller General.

Statement Pursuant to Clause 2(l) of Rule XI

(A) No oversight findings or recommendations have been made with regard to this measure.

(B) This measure does not provide for additional budget authority.

(C) The estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974 follow. Unless otherwise stated, all figures represent cumulative totals for the approximately 50 agencies covered by the open meeting provisions of the bill:

COST ESTIMATE

Any projections of the costs of the "Sunshine Act" has to be tentative since the number of recording devices it will be necessary to buy and the amount of clerical time involved is difficult to estimate. With this limitation, the costs of making the proceedings of closed meetings available to the public could be $30,000 for new recording equipment and $130,000 annually for additional clerical help. Assuming a starting date of July 1, 1977, the budget impact would be:

Transition quarter	[1] 62, 500
Fiscal year 1977	130, 000
Fiscal year 1978	[2] 138, 000
Fiscal year 1979	145, 000
Fiscal year 1980	152, 000
Fiscal year 1981	160, 000

[1] $30,000 for recording devices, 25 percent of $130,000 in personnel costs.
[2] Salaries are tied to the changes in the CPI at a 5-percent real growth rate in GNP.

BASIS OF ESTIMATE

The cost of a conference recording device should be about $400. This analysis has assumed that half of the fifty or so agencies in question will purchase one new recording machine, and that the other half will require two.

As for hiring additional clerical help, the assumption here is that one-quarter of the fifty agencies will do so at an average salary of $10,000 annually. If Congressional expectations that there will be few closed meetings are realized, this estimate on personnel could be on the high side of the spectrum.

ESTIMATE COMPARISON

Senate Report 94–354 estimates that the cost per agency will be a few thousand dollars. The CBO cost projections are also in that range.

Statement Pursuant to Clause 2(l)(4) of Rule XI

The enactment of this bill into law is not expected to have any inflationary impact on prices or costs in the operation of the national economy.

Section-By-Section Analysis

SECTION 1

Section 1 provides that this act may be cited as the "Government in the Sunshine Act."

SECTION 2

Section 2 declares that it is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that it is the purpose of this act to provide the public with such information to the maximum extent possible without infringing the rights of individuals or significantly interfering with the ability of the Government to carry out its substantive responsibilities.

SECTION 3

Section 3 adds a new section 552b, entitled "Open meetings", to title 5 of the United States Code.

Subsection (a)

Subsection (a) defines certain terms employed in section 552b. Since section 552b will be part of chapter 5 of title 5, United States Code, the definitions contained in existing section 551 also apply to it unless inconsistent with the definitions in subsection (a).

The term "agency" includes (1) any Federal agency, as defined under the Freedom of Information Act (5 U.S.C. § 552(e)), which is headed by a collegial body composed of two or more members, a majority of whom are appointed by the President with the advice and consent of the Senate, (2) any subdivision thereof authorized to act on behalf of the agency (without regard to the number of members composing or included in the subdivision), and (3) the Federal Election Commission. Though a single agency head, his deputy, and his assistants may "head" an agency in the colloquial sense, they do not have common duties and thus are not a collegial body, and their agency would not come within this definition. On the other hand, while the chair of a commission that heads an agency may have certain responsibilities over and above those of his or her fellow commissioners, his or her position as *primus inter pares* would not remove the agency from the coverage of section 552b.

A subdivision of an agency covered under section 552b is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of section 552b.

While the definition of agency does not include advisory committees generally, it does include other bodies composed of part-time Govern-

ment employees which meet from time to time to review agency activities and give guidance to staff, approve staff actions, review and approve the agency's proposed budget, and so forth. Such a board or group would come within the definition of an agency even though day-to-day supervision might be provided by a single administrator. A specific provision as to the applicability of the Federal Advisory Committee Act, 5 U.S.C. App. I, is contained in subsection (o) of section 552b.

The use of a generic definition for the agencies covered by the bill parallels the Administrative Procedure Act, 5 U.S.C. § 551(1), the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

MEETING

The term "meeting" means the deliberations of at least the number of agency members required to take action on behalf of the agency, where such deliberations concern the joint conduct or disposition of agency business. The word "deliberations" includes not only a gathering of the requisite number of members in a single physical place, but also, for example, a conference telephone call or a series of two-party calls involving the requisite number of members and conducting agency business. The conduct of agency business is intended to include not just the formal decisionmaking or voting, but *all* discussion relating to the business of the agency. The limitation of the definition to "joint" conduct is intended to exclude a situation where the requisite number of members is physically present in one place but not conducting agency business as a body (as, e.g., at a meeting at which one member is giving a speech while a number of his fellow members are scattered throughout the audience). It does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business.

MEMBER

The term "member" means an individual who belongs to a collegial body heading an agency. Such an individual is a member for the purposes of section 552b even if not appointed by the President and confirmed by the Senate, so long as a majority of the members of the body are so appointed and confirmed.

Subsection (b)

Subsection (b) sets forth the basic principle of section 552b, namely, that unless specifically exempted by subsection (c), every portion of every meeting must be open to public observation. The presumption in every instance is that a meeting shall be open to the public, and this presumption may be overcome only by a preponderant showing that the portion proposed to be closed clearly comes within one of the exemptions contained in subsection (c).

The phrase "open to public observation," while not affording the public any additional right to participate in a meeting, is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.

Subsection (c)

Subsection (c) sets forth the circumstances under which a meeting or portion thereof may be closed to the public, and under which specified information developed in such a meeting or portion need not be disclosed to the public. The subsection contains 10 exemptions to the general rule of openness set forth in subsection (b), but provides that even if a meeting or information falls within one of them, it shall not be closed (or, in the case of information, withheld), if the public interest requires otherwise. This balancing procedure is to be performed by the agency in the first instance.

The provision permits closing where the agency properly determines that the discussion is likely to come within one or more of the exemptions. It lets the agency withhold information contained in a transcript or recording where the disclosure of the information would in fact have the effect set forth in one or more exemptions. The burden of sustaining a closing or withholding is at all times upon the agency.

The specific exemptions are:

(1) Exemption 1 covers matters that are specifically authorized under criteria established under an Executive order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. No matters may be withheld under this exemption unless they meet both requirements. In order for material to be "properly classified", it must have been originally classified pursuant to the applicable Executive order, remain entitled to such classification, and currently be protected from loss or compromise pursuant to the provisions of the Executive order.

Under subsection (h) of section 552b, a court considering whether this or any other exemption has been properly invoked may examine the transcript or electronic recording of the meeting in camera, and may take any other evidence it deems necessary.

(2) This exemption includes meetings relating solely to an agency's internal personnel rules and practices. It is intended to protect the privacy of staff members and to cover the handling of strictly internal matters. It does not include discussions or information dealing with agency policies governing employees' dealings with the public, such as manuals or directives setting forth job functions or procedures. As is the case with all of the exemptions, a closing or withholding permitted by this paragraph should not be made if the public interest requires otherwise.

(3) This paragraph permits closing or withholding where a statute other than section 552b requires the withholding of the information in question and establishes particular criteria defining such information or refers to particular types of information. A statute that merely permits withholding, rather than affirmatively requiring it, would not come within this paragraph, nor would a statute that fails to define with particularity the type of information it requires to be withheld.

Thus, for example, section 1104 of the Federal Aviation Act of 1958, (49 U.S.C. § 1504), which allows the Federal Aviation Administration to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public," would not qualify under this exemption. *See Adminis-*

trator, FAA v. *Robertson*, 422 U.S. 255 (1972). Similarly, the Freedom of Information Act (5 U.S.C. 552), which permits but does not require the withholding of information would not come within this exemption; and the Trade Secrets Act (18 U.S.C. § 1905), which relates only to the disclosure of information "not authorized by law," would not permit the withholding of information whose disclosure is required under the Freedom of Information Act or under this act, since FOIA and this act authorize its disclosure. (In connection with section 1905, see *Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F. 2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.)

Examples of statutes that could justify a closing or withholding under paragraph 3 include sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e–5(b), 2000e–8(e)), and section 314(a)(3) of the Federal Election Campaign (2 U.S.C. § 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

(*4*) This exemption, which is identical to the trade secrets exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), protects trade secrets and commercial or financial information obtained from a person and privileged or confidential. A "trade secret" has been defined judicially as:

> An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities. *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Comm.*, 6 F. 2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927).

This exemption also includes matter subject to certain evidentiary privileges (doctor-patient, attorney-client) and confidential commercial or financial information. The adoption of language following that in the Freedom of Information Act is with recognition of judicial interpretations of the FOIA exemption.

(*5*) Exemption (5) covers discussions that involve accusing any person of a crime or formally censuring any person. In order to be covered by this paragraph, the discussion must relate to a specified person or persons and, if possible criminal violation is at issue, a specific crime or crimes. Further, the agency must be considering a possible action of a formal nature against the person in question.

Although the statute contains a general presumption in favor of open meetings, this exemption balances that presumption against the individual's right of privacy. Unless the public interest requires otherwise, this exemption permits an agency to close a discussion that deals with and precedes a decision whether to take formal action against an individual.

(*6*) This paragraph permits the closing of a meeting where the discussion would reveal personal information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. Like exemption (5), this paragraph balances the need for openness against the individual's right to privacy. It would, for example, allow the closing of a discussion of an individual's health or alleged drinking habits.

In addition to the applicability of the general rule that allows such a discussion to be open if that is in the public interest, the committee notes that there may be circumstances where the official status of the individual in question affects whether this exemption should be invoked (e.g., a discussion of an individual's competence to perform his job might be open if he is a high government official, but closed if he is of a lower rank or a private citizen). *Compare New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), *with Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

Since the primary purpose of this exemption and of exemption (5) is to protect the privacy of the person in question, the exemptions should not ordinarily be utilized to close a meeting that the subject would prefer to have open.

(*7*) This paragraph applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. A meeting could be closed, however, only to the extent that disclosure of records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; disclose investigative techniques and procedures; or endanger the life or physical safety of law enforcement personnel. This exemption recognizes that premature public disclosure of certain matters concerning an investigation could jeopardize these investigations and hinder the ability of the agencies to fulfill their statutory duties.

To justify closing under this exemption, the records in question must relate to a specific person or persons. The fact that the identity of a confidential source may be withheld does not justify the withholding of information secured from such a source which does not in and of itself reveal the identity of the source. Another governmental agency may not be a "confidential" source, as the intent of subparagraph (D) is to protect citizen informants and like sources.

An investigation may not be a "lawful" national security investigation unless it is carried on within the Constitution and applicable laws. Thus, a discussion involving the records of unlawful activities in such programs as CHAOS, COINTELPRO, and illegal CIA and FBI mail opening does not involve a lawful national security investigation.

The provision relating to investigative techniques and procedures does not include matters already known to the public. Thus, although a meeting might be closed if it concerns a new technique for crime detection only to the extent that the discussion is likely to bring out aspects of it not already made public through judicial proceedings, news stories, and the like.

The provision relating to an invasion of personal privacy is limited to the privacy of an individual. See Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9 (1975).

(*8*) This exemption applies to meetings which would, if open, disclose information contained in or relating to examination, operating, or condition reports on financial institutions. Such reports are prepared by or for such bank regulatory agencies as the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve Board. This provision is identical to exemption (8) of the Freedom of Information Act.

(*9*) This exemption protects information whose premature disclosure would have certain adverse affects. Subparagraph (A), which applies solely to agencies that regulate securities, currencies, commodities or financial institutions, includes information whose disclosure would be likely to lead to significant financial speculation or to significantly endanger the stability of any financial institution. This subparagraph would cover many of the regulatory activities of such agencies as the Federal Reserve Board and the Securities and Exchange Commission.

Subparagraph (9) (B) applies to all agencies and protects information whose premature disclosure would be likely to significantly frustrate an agency action that has not yet taken place. This provision does not apply to such information, though, if the content or nature of the proposed action has already been disclosed to the public by the agency or the agency is required by law to disclose it to the public before final approval of the action. In the case of rule making, for example, where an agency has or will be required to publish the proposed rule for notice and comment prior to placing it in effect, subparagraph (9) (B) would not permit closing of a discussion of the proposal.

If it is not already covered by exemption (2) an agency's discussion of its strategy in labor negotiations, or a Civil Service Commission discussion of labor negotiation strategy for other agencies, could come within paragraph (9) (B).

As with several other exemptions, exemption (9) employs a balancing test between the presumption in favor of openness and the need to delay the disclosure of certain information in the interest of proper administration. The use of the words "significant" and "significantly" is intended to limit closings under this paragraph to instances wherein disclosure at the time in question would have a considerable adverse effect.

(*10*) This paragraph includes discussions specifically concerning the agency's issuance of a subpoena, participation in a civil action, 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 adjudication involving a determination on the record after opportunity for a hearing (whether or not pursuant to 5 U.S.C. § 554).

A discussion of whether to commence a civil action or adjudicatory proceeding, or to formally request the Justice Department to commence a civil action, is included within the ambit of this exemption.

Among the reasons for this exemption are the need to allow an agency to discuss in private its strategy in litigation in which it is

involved and the fact that, when acting in an adjudicatory proceeding, the agency is relying upon the written record and acting in a quasi-judicial fashion.

Of course, if the public interest or another provision of law (see discussion of subsection (m), *infra*) so requires, a discussion falling within the literal terms of this or any other exemption must be open to the public.

Subsection (d)

Subsection (d) sets forth the procedures governing the closing of meetings, or portions of meetings, subject to the criteria set forth in subsection (c).

Subsection (d)(1) allows the closing of a meeting or the withholding of information only when a majority of the agency members votes to take such action, and requires a separate vote for each meeting a portion or portions of which are proposed to be closed. There is no requirement that a vote on whether to close a meeting must itself be taken at a meeting, and the seriatim marking of a written tally sheet would be a permissible means of taking such a vote. If, though, a vote on whether to close a meeting is taken at that meeting or a prior meeting, the vote and all discussion leading up to it must be open unless closed under one of the exemptions set forth in subsection (c).

Subsection (d)(1) permits a single vote to be taken with respect to a series of portions of meetings if all are to be held within thirty days after the first and all involve the same particular item (i.e., not just a general discussion of a generic subject).

No proxy votes may be cast in a vote on whether to close a meeting, and the vote of each agency member must be recorded so as to permit identification by name of how each member has voted.

Subsection (d)(2) permits any person whose interests may be directly affected by a portion of a meeting to request that it be closed under exemption (5) (accusation of a crime), (6) (personal privacy) or (7) (investigatory records). If any agency member so requests, the agency must vote by recorded vote whether to close the meeting in response to the request.

Subsection (d)(3) requires that within one day after a vote on whether to close a meeting or withhold information, the agency must make publicly available a written statement setting forth the vote of each member. All such votes must be made public in this manner, even if the decision has been to keep the meeting open or to release the information in question. This will enable the general public to be aware of an agency member's overall voting record on openness questions.

Subsection (d)(3) also requires, that if a meeting is to be closed to the public, the agency shall, within one day after the decision to close is reached, make publicly available a full written explanation of the action and a list of the names and affiliations of all persons expected to attend the meeting. Such an explanation should note the paragraph or subparagraph of subsection (c) which is the basis for the closing, and should explain how the discussion falls into that exemption and the factors that were considered in reaching the deci-

sion to close. It should in every instance be as detailed as possible without revealing the exempt information.

This subsection and others in the bill require that certain information be made available to the public. The committee, desiring to avoid the expense and delay attendant upon requiring publication of such matter in the Federal Register, has not mandated this in any instance. The committee does intend, though, that all reasonable means be used to assure that the public is fully informed of such information. Means of publicizing such information should include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest, and sending them to the individuals on the agency's general mailing list or a mailing list maintained for those who desire to receive such material. Publication in the Federal Register, while not mandated by the bill, provides a further potential means of publicizing these announcements and should be used wherever possible.

Subsection (d)(4) permits any agency a majority of whose meetings may properly be closed pursuant to exemptions (4), (8), (9)(A), or (10) to provide by regulation for the use of an expedited procedure for the closing of meetings coming within those exemptions. Closings under this paragraph will not be subject to the following requirements normally imposed by the bill: providing one week's advance notice of the meeting; taking a vote on whether close prior to the time of the meeting; providing an explanation for the closing; providing advance notice of the name of an official who will respond to requests for information about the meetings; and taking a vote of the agency membership to change the agenda for a meeting after it has originally been announced.

Closing will be permitted under this provision only if the agency so votes by recorded vote no later than the beginning of the meeting or portion in question and gives public notice of the date, place and subject matter of each portion of the meeting at the earliest practicable time and in no case later than the commencement of the meeting or portion. While the vote to close is not required to be made public within one day after it is taken, it must be made public as promptly as is physically possible.

Subsection (d)(4) will simplify closing procedures for agencies regulating securities, commodities, and financial institutions, who must often meet on very short notice, and agencies whose primary or sole responsibility is to conduct adjudicatory proceedings. Examples of agencies expected to qualify under this paragraph are the Securities and Exchange Commission, the Federal Reserve Board and the National Labor Relations Board.

Subsection (e)

This subsection requires a week's public notice of the date, place, and subject matter of a meeting, as well as whether it is to be open or closed and the name and telephone number of an agency official who will respond to requests for information regarding the meeting. The one-week period may be shortened if a majority of the agency membership votes by recorded vote that the agency business so requires, in which case the announcement shall be made at the earliest practicable time and in no case later than the commencement of the

meeting or portion in question. Such a vote shall be made public as promptly as it physically possible.

No change may be made in any of the items required to appear in the meeting notice once it has been made public except by a recorded vote of the majority of the agency upon a determination that the agency business requires the change and that no earlier announcement thereof was possible. The agency must announce the change and the vote of each member at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

The subject-matter identification required by this subsection must be of a specific nature, e.g., the docket names or titles and numbers, rather than a general statement as to the generic subjects to be discussed. Affording the public less than one week's notice, or making changes after the meeting has been publicly announced, should occur only on an emergency basis.

Subsection (f)

Subsection (f)(1) requires that a complete, verbatim transcript or electronic recording be made of any meeting or portion closed to the public, except for meetings closed under exemption (10) (civil actions and adjudications). Once the meeting has been concluded and the transcript or recording prepared, the agency must make public such portions of it as it determines (by recorded vote) not to contain information exempt from disclosure under subsection (c). In place of each deletion, the agency must supply a written explanation of the reason therefor and the identity of the statute said to permit the deletion. This explanation would not be required to disclose exempt information.

The transcript or recording must be made easily accessible to the public and available for inspection without charge. If made available in the form of a recording, provision must be made so that the identity of each speaker is disclosed. The agency must furnish copies of the transcript (or transcription of the recording) at no greater than the actual, direct cost of duplication; if the public interest so requires, copies shall be made available without charge.

A complete copy of the transcript or recording must be maintained for two years after the meeting or until one year after the conclusion of the proceeding in question, whichever occurs later.

The premise of this bill is that almost all agency meetings will be open, and that as a result, relatively few transcripts or recordings will have to be made. One reason for requiring a transcript or recording is that, once a closed meeting is actually held, most or all of it may turn out to be non-exempt. The existence of the transcript or recording allows the release of the discussion as soon as this fact becomes apparent (albeit after the meeting has been held). A second reason, related to judicial review, is discussed under subsection (h), *infra*.

Within a transcript or recording, deletions should be made only where the deleted material is exempt under subsection (c). Of course, the agency must maintain in its files a complete copy, without any deletions, for the period set forth in the last sentence of subsection (f)(1).

Agency fees for duplication should be uniform and contained in published regulations, as is the case under the Freedom of Information Act. Fees must not exceed the actual, direct cost of duplication (in the

case of a transcript) or transcription (for a recording) and, when in the public interest, or primarily of benefit to the public, the material should be furnished without charge. In no instance should fees be set with the purpose of discouraging public requests for transcripts or transcriptions; their sole purpose is to permit recovery of some or all of the direct cost of providing them.

Subsection (f)(2) requires that written minutes be made of all meetings open to the public, and that they be made available for public inspection without charge. Copies are to be furnished to the public at no greater than the actual, direct cost of duplication or, if in the public interest without charge. The minutes shall be maintained for a period of at least two years after the meeting.

Most, if not all agencies already keep minutes of their meetings. This provision would permit an individual who is unaware of or unable to attend an open meeting to ascertain with ease what transpired there.

Subsection (g)

This subsection required each agency, within 180 days after the date of enactment of this section and following consultation with the Office of the Chairman of the Administrative Conference of the United States and 30 days' notice for comment in the Federal Register, to promulgate regulations to implement subsections (b) through (f). Should an agency fail to promulgate regulations within the 180-day period, any person may bring a proceeding in the United States District Court for the District of Columbia to require promulgation.

Once regulations have been promulgated by an agency, they are subject to challenge by any person in the United States Court of Appeals for the District of Columbia Circuit. Such a proceeding would be subject to the same statute of limitations as any other proceeding challenging a rule-making order of the agency in question. *See, e.g.*, 28 U.S.C. § 2344, 47 U.S.C. § 402 (c). This limitation of time for a direct challenge to the regulations is of course not intended to limit the right of a litigant to question their validity when they are applied to him at some later date. *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

Subsection (h)

Subsection (h) permits any person to bring an action in a United States District Court against an agency or any members thereof to enforce the requirements of subsections (b) through (f). Such a suit must be commenced no later than 60 days after the meeting in question, except that if public announcement in accord with this section is not made, the plaintiff may commence his action at any time up to 60 days after a public announcement of the meeting is in fact made. As in subsections (d) and (e), any public announcement must be made in a manner calculated to assure its wide dissemination in order to qualify as a "public announcement" as that term is used herein. The plaintiff need not pursue any remedies or appeals within the agency prior to bringing suit under this subsection.

An action 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. Venue provisions permitting the plaintiff to sue where he resides are applicable generally to actions against officers of the United States, 28 U.S.C. § 1391(e), as well as in actions under

the Freedom of Information Act, 5 U.S.C. § 552, and the privacy Act of 1974. 5 U.S.C. § 552a.

The defendant must serve his answer to a complaint in such an action within 20 days after the complaint is served upon him, and the court may extend this limit for up to 20 additional days upon a showing of good cause therefor. A showing of good cause requires not merely a conclusory recital that additional time is required, but an affidavit setting forth facts which justify an extension in the particular case.

The burden of proof is upon the agency to sustain the closing, withholding of information, or other action alleged to have been taken improperly. The reasons for this requirement are two: first and foremost, the presumption is in favor of openness; and second, the agency will in almost every instance be in exclusive possession of the facts relevant to the agency decision.

In considering a case under this section, the court may examine in chambers any portion of a transcript or electronic recording of a closed meeting, and may also take an additional testimonial or documentary evidence it deems necessary.

The court may award any appropriate relief (other than money damages), including an injunction against future violations of this section or a declaratory judgment that a certain practice or policy is unlawful. The court may also order the release of any portion of the transcript, recording, or transcription as does not contain information specifically exemplified from disclosure under subsection (c). The court, when acting solely under this subsection, is not authorized to set aside, enjoin, or invalidate any substantive agency action taken or discussed at the meeting in relation to which a violation of this section occurred.

The power of the court to release the non-exempt portion of a transcript, recording, or transcription of an unlawfully closed meeting points up another reason for requiring such records to be made. Since a judicial determination that a meeting was unlawfully closed will in most instances come long after the meeting has been held, and since the substantive action taken at the meeting cannot be nullified when the court is acting solely under this subsection, the possibility of finding out what transpired at the meeting represents the only realistic remedy available to a plaintiff.

Subsection (i)

This subsection authorizes a court otherwise empowered by law to review an agency action to consider in the course of its review whether the agency violated this section. This provision does not make reviewable any action that is not reviewable on another basis, nor does it make applicable to a proceeding for review of a substantive agency action the limitations of time and other procedural aspects of judicial review under subsection (h). A court reviewing compliance with this section under subsection (i) may afford any relief it deems appropriate. This might, in a rare instance, include nullification of the substantive agency action.

Subsection (j)

Subsection (j) authorizes the court to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in an action brought

under subsection (g), (h), or (i), except that costs may be assessed against an individual agency member only where the court finds that he has intentionally and repeatedly violated this section, and against the plaintiff only where the action was commenced primarily for frivolous or dilatory purposes. When costs are assessed against an agency, the court may assess them against the United States in lieu of the agency or may permit the plaintiff to elect whether to have them assessed against the agency or the United States.

While the concept of rendering individual agency members liable for attorney fees (albeit only in extraordinary instances) appears to be a novel one in Federal law, the committee notes that the Privacy Act of 1974, 5 U.S.C. § 552a, contains criminal penalties for violations, and that the Freedom of Information Act, 5 U.S.C. § 552, requires the Civil Service Commission to institute disciplinary proceedings where agency personnel act arbitrarily or capriciously in withholding documents thereunder. Further, of the 49 states that have open meeting laws, 24 impose criminal penalties for violations by government officials, two more provide for civil penalties, and 19 render the substantive action taken at an unlawfully closed meeting void or voidable.

The provision for liability on the part of a plaintiff or individual agency member should rarely have to be used, and any invocation of it should be attended by notice, an opportunity to be heard, and any other applicable aspects of due process of law.

Subsection (k)

This subsection requires each agency subject to this section to report annually to Congress regarding its compliance, including a tabulation of the total number closed to the public, the reasons for closings, and a description of any litigation brought against the agency under this section (including any costs assessed against the agency).

Subsection (l)

This subsection provides that this section is not intended to alter rights under the Freedom of Information Act, 5 U.S.C. § 552, except as expressly provided. The provisions of this section, rather than the Freedom of Information Act, shall apply to transcripts or recordings made in order to comply with this section; as is the case under that act, however, the agency must demonstrate that the material in a transcript would, if released, have the effect protected under subsection (c). Since these items must be retained for a specific time period under subsection (f)(1), this subsection removes them from the coverage of the Federal Records Act, 44 U.S.C. § 3301 et seq., which contains general standards for the disposal of agency records.

Subsection (m)

Subsection (m) provides that this section does not constitute authority to withhold information from Congress and does not authorize the closing of any agency meeting otherwise required by law to be open.

Subsection (n)

Subsection (n) provides that if a record, including a transcript or electronic recording made pursuant to this section, is accessible to an individual under the Privacy Act of 1974, 5 U.S.C. § 552a, it may not be withheld from him on the basis of this section.

Subsection (o)

Subsection (o) provides that in the event any meeting is subject to the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. I, as well as the provisions of this section, the provisions of this section shall govern. An example of this is a meeting between the collegial body heading an agency and one of the agency's advisory committees.

SECTION 4

Section 4 would establish for the first time a definite, general statutory statement as to the limitations and procedures governing ex parte communications with respect to agency proceedings. At present, such limitations and procedures are governed by agency rules and by constitutional standards, neither of which have the clarity, uniformity, and general public availability of a statute.

Section 4(a) adds a new subsection (d) to 5 U.S.C. § 557, enacting the general prohibition ex parte communications relative to the merits of a pending proceeding between an agency decision making official and an interested person outside the agency. The subsection also requires placing such communications on the public record if they do occur.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section are not intended to repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The rule forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption might include, for example, requests by one party to a proceeding for subpoenas, adjournments, and continuances.

Paragraph (1)(A) forbids contacts between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The term "interested person" is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person to be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large

who makes a casual or general expression of opinion about a pending proceeding.

The rule applies to interested persons who "make or cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of causing an ex parte contact.

Contacts are prohibited with any agency member, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional process. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The ex parte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relative to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not prohibted by this section.

A request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the

agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

Paragraph (1)(B) is the inverse of paragraph (1)(A). It prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1)(A).

Paragraph (1)(C) states that if an ex parte communication prohibited by this subsection is made or received by an agency official, he must place on the proceeding's public record: (i) any written communication, (ii) a memorandum stating the substance of any such illegal oral communication, and (iii) any written statements, or memoranda of any oral statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the materials relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively nullified. Agency officials who make an ex parte conact are under the same obligation to record it publicly, as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certin cases actual notice of the ex parte communication to be provided to all parties.

Paragraph (1)(D) states that the officer presiding over the agency hearings in the proceeding may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected because of the violation. This provision accompanies section 4(c), which amends 5 U.S.C. S 556(d) to authorize an agency to consider a violation of this section as grounds for ruling against a party on the merits. Subparagraph (D) insures that the record contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion. As in the case of subsection 4(c), the presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus, a showing should not be required where the violation was clearly inadvertent.

Paragraph (1)(E) requires that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communication before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency, if it wishes, may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

The new subsection 557(d) would also provide that section 557 is not authority to withhold information from Congress. While the pro-

hibitions on ex parte communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence.

Subsection 4(b) adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act. The term includes an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. As in subsection (a), "public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceedings, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Subsection 4(c) amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provision apply to both formal parties and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in an illegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes."

For example, the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

It is expected that an agency will rule against a party on the merits under this subsection only in rare instances, and in no case wherein the party demonstrates that the violation was inadvertent. However, the committee felt it very important that an agency have this option available where the circumstances justify it.

Section 5

Section 5(a) conforms 39 U.S.C. § 410(b)(1) to the open meeting provisions of this bill and the Privacy Act by clarifying the applicability of these statutes to the Postal Service.

Section 5(b) amends exemption (3) of the Freedom of Information Act, 5 U.S.C. § 552, to conform it to exemption (3) of the open meeting

provisions of this bill and to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1972).

Robertson held that exemption (3), which exempts from the coverage of the Freedom of Information Act any information "specifically exempted from disclosure by statute," includes within its ambit section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504), which allows the FAA Administrator to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public."

Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S C. §§ 2161–66, which provides explicitly for the protection of certain nuclear data.

Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *cart blanche* to withhold any information he pleases, would not come within exemption 3. Similarly, the Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is "not authorized by law," would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. *See Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.

Examples of statutes that could justify withholding under the amended exemption (3) includes sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e–5(b), 2000e–8(e)) and section 314(a)(3) of the Federal Election Campaign Act (2 U.S.C. S 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

Section 6

Section 6 provides that, with the exception of subsection (g) of the new 5 U.S.C. § 552b added by this act, the act shall take effect 180 days after the date of its enactment. Subsection (g), which requires the affected agencies to promulgate regulations within 180 days after it

takes effect, is to take effect upon enactment; this will assure that regulations have been promulgated by the time the substantive provisions of the open meeting portion of the bill come into force.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

SEC.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.
552. Public information; agency rules, opinions, orders, records and proceedings.
552a. Records about individuals.
552b. Open meetings.
553. Rule making.
554. Adjudications.
555. Ancillary matters.
556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.
558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
559. Effect on other laws; effect of subsequent statute.

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

571. Purpose.
572. Definitions.
573. Administrative Conference of the United States.
574. Powers and duties of the Conference.
575. Organization of the Conference.
576. Appropriations.

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.] *; and*

(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.

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§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) * * *

* * * * * * *

(b) This section does not apply to matters that are—

(1) * * *

* * * * * * *

[(3) specifically exempted from disclosure by statute;]

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

* * * * * * *

§ 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, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations 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.

(b) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

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

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

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

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

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

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

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

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

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

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

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

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that 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

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d) (1) Action under subsection (c) 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 thity 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 paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

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

(4) Any agency, a majority of the portions of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) 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), (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 meeting 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 announcement 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 an-

nouncement 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 (10) 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. 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 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, within 180 days after the date of enactment of this section, 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 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. Subject to any limitations of time therefor provided by law, 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. 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. 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, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. 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, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. 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 action 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 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.

(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.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *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.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * * * * * *

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) * * *

(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, ad-

ministrative 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 or interested person, 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.

* * * * * * *

SECTION 410 OF TITLE 39, UNITED STATES CODE

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) Section 552 (public information), *section 552a (records about individuals)*, *section 552b (open meetings)*, section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

* * * * * * *

ADDITIONAL VIEWS OF HON. FRANK HORTON (CONCURRED IN BY HON. JOHN N. ERLENBORN, HON. JOHN W. WYDLR, HON. CLARENCE J. BROWN, HON. SAM STEIGER, HON. GARRY BROWN, HON. EDWIN B. FORSYTHE, AND HON. WILLIS D. GRADISON, JR.)

INTRODUCTION

The undersigned subscribe wholeheartedly to the objectives of this legislation. The public's faith in the integrity of government rests on public understanding of the reasons for governmental decisions, and on the accountability of government officials for particularly those decisions which set legislative or administrative policies which impact on the nation as a whole. However, as recognized in the "Declaration of Policy" which begins on the first page of H.R. 11656, the public is not necessarily served by complete and unfettered disclosure of all government decisionmaking processes. The words "fullest practicable information" as used in the bill indicate the need for certain sensible limitations.

Our differences with the Committee bill are relatively few, but they afford an opportunity for highly significant improvements. Our principal concern is that the Congress which has enacted the two basic planks for federal information policies, the Freedom of Information Act and the Privacy Act, should adopt a sunshine bill which is consistent with the principles laid down in the two landmark bills we have already enacted. The Committee bill does not fully meet this standard since it erodes the clarity and firmness of the FOI Act exemptions, and threatens to erode the privacy protections we have erected for those involved in adjudications before collegial agencies.

We believe that a number of provisions of the Committee bill are inconsistent with the Declaration of Policy contained in the bill itself, and that these provisions would permit or mandate disclosures which would injure the rights of individuals and injure the ability of the Government to carry out its responsibilities.

We addressed our concerns with several specific provisions of H.R. 11656 in Committee, and we feel it is possible to amend the bill in a way that would let every bit as much sunshine behind the doors of government agency deliberations and provide a brand of sunshine which is less clouded by procedural red tape and confusion than that created by the Committee bill.

Our differences with H.R. 11656 are few but important. They include (1) the verbatim transcripts requirement for closed meetings, (2) the definition of "agency", (3) the definition of "meeting", (4) the identification of persons expected to attend a closed meeting, (5) the prescribed venue for actions brought under this legislation, (6) the personal liability of individual agency officials, and (7) the unfettered disclosure of all ex parte communications. These differences are summarized below.

NEEDED IMPROVEMENTS

(1) The Verbatim Transcript Requirement

The verbatim transcript requirement of H.R. 11656 could effectively destroy the provisions of the bill which permit certain meetings to be closed. While the provisions of the bill enable an agency to delete, by recorded vote at a subsequent meeting, sensitive portions of a transcript, they also require the agency to furnish the public what, in effect, are summaries of the deleted portions. In the case of agencies involved in the regulation of financial institutions, for example, harmful inferences drawn from the deletions could result in market speculation or damage to the stability of our financial markets and institutions.

The possibility of later disclosure of a verbatim transcript will inhibit free discussion about sensitive matters and thus impair the decisionmaking process in instances where candor is essential.

Moreover, the effect of the transcript requirement of the bill when coupled with relevant procedural requirements would lead to a situation bordering on the ridiculous.

The bill provides that votes to close meetings must be cast in person, no proxies being permitted. Thus a meeting must be held to vote on closing a subsequent meeting or meetings, and another meeting must be held to vote on any change in the time, place, or subject matter of a meeting already announced.

When these procedural requirements are coupled with the verbatim transcript or electronic recording requirements, the prospect is one of mind-boggling infinity. Thus, when a meeting is properly closed, the complete transcript or electronic recording of the proceedings must be made available to the public except for such portions determined by a recorded vote to fall within the exemptive provisions. In order to avoid the disclosure of such portions of the transcript, the meeting called to discuss, consider and vote on the proposed deletions must also be closed pursuant to the procedural requirements cited above. Since this meeting would be closed to consider information coming within the exemptive provisions of the bill, the complete transcript or electronic recording of such meeting must also be made available to the public except for those portions determined by a recorded vote to fall within the exemptive provisions. Again, in order to avoid the disclosure of such portions of the transcript of the second closed meeting, a third meeting called to consider and vote on the proposed deletions stemming from the second meeting must be closed, and the transcript of that meeting must be examined at a fourth closed meeting and so on and on ad infinitum. Obviously, some rule of reason must prevail in the implementation of such a provision, but the letter of the law, if observed, would be paralytic in its effect.

We do not subscribe to the position that the transcript requirement is essential to the enforceability of the act and we feel that a reasonable compromise can be worked out in this area. The discovery procedures available to U.S. District Courts do not depend upon the availability of verbatim transcripts or electronic recordings of agency meetings. While the concepts embodied in H.R. 11656 stem from "Sunshine" or "open meeting" statutes of the States, none of the 49 State

statutes, so far as we can determine, has a verbatim transcript requirement for either open or closed meetings.

(2) The Definition of "Agency"

The definition of "agency" contained in H.R. 11656 is unclear and would lead to unnecessary confusion and litigation.

The agencies to be covered can and should be specifically listed. A successful precedent for this approach is the Government Corporation Control Act of 1945, 31 USC 841 et seq. This Act has been amended on several occasions to add or delete particular corporations. This procedure would be appropriate for H.R. 11656. Congress can, of course, always amend the Act to add or delete agencies but would be required to review the applicability of the Act on the infrequent occasions when such an agency is created.

(3) The Definition of "Meeting"

Meetings covered by the bill should be those gatherings for the purpose of conducting official agency business of at least the number of individual agency members required to take final action on behalf of the agency. The meeting definition in H.R. 11656 would apply even to casual or social encounters which were not gatherings for the purpose of acting in behalf of the agency.

(4) Identification of Persons Attending Closed Meetings—

The requirement of H.R. 11656 that an agency publicly list all persons expected to attend a closed meeting and their affiliations would permit inferences not in the public interest to be drawn from such information. Particularly in adjudicatory proceedings falling under one of the 10 exemptions from the open meetings requirement, premature disclosure of the names of individuals or organizations, concerning or against whom official action may or may not be taken, could lead to damaging speculation or premature public reaction that could result in damage to individual rights, to financial markets or to other interests that should legitimately be protected by government regulators.

(5) Venue For Actions Brought Under the Legislation

We feel that venue for actions brought under the legislation should be limited to the district in which the agency in question has its headquarters or where the meeting in question occurred. H.R. 11656 permits such actions to be brought also where the plaintiff resides or has his principal place of business. This could lead to duplicative lawsuits spread across the country covering the same agency meeting or meetings.

(6) Personal Liability of Individuals

We question the provisions of H.R. 11656 imposing personal liability on individual agency members for attorney's fees and court costs. The assessment of attorney fees and other litigation costs personally against individual members of an agency can only lead to a further diminution of the rewards of public service. This provision would not only discourage qualified persons from accepting agency appointments, but would inhibit performance of official duties by those in office.

(7) *Ex Parte Communications*

H.R. 11656 would place in the public record all documentation of prohibited ex parte communications even those dealing with matters which, if the subject of an agency meeting, would permit the closing of such meeting, or, if the subject of a request for documents under the Freedom of Information Act, would be exempt from disclosure under one of the Act's exemptions. We fully support the prohibition of ex parte contacts, but feel this provision could be abused to force disclosure of otherwise exempt information.

Cost

It is not possible to estimate the the costs of complying with the provisions of H.R. 11656. Certainly the time of a majority of the entire membership of an agency spent in the repeated voting sessions attendant upon closed meetings; the time spent by lawyers and other staff members examining documents; litigation costs arising from actions created by the bill; the administrative burden of preparing a verbatim transcript of each closed meeting, of deleting exempt portions and of providing a copy of the remainder to the public will be significant.

Summary

In summary, we support the purposes of H.R. 11656, but we feel the bill should be improved to avoid disclosures not in the public interest, invasions of privacy, excessive costs, and the disruptions and delays of agency proceedings that are bound to result from the enactment of H.R. 11656 in its present form.

We concur in the foregoing views:

Frank Horton.
John N. Erlenborn.
John W. Wydler.
Clarence J. Brown.
Sam Steiger.
Garry Brown.
Edwin B. Forsythe.
Willis D. Gradison, Jr.

ADDITIONAL VIEWS OF HON. CLARENCE J. BROWN

I concur fully with the views expressed by my colleague, Congressman Horton.

While I strongly support the policy of open meetings as vital to maintaining and enhancing the integrity of the governmental process, I feel that H.R. 11656 fails to make what I believe is a necessary distinction between the rule-making (quasi-legislative) and the adjudicatory (quasi-judicial, quasi-administrative) functions of the agencies covered by this legislation.

Meetings of an agency at which decisions of applicability to the general public are made are quasi-legislative, and therefore should most definitely be open to the public. On the other hand, those meetings at which decisions are made that affect only the status of the parties involved are quasi-adjudicatory in nature, and should in appropriate cases be permitted to remain private until a final decision is reached in order to protect to the fullest extent possible the rights of the individuals or parties involved.

It makes bad law for us not to draw these distinctions, and emphasizes the contradiction in current Congressional passions for the public's right to know, and the individual's right to privacy. The schizoid nature of Congressional attitude in these areas needs to be clarified. Rather than clarifying, this legislation only serves to blur them further.

CLARENCE J. BROWN.

ADDITIONAL VIEWS OF HON. PAUL N. McCLOSKEY, JR., HON. JOHN N. ERLENBORN, HON. GARRY BROWN, HON. CHARLES THONE, HON. EDWIN B. FORSYTHE, HON. ROBERT W. KASTEN, JR., AND HON. WILLIS D. GRADISON, JR.

This "Sunshine" bill has a laudable purpose. As written, however, the bill imposes incredible new burdens on the day-to-day operations of government.

H.R. 11656 received very little testimony before the House Subcommittee on Government Information and Individual Rights (B. Abzug, Chairperson), partly because it was originally taken almost verbatim from S. 5, passed by the Senate by a vote of 94 to 0.

Whenever the Senate acts unanimously, it behooves us to examine their work carefully to determine whether such unusual agreement betokens careful craftsmanship or uncommon inattention. In this instance, we believe the latter description applies.

All of us desire that the affairs of government be conducted as openly as possible "in the sunshine," as it were.

Likewise, however, all of us have agreed of late that we should try to cut the cost of government, and, in particular, that we should try to cut the need for mountains of paperwork.

Similarly, we believe we are beginning to perceive a need to discourage undue litigation in the court system. Our federal judges are already underpaid and overworked.

Balancing these three goals, (1) open government (2) cutting costs of government and (3) discouraging undue litigation, how does the "Sunshine" bill, H.R. 11656, measure up?

First of all, it is a lawyer's dream. Imagine the right to bring a lawsuit and be guaranteed attorney's fees and costs merely if you "substantially prevail?" (Page 12, line 20 et seq.)

Further, note that as a plaintiff, not only can you obtain personal costs against individual agency members in certain cases (pages 12–13), but that costs cannot be assessed against you, even if you lose, at least not unless you are found to have initiated the lawsuit "primarily for frivolous or dilatory purposes" (page 13, lines 2–4). Further, note with pleasure that the burden of proof is always on the government!

Finally, note that one can bring such a lawsuit against any agency covered in the Act in the plaintiff's own home district, regardless of where the meeting is held. (Page 11, lines 16–18.)

What a bonanza for the legal profession?

Assume, for example, that the SEC wishes to hold a closed meeting in Washington on the question of whether to order a cessation in trading of Lockheed shares on the stock market.

Any shareholder or citizen residing in any one of the 50 states could bring a lawsuit in his home district to contest the closing of the meeting. The SEC would be required to answer an ordinary complaint in

20 days, or within 40 days if it could show good cause, but this is a simple responsibility compared to the SEC's problem if a few Lockheed shareholders in different states should elect to sue to enjoin the SEC from closing its meeting.

Consider the legal cost to a Washington-based agency in defending against a temporary restraining order, in Alaska on Friday, Hawaii on Monday and Idaho on Tuesday!

The legal burden imposed on a single agency by the unique combination of legal rights and duties contained in H.R. 11656 could constitute an unconscionable burden on the public treasury, as well as practically paralyze the Justice Department and the legal staff of the agency involved.

At least 38 agencies are covered by this bill, and each one of them is subject to an easily-brought lawsuit every time a meeting is closed under one of ten permitted exemptions.

Also, the exemptions are by no means clear cut. Take exemption (6) for example (page 4, lines 1–3), permitting closure when a meeting is likely to: "disclose information of a personal nature were disclosure would constitute a clearly unwarranted invasion of personal privacy."

This kind of language permits a bona fide court test of almost any privacy contention an agency might determine as the basis for closing a meeting.

Do we really want to subject all agencies of the federal government "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President" (page 2, lines 10–14), to such risk of litigation?

It is true that a majority of the Members of the House are lawyers. It is likewise true that many of us anticipate returning to the practice of law at some future date. (Some of us sooner than others if the impact and costs of this bill are ever understood by the organized Bar and the public.) But do we really need to create such a new and profitable field of employment for our own profession?

We have to confess to a certain feeling of inadequacy at having failed initially to perceive the serious problems with the bill, or to persuade our colleagues on the Government Operations Committee of the need for its substantial amendment.

We have not mentioned in these views the cumbersome nature of the notice and verbatim transcript provisions of the bill mentioned in the views of our colleague, Frank Horton, but their possible costs could also be monumental. In our haste to pass the bill, we think the least the Committee could have done was to wait for testimony by the Administration on its potential budgetary impact.

Unfortunately, the Committee received no testimony whatsoever on the magnitude of potential costs, either legal or administrative.

Upon reflection, it seems to us that the cumulative effects of the pernicious provisions of H.R. 11656 outweigh the bill's usefulness. Unless the Horton substitute can be adopted, we are impelled to conclude that the bill should be recommitted for more careful draftsmanship.

PAUL N. MCCLOSKEY, Jr.,
JOHN N. ERLENBORN,
GARRY BROWN,
CHARLES THONE,
EDWIN B. FORSYTHE,
ROBERT W. KASTEN, Jr.,
WILLIS D. GRADISON, Jr.

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 94–
2d Session } { 880 Part 2

GOVERNMENT IN THE SUNSHINE ACT

APRIL 8, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 11656]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 2, lines 19, 20, 21, 22 and 23: Strike "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" and insert: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

Page 3, line 1: Strike "(b):" and insert:

"(b) (1) Members as described in subsection (a) (2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

(2)".

Page 3, line 19: After "required" insert "or permitted".

Page 4, line 7: After "purposes", insert "or information which if written would be contained in such records,".

Page 4, line 8: After "records" insert "or information".

Page 5, line 11: Strike "where" and insert "after".

Page 5, line 12: Strike "already".

Page 5, line 13: Strike "or where" and insert "unless".

Page 5, line 15: Strike "proposal;" and insert "proposal, or after the agency publishes or serves a substantive rule pursuant to section 553 (d) of this title;".

Page 5, line 19: After "action" insert "or proceeding".

Page 6, lines 7, 8, and 9: Strike ", or with respect to any information which is proposed to be withheld under subsection (c)".

Page 7, line 9: Strike "of the portions".

Page 7, line 13: Strike "portions" and insert "meetings or portions thereof".

Page 9, lines 13, 14 and 15: Strike ", by recorded vote taken subsequent to the meeting and promptly made available to the public,".

Page 9, lines 17 through 20: Strike "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."

Page 11, line 13: Strike "or its members".

Page 11, lines 21 and 22: Strike "wherein the plaintiff resides, or has his principal place of business" and insert "court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia".

Page 12, lines 13 and 14: Strike "Except to the extent provided in subsection (i) of this section, nothing" and insert "Nothing".

Page 12, lines 19 through 23: Strike "(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 proceedings, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

Page 12, line 24: Strike "(j)" and insert "(i)".

Page 13, lines 2 and 3: Strike "(g), (h), or (i)" and insert "(g) or (h)".

Page 13, lines 4, 5, and 6: Strike "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".

Page 13, line 11: Strike "(k)" and insert "(j)".

Page 13, line 20: Strike "(l)" and insert "(k)".

Page 14, line 5: Strike "(m)" and insert "(l)".

Page 14, line 9: Strike "(n)" and insert "(m)".

Page 14, line 14: Strike "(o)" and insert "(n)".

Page 18, line 8: After "required" insert "or permitted".

Purpose

The purpose of the proposed legislation is to amend the Administrative Procedure Act provisions of title 5, United States Code, to provide, subject to the exceptions in the bill, that all meetings of agencies headed by a collegial body of two or more members shall be open to public observation. The new section added to title 5 would provide for procedures and court jurisdiction to implement this purpose. In addition, the bill would add language to existing provisions of the Administrative Procedure Act to bar ex parte communications in connection with adjudication and formal rule making under the provisions of that Act now codified as a part of title 5.

EXPLANATION OF COMMITTEE AMENDMENTS

Page 2, lines 19 through 23

(Definition of "meeting")

This amendment would change the definition of "meeting" in § 552b (a) (2) to read: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

New section 552b requires advance notice of the date and place of meetings, their subject matter, and whether it will be open or closed to the public. The revised language of the definition of "meeting" makes it possible to identify the meeting and its purpose to satisfy this requirement of advance notice. It makes it clear that there must be at least two members at the meeting, with an additional requirement that there also be at least the number of individual agency members required to take action on behalf of the agency. It also adds the clarification that the term includes any joint communication such as a conference telephone call. This definition must be read in relation to the amendment made to subsection (b) which provides that the agency members referred to in this subparagraph cannot jointly conduct or dispose of agency business other than as provided in the section—that is, in an open meeting or, where authorized, a closed meeting governed by the same definition. This amendment includes the words "but does not include meetings required or permitted by subsection (d)". This would except from "meetings" covered by the new section those meetings required to decide matters covered by subsection (d) which are procedural in nature and concern decisions and voting on closing meetings and on announcing meetings. However, such meetings could not include the conduct or disposition of agency business.

Page 3, line 1

(Prohibition Against Evasion of Provisions of New Section 552b as to Conduct or Disposition of Agency Business)

The new language added as new subparagraph (b) (1) of section 552b would bar the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. This gives an express standard for compliance. On challenge, a court will be in a better position to determine whether the agency has complied. This provision will bar any effort of the number of members necessary for agency action to deliberate, discuss, conduct, or dispose of agency business other than in an open meeting as provided in new section 552b or in a closed portion authorized by the exceptions in that section.

Page 3, line 19

(Statutes requiring or permitting withholding of particular information)

The amendment adds the words "or permitted" to the existing language of exception (3) of subsection (c) providing an exception for

withholding of information directed by statute. Many statutes permit the withholding of information but since they allow judgment or discretion in withholding information, the bill would not have originally included such statutes within the exception. The amendment is consistent with the language and purpose of those statutes which assume that such information can be withheld when the information has been determined to fit the criteria or particular identification of the statute concerned.

Page 4, line 7

(Clarification as to Non-record Information)

The exceptions in the bill were patterned after the Freedom of Information Act (5 U.S.C. 552), an Act which concerns written records. This bill concerns the right of members of the public to observe agency meetings at which information will be given in oral discussions. This amendment clarified the fact that the exception also applies to information given orally by adding to "records" the phrase "or information which if written would be contained in such records".

Page 5, lines 11 and 12

(To Clarify When the Exception as to Premature Disclosure of Agency Will *Not* be Available)

The substitution of the word "after" for "where" is to clarify that the exception as to a frustration of agency action will be unavailable after the content or nature of the action has been disclosed. The word "already" is deleted as unnecessary.

Page 5, line 13

(Inserting the Word "Unless" to Qualify the Previous Bar to the Use of the Exception in Cases Where Disclosure is to be Made Prior to Final Agency Action)

The word "unless" is substituted for "or where" to make a further qualification concerning required statutory disclosure prior to final action.

Page 5, line 15

(Reference to Public Notice of Rule Making Under Section 553 of title 5)

The addition of the language relating to rule making makes it clear that the exception does not apply after notice of rule making has been given under section 553.

Page 5, line 19

(Legal "Proceedings")

The addition of the word "proceeding" is added so that it will be included along with a civil action.

Page 7, line 9, and line 13

(Clarification of Meetings Subject to Exception)

The words "of the portions" were deleted because of the difficulty of determining how "a majority of the portions" of agency meetings could be determined. While a "portion" could be all or a part of a meeting, the term is unclear for the purpose of determining a majority as provided in the subparagraph. This amendment will make such a determination possible.

Page 9, lines 13, 14 and 15 and Page 6, lines 7, 8 and 9

(Striking the Requirement for Agency Vote on Each Transcript Deletion)

The amendment on page 9 is to strike the words ", by recorded vote taken subsequent to the meeting and promptly made available to the public,". This would preserve the right of the public to access to a transcript or recording of any closed meeting with only those portions deleted that are subject to the exceptions in section 552b. However, it would relieve the agency members from the detailed and procedurally difficult operation of going over the transcripts or recordings and voting on deletions. The amendment on page 6, lines 7, 8 and 9 deletes the words ", or with respect to any information which is proposed to be withheld under subsection (c)", and this is a conforming amendment to the one described above.

Page 9, lines 17, 18, 19 and 20

(Striking the Requirement for a Written Explanation of Each Deletion)

The amendment deletes the requirement of a written explanation of each deletion from the transcript by striking the words "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." Of course, the complete transcript or recording must be made and kept as provided in the section to be available in the event of any court challenge as provided in subsection (h).

Page 11, line 13

(Deletion of "or its members")

The language of subsection (h) authorizes an action against the agency so that it would not be necessary to join individual members to gain court jurisdiction. The amendment also removes the objection that the provision would have the effect of subjecting individual agency members to suit for official acts and possibly being assessed costs and attorneys fees. The amendment also conforms to the amendment on page 13 deleting the references to members in reference to the assessment of costs.

Page 11, lines 20 and 22

(Changing Venue Requirements to Require Challenges Based on Section 552b to be Brought in the District in Which the Agency Meeting is Held or in the District of Columbia or in the District in Which the Agency Has its Headquarters)

This amendment substitutes the words "court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia" for the words "wherein the plaintiff resides, or has his principal place of business." It should be emphasized that the language of the section conferring jurisdiction in the district courts to enforce requirements of the section and permitting "any person" to bring the action are retained. These actions would concern meetings of the agency and matters relating to those meetings. It is therefore logical that the actions be brought in districts in which those meetings are or have been held. The amended venue provisions are, therefore, appropriate in view of the purpose of the new section and of court enforcement of its specific provisions concerning the conduct of the meetings.

Page 12, lines 13 and 14 and
lines 19 through 23; and
Page 13, lines 2 and 3

(Striking Subsection (i) referring to Review of Agency Actions)

While subsection (h) of section 552b provides that any court, acting under the jurisdiction provided therein to enforce the requirement of subsections (b) through (g) of the section cannot set aside, enjoin or invalidate any agency action by reason of the violation concerned, subsection (i) would permit such invalidation incident to a review on the merits. The amendment strikes subparagraph (i) from the section. Section 706 of title 5 is the section of the Administrative Procedure Act concerning the scope of judicial review and details the basis for invalidation of agency action. Included therein is item (2) (D) which provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "without observance of procedure required by law". Adequate authority is therefore provided by law to inquire into matters governed by the new section in the event of such subsequent judicial review. The exception in subsection (h) in lines 13 and 14 of page 12 referring to subsection (i) is also deleted as a conforming amendment as is the reference to subsection (i) in original subsection (j) which would then be re-lettered.

Page 12, line 24; Page 13, lines 11 and 20;
Page 14, lines 5, 9 and 14

These are conforming amendments to change subsection designations as the result of the deletion of subsection (i).

Page 12, lines 19 through 23

(Deletion of Provision Concerning Assessment of Attorneys Fees and Costs Against Individual Agency Members)

The provision is deleted because it was concluded that it is not desirable or even possible to assess costs against individual members for actions taken by a collegial body based upon the participation by those agency members in agency action.

Page 18, line 8

(Amendment to Information Permitted to be Withheld Conforming Amendment to that Added to 552b(c)(3) on page 3)

As introduced, the bill would have also amended the Freedom of Information Act provisions of § 552(b)(3) to limit the exception for information covered by statutes to only information covered by statutes which require that information of a particular type or criteria be withheld. This would not provide an exception for statutes which permit the agency to determine whether such information should be released or not. The amendment was made because the language is unduly restrictive.[1] (For example, the section concerning release of atomic energy information permits a continuous review of restricted data to permit declassification where information may be declassified "without undue risk to the common defense and security." 42 U.S.C. 2162)

OUTLINE OF PROVISIONS OF THE BILL

Section 1 of the bill provides that the Act is to be cited as the "Government in the Sunshine Act".

Section 2 of the bill states that the bill is intended to provide the public with the fullest practicable information as to Governmental decisionmaking processes.

Section 3(a) of the bill adds a new Section 552b to title 5 and provides for open meetings by the agencies defined in the section.

Subsection (a) provides for definitions in addition to those applicable to the Administrative Procedure Act provisions of title 5. The term "agency" is to include Government authorities as defined in the Administrative Procedure Act provisions of section 551 and the Freedom of Information Act provisions of Section 552(e) with the further qualification that it is to be an agency headed by a "collegial" body of two or more members "a majority of whom are appointed to such position by the president with the advice and consent of the Senate".

The bill, as referred to the Committee on the Judiciary, would have defined "meeting" as the deliberations of the agency members required to take action concerning the joint conduct or disposition of agency business. The Judiciary Committee amendment is to strike

[1] Note the discussion concerning similar language and on identical amendment to the language of exception (3) of subsection (c) of new section 552b in the explanations of committee amendments and in the general statement of the committee in this report.

the previous definition of meeting and provide that the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency. The definition includes an exception that the term "meeting" will not include meetings required or permitted by subsection (d) of new Section 552b. Subsection (d) of the amended bill concerns the closing of agency meetings and the manner in which those meetings can be closed by votes of the agency.

A "member" means an individual who belongs to the collegial body heading an agency.

Subsection (b) of the bill as amended by the Judiciary Committee refers in subparagraph (b)(1) to "members", as described in Section (a)(2), as two or more members of an agency, but at least the number of agency members required to take action on behalf of the agency. This subparagraph provides that the members so described shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g) of this section, which contain the requirements for meetings covered by the section. Subparagraph (b)(2) contains the language of original section (b) and states the basic requirement of the bill that every portion of every meeting of an agency is to be open to public observation unless falling within the exceptions of subsection (a).

Subsection (c) provides ten exceptions which authorize an agency to close "any portion of any agency meeting". These exceptions would permit closed meetings to prevent the disclosure of the following:

1. Matters authorized under executive order criteria to be kept secret in the interest of national defense or foreign policy.

2. Matters which relate solely to the internal personnel rules and practices of an agency.

3. Information required or permitted to be withheld from the public by any statute. The Judiciary Committee amendment to this provision was to insert the term "or permitted" to provide for an application to information covered by statutes requiring a degree of judgment or discretion in the release of information.

4. Privileged or confidential trade secrets and commercial or financial information obtained from a person.

5. Matters involving the criminal accusation of commission of a crime or formal censure of any person.

6. Information of a personal nature constituting an unwarranted personal invasion of privacy.

7. Investigatory records or information which if written would be contained in such records compiled for law enforcement purposes but with specific limitations where disclosure would:

(A) interfere with enforcement proceedings,

(B) deprive a person of a fair trial or an impartial adjudication,

(C) constitute an unwarranted invasion of personal privacy,

(D) disclose the identity of a confidential source and—as to records or information compiled in a criminal investigation by a criminal law enforcement authority, or as to records or information compiled by an agency in a lawful security intelligence in-

vestigation—confidential information furnished only by the confidential source,

(E) disclose investigative techniques and procedures,

(F) endanger the life or physical safety of law enforcement personnel.

8. Information by or for an agency responsible for the regulation or supervision of financial institutions concerning examination, operation or condition reports of those institutions.

9. Information where premature disclosure would—

(A) for agencies involved in the regulation of currencies, securities, commodities, or financial institutions which would either lead to significant financial speculation or to significantly endanger the stability of any financial institution, or

(B) be likely to significantly frustrate the implementation of a proposed agency action.

This exception would not be available after the content or nature of the proposed action has been disclosed to the public by the agency or unless the agency, as required by law, makes such disclosure prior to taking final agency action on the proposal. It is further provided in the amended bill that the exception will not be available after the agency publishes or serves a substantive rule pursuant to Section 553(d) of this title.

10. Concern matters relating to litigation, including those concerning the agency's issuance of a subpoena, participation in a civil action or proceeding, or action in a foreign court or international tribunal. The exception would also apply to matters concerning arbitration, formal agency adjudication or determinations on the record after opportunity for a hearing (formal rule making).

Subsection (d)(1) of the amended bill details the procedures to be followed in closing a portion or portions of a meeting. A separate recorded vote of agency members is required in each proposal to close a meeting. A "series of portions of meetings" for a period of 30 days involving the "same particular matters" can be closed by a single vote. Subsection (d)(2) provides that a person affected may make a request for closure based on the exceptions related to (5) accusation of a crime, (6) information of a personal nature or (7) investigatory records. Within one day of a vote to close, the written copy of the vote reflecting the vote of each member is to be made public and if a portion of a meeting is to be closed, there must be a full written explanation of the action of all persons who will attend and their affiliation. When a majority of an agency's meetings may be closed under exceptions relating to (4) trade secrets and financial information, (8) financial institution regulations, (9) premature disclosures concerning financial speculation, stability of financial institutions or frustration of agency action, or (10) matters relating to litigation, arbitration, formal agency adjudication or determinations on the record, the agency may provide by regulation for the closing of such portions of meetings. However, a majority of the members of the agency must still vote by recorded vote at the beginning of each meeting or portion thereof to close the exempt portion. The agency will also be required to provide the public with an announcement of the date, place and subject matter of the meeting and

"each portion thereof" at the earliest practicable time prior to the meeting.

Subparagraph (e) provides for the public announcement, at least one week before a meeting, of the date, place, subject matter and whether it is open or closed, but by recorded vote, a majority of the members may provide for an earlier meeting date, in which case the announcement must be made prior to the commencement of the meeting.

Subparagraph (f)(1) of the amended bill requires that there be a complete transcript or electronic recording of all meetings or portions of meetings closed to the public. The only exception is for meetings or portions closed relative to Exception 10 concerning litigation, arbitration, formal adjudication or formal rule making. A revised version of the transcript or recording, with the portions deleted which are covered by the exceptions of subsection (c), is to be made available to the public. The complete transcript or recording must be maintained for two years or for one year following disposition of the matter. Subparagraph (f)(2) provides that written minutes of open agency meetings shall be made public, and maintained for at least two years.

Subparagraph (g) requires promulgation of regulations to implement the requirements of the section. Notice and written comment are required. Any person can bring an action in the U.S. Court of Appeals for the District of Columbia to require promulgation or to challenge the regulations, and similarly any person can bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations not satisfying subsections (b) through (f) and to require new regulations that do so.

Subparagraph (h) of the amended bill confers jurisdiction on the district courts to enforce the requirements of the section and authorizes actions by any person which may be brought in the court of the United States for the district in which the agency meeting is held or in the District Court for the District of Columbia or where the agency has its headquarters. The Government has the burden to sustain its actions and the court will have access to any transcript or recording and may grant appropriate equitable relief. Nothing in the section may be taken as the sole basis for invalidating the agency action involved in the meeting which is the subject of the litigation.

Subparagraph (i) of the amended bill was previously subsection (j) and the designation was changed because the bill was amended to strike (i), as explained in the discussion of the committee amendments. The redesignated paragraph provides for attorneys fees and litigation costs for "any other party" who substantially prevails in an action. This can include assessment of costs against the United State. The Committee on the Judiciary struck language which would have permitted the assessment of costs against individual agency members. They may also be assessed against plaintiffs where the court finds that the primary motive was for frivolous or dilatory purposes.

Subparagraph (j) of the amended bill [relettered] provides for an annual report to Congress involving matters covered by the section.

Subparagraph (k) of the amended bill [relettered] relates to the Freedom of Information Act and in effect says that nothing in the section is to be interpreted as expending or limiting the rights of any

person under Section 552 except as specifically provided as to transcripts and recordings.

Subparagraph (l) of the amended bill [relettered] provides that the section is not to be construed as limiting information to Congress and does not authorize the closing of meetings required to be open by law.

Subparagraph (m) of the amended bill [relettered] preserves the rights of individuals to any record accessible under the Freedom of Information Act provisions of section 552(a).

Subparagraph (n) of the amended bill [relettered] provides that the section is to govern in the event of a meeting also subject to the Federal Advisory Committee Act.

Section 3(b) of the bill amends the chapter analysis of chapter 5 of title 5 by adding the catch line of new section 552b as follows:

"552b. Open meetings."

Section 4(a) of the bill adds a new subsection (d)(1) to section 557 of title 5, United States Code, concerning ex parte communications in relation to adjudication and formal rule making under the Administrative Procedure Act. Section 557 concerns decisions based on the record of hearings conducted in accordance with section 556. The new subsection (d) added by this bill would provide express limitations and procedures relating to ex parte communications relative to the merits of agency proceedings. The bar would apply to ex parte communications relative to the merits of such proceeding by interested persons outside the agency made to agency personnel involved or expected to be involved in the decisional process. Similarly, no such agency official could make an ex parte communication to an interested party outside the agency. The incorporation of the new subsection in Section 557 results in the provisions being made applicable to adjudications and to formal rule making. The language of the bill provides for communications or memoranda of oral communications to be made a part of the public record of the proceedings along with written responses and memoranda of oral responses. In the event there is such an ex parte communication, the agency, administrative law judge or presiding employee may require a party to show cause why his claim or interest in the proceeding should not be denied, dismissed or disregarded or otherwise be acted upon adversely.

Section 4(b) amends Section 551, the definitions section of the Administrative Procedure Act, to include an item (14) a definition of "ex parte communication". This term is defined as "an oral or written communication entered on the public record with respect to which reasonable prior notice to all parties is not given."

Section 4(c) amends Section 556(d) of title 5 which is the section concerning hearings, presiding employees, powers and duties, burden of proof, evidence and record as to basis of decision by the addition of a sentence referring to ex parte communications. The amendment is to add that "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.

Section 5 of the bill provides for conforming amendments. Subsection (a) amends Section 410(b)(1) of title 39 (Postal Service) U.S.

Code to include in the subparagraph the words "Section 552(a) (records about individuals), Section 552(b) (open meetings),".

Subsection 5(b) of the amended bill amends Section 552(b)(3) of title 5, the subparagraph which relates to matters specifically exempted from disclosure by statute. As amended, subparagraph (3) would read: "Required *or permitted* to be withheld from the public by any statute establishing particular criteria or referring to particular types of information."

Section 6 of the bill provides that the bill is to take effect 180 days after the date of enactment, except that subsection (g) of Section 552b, added to title 5 by the bill, is to take effect upon enactment. Subsection (g) is the subsection which concerns the promulgation of implementing regulations.

Openness of Committee Meetings

The basic purpose of this bill is expressed in subsection (b) [amended as (b)(2)] of new section 552b where it is provided that meetings of agencies covered by the section are to be open to public observation unless the information being discussed falls within an exception in subsection (c). Our system of Government assumes that citizens have the right to know how their government operates and what the government is doing for them and in their name. Public participation and awareness will be promoted by increasing openness in Government and this should lead to improved decision-making and greater accountability on the part of the Government. At the same time, an understanding of Government operation and action will promote public confidence in the Government.

The subjects dealt with in this bill have been extensively considered both in the Senate and in the House. The provisions of the bill as referred to the Committee on the Judiciary has already been discussed at length in Part I of this report based upon the consideration of the bill before the House Committee on Government Operations (H. Rept. 94–880, 94th Cong. 2d Sess., Part I). A similar discussion as to provisions embodied in the Senate companion bill, S. 5, was the subject of the report of the Senate Committee on Government Operations (Senate Report 94–354, 94th Congress, 1st Session). It is therefore not necessary to discuss in detail the provisions of the bill which were approved without change by this Committee.

The consideration by the Committee on the Judiciary included two days of hearings on March 24 and 25, 1976. The committee further had the advantage of the previous hearings in the House and the Senate and the reports referred to above. The amendments recommended by the Committee are based on its consideration of the reports, testimony before the committee, and the material relating to the previous considerations made available to the Committee.

Agencies Subject to the Bill

Witnesses appearing at the hearing before this committee discussed the provisions of the bill which define the agencies which will be subject to its provisions. As has been indicated in the outline of provisions of the bill, the term "agency" is to include Government authorities as

defined in the Administrative Procedure Act provisions of section 551 and section 552(e) of title 5 with the further qualification that in order to be covered, an agency must be headed by a collegial body of two or more members, a majority of whom are appointed to their position by the President with the advice and consent of the Senate. The Senate report, in discussing the similar provisions of the bill before that body, included a list of agencies that would be covered by the bill. In view of the similarity of the provisions contained in the present bill and the bill S. 5, considered by the Senate, the list developed by the Senate is included at this point to indicate the potential coverage of the bill. However, the definition will govern the actual application of the bill rather than the list set out below. The list is as follows:

Board for International Broadcasting;
Civil Aeronautics Board;
Commodity Credit Corporation (Board of Directors);
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Reserve Board;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors);
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Parole Board;
Railroad Retirement Board;
Renegotiation Board;
Securities and Exchange Commission;

Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights;
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

The committee considered the various suggestions concerning changes in the description of agencies covered by the bill and concluded that the general definition provides the best approach and therefore did not change the language as contained in the bill referred to the committee.

Meetings Subject to New Section 552b

A considerable portion of the testimony presented to the committee concerning the definition of "meeting" is included in the new section. The language of the bill as referred to the committee provided that a meeting would consist of "deliberations" which concern the joint conduct or disposition of agency business. It was pointed out that this language could make it difficult to identify a meeting in advance of that meeting, or to determine whether the "meeting" was one actually covered by the provisions contained in the bill. The subcommittee considering the bill recommended language which was intended to remedy this situation and provide the basis for adequate and meaningful notice required by the bill of the date and place of meetings, their subject matter, and whether they would be open or closed to the public. This language underwent further modification before the Full Committee and the language ultimately approved by the committee was to provide that "meeting" would be defined as "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d)". This definition makes it possible to determine and define the basic purpose of the meeting. As is indicated in the outline of provisions of the bill and also in the explanation of committee amendments, this definition must be read in the light of the amendment made to subsection (b) of new section 552b which prohibits the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. The definition of "meeting" contains the qualification that the term "meeting" for the purposes of the section will not include meetings required or permitted by subsection (d), a subsection which concerns the closing of meetings. As a result, it will be possible for agencies to make the necessary decisions concerning opening or closing meetings prior to the holding of covered meetings without being subject to the detailed procedures provided for in the balance of section 552b.

Clarification Concerning Exceptions

The committee considered the provisions of the exemption provided in subsection (c)(3) of section 552b concerning the disclosure of in-

formation required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. This exemption was discussed at page 9 of the report of the Committee on Government Operations, which pointed out that, under the original language of this bill, a statute that permits withholding rather than actually requiring it would not come within the exception provided in the paragraph. While the committee agrees that the language concerning criteria or types of information should be retained, it was felt that limiting the exemption to information required to be withheld by statute would be too restrictive. Rather, the exemption should extend to those statutes which require or permit information to be withheld from the public where the statute establishes criteria or refers to particular types of information.[2]

The exemptions contained in subsection (c) of the new section are based on the exemptions presently contained in the Freedom of Information Act provisions of section 552 of Title 5. The latter exemptions relate to governmental records and in most instances, this same or similar language can be applied to information being presented at a meeting. However, it was brought to the attention of the committee that in connection with exemption No. 7, the exemption relating to investigatory records compiled for law enforcement purposes, it was important to qualify the provision to the extent that the exemption would be clearly applicable in addition to records to information which if written would be contained in such records. This is in the nature of a technical amendment which the committee feels is consistent with the basic purpose of the exemption in its original form. In the course of subcommittee consideration of this exemption, there was a discussion of whether there should be a change in the language to cover matters discussed at the agency meetings at an early stage of the investigation when it was not clear whether enforcement proceedings would actually be instituted. However, after a discussion, it was felt that the existing language was adequate to meet the situation.

Exemption 9 of subsection (c) of new section provides an exception relating to the withholding of information where premature disclosure would, in the case of an agency which regulates currency, securities, commodities or financial institutions, be likely to lead to significant financial speculation or significantly endanger the ability of a financial institution. The exemption would also apply to information where premature disclosure would likely significanty frustrate the implementation of proposed agency action. However, the latter exemption would not be available where the content or nature of the agency action has been disclosed to the public. It was objected that the time when this bar to the application of the exemption would go into effect was not clear by the use of the term "where". Accordingly, the committee recommended an amendment to substitute the word "after" so that the exemption would not be available after the content or nature of the proposed action had been disclosed by the agency. In a conforming amendment, the term "unless" was inserted so that the agency disclosure required by law would also be covered. A similar amendment was made to the same provision which in effect provided that the exemp-

[2] This would clarify the fact that statutes such as 50 U.S.C. 403(d)(3) concerning security information and 8 U.S.C. 222 concerning confidential records of the State Department concerning visas and related matters, are included.

tion would not be available after publication of agency notice of rule-making pursuant to section 553(d) of Title 5.

The committee also added a clarification to the exemption No. 10 which concerns agency participation in litigation or related matters. The qualification is to add the term "or proceeding" to the reference to agency participation in a civil action so that the exemption would clearly apply to information relating to the agency's participation in a civil action or proceeding.

Transcript Requirement

Subsection (f)(1) of the new section requires that a complete transcript or an electronic recording which is adequate to record the proceedings shall be made of each agency meeting or portion of a meeting closed to the public with the single exception of meetings closed to the public pursuant to paragraph 10 of subsection (c). The committee considered the difficulties incident to the review of the transcript of closed meetings required by the original provisions of the bill. The bill would have required that each deletion authorized by an exception in the section would be made by recorded vote of the agency taken subsequent to the meeting. It was pointed out this would require a considerable expenditure of the time of the senior officials of the agency and that this would be cumbersome and time-consuming. It was determined that the intent of the bill could be adequately carried out by deleting this provision and similarly deleting the provision requiring a written explanation of the reason and statutory basis for each deletion. These amendments would not change the requirements of the section making revised copies of the transcript or transcription of the electronic recordings available to any person upon payment of the cost of duplication or its transcription. Further, it is provided that if the agency determines it to be in the public interest, the material can be made available to the public without cost. The complete verbatim copy of the transcription or the complete electronic recording of each meeting closed to the public would be maintained by the agency for at least two years after the meeting or until one year after the conclusion of the agency proceeding with respect to which the meeting was held, whichever occurs later.

Court Jurisdiction Under Section 552b(h)

Subsection (h) provides jurisdiction in the district courts of the United States to enforce the requirements of sections (b) through (f) of the new section. Such actions may be brought by any person against the agency prior to or within sixty days after the meeting at which the alleged violation of the section occurred. The time limit would be varied in the event that a public announcement of the meeting had not been made in accordance with the requirements of the section. The original version of the bill would have provided jurisdiction in the courts to bring such actions against the agency or its members. The committee recommended the deletion of the provision for joinder of members for since the subsection authorizes an action against the agency, there would be no necessity to join individual members to gain court jurisdiction. Further, as is discussed below, the

committee also amended the bill to delete the provision authorizing the assessment of court costs against individual agency members. As was pointed out in the explanation of the committee amendments, these amendments remove the objection that individual agency members would be subjected to suit for official acts and possibly being asessed costs and attorneys fees in these circumstances. In line with these principles, the committee recommends the deletion of the provision in original subsection (j) which would have permitted the asessment of costs against individual members of an agency.

Objections were raised at the hearings on the bill concerning the breadth of the provisions concerning venue for actions authorized by the bill. The committee concluded that there should be no limitation upon the jurisdiction provided in the bill nor persons who could bring the actions contemplated by the bill. However, the bill concerns meetings and matters relating to meetings that have a definite relation to certain locations, and the practical aspects concerning government action and court consideration of these matters make it logical to provide venue in the district where the agency meeting is held, where the agency has its headquarters, or in the District Court for the District of Columbia.

Scope of Judicial Review

Subsection (i) of subsection 552b as contained in the bill referred to the committee would have provided that any federal court otherwise authorized by law to review agency action could on application of any person properly participating in the judicial review proceedings inquire into the violations of the requirements of the section and afford any relief deemed appropriate. The committee recommends deletion of this language. As was outlined in the explanation of the committee amendments, it was concluded that the provisions of section 706 of title 5 of the Administrative Procedure Act provides adequate authority to inquire into the matters apparently referred to in original subsection (i). Section 706 concerns judicial review and details the basis for invalidating agency action. Item 2(d) as contained in that section authorizes a court to set aside agency action which was taken "without observance of proceedings required by law". In consideration of matters covered by this section, the courts, in reviewing actions, would then therefore be prepared to proceed in accordance with their normal procedures under Section 706. The weight to be given violations of the provisions of section 552b would be considered as are other matters covered by this provision in the Administrative Procedure Act. The reviewing court would then be in a position to determine whether the violation was of material prejudice to the party involved.

Ex Parte Communications

The provisions added to Section 557 of title 5 of the United States Code by Section 4(a) of the bill are almost identical to the provisions contained in the bill H.R. 10197, presently pending before this committee. The bill H.R. 10197 was the subject of a hearing before this committee's Subcommittee on Administrative Law and Governmental Relations on December 4, 1975. At that hearing testimony was received from the American Bar Association in support of the provisions gov-

erning ex parte communications. At that hearing it was noted that the provisions of H.R. 10197 on this subject paralleled the provisions on the same subject contained in S. 5, the Senate companion measure to the present bill, H.R. 11656. At that time, the American Bar Association witness stated that the provisions in the Senate version were acceptable to his Association. The provisions in the bill H.R. 11656 have a different numbering system, but otherwise are substantially identical to the provisions referred to in the Senate bill, S. 5.

In order to ensure both fairness and soundness to adjudication and formal rule making, the applicable provisions of the Administrative Procedure Act require a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut others' presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision-maker in private and others are denied the opportunity to respond.

The present Administrative Procedure Act provisions of title 5 do place a degree of limitation on ex parte communications, but the coverage is not as complete as would be provided by this bill. For example, ex parte contacts with agency heads are not covered and neither are contacts relating to formal, on-the-record rulemaking hearings. The language of this bill would close the loopholes, and would prohibit all external ex parte communications between agency members (and decisional employees) and persons outside the agency regarding the merits of any formal proceeding. The proposal also provides that any prohibited communication received by an agency must be placed on the public record and that the agency may rule against the person who made the communication as a sanction for doing so. The bill therefore establishes a prohibition against ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act. While this is presently implied by section 556(e) of the Administrative Procedure Act which states that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision", the Administrative Procedure Act provisions of title 5 contain no general statutory prohibition against ex parte contacts. To invalidate an agency proceeding because of ex parte contacts, a court must rely on constitutional standards, rather than specific provisions. *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F.2d 221 (1959). This bill would therefore provide for the first time a clear, statutory prohibition of ex parte contacts of general applicability.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section do not repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The bill forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption includes, for example, requests by one party to a proceeding for subpenas, adjournments, and continuances.

Contacts are forbidden between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The wording "interested persons" covers any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. As used in this section, "person" has the same meaning as elsewhere in the Administrative Procedure Act.

The rule applies to interested persons who "make or knowingly cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of knowingly causing an ex parte contact.

Contacts are prohibited with any agency members, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional process. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The exparte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relevant to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have any effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific ageny adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not directly discuss the merits of a pending adjudication it is not prohibited by this section.

However, a request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

The bill also prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as are provided in paragraph (A) of new subsection (d)(1) of section 557 concerning persons outside the agency.

If an ex parte communication is made or received by an agency official, he must place on the proceeding's public record: (1) any illegal written communication, (2) a memorandum stating the substance of any illegal oral communication, and (3) any oral or written statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the material relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. Agency officials who make an ex parte contact are under the same obligation to record it publicly as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public reord will not, in fact, provide sufficient notice to all the parties. In the Senate report (Sen. Rpt. 94–354) on S. 5 it was suggested that in such cases each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

An officer presiding over the agency hearings in the proceedings may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise aversely affected because of the violation. This provision parallels the amendment provided in section 4(c) of the bill to section 556(d), which authorizes an agency to consider a violation of this section as grounds for rul-

ing against a party on the merits. The new language insures that the record of the proceeding contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion.

The presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus a showing should be required where, among other factors, there will be shown to have been made knowingly, but not where the violation was clearly inadvertent.

The bill provides that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communciation before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

Subsection (c) of section 4 of the bill adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act in section 551 of title 5. The term means an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. "Public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Subsection (c) of section 4 of the bill amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provisioin apply to both formal parties, and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in a nillegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes." The Senate Report noted that one example would be an instance in which the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are

of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

The subsection specifies that an agency may rule against a party for making an ex parte communication only where the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, an agency should not definitively rule against a party simply because of an inadvertent violation.

Committee Vote

On April 6, 1976, the Full Committee on the Judiciary approved the bill H.R. 11656 by voice vote.

Conclsion

The Committee has concluded that the facts developed in the hearings on the bill and as outlined in this report demonstrate the need for legislative action with reference to meetings of the agencies covered by the provisions of the bill. It is recommended that the amended bill be considered favorably.

Cost

(Rule XII (7) (a) (1) of the House Rules)

The bill does not provide for any specific new government programs. As has been outlined in the report, the bill concerns amendments to the law concerning administrative procedures and adds new language concerning ex parte communications in connection with adjudication and formal rule making. Other than outlined below and in the Budget Office estimate it is not contemplated that those procedural changes will add significant cost to government activity.

The ex parte provisions of the legislation should result in no additional costs.

Most of the costs incurred in connection with the open meeting provisions will be for the clerical and administrative work they require, and it is estimated that such costs will be minimal.

Under the bill, the agency meetings open to the public will not require transcripts or electronic recordings. In most instances, minutes are already taken at such meetings, so the only additional expense will be that of duplicating one or more sets of the minutes to be made available to the public. (As provided in the bill, a member of the public desiring his own set of the minutes will bear the expense of copying, unless the agency deems it is in the public interest to supply them without cost.) The only other cost of an open meeting under this legislation is that of the public announcement.

An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. There will be approximately 50 covered agencies and the cost should therefore be directly proportional to the number of closed meetings. This cost could be further reduced if an electronic recording device, rather than stenographic notation,

is used. The cost of electronic recording equipment is estimated at a few thousand dollars per covered agency. The cost of transcription will be borne in large measure by members of the public requesting copies of transcripts.

Statement Under Clause 2(l)(3) and Clause 2(l)(4) of Rule XI of the Rules of the House of Representatives

A. OVERSIGHT STATEMENT

This report embodies the findings and recommendations of the Subcommittee on Administrative Law and Governmental Relations pursuant to its oversight responsibility over administrative procedures of the Federal Government and its jurisdiction over the Administrative Procedure Act as codified in title 5, United States Code, pursuant to the procedures relating to oversight under Rule VI(b) of the Rules of the Committee on the Judiciary, and the committee has determined that legislation should be enacted as set forth in the amended bill.

B. BUDGET STATEMENT

As has been indicated in the committee statement as to cost made pursuant to Rule XIII(7)(a)(1) the bill concerns administrative procedure and requirements concerning meetings of the agencies covered by the bill. Other than as required by the items of expense referred to in the attached estimate of the Congressional Budget Office, the bill should not involve new budget authority or require appreciable new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

C. ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

The estimate or comparison was received from the Director of the Congressional Budget Office, as referred to in subdivision (C) of Clause 2(l)(3) of House Rule XI, by the Commission on Government Operations and is set forth below. Unless otherwise stated, all figures represent cumulative totals for the approximately 50 agencies covered by the open meeting provisions of the bill:

Cost Estimate

Any projections of the costs of the "Sunshine Act" has to be tentative since the number of recording devices it will be necessary to buy and the amount of clerical time involved is difficult to estimate. With this limitation, the costs of making the proceedings of closed meetings available to the public could be $30,000 for new recording equipment and $130,000 annually for additional clerical help. Assuming a starting date of July 1, 1977, the budget impact would be:

Transition quarter	[1] 62,500
Fiscal year 1977	130,000
Fiscal year 1978	[2] 138,000
Fiscal year 1979	145,000
Fiscal year 1980	152,000
Fiscal year 1981	160,000

[1] $30,000 for recording devices, 25 percent of $130,000 in personnel costs.
[2] Salaries are tied to the changes in the CPI at a 5-percent real growth rate in GNP.

Basis of Estimate

The cost of a conference recording device should be about $400. This analysis has assumed that half of the fifty or so agencies in question will purchase one new recording machine, and that the other half will require two.

As for hiring additional clerical help, the assumption here is that one-quarter of the fifty agencies will do so at an average salary of $10,000 annually. If Congressional expectations that there will be few closed meetings are realized, this estimate on personnel could be on the high side of the spectrum.

Estimate Comparison

Senate Report 94–354 estimates that the cost per agency will be a few thousand dollars. The CBO cost projections are also in that range.

D. OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI, however, the committee did have the advantage of the material contained in that Committee's legislative report, H. Rept. No. 94880, Part I, on this bill.

Inflationary Impact

In compliance with clause (l)(4) of House Rule XI it is stated that enactment of this legislation will have no inflationary impact on prices and costs in the operation of the national economy. The bill provides for the procedural matters referred to above. It does not provide for any new programs.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Title 5, United States Code

* * * * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.] *; and*

(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.

* * * * * * *

§ 552. Public information; agency rules, opinions, orders records, and proceedings

(a) * * *

* * * * * * *

(b) This section does not apply to matters that are—

(1) * * *

* * * * * * *

[(3) specifically exempted from disclosure by statute:]

(3) required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

* * * * * * *

§ 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, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and

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

(b) (1) Members as described in subsection (a) (2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

(2) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

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

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

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

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

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

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

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

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an

agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

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

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

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

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal, or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d) (1) Action under subsection (c) 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). 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 paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

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

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof 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), (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 meeting 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 announcement 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 (10) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the compete 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 determines to contain 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 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, within 180 days after the date of enactment of this section, 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 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. Subject to any limitations of time therefor provided by law, 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. Such actions may be brought by any person against an agency 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. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia, 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, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. 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, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) 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) 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) or (h) of this section, except that costs may be assessed 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 assesed by the court against the United States.

(j) 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).

(k) 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 action to copy or inspect the transripts 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.

(l) 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.

(m) 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.

(n) 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.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide

for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *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.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * * * * * *

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) * * *

(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 or interested person, 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.

* * * * * * *

SECTION 410 OF TITLE 39, UNITED STATES CODE

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) Section 552 (public information), *section 552a (records about individuals)*, *section 552b (open meetings)*, section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

* * * * * * *

OVERSEAS PRIVATE INVESTMENT CORPORATION,
Washington, D.C., April 5, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Overseas Private Investment Corporation (OPIC) offers the following additional comments regarding H.R. 11656, the Government in the Sunshine Act (the "bill").

Comments by OPIC regarding the bill were previously submitted to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, by letter dated November 26, 1975, a copy of which is included in the report of the hearings before the Subcommittee. As the bill was referred from the Government Operations Committee, there were several provisions that were of serious concern to OPIC. We believe some of these provisions have been improved. Nevertheless, the following matters remain of serious concern to us.

COMMENTS OF SPECIFIC PROVISIONS

1. *Closing Mettings by Regulation.*—Section 3(d)(4) of the bill authorizes agencies to adopt regulations for the closing of portions of meetings whenever a majority of the meetings of such agency may properly be closed to the public pursuant to paragraphs (4), (8), (9)(A) or (10) of Subsection (c). This section does not authorize the adoption of such regulations whenever the majority of such meetings would properly be closed under paragraph (1); i.e., whenever such meetings would involve the discussion of information kept secret for reasons of national security. OPIC believes that this is an error that should be corrected.

Of the forty-seven agencies that the Senate Report identifies as being subject to the provisions of section 201(section 3 of the companion bill), only a small minority would have the need to use with any frequency information classified for reasons of national security OPIC is one of the few such agencies which need to use classified information to the extent that a substantial portion of its meetings would be closed because the meetings would involve discussions of classified information.

OPIC's functions are an integral part of the foreign relations of the United States. Information properly kept secret for reasons of foreign relations is discussed in most meetings of OPIC's Board of Directors in connection with the Board's determination of policy issues with respect to OPIC's operations, the review of policy issues in projects to be considered by the Board of Directors and the review of events regarding actual or potential claims under OPIC insurance contracts or events that would affect an OPIC-financed project.

Since the majority of the meetings of OPIC's Board of Directors, or portions thereof, could properly be closed to the public for reasons of national security, OPIC's inability to adopt regulations pertaining to the closing of meetings under such circumstances would constitute an additional and unwarranted administrative burden. This is especially true because the need to discuss classified information cannot regularly be predicted in advance of a scheduled meeting, may necessitate special meetings on short notice, and, in the case of meetings of OPIC's Board of Directors, may not arise until after the meeting commences.

2. *Requirement of a Verbatim Transcript of Closed Meetings.*—OPIC still objects to the inclusion in the bill of the provisions requiring that a mandatory transcript be made of each meeting, or portion thereof, closed to the public. As long as the transcript requirement remains, the provisions of the bill permitting the closure of meetings do not provide adequate protection from public disclosure of information discussed at meetings. The exemptions merely provide standards to be used in determining whether any information to be discussed at a meeting is of such a nature as to justify withholding it from the public. Since the bill provides for *de novo* review by the courts, a judge could overrule an agency's determination (for instance, in the case of privileged business information) that such information is privileged even though it was furnished to the agency and discussed at a meeting on the assumption that information and the discussion

would not become available to others. This risk will clearly be a deterrent to full and free discussion of sensitive issues which the bill purports to protect.

Furthermore, in view of the fact that classified information, confidential business information and matters with respect to potential adjudication of claims would be discussed regularly at meetings of OPIC's Board of Directors, the costs of preparing a verbatim transcript of such meetings, or of editing any transcript or summary in order to delete discussions of sensitive materials, would be very high and burdensome. We have already provided information with respect to the administrative burden involved to the various Committees that have considered this matter.

As a workable alternative to the requirement for a verbatim transcript of all closed meetings or portions thereof, OPIC recommends an approach similar to that adopted by the Senate and the House in applying the open meeting concept to their own proceedings. Thus, for instance, a majority of a Committee may vote both to close one of its meetings to the public and either to have such closed meeting transcribed or not. To impose a more stringent requirement on the Executive Branch would result in a double standard of openness, one of flexibility for the Congress and the other of rigidity for executive agencies.

GENERAL COMMENTS

For the reasons set forth in pages 1 to 3 of our letter of November 26, 1975, to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, we reiterate our view that it is, in any event, inappropriate to include OPIC within the scope of the bill. OPIC is not a regulatory agency. It operates more like a private financial institution than a government agency. OPIC's Board of Directors must be free to examine and candidly discuss, as would the Board of Directors of a private financial institution, all aspects of underwriting policy, applications pending before the Board for insurance or financing, and matters concerning insurance claims. Involved in these discussions are candid assessments of individuals, companies and events and the liberal use of privileged business information and governmental information kept secret for reasons of foreign relations. Such discussions must be carried out in a confidential manner that is not adequately protected by the bill.

The requirement that a verbatim transcript must be maintained within respect to any closed meeting, and that any person may sue to obtain access to any such transcript, would result in the ever-present concern of the private sector entities who deal with OPIC as well as of participants in meetings of OPIC's Board, that a judge could later hold that matters either given or spoken with the understanding that they be treated in confidence were not entitled to such protection. Such a concern, particularly among OPIC's private Directors, and among the private companies with which OPIC deals, will inevitably result in less than a full and free exchange of ideas, and could materially undermine the Congressional mandate that OPIC achieve greater private participation in its programs.

Sincerely yours,

GERALD D. MORGAN, Jr.,
Vice President and General Counsel.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., April 5, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Civil Service Commission is herewith submitting a voluntary report on H.R. 11656, a bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes," cited as the "Government in the Sunshine Act."

The Commission submitted a similar report to the Subcommittee on Administrative Law and Government Relations but we understood that the Subcommittee was not able to reach the Commission's proposed amendment to the bill. We accordingly again urge amendment to H.R. 11656 based on the considerations stated herein.

Unlike certain other central agencies designed to service the Federal Government, such as the General Services Administration, the Commission is a three-member body. But, unlike most such multi-headed Commissions, the Civil Service Commission does not regulate any segment of the economy affecting the general public. The Commission's primary mission is to provide leadership and regulatory direction to the central personnel programs of the executive branch.

The drafters and sponsors of H.R. 11656 recognized that agency internal personnel matters are not of direct interest to the general public and have no direct impact on the public sector. Therefore, they provided an exemption in the bill from the public meeting requirements. The Commission strongly supports this exemption, but urges that it be modified to apply not just to individual agency personnel programs but also to inter-agency personnel programs administered by the Civil Service Commission. Just as the separate parts are now exempt—so, too, should be the whole.

The exemption should be extended to Government-wide personnel rules and practices to meet the need of the Commission to continue to carry out its internal Governmental personnel management responsibilities as efficiently and effectively as possible. In addition, the Commission's meetings concerning Government-wide policies and programs in labor-management relations as well as agency labor-management relations should be included in this exemption. We do not believe that the decision-making process in regard to agency and Government-wide labor-management relations strategy and negotiation considerations should be exposed to public view and particularly the view of those with whom we will be negotiating. The Commission and other agencies could hardly adopt flexible negotiating positions when the fall-back positions and strategies have been discussed and decide in public sessions attended by both parties to the negotiations.

Accordingly, we respectfully urge that the exemption to open meetings in proposed section 552b(c) (2) of title 5, United States Code, in H.R. 11656 be amended to read as follows: "(2) relate to the internal personnel rules and practices or labor-management relations policy of an agency or to Government-wide personnel rules and practices or to Government-wide labor-management relations policy;"

By direction of the Commission:

Sincerely yours,

ROBERT E. HAMPTON,
Chairman.

ADDITIONAL VIEWS OF HON. CARLOS J. MOORHEAD AND HON. THOMAS N. KINDNESS (CONCURRED IN BY HON. EDWARD HUTCHINSON, HON. HENRY J. HYDE, HON. HAMILTON FISH, JR., AND HON. WILLIAM S. COHEN)

INTRODUCTION

We fully support the principle that governmental decisionmaking should be as open to public scrutiny as is Constitutionally and practically possible. An informed public is an essential element in assuring the effectiveness and viability of the American system of government.

We have no quarrel with the stated purpose of the "Government in the Sunshine Act". Furthermore, we are greatly encouraged by the changes made in H.R. 11656 by the Subcommittee on Administrative Law and Governmental Relations, as agreed to by the full Committee on the Judiciary. As amended, this legislation is less ambiguous less likely to produce extensive litigation, and less likely to impose unrealistic and unfair burdens on the ability of government agencies to perform the functions for which they were created. There still remains, however, considerable room for improvement.

THE DEFINITION OF AGENCY

The definition of "agency" should be made more specific. In defining "agency" in subsection (a)(1) of section 3, the bill relies, first, upon the definition of "agency" as it is found in the amended Freedom of Information Act, 5 U.S.C. 552(e). The FOIA definition, in turn, is based largely on the definition of 'agency' as it is contained in the Administrative Procedure Act, 5 U.S.C. 551(a). Then subsection (a)(1) makes the additional qualification that it extends only to those Federal agencies headed by "collegial bodies composed of two or more members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." Panels, Regional Boards, and other subdivisions authorized to act on behalf of an agency are also intended to be covered by this definition.

Administration witnesses appearing before our Committee argued that the definition of "agency", as it now stands, is unclear in its scope and can only result in extensive litigation. In testimony before our Committee, Deputy Attorney General Tyler noted that recent cases reflect a confusion about the scope of the definition of "agency", both in the APA and the FOIA. See: *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168, 187–8 (1975); *Soucie* v. *David*, 448 F. 2d 1067, 1075 (D.C. Cir., 1971); *Washington Research Project, Inc.*, v. *H.E.W.*, 504 F.2d 238, 245–8 (D.C. Cir., 1974). These decisions suggest that administrative entities may be "agencies" for some but not

all purposes, depending on the particular function they're performing in a particular instance.

A listing of those agencies which Congress specifically intends to cover by this legislation seems to us to be an exact and logical manner in which to proceed. The inclusion of such a list, as an alternative to a generalized definition, would avoid any confusion as to which agencies are covered and would minimize litigation. Such an approach was taken in the Government Corporation Act of 1945, 31 U.S.C. 841 et. seq., where there was a similar problem of entities not easily defined in one statutory phrase.

THE DEFINITION OF MEETING

The definition of 'meeting' in subsection (a)(2) is another problem area. We are particularly concerned about the language inserted by the full Judiciary Committee, which is troublesome for two reasons. First, the new definition does not contain the "purpose" test agreed to by the Administrative Law Subcomittee. So, instead of reading "a gathering to jointly conduct or dispose of agency business . . .", the definition now reads: "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business . . ." The new language leaves open the possibility that this Act could apply to casual or social encounters, where agency business might be discussed. It also could apply to a situation where one agency member gives a speech concerning agency business with other agency members present in the audience.

Second, this new definition also extends to "simultaneous communication(s)" of agency members. This is an obvious attempt to bring conference telephone calls within the ambit of the definition. That intention had previously been rejected in Subcommittee. How, one may ask, can a telephone conversation be viewed as a public meeting? 'Meeting', within the terms of the Sunshine legislation should be limited to an actual "gathering" of agency members in a single, physical location for the sole purpose of conducting official agency business.

EXEMPTION PROCEDURES

Subsection (d)(1) requires a majority vote of the entire membership of the agency for any meeting to be closed pursuant to the exemptions listed in subsection (c)(1)–(10). In many cases, regulatory agencies are permitted by statute to adopt procedures by which sub-groups or panels can be delegated the responsibility to take action on behalf of the entire agency. See, for example, the Communications Act Amendments of 1952. 47 U.S.C. § 155(d). Why then, if a subdivision can act on behalf of an agency in substantive, policy matters, shouldn't it also be able to close meetings? The provision elevates procedure to a position of greater importance than the substantive, policy deliberations for which the meetings are to be held. As the bill is now written, a majority of the entire agency board or commission would have to convene to close the meetings of such panels or subdiviisons. We support the deletion of the phrase "a majority of the entire membership of" from subsection (d)(1) of the bill.

JUDICIAL REVIEW

We are also deeply concerned about granting "any person" the right to sue to enforce the provisions of the Sunshine Act. Subsection (h) permits any individual, irrespective of the usual standing requirements, to bring an action in a U.S. District Court to enjoin or remedy violations of any of the substantive provisions of the Act. There is serious question whether or not by doing away with normal Federal court standing requirements, that H.R. 11656 violates the "case and controversy" requirements of Article 3 of the Constitution. Furthermore, the encouragement of litigation on such a broad scale can only serve to seriously interfere with the efficient administration of government. Subsection (h) should be amended so as to require that a plaintiff makes some showing of specific harm to his interests.

Subsection (h) also contains a provision requiring that the defendant (the government) must serve his answer to a complaint within 20 days (an additional 20 days may be allowed by the court on a showing of "good cause"), instead of the 60 days normally allowed. This accelerated answer provision has its origins in the Senate bill (S. 5). However, the Senate version also required that, before instituting a suit, the plaintiff must first notify the agency and give it a reasonable time (up to ten days) to rectify the violation. No comparable notification requirement is present in the House bill. There can be no question but that a notice provision would alleviate the volume of litigation encouraged by this Act. If the accelerated answer provision is to remain in H.R. 11656, then the notification requirement present in the Senate bill should also be included in this legislation as a matter of fundamental fairness.

SUMMARY

Again, we support the purposes of H.R. 11656, but still retain serious reservations about the advisability and practicality of certain of its key provisions. We retain the hope that further improvements can be made, when this legislation is considered on the House Floor.

CARLOS J. MOORHEAD.
THOMAS N. KINDNESS.
HENRY J. HYDE.
EDWARD HUTCHINSON.
HAMILTON FISH.
WILLIAM S. COHEN.

SUPPLEMENTAL VIEWS OF HON. EDWARD HUTCHINSON AND HON. ROBERT McCLORY (CONCURRED IN BY HON. THOMAS N. KINDNESS, HON. HENRY J. HYDE, AND HON. JOHN M. ASHBROOK)

We are deeply concerned about the scope of the verbatim transcript requirement found in subsection (f)(1) of H.R. 11656. Implicit in this provision is the ill-founded belief that the public somehow has an inherent right to know everything about governmental deliberations, no matter what their content or the potential harm of public disclosure.

The American people certainly have legitimate interest in knowing how governmental decisions are made. However, this "right to know" has never been and cannot be viewed as an absolute. It must be modified, for example, by such competing interests as: (1) the national security; (2) Constitutional right of personal privacy; (3) the need for economic stability and security and (4) law enforcement effectiveness and efficiency. This legislation requires that all agencies which come under the scope of the Sunshine bill make a complete transcript or electronic recording of all of their proceedings. This requirement would extend even to those meetings, validly closed pursuant to the exemptions noted in subsection (c)(1–10). So, for example, a complete record must exist for all closed meetings of the Federal Reserve Board and Securities and Exchange Commission, no matter how sensitive the content or how damaging unwarranted disclosure could be.

First, we object to the imposition of an across-the-board transcript and electronic recording requirement. We object because of the very practical and real possibility that privileged subject matter could easily be leaked. Second, as written, this provision leaves the decision regarding disclosure of the complete transcript of a closed meeting solely up to the agencies in question. This discretion leaves room for arbitrary and tyrannical disregard of individual rights by a majority vote in a bureaucracy.

There are practical objections as well. Since the provision clearly leaves open the possibility of subsequent disclosure of a complete transcript of a closed meeting, the likelihood is that the free exchange of ideas between agency members about sensitive policy matters will be greatly hampered. This requirement can only be viewed as potentially impairing the decision-making processes of government.

Proponents argue that a complete transcript of closed meetings must be retained by the agency so that it will be available for an "in camera" review of a judge, should litigation of the appropriateness or contents of a closed meeting develop. Discovery procedures available in Federal courts have never depended upon the availability of verbatim transcripts or electronic recordings of agency meetings. Furthermore, this attitude is evidence of Congress once again dele-

gating to the courts the power to make a decision on a policy question that is properly within our prerogatives.

We strongly feel that Congress would be ill-advised to pass H.R. 11656 containing this damaging transcript requirement. The desperate attempt to appear "open" at all costs, can only result in the diminution of the rights and expectations of the citizens we seek to serve.

EDWARD HUTCHINSON.
ROBERT MCCLORY.
THOMAS N. KINDNESS.
HENRY J. HYDE.
JOHN A. ASHBROOK.

SUPPLEMENTAL VIEWS OF HON. EDWARD MEZVINSKY, HON. JOHN SEIBERLING

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administration Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

EDWARD MEZVINSKY.
JOHN SEIBERLING.

SUPPLEMENTAL VIEWS OF HON. BOB KASTENMEIER

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BOB KASTENMEIER.

SUPPLEMENTAL VIEWS OF HON. JACK BROOKS AND HON. ELIZABETH HOLTZMAN

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JACK BROOKS.
ELIZABETH HOLTZMAN II.

SUPPLEMENTAL VIEWS OF HON. JOHN CONYERS

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JOHN CONYERS.

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94TH CONGRESS
2d Session
SENATE
REPORT
No. 94-1178

GOVERNMENT IN THE SUNSHINE ACT

AUGUST 27, 1976.—Ordered to be printed

Mr. CHILES, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 5]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

SEC. 2. 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.

OPEN MEETINGS

SEC. 3. (a) 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 any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such

position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

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

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

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

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

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

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

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

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

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

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

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

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the

use of an agency responsible for the regulation or supervision of financial institutions;

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

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

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

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

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

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

"(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof 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), (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 time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

"(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, 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 meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

"(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The 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 announcement required by this subsection only if (A) 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 (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

"(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

"(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

"(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, 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 portion was held, whichever occurs later.

"(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, 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 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. Subject to any limitations of time provided by law, 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)(1) The district courts of the United States shall 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 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. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes 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 parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

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

"(i) 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) or (h) of this section, except that costs may be assessed 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.

"(j) 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).

"(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

"(l) 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 required by any other provision of law to be open.

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

(b) 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.".

EX PARTE COMMUNICATIONS

SEC. 4. (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 knowingly 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 relevant 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 knowingly cause to be made to any interested person outside the agency an ex parte communication relevant 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 knowingly 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) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, 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 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 subsection 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 paragraph (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, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.".

(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 party who has knowingly committed such violation or knowingly caused such violation to occur.".

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting after "Section 552 (public information)," the words "section 552a (records about individuals), section 552b (open meetings),".

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

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

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: "Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.".

EFFECTIVE DATE

SEC. 6. (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, added by section 3(a) of this Act, shall take effect upon enactment.

And the House agree to the same.

ABE RIBICOFF,
EDMUND S. MUSKIE,
LEE METCALF,
LAWTON CHILES,
C. H. PERCY,
J. JAVITS,
W. V. ROTH, Jr.,
Managers on the Part of the Senate.

JACK BROOKS,
JOHN E. MOSS,
DANTE B. FASCELL,
JOHN CONYERS,
BELLA S. ABZUG,
WALTER FLOWERS,
GEORGE E. DANIELSON,
BARBARA JORDAN,
R. L. MAZZOLI,
EDWARD W. PATTERSON,
FRANK HORTON,
PAUL N. MCCLOSKEY, Jr.,
CARLOS J. MOORHEAD,
THOMAS N. KINDNESS,
Managers on the Part of the House.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a complete substitute for the House amendment, and the House agrees to the same. The differences among the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

SHORT TITLE

The Senate bill, the House amendment, and the conference substitute provide that this legislation may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

The Senate bill, the House amendment, and the conference substitute provide in section 2 that it is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that 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.

OPEN MEETINGS

CODIFICATION

Senate bill

The Senate bill did not make its open meeting provisions a part of title 5, United States Code.

House amendment

The House amendment enacted its open meeting provisions as a new section 552b of title 5, United States Code.

Conference substitute

The conference substitute is the same as the House amendment.

DEFINITIONS

Senate bill

Section 3 of the Senate bill defined the term "person" to include an individual partnership, corporation, association, or public or private organization other than an agency.

Section 4(a) of the Senate bill made section 4 applicable to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate.

Section 4(a) of the Senate bill also provided that for purposes of section 4, a 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 official agency business.

The Senate bill did not contain a definition of the term "member".

House amendment

The House amendment, subsection (a) of the proposed new section 552b of title 5, United States Code, contained no definition of the term "person", since the proposed section 552b would automatically be subject to the definition of "person" continued in 5 U.S.C. 551(2) (which is identical to the definition contained in the Senate bill).

The House amendment defined the term "agency" as the Federal Election Commission and any agency, as defined in section 552(e) of title 5, United States Code, headed by a collegial body composed of two or more individuals, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, including any subdivision thereof authorized to act on behalf of the agency.

The House amendment defined the term "meeting' as a gathering to jointly conduct or dispose of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but not including gatherings held to take action required or permitted by subsection (d) of section 552b.

The House amendment defined the term "member" as an individual who belongs to a collegial body heading an agency.

Conference substitute

The conference substitute is subsection (a) of new section 552b. It is the same as the House amendment, except as follows:

1. The separate reference to the Federal Election Commission in the definition of "agency" is eliminated, since that body now falls within the bill's generic definition of the term uuder the provisions of Public Law 94–283.

2. Although the language of the House amendment referring to a covered agency as "headed by a collegial body" is used in the substitute instead of the reference in the Senate bill to "the collegial body comprising the agency", the intent and understanding of the conferees regarding this provision is that meetings of a collegial body governing an agency whose day-to-day management may be under the authority of a single individual (such as the United States Postal Service and the National

Railroad Passenger Corporation (Amtrak)) are included within the definition of agency.

3. The substitute defines the term "meeting" as the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of agency business, but not including deliberations to take action to open or close a meeting, or to release or withhold information under subsection (d) or (e) of this section. This is the Senate definition, as explained in the Senate report, except that the word "concern" is replaced by the words "determine or result in". This definition will include conference telephone calls if they involve the requisite number of members and otherwise come within the definition.

PROHIBITION ON CONDUCT OF BUSINESS OTHER THAN AS PROVIDED IN THIS SECTION

Senate bill

The Senate bill contained no express prohibition on the conduct of agency business other than as provided in the bill.

House amendment

Section (b)(1) of new section 552b, as included in the House amendment, provided that members, as described in subsection (a)(2), shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

Conference substitute

The conference substitute provides that members shall not jointly conduct or dispose of agency business in a meeting other than in accordance with new section 552b. This prohibition does not prevent agency members from considering individually business that is circulated to them sequentially in writing.

OPEN MEETING REQUIREMENT

Senate bill

Subsection 4(a) of the Senate bill provided that, except as provided in subsection 4(b), all meetings of a collegial body comprising an agency, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public.

House amendment

The House amendment provided, in subsection (b)(2) of new section 552b, that except as provided in subsection (c), every portion of every meeting of an agency (including a subdivision) shall be open to public observation.

Conference substitute

The conference substitute is the same as the House amendment. The phrase "open to public observation" is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.

EXEMPTIONS FROM OPEN MEETING REQUIREMENT

Senate bill

Section 4(b) of the Senate bill provided that, except where the agency finds that the public interest requires otherwise, (1) the open meeting requirement of subsection 4(a) shall not apply to any meeting, or portion thereof, of an agency or a subdivision of an agency authorized to take action on behalf of the agency, and (2) the informational and disclosure requirements of subsections 4 (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency or subdivision in question properly determines that such portion or portions of the meeting, or such information, can be reasonably expected to—

(1) disclose matters (A) specifically authorized under criteria 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;

(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;

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

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only 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 course 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;

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

(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution;

(B) any agency where such disclosure would significantly frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

This exemption would not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal;

(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 participation in a civil action in Federal or State court, 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 title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

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

House amendment

Subsection (c) of 5 U.S.C. 552b, as included in the House amendment, provided that except in a case where the agency finds that the public interest requires otherwise, the open meeting requirement of subsection (b) shall not apply to any portion of an agency meeting, and the informational and disclosure requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

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

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

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5, United States Code), provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

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

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

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

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

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

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

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

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that exemption (9)(B) would not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal or after the agency publishes or serves a substantive rule pursuant to section 553(d) of title 5, United States Code; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing.

Conference substitute

The conference substitute is the same as the House amendment, except that the third exemption, incorporating by reference exemptions contained in other statutes, applies only to statutes that either (a) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establish particular criteria for withholding or refer to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).

The conferees' understanding and intention with respect to subsection (c) is as follows:

1. The conferees understand the word "likely" to mean that it is more likely than not that the event or result in question will occur.

2. The conferees intend the inclusion in the seventh exemption (law enforcement material) of non-written information, such as oral information imparted by a confidential informant, to cover only information that if written would be included in investigatory records compiled for law enforcement purposes.

3. The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 522(b)(4), and the conferees have agreed to this language with recognition of judicial interpretations of that exemption.

4. The limitation on the second part of the ninth exemption (information whose disclosure would significantly frustrate a proposed agency action) provides that it shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on the proposal. Disclosure of the information other than by the agency, such as by an unauthorized "leak", would not render it ineligible for the protection of this exemption.

5. In an appropriate instance, an agency discussion of the possible purchase of real property would fall within the second part of the ninth exemption.

6. The House version of the personnel exemption is agreed to with recognition of the Supreme Court's interpretation of the analogous Freedom of Information Act exemption in *Department of the Air Force* v. *Rose*, — *U.S.* —, 44 U.S.L.W. 4503. (April 21, 1976).

PROCEDURE FOR CLOSING MEETINGS

Senate bill

Subsection 4(c)(1) of the Senate bill provided that action to close a meeting or to withhold information under subsection 4(b) shall be taken only when a majority of the entire membership of the agency or subdivision concerned votes to take such action. A separate vote is to be taken with respect to each meeting (or portion thereof) proposed to be closed, or any information proposed to be withheld, except that a single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, if each meeting in the series involves the same particular matters and is scheduled to be held no more than 30 days after the initial meeting in the series.

The vote of each agency member is to be recorded and proxies are not permitted.

Whenever any person whose interests might be directly affected by a meeting requests that the agency close a portion or portions of the meeting under the exemptions relating to personal privacy,

criminal accusation, or law enforcement information, the agency, upon the request of any one of its members, is required to vote whether to close such meeting.

Within one day of any vote taken pursuant to this paragraph, the agency is required to make public a written copy of the vote.

Subsection 4(c)(2) of the Senate bill provided that if a meeting (or portion thereof) is closed, the agency must, within one day of the vote taken under paragraph (c)(1), make public a full written explanation of its action closing the meeting, together with a list containing the names and affiliations of all persons expected to attend the meeting.

Subsection 4(c)(3) of the Senate bill provided a special procedure whereby any agency, a majority of whose meetings will properly be closed to the public pursuant to the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudicatory proceedings or civil actions, may provide by regulation for the closing of such meetings or portions, so long as a majority of the members of the agency vote at the beginning of the meeting or portion to close the meeting and a copy of the vote is made public.

The closing procedures of paragraphs (c)(1) and (2), and the announcement procedures of subsection (d), do not apply to any meeting closed under these regulations, but the agency is required to make a public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity (except to the extent that to do so would disclose information exempt under subsection 4(b)).

House amendment

Subsection (d)(1) of new section 552b, as set forth in the House amendment, provided that action to close a meeting (or portion thereof) may 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 is to be taken with respect to each meeting a portion or portions of which are proposed to be closed, except that a single vote may be taken with respect to a series of portions of meetings proposed to be closed if each portion in such series involves the same particular matters and is scheduled to be held no more than 30 days after the initial portion of a meeting in the series.

The vote of each agency member is required to be recorded and proxies are not permitted.

Subsection (d)(2) of section 552b provided that whenever any person whose interests might be directly affected by a portion of a meeting requests that the agency close such portion to the public under the exemptions relating to personal privacy, criminal accusation, or law enforcement information, the agency, upon the request of any one of its members, is required to vote by recorded vote whether to close such meeting.

Subsection (d)(3) of section 552b required the agency to make public a written copy of any vote taken pursuant to paragraphs (d)(1) or (2), reflecting the vote of each member on the question, within one day after the vote. If the vote is to close the meeting (or a portion thereof), the agency is also required to make public within one day a full written explanation of its action closing the portion and a list of the names and affiliations of all persons expected to attend the meeting.

Subsection (d)(4) of section 552b provided a special procedure whereby any agency, a majority of whose meetings may properly be closed pursuant to the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudicatory proceedings or civil actions, may provide by regulation for the closing of such meetings or portions in the event that a majority of the members of the agency vote by recorded vote at the beginning of the meeting or portion to close the exempt portions thereof and a copy of the vote, reflecting the vote of each member on the question, is made public.

The closing procedures of paragraphs (d)(1), (2) and (3), and the announcement procedures of subsection (e), do not apply to any portion of a meeting closed under these regulations, but the agency is required to make a 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 (except to the extent that to do so would disclose information exempt under subsection (d)).

Conference substitute

The conference substitute is the same as the Senate bill, except as follows:

1. The reference to an agency subdivision in paragraph (1) is eliminated, since the definition of "agency" in subparagraph (a)(1) of section 552b includes any subdivision thereof authorized to act on behalf of the agency. The reference to the definition of "agency" in this instance is intended to make clear that when a subdivision is authorized to act on behalf of the agency, a majority of the entire membership of the subdivision is necessary to close a meeting.

2. Any vote to close a meeting upon the request of an affected person, or using the special procedure under paragraph (d)(4), must be recorded. When such vote is published, the vote of each individual member shall be set forth.

3. While the public announcement required when a meeting is closed using the special procedure under paragraph (d)(4) need only be made at the earliest practicable time, the conferees intend that such announcements be made as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.

4. The fact that one portion of a meeting may be closed does not justify the closing of any other portion.

ANNOUNCEMENT OF MEETINGS

Senate bill

Section 4(d) of the Senate bill required that the agency publicly announce, at least one week before a meeting, the following:

1. the date of the meeting;
2. the place of the meeting;
3. the subject matter of the meeting;
4. whether the meeting is open or closed to the public; and
5. the name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

This seven day period may be reduced if the majority of the members of the agency or subdivision determine by vote that the agency business so requires, in which case public announcement of the date, place, and subject matter of the meeting, and whether it is open or closed, is to be made at the earliest practicable opportunity.

The subject matter or closed/open determination for a meeting may be changed following the initial public announcement if (1) a majority of the entire membership of the agency or subdivision determines by vote that the agency business so requires and that no earlier announcement of the change was possible, and (2) the change is announced at the earliest practicable opportunity.

Notice of any public announcement required by this subsection is to be submitted for publication in the Federal Register immediately after its release.

House amendment

Subsection (e) of new section 552b, as added by the House amendment, required that the agency publicly announce, at least one week before a meeting, the following:

1. the date of the meeting;
2. the place of the meeting;
3. the subject matter of the meeting;
4. whether the meeting is to be open or closed to the public; and
5. the name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

This seven day period may be reduced if the majority of the members of the agency determines by recorded vote that the agency business so requires, in which case public announcement of the date, place, and subject matter of the meeting, and whether it was open or closed to the public, is to be made 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 whether a meeting should be open or closed, may be changed following the initial public announcement if (1) a majority of the entire membership of the agency determines by recorded vote that the agency business so requires and that no earlier announcement of the change was possible, and (2) the change and the vote of each member thereon is announced at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

Conference substitute

The conference substitute is the same as the House amendment, except as follows:

1. While the public announcement required when a meeting is announced on less than seven days' notice, or when the time, place or subject matter of a meeting, or the determination whether to open or close a meeting is changed following the initial public announcement, need only be made at the earliest practicable time, the conferees intend that such announcements be made as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.
2. A change in the time or place of a meeting made subsequent to the initial announcement need not be voted upon by the agency members, but must be announced at the earliest practicable time.

3. The bill requires that reasonable means be used to assure that the public is fully informed of public announcements pursuant to this section. Such means include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest in the agency's, operations, and sending them to the persons on the agency's general mailing list or a mailing list maintained for those who desire to receive such material.

Notice of a public announcement pursuant to this subsection must also be submitted immediately for publication in the Federal Register.

TRANSCRIPTS, RECORDINGS, AND MINUTES OF MEETINGS

Senate bill

Section 4(e) of the Senate bill required that a verbatim transcript or electronic recording be made of each meeting or portion closed to the public, except for a meeting or portion closed under the exemption for adjudicatory proceedings and civil actions. The transcript or recording of each item on the agenda is to be made available to the public promptly, in a place easily accessible to the public, where no significant portion of such item contains any information falling within one of the the exemptions in section 4(b).

Copies of the transcript (or a transcription of the recording disclosing the identity of each speaker) are to be furnished to any person at the actual cost of duplication or transcription.

The complete transcript or recording is to be maintained by the agency for at least two years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurred later.

House amendment

Subsection (f)(1) of new section 552b, as contained in the House amendment, required that for every meeting closed under the section, the General Counsel or chief legal officer of the agency certify that, in his opinion, the meeting may properly be closed and state the relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, the persons present, the generic subject matter of the discussion at the meeting, and the actions taken, is to be incorporated into minutes retained by the agency.

Subsection (f)(2) of section 552b required that written minutes be kept of any meeting or portion which is open and promptly be made available to the public in a location easily accessible to the public. The minutes are to be maintained for a period of at least two years after the meeting, and copies are to be furnished to any person at no greater than the actual cost of duplication (or, if in the public interest, at no cost).

Conference substitute

Subsection (f)(1) of the conference substitute requires that before a meeting may be closed, the General Counsel or chief legal officer of the agency must certify that, in his or her opinion, the meeting may properly be closed and state each relevant exemptive provision. A copy

of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, and the persons present, shall be retained by the agency as part of the transcript, recording, or minutes of the meeting.

The agency shall make a verbatim transcript or electronic recording of each meeting or portion closed to the public, except that for a meeting closed under exemptions (8) (bank reports), (9)(A) (information likely to lead to financial speculation), and (10) (adjudicatory proceedings or civil actions), the agency may elect to make either a transcript, a recording, or minutes. If minutes are kept, they must fully and clearly describe all matters discussed, provide a full and accurate summary of any actions taken and the reasons expressed therefor, and include a description of each of the views expressed on any item. The minutes must also reflect the vote of each member on any roll call vote taken during the proceedings and must identify all documents considered at the meeting.

Subsection (f)(2) of the conference substitute requires that the transcript, recording, or minutes made pursuant to paragraph (f)(1) as to each item on the agenda must be made promptly available to the public, except for agenda items or items of the discussion or testimony that the agency determines to contain information exempt under subsection (c).

Copies of the nonexempt portions of the transcript, or minutes, or a transcription of the recording disclosing the identity of each speaker, must be furnished to any person at the actual cost of duplication or transcription.

The complete transcript, minutes, or recording of a closed meeting is to be maintained by the agency for at least two years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurs later.

AGENCY REGULATIONS

Senate bill

Section 4(f) of the Senate bill required each agency subject to the requirements of section 4 to promulgate implementing regulations within 180 days after the enactment of the Act, following consultation with the Office of the Chairman of the Administrative Conference of the United States, published notice in the Federal Register of at least 30 days and opportunity for any person to make written comment thereon.

The Senate provision permitted any person to bring a proceeding in the United States District Court for the District of Columbia to require the promulgation of such regulations if not promulgated within the 180-day period, and also permitted any person to bring a proceeding in the United States Court of Appeals for the District of Columbia Circuit to set aside any such regulations not in accord with the requirements of subsections (a) through (e) of section 4 and to require the promulgation of regulations in accord with those provisions.

House amendment

The House amendment, subsection (g) of new section 552b, was the same as the Senate bill, except that the right to bring a proceeding in the Court of Appeals to challenge agency regulations promulgated

under the Act is subject to "any limitations of time therefor provided by law."

Conference substitute

The conference substitute is the same as the House amendment, except that the right to bring a proceeding in the Court of Appeals to challenge agency regulations promulgated under the Act is subject to "any limitations of time provided by law."

JUDICIAL REVIEW

Senate bill

Section 4(g) of the Senate bill vested in the United States District Courts jurisdiction to enforce subsections (a) through (e) of section 4 by declaratory judgment, injunctive relief, or other appropriate relief. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The Senate provision required a potential plaintiff to notify the agency before instituting suit and to allow it a reasonable period of time (not to exceed 10 days or, if notification is made prior to the meeting, not to exceed two days) to correct the violation.

An action may be brought where the plaintiff resides or has his principal place of business, or where the agency has its headquarters. The defendant is required to serve his answer within 20 days after the service of the complaint, and the burden is on the defendant to sustain his action.

In deciding such an action the court may examine in camera any portion of the transcript or recording of a closed meeting and may take any additional evidence it deems necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public the transcript or recording of any portion of a meeting improperly closed to the public.

Subsection 4(g) provided that, except as provided in subsection 4(h), nothing in section 4 confers jurisdiction upon any district court to set aside or invalidate any agency action taken or discussed at a meeting out of which a violation of this section arose.

Subsection 4(h) of the Senate bill provided that any Federal court otherwise authorized by law to review agency action may, at the request of any person properly participating in such a review proceeding, inquire into violations of section 4 by the agency and afford any such relief as it deems appropriate.

House amendment

In the House amendment, subsection (h) of new section 552b vested in the United States District Courts jurisdiction to enforce subsections (b) through (f) of section 552b. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The House amendment permitted an action to be brought where the meeting was held, where the agency has its headquarters, or in the District of Columbia. The defendant is required to serve his answer within 20 days after the service of the complaint, but the court may extend that time limit for up to 20 additional days upon a showing of good cause for an extension. The burden is on the defendant to sustain his action.

In deciding such an action the court may examine in camera any portion of the minutes of a closed meeting and may take any additional evidence it deemed necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public such portion of the minutes as was not exempt under subsection (c) of section 552b.

Subsection (h) further provided that nothing in section 552b confers jurisdiction on a district court acting solely under subsection (h) to set aside, enjoin, or invalidate any agency action taken or discussed at a meeting out of which a violation of section 552b arose.

Conference substitute

The conference substitute vests in the United States District Courts jurisdiction to enforce subsections (b) through (f) of section 552b by declaratory judgment, injunctive relief, or other relief as may be appropriate. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The conference substitute does not contain the requirement of the Senate bill that a potential plaintiff formally notify the agency before commencing an action under this subsection because the conferees expect and encourage potential plaintiffs or their attorneys to communicate informally with the agency before bringing suit.

An action under subsection (h)(1) may be brought where the agency meeting was or is to be held, where the agency has its headquarters, or in the District of Columbia. The defendant must serve his answer within 30 days after the service of the complaint, and the court is not given discretion by the substitute to extend that time limit. The burden is upon the defendant to substain his action.

In deciding such an action the court may examine in camera any portion of the transcript, recording, or minutes of a closed meeting and may take any additional evidence it deems necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public such portion of the transcript, recording, or minutes as is not exempt under subsection (c) of section 552b.

Subsection (h)(2) of section 552b, as contained in the conference substitute, provides that any Federal court otherwise authorized to review action (under provisions such as chapter 7 of title 5, U.S. Code, or chapter 158 of title 28, U.S. Code) may, on the application of any person properly participating in the review proceeding, inquire into violations of section 552b by the agency and afford such relief as it deems appropriate. Nothing in section 552b authorizes any

Federal court having jurisdiction solely on the basis of subsection (h)(1) to set aside, enjoin, or invalidate any agency action (other than an action, such as to close a meeting, or withhold a portion of a transcript, recording, minutes, or other information, taken pursuant to section 552b) taken or discussed at a meeting out of which a violation of section 552b arose.

The conferees do not intend the authority granted to the Federal courts by the first sentence of subsection (h)(2) to be employed to set aside agency action taken other than under section 552b solely because of a violation of section 552b in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation of section 552b unless that violation is of a serious nature.

ATTORNEY FEES AND LITIGATION COSTS

Senate bill

Section 4(i) of the Senate bill authorized the court hearing an action under subsection (f), (g), or (h) of that section to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in the action. Costs may be assessed against an individual member of an agency only where the court finds that he has intentionally and repeatedly violated section 4, and against a plaintiff where the court finds that he initiated the suit for frivolous or dilatory purposes. In the case of apportionment of fees or costs against any agency, the fees or costs may be assessed against the United States.

House amendment

Subsection (i) of new section 552b, as contained in the House amendment, authorized the court hearing an action under subsection (g) or (h) of section 552b to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in the action. Costs may be assessed against a plaintiff only where the court finds that he initiated the suit primarily for frivolous or dilatory purposes. In the case of assessment of fees or costs against an agency, they may be assessed against the United States.

Conference substitute

The conference substitute is the same as the House amendment.

ANNUAL REPORT TO CONGRESS

Senate bill

Section 4(j) of the Senate bill required the agencies subject to the requirements of section 4 to report annually to Congress regarding their compliance, including the total number of meetings open to the public, the total number closed to the public, the reasons for the closings, and a description of any litigation brought against the agency under section 4.

House amendment

Subsection (j) of new section 552b of the House amendment required each agency subject to the requirements of the section to report annually to Congress regarding its compliance, including the total number of meetings open to the public, the total number closed to the

public, the reasons for the closings, and a description of any litigation brought against the agency under section 552b (including any fees or costs assessed against the agency in such litigation, whether or not paid by the agency).

Conference substitute

The conference substitute is the same as the House amendment.

RELATIONSHIP TO THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552

Senate bill

Section 6(a) of the Senate bill provided that except as specifically provided in section 4, nothing in section 4 confers any additional rights on any person or limits the existing rights of any person to inspect or copy, under 5 U.S.C. 552, any documents or written material within the possession of any agency. In the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the transcripts or recordings described in section 4(e) of the Senate bill, the provisions of this Act govern whether the transcripts or recordings are to be made available in response to the request.

Section 6(a) also makes the requirements of chapter 33 of title 44, United States Code, inapplicable to the transcripts and recordings described in section 4(e) of the Senate bill.

The Senate bill contained no provision amending the third exemption set forth in 5 U.S.C. 552(b).

House amendment

Subsection (k) of new section 552b, as included in the House amendment, provided that other than as specifically provided in section 552b, nothing in section 552b expands or limits the existing rights of any person under 5 U.S.C. 552, except that the provisions of this act govern in the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the minutes described in subsection (f) of new section 552b.

Subsection (k) also makes the requirements of chapter 33 of title 44, United States Code, inapplicable to the minutes described in subsection (f) of section 552b.

Section 5(b) of the House amendment amended the third exemption set forth in 5 U.S.C. 552(b) to include matters specifically exempted from disclosure by statute (other than the new section 552b), if the statute either requires that the matters be withheld from the public or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Conference substitute

The conference substitute provides that nothing in section 552b expands or limits the existing rights of any person under 5 U.S.C. 552, except that the exemptions in subsection (c) of section 552b shall govern in the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the transcripts, recordings or minutes described in subsection (f) of section 552b.

The conference substitute further provides that the requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of section 552b.

Section 5(b) of the conference substitute amends the third exemption in 5 U.S.C. 552(b) to include information specifically exempted from disclosure by statute (other than new section 552b), if the statute either (a) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).

AUTHORITY TO WITHHOLD INFORMATION FROM CONGRESS

Section 6(a) of the Senate bill, subsection (*l*) of new section 552b of the House amendment, and subsection (*l*) of section 552b in the conference substitute all provide that the open meeting provisions of the legislation (section 552b of the conference substitute) do not constitute authority to withhold information from Congress.

CLOSING OF MEETINGS OTHERWISE REQUIRED TO BE OPEN

Senate bill

No comparable provision.

House amendment

Subsection (*l*) of new section 552b, as contained in the House amendment, provides that section 552b does not authorize the closing of any agency meeting otherwise required by law to be open.

Conference substitute

The conference substitute is the same as the House amendment.

RELATIONSHIP TO THE PRIVACY ACT OF 1974, 5 U.S.C. 552A

The Senate bill, the House amendment, and the conference substitute all provide that nothing in the open meeting provisions of this legislation (section 552b of the conference substitute) authorizes any agency to withhold from any individual any record, including the transcripts, recordings, and minutes required by these provisions, which is otherwise accessible to that individual under 5 U.S.C. 552a.

RELATIONSHIP TO FEDERAL ADVISORY COMMITTEE ACT, 5 U.S.C. APP. I

Senate bill

No comparable provisions.

House amendment

Subsection (n) of new section 552b of the House amendment provided that in the event that any meeting is subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. I) as well as the provisions of section 552b, the meeting is governed by the provisions of section 552b.

Subsection 5(c) of the House amendment amended the Federal Advisory Committee Act to make advisory committee meetings subject to the exemptions contained in the new 5 U.S.C. 552b (enacted by this act), rather than to the exemptions contained in 5 U.S.C. 552.

This provision in the House bill is addressed to a problem that has arisen in administration of the Federal Advisory Committee Act, enacted in 1972. In establishing a requirement in that Act that meeting, of Executive Branch advisory committee should be open to the public, Congress adopted the exemption provisions set forth in the Freedom of Information Act (FOIA) to describe the few types of meetings that might properly be closed. Unfortunately, this approach has not been entirely satisfactory, largely because those exemptions were designed to deal with documents rather than meetings, and some agencies have closed advisory committee meetings for reasons not contemplated by Congress. The chief concern in this regard has been application of exemption 5, a provision intended to protect the confidentiality of purely *internal* governmental deliberations, as a basis for closing discussions with and among *outside* advisers. One court has given approval to the use of exemption 5 to close advisory committee meetings, *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101 (D.C. Cir. 1976).

The House provision which was unanimously approved, is intended to cure this and similar problems by replacing the nine FOIA exemptions presently incorporated in the Federal Advisory Committee Act with the new exemptions of the Sunshine Act that have been expressly designed to govern meetings, as opposed to documents. This provision thus overrules the *Washburn* case and is intended to end agency reliance upon the "full and frank" discussion rationale for closing advisory committee meetings. Under this provision, portions of federal, advisory committee meetings may be, but are not required to be closed when they fall within one of the disclosure exemptions that are created for meetings of collegial bodies under section 552b of title 5, United States Code.

Conference substitute

Subsection 5(c) of the conference substitute amends the Federal Advisory Committee Act (5 U.S.C. App. I) to make advisory committee meetings subject to the exemptions contained in 5 U.S.C. 552b (enacted by this act).

The Conference substitute is the same as the House provision. The conferees, however, are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary data review systems of the National Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. While the conferees are sympathetic to the concerns expressed by NIH regarding its committees' funding recommendations and analysis of preliminary data, the conferees are equally sympathetic to concerns expressed by citizens' groups that important fiscal and health-related information not be unnecessarily withheld from the public.

With these competing interests in mind, the conferees have secured assurances that the appropriate House and Senate committees will

review the unique problems of NIH under the new standards. Indeed, it is noted that the Subcommittee on Reports, Accounting and Management of the Senate Government Operations Committee has already held three days of hearings on this matter and plans to continue with further inquiry at an early date.

Ex Parte Communications

PROHIBITION

Senate bill

Section 5(a) of the Senate bill added a new subsection (d) to 5 U.S.C. 557. Subsection (d) provided that in any agency proceeding subject to 5 U.S.C. 557(a), except as required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or knowingly 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 relevant to the merits of the proceeding;

(2) 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 knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(3) 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, a communication in violation of subsection (d), shall place on the public record of the proceeding:

(A) written communications transmitted in violation of subsection (d);

(B) memorandums stating the substance of all oral communications occurring in violation of subsection (d); and

(C) responses to the materials described in the two preceding paragraphs;

(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of subsection (d), 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 by virtue of such violation;

(5) the prohibitions of subsection (d) shall apply at such time as the agency might designate, but in no case 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 at the time of his acquisition of such knowledge.

Section 6(a) of the Senate bill provided that the act does not authorize any information to be withheld from Congress.

House amendment

Section 4(a) of the House amendment added a new subsection (d) to 5 U.S.C. 557. Subsection (d) provided that in any agency proceeding subject to 5 U.S.C. 557(a), except as required for the disposition of ex parte matters as authorized by law—

(1) 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;

(2) 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, may make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(3) 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 caused to be made, a communication prohibited by subsection (d) shall place on the public record of the proceedings:

(A) all such written communications;

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

(C) all written responses, and memoranda stating the substance of all oral responses, to the materials described in the two preceding paragraphs;

(4) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, 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

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

Subsection (d)(2), as added by the House amendment, provided that subsection (d) does not constitute authority to withhold information from Congress.

Conference substitute

The conference substitute is the same as the Senate bill, except as follows:

1. The requirement of placing material on the public record applies to an agency decisionmaking official who knowingly causes an ex parte communication to be made, as well as to one who receives or makes such a communication.

2. The conference substitute clarifies the time at which the prohibition on ex parte communications begins to apply.

3. The provision that subsection (d) is not authority to withhold information from Congress is included in the subsection as paragraph (2).

4. Although the conference substitute does not contain express provision for sanctions against an interested person (who is not a party) who makes a prohibited communication, the conferees intend that such a person be subject to all sanctions provided in the bill if he later becomes a party to the proceeding.

The word "relevant" is not used in the strict evidentiary sense, but is intended to apply to communications bearing on the merits or affecting the merits.

DEFINITION OF "EX PARTE COMMUNICATION"

Senate bill

Section 5(b) of the Senate bill defined an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

House amendment

Section 4(b) of the House amendment defined an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The definition expressly excluded requests for information on or status reports relative to any matter or proceeding covered by subchapter II of chapter 5 of title 5, United States Code.

Conference substitute

The conference substitute defines an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The definition contained in the conference substitute expressly excludes requests for status reports on any matter or proceeding covered by subchapter II of chapter 5 of title 5, United States Code.

The conferees wish to note the fact that this provision and the ex parte provisions of new section 557(d) (as added by this act) in no way prohibit—

1. any communication with an agency decisionmaking official if not involving a formal adjudicatory proceeding (and a few formal rulemaking proceedings); or

2. any communication with a decisionmaking official is not relevant to the merits of a covered proceeding; or

3. any communication with a decisionmaking official in any proceeding at any time if it involves only a request for the status of the proceeding and is not intended to affect the merits; or

4. any communication at any time with an agency official not involved in the decisional process.

SANCTIONS

Senate bill

Section 5(c) of the Senate bill amended 5 U.S.C. 556(d) to permit an agency, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, to consider a violation of 5 U.S.C. 557(d), as added by this act, sufficient grounds for a decision on the merits adverse to a party who has knowingly committed or caused the violation.

House amendment

Section 4(c) of the House amendment amended 5 U.S.C. 556(d) to permit an agency, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, to consider a violation of 5 U.S.C. 557(d), as added by this act, sufficient grounds for a decision on the merits adverse to a person or party who has committed or caused the violation.

Conference substitute

The conference substitute is the same as the Senate bill.

Conforming Amendment and Effective Dates

U.S. Postal Service

Senate bill

No comparable provision.

House amendment

Section 5(a) of the House amendment amended 39 U.S.C. 410(b)(1) to make clear the fact that new section 552b and the Privacy Act of 1974 (5 U.S.C. 552a) apply to the United States Postal Service.

Conference substitute

The conference substitute is the same as the House amendment.

Effective Dates

The Senate bill, the House amendment, and the conference substitute all provide that this act shall take effect 180 days after the date of its enactment, except that the provision requiring the promulgation of agency regulations to implement the open meeting provisions (new section 552b(g)), as contained in the conference substitute, shall take effect upon enactment.

Abe Ribicoff,
Edmund S. Muskie,
Lee Metcalf,
Lawton Chiles,
C. H. Percy,
J. Javits,
W. V. Roth, Jr.,
Managers on the Part of the Senate.

Jack Brooks,
John E. Moss,
Dante B. Fascell,
John Conyers,
Bella S. Abzug,
Walter Flowers,
George E. Danielson,
Barbara Jordan,
R. L. Mazzoli,
Edward W. Patterson,
Frank Horton,
Paul N. McCloskey, Jr.,
Carlos J. Moorhead,
Thomas N. Kindness,
Managers on the Part of the House.

○

S. 5

Ninety-fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the nineteenth day of January, one thousand nine hundred and seventy-six

An Act

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".

DECLARATION OF POLICY

SEC. 2. 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.

OPEN MEETINGS

SEC. 3. (a) 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 any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

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

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

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

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

"(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the

interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

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

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

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

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

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

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

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

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

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

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

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

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

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

"(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof 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), (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 time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

"(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, 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 meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

"(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The

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 announcement required by this subsection only if (A) 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 (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

"(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

"(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

"(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, 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 portion was held, whichever occurs later.

"(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, 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 person, promulgate regulations to implement the requirements

of subsections (b) through (f) of this section. 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. Subject to any limitations of time provided by law, 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) (1) The district courts of the United States shall 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 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. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes 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 parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

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

"(i) 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) or (h) of this section, except that costs may be assessed against the plantiff only where the court finds that the suit was initiated by the plantiff 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.

"(j) 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).

"(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

"(l) 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 required by any other provision of law to be open.

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

(b) 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.".

EX PARTE COMMUNICATIONS

SEC. 4. (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 knowingly 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 relevant 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 knowingly cause to be made to any interested person outside the agency an ex parte communication relevant 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 knowingly 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) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, 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 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 subsection 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 paragraph (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, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.".

(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 party who has knowingly committed such violation or knowingly caused such violation to occur.".

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting after "Section 552 (public information)," the words "section 552a (records about individuals), section 552b (open meetings),".

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

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

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: "Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where

the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.".

EFFECTIVE DATE

SEC. 6. (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 added by section 3(a) of this Act, shall take effect upon enactment.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

FOR IMMEDIATE RELEASE September 13, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

GOVERNMENT IN THE SUNSHINE ACT (S. 5)

The President today signed the Government in the Sunshine Act of 1976.

BACKGROUND

The purpose of this Act is to increase the opportunity for the public to observe governmental decision-making and to enhance the public's faith in the integrity of government. The bill was sponsored by Senator Lawton Chiles (D.-Fla.) and 40 others who urged "that the Government conduct the people's business in public."

GOVERNMENT IN THE SUNSHINE ACT (S. 5)

The Act requires multiheaded agencies, e.g., the independent regulatory agencies and other agencies such as the Civil Service Commission, the United States Postal Service, the Export-Import Bank and the governing board of the National Science Foundation, to hold their meetings open to the public unless any of ten specific reasons for holding closed meetings is present. These agencies will be required to give advance notice of meetings where possible. In addition, verbatim transcripts of certain closed meetings will be made available to the public. The Act affords judicial remedies when an agency has not complied with these procedures.

The Act has five key features:

-- Requires generally that meetings of the members of multiheaded Executive agencies be open to public observation with certain specified exceptions;

-- Establishes procedures for closing certain meetings to the public;

-- Provides for judicial review of agency action regarding open meetings and related provisions;

-- Prohibits ex parte communications in certain administrative hearings; and,

-- Amends the Freedom of Information and Federal Advisory Committee Acts.

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FOR IMMEDIATE RELEASE SEPTEMBER 13, 1976

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

REMARKS OF THE PRESIDENT
UPON SIGNING
S. 5, "GOVERNMENT IN THE SUNSHINE" BILL

THE ROSE GARDEN

12:07 P.M. EDT

Distinguished Members of the House and the Senate, members of the Administration and guests:

It is my great privilege and honor this morning to sign into law S. 5, the 'Government in Sunshine Act."

I strongly endorse the concept which underlies this legislation, that the decision-making process and the decision-making business of regulatory agencies must be open to the public.

I congratulate the Members of the Congress in making certain that this legislation comes to the White House and is available for my signature on this occasion.

In a democracy, the public has a right to know, not only what the Government decides, but why and by what process.

Today, many citizens feel that their Government is too remote; that it is not responsive to their needs. This legislation should go a long way in reaffirming that Government exists for the people, not apart from the people.

Under this law some 50 regulatory agencies, including the Securities and Exchange Commission, the Civil Service Commission and the National Science Board, are required to give advance notice of their meetings and then hold these meetings in public. If an agency votes to close a session for one of the specific reasons set forth in the law, verbatim transcripts of most such meetings would be available to the public.

The law also prohibits any communication between agency officials and outside persons having an interest in matters being considered before a regulatory body. Furthermore, the Freedom of Information Act has been amended by narrowing the authority of agencies to withhold information from the public.

The 'Government in the Sunshine Act' is in keeping with America's proud heritage that the Government serves and the people rule.

This afternoon, I am delighted to sign this legislation and to reaffirm that heritage and let the sunshine in.

END (AT 12:09 P.M. EDT)

FOR IMMEDIATE RELEASE SEPTEMBER 13, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I have today signed into law S. 5, known as the "Government in the Sunshine Act". I strongly endorse the concept which underlies this legislation -- that most of the decisionmaking business of regulatory agencies can and should be open to the public.

Under this new law, certain agencies, such as the Securities and Exchange Commission, the Civil Service Commission and the National Science Board -- approximately 50 in all -- are required to give notice in advance and hold their business meetings open to public observation, unless the agency votes to close a session for a specific reason permitted by the Act. Verbatim transcripts would be required to be maintained and made available to the public for many of the closed meetings.

Communications between agency officials and outside persons having an interest in a statutorily required hearing or an adjudication are prohibited. Furthermore, the provision of the Freedom of Information Act which permits an agency to withhold certain information when authorized to do so by statute has been narrowed to authorize such withholding only if the statute specifically prohibits disclosure, or establishes particular criteria for the withholding, or refers to particular types of matters to be withheld. The new Act also amends the Federal Advisory Committee Act to permit the closing of such committee meetings for the same reasons meetings may be closed under this Act.

I wholeheartedly support the objective of Government in the Sunshine. I am concerned, however, that in a few instances unnecessarily ambiguous and perhaps harmful provisions were included in S. 5.

The most serious problem concerns the Freedom of Information Act exemption for withholding information specifically exempted from disclosure by another statute. While that exemption may well be more inclusive than necessary, the amendment in this Act was the subject of many changes and was adopted without a clear or adequate record of what statutes would be affected and what changes are intended. Under such circumstances, it can be anticipated that many unintended results will occur including adverse effects on current protections of personal privacy, and further corrective legislation will likely be required.

Moreover, the ambiguous definition of the meetings covered by this Act, the unnecessary rigidity of certain of the Act's procedures, and the potentially burdensome requirement for the maintenance of transcripts are provisions which may require modification. Implementation of the Act should be carefully monitored by the Executive branch and the Congress with this in mind.

more

Despite these concerns, I commend the Congress both for its initiative and the general responsiveness of this legislation to the recommendations of my Administration that the "Government in the Sunshine Act" genuinely benefit the American people and their Government.

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