The original documents are located in Box 18, folder "Government in the Sunshine Bill (3)" of the John Marsh Files at the Gerald R. Ford Presidential Library.

Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.

An amendment which [illegible] qualifications for nine [illegible] training experience in the [illegible]

The clerk was authorized [illegible] corrections in the engrossment [illegible]

Pages H7863-H7866

Subcommittees To Sit: Subcommittee on Military Compensation of the Committee on Armed Services received permission to sit Thursday, July 29, during the proceedings of the House under the 5-minute rule; and

Subcommittee on Science, Research and Technology of the Committee on Science and Technology received permission to sit Thursday, July 29, during the proceedings of the House under the 5 minute rule.

Pages H7863-H7866

Presidential Message—Budget Deferrals: Received and read a message from the President proposing four rescissions in budget authority provided in Second Supplemental Appropriations, 1976, and reporting four new deferrals—referred to the Committee on Appropriations and ordered printed. Page H7863

Packers and Stockyards: Speaker appointed Representative English as a conferee on H.R. 8410, Packers and Stockyards Act Amendments, vice Representative Weaver, excused. Page H7866

Government in Sunshine: By a yea-and-nay vote of 390 yeas to 5 nays, the House passed H.R. 11656, Government in the Sunshine Act.

Agreed to an amendment in the nature of a substitute incorporating all the committee amendments as recommended by the committees on Government Operations and the Judiciary as amended by:

An amendment requiring that reason and statutory authority be set forth when an agency deletes material from transcripts (by a recorded vote of 232 ayes to 168 noes);

An amendment which clarifies the definition of meeting to include only those meetings called for the purpose of discussing agency business (agreed to by a recorded vote of 204 ayes to 180 noes);

An amendment which deletes the verbatim transcript requirement and replaces it with a requirement that minutes be recorded and retained by the agency (agreed to by a recorded vote of 201 ayes to 193 noes);

An amendment which applies the exemption provisions of the bill to the Federal Advisory Committee Act;

An amendment excluding requests for information or status reports from the meaning of ex parte communication; and

An amendment which clarifies the provisions of the bill and its effect upon existing statute criteria of the Freedom of Information Act (agreed to by a recorded vote of 282 ayes to 112 noes). Previously, this amendment was rejected by a division vote of 34 ayes to 35 noes.

Pages [illegible]

An amendment which sought to strike the language providing that any person can bring suit against an agency for violation of the requirements of the bill (by a recorded vote of 134 ayes to 258 noes); and

An amendment which sought to redefine the term agency.

Subsequently, this passage was vacated, and S. 5, a similar Senate-passed bill was passed in lieu after being amended to contain the language of the House bill as passed.

H. Res. 1207, the rule under which the bill was considered, was agreed to earlier by a yea-and-nay vote of 391 yeas. Pages H7866-H7932

Amendments Ordered Printed: Amendments ordered printed pursuant to the rule appear on pages H7919-H7920.

Quorum Calls—Votes: Three quorum calls, three yea-and-nay votes, and six recorded votes developed during the proceedings of the House today and appear on pages H7849, H7855, H7862, H7865-H7866, H7887, H7888-H7880, H7890, H7893-H7894, H7895-H7896, H7897-H7898, H7899.

Adjournment: Adjourned at 6:25 p.m.

Committee Meetings

FOOD STAMP ACT

Committee on Agriculture: Continued markup of H.R. 13613, Food Stamp Act of 1976, and will resume tomorrow.

TIMBER MANAGEMENT PRACTICES

Committee on Agriculture: Subcommittee on Forests continued markup of legislation dealing with timber management practices, and will resume tomorrow.

CONSOLIDATED FARM AND RURAL DEVELOPMENT ACT AMENDMENTS

Committee on Agriculture: Subcommittee on Conservation and Credit held a hearing on H.R. 14641, to amend the Consolidated Farm and Rural Development Act. Testimony was heard from Representative Harkin; USDA; and public witnesses.

COMMERCE APPROPRIATIONS

Committee on Appropriations: Subcommittee on State, Justice, Commerce and Judiciary held a hearing on the public works employment appropriation bill—EDA.

MEDICAL OFFICERS' INCENTIVE PAY

Committee on Armed Services: Subcommittee on Military Compensation held a hearing on H.R. 14772, to pay variable incentive pay to medical officers who participated in the Berry Plan. Testimony was heard from Vernon McKenzie, Acting Assistant Secretary for Health Affairs, DOD; Vice Adm. D. L. Custis, Chief,

on I.R.S. collection of delinquent taxes, and on medicare administrative costs. The exact time and place of those hearings will be announced later.

GOVERNMENT IN THE SUNSHINE ACT

SPEECH OF

HON. RICHARD L. OTTINGER

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 28, 1976

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes.

Mr. OTTINGER. Madam Chairman, by passing a Sunshine Act, we have the rare opportunity not only to help relieve public criticism about a removed, secretive government, but also to reaffirm the principles on which this great Nation was founded 200 years ago. One of the main tenets of our Government is that it exists "for the people." By opening up governmental processes to the scrutiny of the American public, we can tear down the wall of bureaucratic secrecy and help insure that the Government does indeed exist "for the people."

The concept behind the Government in the Sunshine Act, that of opening meetings of Federal agencies to the public, represents a large step toward restoring the public's confidence in its Government institutions. The Government Information and Individual Rights Subcommittee hearings provided us with a clear picture of how necessary a sunshine law is. At those hearings, David Cohen, president of Common Cause, said:

> For too long secrecy, mystery, remoteness have dominated government practices at all levels and in all branches. Let's have our leaders level with us, tell us what's going on, enable us to understand government decisions. Let's act on the recognition that government belongs to its citizens and not a variety of special interests or public officials.

As it now stands, the bill could use an improvement. The decision to drop statements of the reasons and statutory authority for transcript deletions furthers government secrecy and represents a regression from the bill's original intentions. People should be able to know why they are prevented from having information about agency proceedings. The Government Operations Committee's original version of this provision properly balanced the need to keep certain matters secret against the people's right to know.

There have been other attempts to weaken the bill. The movement to drop the verbatim transcript requirement must be defeated, as the change would constitute a further diminution of the people's right to know. During the course of legitimately closed meetings, there will occur discussion that would normally be made available to the public, but will not if the transcript requirement is dropped. By purporting to discuss any legitimately closed business, an agency could keep all of its meetings from being made open to the public. The cost of enforcing the transcript requirement is not enough to justify denying the people information that is rightfully theirs.

I believe that if we can resist attempts to weaken the bill, the Sunshine Act that results will be an outstanding legislative accomplishment. Especially since the Watergate crisis, people have withdrawn from and become distrustful of their Government. Government secrecy can only encourage distrust. Effective citizen participation in Government affairs is essential in a democracy, and for people to participate effectively, they must be informed of what goes on within the Government. In this our Bicentennial Year, let us make sure that the people's Government is in fact the people's Government. Let us reestablish the principle of openness in the affairs of the Federal Government.

GOVERNMENT IN THE SUNSHINE ACT—II

SPEECH OF

HON. BELLA S. ABZUG

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 28, 1976

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes.

Ms. ABZUG. Madam Chairman, I move to strike the last word.

(Ms. ABZUG asked and was given permission to revise and extend her remarks.)

Ms. ABZUG. Madam Chairman, I rise in opposition to the amendment. Again, I want to point out to this body that all four House committees and subcommittees considered this bill, and we all rejected this particular amendment. I think we should follow suit here. The bill as we have reported it contains a simple and entirely clear definition of a public agency, namely any agency subject to the Freedom of Information Act and "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate."

This is the same approach that the Congress has used in the Administrative Procedure Act, which has been in existence since 1946, the Freedom of Information Act, and the Privacy Act of 1974. It has been the subject of relatively little litigation, and it has the advantage of not having to be amended each time an agency's name is changed or a new agency is established on an agency is disposed of.

It has been demonstrated to be eminently workable, and it should be retained.

I want to point out to the Members that this amendment exempts from the operation of this act the Federal Reserve Board, the Parole Board, the Securities and Exchange Commission, the Commodity Credit Corporation seems to me that if we are going to h open government, government in sunshine, there is no reason why should leave these agencies in the da ness.

Mr. FLOWERS. Madam Chairm will the gentlewoman yield?

Ms. ABZUG. I yield to the gentlen from Alabama.

Mr. FLOWERS. I thank the gent woman for yielding.

I want to express my complete a proval of everything the gentlewom has said. This bill has been amended where it is a much more modest propo. than it was in the first instance, and would think that even the Federal R serve Board might want to be includ under this bill. The general definition absolutely to be preferred for all of t reasons that the gentlewoman recite and I wholeheartedly agree with h position.

Mr. FASCELL. Madam Chairman, w the gentlewoman yield?

Ms. ABZUG. I yield to the gentlema from Florida.

Mr. FASCELL. I thank the gentle woman for yielding.

I agree with the gentleman. The gen eral provisions of the bill are workable We ought to go along with the bill an turn down this amendment.

"SUNSHINE"

HON. BILL FRENZEL

OF MINNESOTA

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 29, 1976

Mr. FRENZEL. Mr. Speaker, yesterday I was pleased to vote for the "Government in the sunshine bill," because its worst flaws had been cured by amendment.

The sunshine bill is a logical follow-up to previous actions taken to open up day-to-day Federal operations to public scrutiny. In 1972, we opened up the meetings of executive branch advisory committees. In 1973 House Resolution 259 pried open some of our own processes; 1974 saw significant amendments to the Freedom of Information Act; and 1975 was the year in which Senate committees and conference committees began to open.

The bill passed yesterday was an important reaffirmation of our commitment to the principle of open government.

Three important amendments were adopted to improve the bill yesterday. The amendment deleting the verbatim transcript requirement—a requirement not included in any State's sunshine law, and not included in many of our own committees' rules—was necessary to protect free exchanges of ideas and discussions of national strategies in agencies like the Federal Reserve, the Securities and Exchange Commission, and the Federal Trade Commission.

The amendment redefining a "meeting" will avoid a fuzziness that would invite unnecessary legal action, and make the bill more workable.

In general, the sunshine bill is a useful step forward in opening up the processes of government. There will undoubtedly be some problems which can be resolved by future amendments, but the bill, as it passed the House, is a good one. Hopefully, the Senate will not, in its normally excessive enthusiasm, overdecorate the bill. It is important to bring it into operation as soon as possible, and Senate overexuberance is likely to cause delay.

While we bask in somebody else's sunshine, it is well to remember that the House record for openness is still poor. We still have no "verbatim record" in the House. Our CONGRESSIONAL RECORD is an exercise in "It might have been." Our committees do not provide public access to verbatim transcripts. Our democrat "King Caucus" has no transcripts at all. A bill to provide TV and radio coverage of House floor proceedings is languishing in the Rules Committee, a victim of leadership pressure. The bill to improve disclosure by lobbyists seems to be making no progress.

While we are patting ourselves on the back for letting sunshine into other folks' business, we ought to try a little of our own.

STATEMENT ON HOUSING

HON. MAX S. BAUCUS

OF MONTANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 29, 1976

Mr. BAUCUS. Mr. Speaker, I would like today to address a serious problem that has been one of my major concerns since I came to Congress 18 months ago. That is the overwhelming absence of a comprehensive national housing policy for both urban and rural areas. The two Federal agencies responsible for administering national housing programs, the Department of Housing and Urban Affairs—HUD—and the Farmers Home Administration—FmHA—lack an adequate framework to meet our national housing needs.

The housing slump started before the recent recession, went deeper than the economy overall, and is responding more slowly than the recovery. Moreover, inflation in housing and financing costs is such that American families have increasing problems buying—or renting—an adequate house.

Since 1972, total private and public housing starts have declined. Though this trend is reversing itself, housing starts are nowhere near the level they were in late 1972, causing much havoc in the building industry and raising the cost of houses.

Many people, especially young families, find it more and more difficult to purchase a home. In 1972, one-third of the Nation's households could afford to purchase a medium-priced house. In 1975, an income of $20,000 was needed to qualify for a conventional mortgage on a medium-priced house: however, only one-fifth of the families in the country had this much income.

More people, because of their low incomes, must now rent instead of buy. Renting families are finding that the amount of money they spend for rent is constantly increasing. In 1960, according to the Census of Housing, the median portion of income spent on rent was in the 15 to 19 percent range. In 1973, the proportions had risen to 20 to 24 percent.

Spiraling inflation in rental costs is due to increases in the cost of maintenance, construction, and mortgage costs, and most importantly, rising utility charges. The housing prospects of all but the wealthiest Americans have been eroded.

RURAL HOUSING POLICY

Our Nation needs a comprehensive rural housing program. Rural areas have one-third of the Nation's population but nearly two-thirds of its substandard housing. This higher incidence of poor housing can be attributed to lower incomes, less credit, and fewer institutions to deliver housing. There are fewer large builders in rural areas who can lower costs through constructing a high volume of units. Also, it is difficult for HUD and FmHA to administer their programs over the wide distances that must be traveled thus reducing the effectiveness of their programs.

Ever since the 1949 National Housing Act, the Federal Government presumably has been committed to improving the housing situation in the United States. Both HUD and FmHA were set up to assist people in securing homes. Though each of these agencies has rural housing programs, there remains a marked lack of emphasis toward meeting rural housing needs.

A SUMMARY OF FEDERAL HOUSING PROGRAMS

FmHA has several programs that are on their way to meeting rural demands. Section 502 provides loans to purchase a new or existing house, or to build, rehabilitate, or relocate homes.

Section 515 provides direct loans to finance rental or cooperative housing and related facilities for occupancy by low to moderate income rural families. Section 504 provides loans to make houses safer and more viable in rural areas, and section 514/515 provides loans at 1 percent interest for a term of up to 33 years to buy, build or repair housing for domestic farm labor. FmHa, however, now operates piecemeal programs, some of which work well. They have no overall rural housing goals as part of their mandate.

HUD was established to assist communities in housing and community development. There are several programs within HUD that could help improve rural housing needs. Section 8 provides housing assistance payments for low income families to either rent or build homes. Section 235 provides assistance in the form of monthly subsidies and is of great importance to rural areas. Section 202 provides housing for the elderly and handicapped. But HUD's orientation is towards the urban areas and it does not have the personnel or background to adequately deal with rural problems.

NATIONAL HOUSING PRODUCTION

We in Montana have a special interest in sound rural housing programs because of the State's wood products industry. Essential to our economic recovery is a healthy nationwide construction industry which uses our forest products. Yet, the Federal Government's responsibility to accelerate recovery of the housing and construction industry is not yet fulfilled, as many jobless Montanans can attest.

As table I indicates this trend is in part attributable to the fact that the number of total private housing starts in the United States dropped from 2,481,000 units in January of 1973 to 1,415,000 units in May of 1976 causing a lag in the housing construction industry. The number of private one family housing starts also dropped by nearly 400,000 from 1.43 million units in January of 1973 to 1.06 million units in May of 1976.

TABLE I.—TOTAL PRIVATE HOUSING STARTS, HOUSING UNITS, PRIVATE, 1-FAMILY

[In thousands of units]

Date	Total private housing starts	Private 1-family units
January 1973	2,481	1,431
February 1973	2,289	1,348
March 1973	2,365	1,237
April 1973	2,084	1,216
May 1973	2,265	1,220
June 1973	2,067	1,196
July 1973	2,173	1,173
August 1973	2,051	1,105
September 1973	1,874	1,019
October 1973	1,677	970
November 1973	1,724	959
December 1973	1,526	824
January 1974	1,453	811
February 1974	1,784	1,032
March 1974	1,553	967
April 1974	1,571	933
May 1974	1,415	900
June 1974	1,526	934
July 1974	1,290	903
August 1974	1,145	813
September 1974	1,180	872
October 1974	1,100	793
November 1974	1,028	812
December 1974	940	719
January 1975	1,005	748
February 1975	953	722
March 1975	986	763
April 1975	982	774
May 1975	1,085	853
June 1975	1,080	874
July 1975	1,207	916
August 1975	1,256	979
September 1975	1,304	966
October 1975	1,431	1,093
November 1975	1,391	1,048
December 1975	1,283	962
January 1975	1,236	957
February 1976	1,547	1,295
March 1976	1,417	1,110
April 1976	1,381	1,063
May 1976	1,415	1,057

This problem was exacerbated by a more than 50 percent reduction in federally supported housing production during the 1973 to 1975 period, as evidenced by table II, thus further cutting the chances that the Montana wood products industry would get back on its feet.

redirected in such a way as to reduce the direct incentives for non-production and non-employment.

LEGISLATIVE HISTORY OF THE SUNSHINE ACT

HON. PAUL N. McCLOSKEY, JR.

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 28, 1976

Mr. McCLOSKEY. Mr. Speaker, pursuant to the dialog with the gentleman from Massachusetts (Mr. BURKE), I place this letter in the RECORD as part of the legislative history of the Sunshine Act:

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The purpose of this letter is to inform you of this Department's views with regard to an amendment which we understand will be offered to H.R. 11656, the "Government in the Sunshine Act", when that bill is considered by the House of Representatives. We understand that Congressman McCloskey will offer an amendment to section 5(b) of the bill, which would amend the third exemption of the Freedom of Information Act—5 U.S.C. 552(b)(3).

The amendment which we understand Congressman McCloskey will offer on the Floor would revise subsection (b)(3) of the Freedom of Information Act to read as follows:

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

* * * * * *

(3) Specifically exempted from disclosure by statute; 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.

In summary, the Department would support this amendment if legislative history is provided to make clear that there is no intention in revising exemption 3 to invalidate certain statutory provisions administered by this Department designed to protect the privacy of personal information obtained by the Department. As so clarified, the amendment would substantially resolve a number of problems which we have noted in the version of the amendment contained in the bill as reported by the House Judiciary and Government Operations Committees.

Under section 5(b) of H.R. 11656 as reported by the House Judiciary Committee, the third exemption in the Freedom of Information Act would have been amended to exempt from disclosure only material required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. We have indicated that this provision may threaten the privacy of records relating to individuals maintained by the Social Security Administration and by other components of the Department.

There are a number of statutory provisions which currently authorize the Department to protect the privacy of information about individuals which is maintained by the Department. Principal among these provisions is section 1106 of the Social Security Act which provides that no disclosure may be made of certain Internal Revenue returns or of any other file, record, report, or other paper obtained by the Secretary in discharging his duties under that Act, except as the Secretary may prescribe by regulations. Section 408(d)(2) of the General Education Provisions Act and section 438(c) of that Act authorize the withholding of information on individuals and their families gathered in connection with certain statistical activities of the Education Division of this Department. Likewise, section 308(d) of the Public Health Service Act provides similar authority with regard to the release of information gathered in the course of health statistical activities and health research, evaluations, and demonstrations. We were concerned, however, that none of these provisions establishes "particular criteria" or refers "to particular types of information" so as to fall within the third exemption from the Freedom of Information Act as it would be amended by H.R. 11656 as reported.

We believe that the amendment which Congressman McCloskey intends to introduce will help to resolve the problems noted above. In particular, we believe that clause (A) of the amended provision, which refers to any statute that requires matters to be withheld from the public, would include the provisions of the Social Security Act, the General Education Provisions Act, and the Public Health Service Act referred to above which require the Department to withhold certain information from the public in the interest of protecting the privacy of individuals. To the extent that the proposed amendment is intended to accomplish this result, we fully support the amendment and urge that it be adopted. However, we would hope that the debate on this provision and the report of the Conferees on the bill (if a Conference is held and this provision is included in the bill as reported) clearly indicate that the statutory provisions referred to above, which are designed to protect the privacy of personal information, will remain in full force and effect.

The amendment to the Freedom of Information Act contained in this bill will, of course, affect other agencies of the Federal government. The views expressed above relate only to the effect of this amendment on programs of this Department and we defer to other affected agencies as to the desirability of this amendment from their standpoint.

We are advised by the Office of Management and Budget that there is no objection to the presentation of these views from the standpoint of the Administration's program.

Sincerely,

MARJORIE LYNCH,
Under Secretary.

WHAT'S THE HURRY?

HON. HELEN S. MEYNER

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 28, 1976

Mrs. MEYNER. Mr. Speaker, the dispute in Congress over the value of the B-1 bomber program continues. The debate is especially important because it involves a weapons program of major, long-term strategic importance with a price tag that could reach $100 billion.

The current issue in Congress is whether construction of the plane should wait until the heat of the current political campaign is over and a new President is inaugurated. I insert in the RECORD at this point an editorial from the Easton Express in Easton, Pa., which makes a particularly strong case for a delay in construction:

WHAT'S THE HURRY?

Within the next six months President Ford could either be unemployed—or ensconced in the White House for another [illegible] the guy at the counter, former Hollywood player-turned-governor of California Ronald Reagan, previously but seeking to rectify his [illegible] November.

In either case, the Air Force and their spokesmen in Congress and influential advisory circles would have no difficulty starting us on the road to expenditure of up to $90 billion for the B-1—the most costly outlay for a single weapons system in the world's history. The only difference might be that Reagan would want to spend more and more of the big bombers—he has been complaining for months in his battle for the Republican Convention delegates that the President that Mr. Ford is stifling our armament and moving the U.S. into the realm of Second Class power.

On the other hand, neither of the candidates could survive the election in November. There's a possibility—it's too early to tell how distinct—that a Georgia peanut grower and ex-governor of that state named Jimmy Carter might be the Facto President of the Oval Office come January, 1977. And Mr. Carter, in one of the limited number of campaign questions in which he has taken an unreserved position, is an outspoken opponent of U.S. commitment of taxpayer money for construction of the B-1.

In the manner characteristic to presidential electioneering, however, the issue has been politicized; sound judgments are impossible under the pressures of the campaign. The sensible thing to do now—the time factor is not that critical—is to let the matter rest until after the disorder of the politicking is cleared away and the issue of national leadership is settled in the fall election.

This was the course taken by the Senate in its vote earlier in the present session on President Ford's demand for an immediate beginning on the B-1. The Senate sensibly voted, 44-37, to defer a decision until the man who will take the presidential chair in January could determine whether building the bomber is truly in the national interest.

The House, however, voted for a start on the B-1, and, in the House-Senate conference committee review of the measure, knocked out the Senate provision. About $1 billion was earmarked for a start on the bomber in the $32.5 billion arms authorization bill sent to the White House last week. The only chance to correct this now is when the Congress is asked to approve the actual appropriations for the B-1. And the more reasonable course under the circumstances would be to hold up the money.

The B-1's opponents may be right—it could be the most wasteful military boondoggle ever foisted on the people. Or, as the military advocates insist, it may be an imperative future defense need in our sorely troubled international community. But the issue must be settled on these bases, rather than on the exigencies of political campaign interests.

THE PREVENTION OF ALCOHOLISM

HON. ALLEN T. HOWE

OF UTAH

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 28, 1976

Mr. HOWE. Mr. Speaker, I would like to bring to the attention of my colleagues an outstanding alcoholism prevention plan which has been developed in my district. This program, called the Cottage Meeting Program, has been so successful that it merits review by all State health officials who deal with the ever-increasing problem of alcoholism. The

PAUL N. McCLOSKEY, JR.
12TH DISTRICT, CALIFORNIA

COMMITTEE ON
GOVERNMENT OPERATIONS
AND
COMMITTEE ON
MERCHANT MARINE
AND FISHERIES

Congress of the United States
House of Representatives
Washington, D.C. 20515

205 CANNON BUILDING
WASHINGTON, D.C. 20515
(202) 225-3411

DISTRICT OFFICE:
305 GRANT AVENUE
PALO ALTO, CALIFORNIA 94306
(415) 326-7383

August 2, 1976

Mr. Michael Duval
Special Counsel to the President
The White House
Washington, D. C. 20500

Dear Mike:

I am enclosing a copy of the full House debate on the Sunshine Act which was passed Wednesday. It is imperative that the White House take steps with the Senate conferees to insure that the House amendments are retained. The Senate conferees were appointed yesterday and are Senators Ribicoff, Muskie, Metcalf, Chiles, Percy, Javits and Roth. I will be contacting each one of them but I suggest that this matter is of enough importance to the Administration particularly to Arthur Burns and Rod Hills, that a maximum way-out effort is deserved.

Sincerely,

Paul N. McCloskey, Jr.

PNMcC:mm
cc: Chairman Arthur Burns
Chairman Roderick Hills

THE WHITE HOUSE

WASHINGTON

July 30, 1976

MEMORANDUM FOR: JACK MARSH

FROM: BOB WOLTHUIS RKW

SUBJECT: Sunshine Bill

I talked to Dick Parsons on the Domestic Council staff and Ken Lazarus in the Counsel's office and they concur in the OMB position which is essentially that the administration continues to have some problems with the government in the Sunshine Bill but does prefer the Judiciary version over the Government Operations Committee version. The administration will not oppose the Judiciary bill if certain amendments dealing with transcripts of meetings are included.

THE WHITE HOUSE
WASHINGTON

Date: 7-30-76

TO: Jack Marsh

FROM: Robert K Wolthuis

For your information_____

Please handle_____

Other

This is Lazarus's memo to Buchen re Government in the Sunshine Legislation. He says the House version is acceptable.

RKW

THE WHITE HOUSE

WASHINGTON

July 30, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: PHILIP W. BUCHEN

FROM: KENNETH A. LAZARUS

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

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

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

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

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

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

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

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

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

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

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

Approve _____ Disapprove _____

Statement by the President

Legislation to open to public observation the decision-making meetings of the agencies whose regulations affect us all is making significant progress in the Congress. I am delighted at the prospect of signing into law during this session of Congress a responsible and effective piece of legislation such as that which the House passed on July 28.

I have made an open government one of the hallmarks of my Administration. While many "multiheaded" agencies already provide for open meetings, it is time that legislation uniformly provide that the public's business be conducted in open view. Although there are valid reasons for not opening all meetings, the general rule should be that the business meetings of these agencies be open to public observation.

The "Government in the Sunshine Act", H.R. 11656 as passed by the House has my support. The Senate previously has passed an open meetings bill which has impractical and dangerous provisions. That bill -- S. 5 -- would unnecessarily and unwisely require the making of a verbatim transcript for

every meeting closed for important reasons recognized by the Congress. It would permit unprecedented civil law suits to be brought against the individual agency members acting within the scope of their official responsibilities. It would also cover social and casual meetings and not just meetings to conduct agency business.

I have instructed the Office of Management and Budget and individual agencies which would be affected by this legislation to work closely with the Congress to assure the swift enactment of open meeting legislation such as that contained in H.R. 11656.

July 30, 1976

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

FROM: JACK MARSH

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

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

Many thanks.

cc: Dick Cheney

JOM/dl

July 30, 1976

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

FROM: JACK MARSH

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

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

Many thanks.

cc: Dick Cheney

JOM/dl

THE WHITE HOUSE

WASHINGTON

August 5, 1976

Dear Pete:

Thanks very much for the information you sent me on the Sunshine Act which was passed Wednesday. After our dinner conversation last week, I spoke to Jack Marsh and Max Friedersdorf about your concerns that the conferees would not fight to keep the House amendments.

I will see to it that they have copies of the materials you sent me in order that they can follow up on my earlier conversation.

It was great seeing you the other night, and I look forward to seeing you in Kansas City, if not before.

Sincerely,

Michael Raoul-Duval
Special Counsel
to the President

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

THE WHITE HOUSE

WASHINGTON

SEP 2 1976

September 2, 1976

MEMORANDUM FOR: BILL NICHOLSON

FROM: MAX FRIEDERSDORF M.F.

SUBJECT: Sunshine Bill

Senator Bill Roth (R-DEL), a co-sponsor of the Government in Sunshine bill has requested a signing ceremony.

We were not particularly desirous of the legislation, but in the event the President decides to approve the bill, I recommend we invite Senator Roth for the signing.

cc: Jack Marsh
Phil Buchen
Jim Lynn
Jim Cannon
Bill Kendall

[9/9/76]

Ford Offers Condolences to Chinese

President Ford Thursday said Mao Tse-Tung was a "most remarkable and very great man" who played a major role in creating a better relationship between the United States and Mainland China.

"His influence on history will extend far beyond the borders of China," Ford told reporters. "Americans will remember that it was under Chairman Mao that China moved together with the United States to end a generation of hostility and to launch a new and more positive era in relations between our two countries." (CBS, NBC)

"I am confident that the trend of improved relations between the People's Republic of China and the United States, which Chairman Mao helped create, will continue to contribute to world peace and stability," he said. (CBS)

Ron Nessen told reporters the President does not believe the death of Mao will mean any change in the course of improving Sino-American relations. -- CBS,NBC,AP,UPI 9/9/76

Congress

Ford Signs "Sunshine" Law

President Ford Thursday signed the "Sunshine" Law opening the meetings and records of about 50 Federal agencies to public scrutiny.

A spokesman said Ford fully supports provisions of the law, which covers all government departments with multiple leadership and exempts only meetings which deal with national defense or security, trade secrets, criminal proceedings and matters of personal privacy.

Among the major agencies affected would be the Federal Power Commission, the Federal Communications Commission, the Federal Reserve Board and the Securities and Exchange Commission. 9/9/76 UPI

not correct

THE WHITE HOUSE

SEP 8 1976

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 8 Time: 630pm

FOR ACTION: Dawn Bennett
Max Friedersdorf
Ken Lazarus
Robert Hartmann
NSC/S
Dick Parsons

cc (for information): Jack Marsh
Jim Connor
Ed Schmults
Bill Baroody

RAH2

FROM THE STAFF SECRETARY

DUE: Date: September 9 Time: 300pm

SUBJECT:

S. 5 - Government in the Sunshine Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

X For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

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

SEP 8 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 5 - Government in the Sunshine Act
Sponsor - Sen. Chiles (D) Florida and 40 others

Last Day for Action

September 13, 1976 - Monday

Purpose

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.

Agency Recommendations

Office of Management and Budget	Approval (Signing statement attached)
Consumer Product Safety Commission	Approval
Civil Service Commission	Approval
Equal Employment Opportunity Commission	Approval
Nuclear Regulatory Commission	Approval (informally)
Civil Aeronautics Board	No objection
Export-Import Bank	No objection
Federal Deposit Insurance Corporation	No objection
Federal Power Commission	No objection
Interstate Commerce Commission	No objection (informal)
National Labor Relations Board	No objection
National Transportation Safety Board	No objection
United States Postal Service	No objection
National Science Foundation	No objection

Securities and Exchange Commission	No objection (Informally)
Department of Health, Education and Welfare	Disapproval
Federal Home Loan Bank Board	Disapproval
Department of Commerce	No recommendation (Signing statement attached)
Federal Maritime Commission	No recommendation
National Mediation Board	No recommendation
Department of Justice	Defers
Federal Communications Commission	No comment (informal)
Overseas Private Investment Corporation	No comment (informal)
Federal Reserve Board	No recommendation received

Discussion

The avowed purpose of S. 5 is to increase the opportunity for the public to observe governmental decisionmaking and to enhance, thereby, the public's faith in the integrity of government. The bill's sponsors have urged "that the Government should conduct the people's business in public." The various articulations of this theme by the sponsors and the difficulties in opposing "Sunshine" have led to overwhelming Congressional support for the bill during its consideration. The conference version of S. 5 passed the House by a unanimous recorded vote (384-0) and the Senate by voice vote on August 31, 1976. Efforts by OMB and other Executive agencies to remedy numerous drafting problems, and to remove or amend provisions in the bill, have either been successful or have resulted in acceptable compromises. Nevertheless, several agencies have serious concerns with features of the enrolled bill, and two recommend a veto.

S. 5 would require 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; to give advance notice of meetings where possible; to make verbatim transcripts of certain closed meetings and make them available to the public; and to afford judicial remedies when an agency has not complied with these procedures.

Specifically, the enrolled bill contains the following provisions:

Open meetings -- The bill would require all agencies headed by a collegial body, a majority of whose members are appointed by the President and confirmed by the Senate, to open essentially all business meetings of two or more members for public observation unless a majority of members properly votes to close a meeting. About 50 agencies would be subject to this requirement according to the reports of the House and Senate committees.

A covered "meeting" would be defined as any gathering of a quorum of the agency members in which the deliberations determine or result in the joint conduct or disposition of agency business. This definition could include conference telephone calls, but would not prevent agency members from individually considering business that is sequentially circulated to them in writing. Whenever possible, the agency would have to provide one week's advance public notice of the date, place, and subject matter of the meetings, as well as state whether or not the meeting is open or closed to the public.

Exemptions from open meeting requirement -- A meeting, or portions of a meeting, could be closed, if deliberations are likely to concern:

(1) national defense or foreign policy matters classified by Executive Order;

(2) internal personnel rules and practices;

(3) information specifically exempted by other statutes from disclosure, provided that the statutes either (a) specifically require that the information be withheld from the public, or (b) establish particular criteria for withholding information or refer to particular types of information to be withheld;

(4) trade secrets or financial or commercial information obtained under a pledge of confidentiality;

(5) the accusation of a crime or formal censure;

(6) information the disclosure of which would constitute an unwarranted invasion of personal privacy;

(7) certain law enforcement investigatory information, including oral information that, if written, would be included in investigatory records compiled for law enforcement purposes;

(8) bank examination records and similar financial audits to be used by an agency regulating or supervising financial institutions;

(9) information either (a) used by an agency regulating currencies, securities, commodities, or financial institutions, where premature disclosure could lead to significant financial speculation or endanger the stability of any financial institution, or (b) which, if disclosed prematurely, would frustrate a proposed agency action, unless the agency has already disclosed the nature or content of its proposed action or is required by law to disclose such information prior to taking final action;

(10) the agency's involvement in Federal or State civil actions, an action in a foreign court or international tribunal, an arbitration, or a formal agency adjudication.

To avoid conflict with other law, the enrolled bill states that these exemptions do not authorize the closing of an agency meeting otherwise required by law to be open nor does it authorize the withholding of information normally accessible under the Freedom of Information Act, except that the exemptions of this bill would govern in any request for transcripts, recordings or minutes of a closed agency meeting.

Procedural requirements for closing meetings -- A majority record vote of either the whole agency or the subdivision authorized to act on behalf of the agency would be required to close all or a portion of a meeting. No proxy votes would be allowed and the agency would have to publish within one day the recorded vote of each member and an accompanying written explanation of the reasons for closing the meeting. Agencies, a majority of whose meetings concern the exemptions covering trade secrets, information that might lead to financial speculation, bank condition reports or agency litigation, arbitration, and adjudications, could provide by regulation for the closing of such meetings or relevant portions thereof. Closing procedures and the advance public notice requirements would not apply to meetings, or portions of meetings, closed by regulation. Verbatim transcripts or electronic recordings would be required for each meeting or portion closed to the public, except that agencies holding meetings closed under the bank reports, sensitive financial information, and adjudicatory or civil action exemptions may elect to make either a transcript, a recording, or minutes.

Regulations and reports -- Each agency would be required to promulgate implementing regulations within 180 days of enactment, following both consultation with the Chairman of the Administrative Conference and publication in the Federal Register for at least 30 days with opportunity for public comment. Each agency would also be required to report annually to Congress the numbers of open and closed meetings, reasons for closings, and descriptions of any litigation against the agency under the "open meeting" provisions.

Judicial review -- To ensure agency compliance with the above procedural requirements, S. 5 would permit an action to be brought by any person in the U.S. District Court in the district where the meeting was held, the district in which the agency headquarters are located, or the District of Columbia for any violation of the "open meeting" requirements. In each such suit, the burden would be on the agency. Although the court would be empowered to enforce the "open meetings" provision by declaratory judgment, injunctive relief, or other appropriate measures, the legislative history makes it clear that the court would not have jurisdiction to set aside agency action taken at an improperly closed meeting unless the violation was serious, intentional, or prejudicial. This is roughly the same as existing administrative law provisions.

In addition, the court could assess reasonable attorney fees and other litigant costs against the United States if the plaintiff substantially prevailed against the agency; the liability of individual agency officials has been eliminated. Such costs could also be assessed against the plaintiff when the court finds that the suit was initiated for "frivolous or dilatory purposes."

Ex parte communications -- The Administrative Procedure Act's provisions regarding statutorily required agency rulemaking hearings and adjudications would be amended to prohibit ex parte communications between agency officials and interested persons outside the agency. Any agency member, administrative law judge, or cognizant agency employee would be required to place any such communication on the public record of the proceeding. Violation of this prohibition could become the sole grounds for an adverse decision against the violating party, notwithstanding the normal rule that agency adjudications should be based upon the record as a whole.

Freedom of Information Act (FOIA) amendments -- The exemption in the FOIA from disclosure of information "specifically exempted from disclosure by statute" would be amended to conform to the counterpart Sunshine exemption; the FOIA exemption would be narrowed to include only information which a statute specifically requires to be withheld or information for which a statute establishes particular criteria for withholding or refers to particular types of matters to be withheld. This provision would overrule statutes which generally permit withholding information, as well as a 1975 Supreme Court decision upholding the current FOIA exemption. For example, the amended FOIA exemption would no longer support the general statutory authority of the Department of Health, Education and Welfare under the Social Security Act to issue regulations governing disclosure of information contained in social security files.

Federal Advisory Committee Act amendments -- This Act would be amended to make the basis for closing meetings of advisory committees the same as the exemptions for closing meetings of these multiheaded agencies. Currently, advisory committee meetings may be closed for the same reasons that documents may be withheld under the FOIA.

Comments

The enrolled bill accommodates many of the major objections raised by OMB, the Department of Justice, and the independent regulatory agencies, particularly the Federal Reserve Board (FRB) and the Securities and Exchange Commission (SEC). Important changes urged by these agencies and incorporated in the enrolled bill are:

-- Deletion of the provision permitting civil actions to be brought against the individual members of the agencies for asserted violations of the Act.

-- Limiting of the amendment to the Freedom of Information Act to avoid repealing many statutes which permit withholding of certain information.

-- Limiting of the venue provisions for enforcement of the Act.

-- Eliminating the requirements for a verbatim transcript for the sensitive meetings of the FRB and SEC.

-- Having meetings only of a more formal nature covered by the bill (the legislative history eliminates social gatherings).

Although Executive branch efforts to amend or delete unacceptable provisions were generally successful in the House, some objectionable features remain in the bill. Specifically, the Executive branch objections not fully accommodated in the enrolled bill concern:

-- The ambiguous and uncertain scope of the definition of agencies covered. In this regard, we urged that the agencies be listed to avoid unnecessary confusion and litigation, and, in particular, to make certain that such Presidential advisory bodies as the National Security Council and the Council of Economic Advisers would not be affected by the bill. Although the enrolled bill does not enumerate the agencies covered, the legislative history makes clear that the bill does not apply to these White House bodies. In addition, the reports of the Senate Government Operations and the House Judiciary Committees contain identical lists of agencies covered, thereby mitigating concerns in this regard.

-- The definition of "meeting." A meeting is defined in the enrolled bill as the "deliberations" of a quorum of agency members which result in the "joint conduct or disposition of official agency business." This definition makes the public notice and open meeting requirements of the bill dependent upon what occurs; the Administration had urged a more traditional definition -- a gathering held for the purpose of jointly conducting agency business, to afford a more meaningful standard upon which to demonstrate a valid reason for a closed meeting. In addition, in its attached views letter, Justice states that terms such as "deliberations" and "joint conduct or disposition of official agency business" are unclear and it is not certain how this definition applies to informal discussions among agency members.

Although the enrolled bill does not reflect the Administration's recommended definition, the compromise definition in the bill may well result in judicial application of a "purpose" test. Moreover, the legislative history makes clear that "informal gatherings" would not ordinarily be subject to the public notice and open meeting requirements. Likewise, the bill requires the courts to consider "orderly administration and the public interest" when determining whether or not to enjoin an agency action taken in a meeting.

-- Verbatim transcripts of all closed meetings. The Chairmen of the Federal Reserve Board and the Securities and Exchange Commission, among others, strongly objected to earlier requirements that transcripts be maintained for closed meetings dealing with sensitive financial and securities matters. To accommodate these concerns, the enrolled bill would give such agencies the option of whether to maintain transcripts, recordings, or minutes of these meetings, which is an acceptable compromise.

-- Freedom of Information Act (FOIA) Amendment. As discussed earlier, one provision in the FOIA allows information to be withheld from disclosure by Federal agencies if there is a general statutory authorization to do so. Section 5(b) of the enrolled bill would amend the FOIA to substantially narrow the scope of the current exemption by limiting it to situations in which a statute either requires that information be withheld, establishes particular criteria for withholding, or refers to particular types of matters to be withheld. Primarily because of the manner in which this FOIA amendment was developed, there is significant uncertainty as to which statutes will be judicially interpreted to be no longer a basis for withholding information. Only two such statutes are mentioned in the legislative history, section 1104 of the Federal Aviation Act of 1958 and section 1106 of the Social Security Act.

HEW strongly objects to this amendment because it precludes use of the Department's current authority under section 1106 of the Social Security Act, in conjunction with the current FOIA exemption, to issue regulations governing, and, therefore, restricting the disclosure of information contained in social security files. Consequently, HEW recommends that the enrolled bill be disapproved because the Department claims it would diminish HEW's authority to safeguard confidential information of a personal character collected in the administration of the social security system except where disclosure is a clearly unwarranted invasion of personal privacy. HEW states, in its attached views letter, that this amendment would force it to accommodate inquiries as to an individual's "medical condition, wage history, amount of benefit entitlement, past and present places of employment or residence, current or previous marital or dependency status, or date of birth."

Similarly, the Department of Commerce objects to the amendment alleging a lack of adequate consideration by the Congress and opportunity for agency comment on its effect on governmental operations involving information confidentially obtained -- a practice recognized in "over 100 statutes" enacted by prior

Congresses. (However, we note that this provision was the subject of deliberation and debate in both the House Government Operations and Judiciary Committees, and the Conference committee ultimately adopted the Judiciary committee version.)

In the event of approval of S. 5, both HEW and Commerce recommend that your signing statement urge the passage of legislation that would either repeal or remedy this provision. We concur with the latter view that remedial legislation may be warranted, because of the absence of an adequate legislative record as to what was intended and the uncertainty of judicial interpretation in this regard. However, we do not concur with recommendations of HEW that S. 5 warrants disapproval solely because of what is, in fact, substantial uncertainty on what information must be disclosed under the bill. We do not believe that it is Congress' intention, nor will it be judicially determined, that this amendment is intended to overturn in a wholesale fashion the guarantees against disclosure of information gathered by an agency on a pledge of confidentiality as sought under the Social Security Act and other statutes.

Moreover, we understand that the effect of this amendment is not that all previously exempt information will be made available to the public, since other exemptions in the FOIA should be applicable to significant portions of this information. Additional legislation may be needed to amend the statutes eliminated by this amendment if the other exemptions from public disclosure in FOIA are not available or are too burdensome to apply on a document-by-document basis. In a draft signing statement attached to this memorandum, we have proposed that you indicate your concern over the scope of this amendment and the likelihood that corrective legislation will be required.

Conclusion

Many of the agencies, in their enclosed enrolled bill letters, express serious reservations about the effect of this legislation on their operations. They claim, for example, that the bill will entail substantial administrative problems, that the requirement for verbatim transcripts will be burdensome, that the bill will be costly and that it may inappropriately open agency deliberations to public scrutiny. The Federal Home Loan Bank Board is so concerned over these possible effects that it recommends your disapproval of S. 5.

Implementing the "open meeting" and other provisions of S. 5 will be initially burdensome, the potential immediate increase in administrative costs to the government is uncertain, and the long-term budgetary impact is unknown. However, these concerns when presented as arguments against the enrolled bill's "open meeting" procedures were consistently and overwhelmingly rejected by Congress.

The bill, taken as a whole, is as reasonable an approach to the subject of "openness" in government as can be expected at this time, and we recommend its approval. Agency experience in implementing S. 5 will probably indicate the desirability of amendments, and these can be proposed as necessary. The attached signing statement notes the need for monitoring the bill's implementation in this regard.

Wilfred H. Rommel

Acting Assistant Director
for Legislative Reference

Enclosures

SIGNING STATEMENT

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 advance notice of and hold their business meetings open to public observation, unless the agency votes to close a session for a specific reason set forth in 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.

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.

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

SEP 7 1975

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C. 20503

Attention: Assistant Director for
Legislative Reference

Dear Mr. Lynn:

This letter is in response to the Office of Management and Budget's request for the views and recommendations of the Consumer Product Safety Commission on S.5, an enrolled bill

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

The bill, cited as the "Government in the Sunshine Act" would provide for open meetings of the heads of certain agencies and would prohibit ex parte communications between agency officials and outside parties regarding matters under adjudication or subject to formal rulemaking by the agency.

The Commission supports the President's signing of S.5 with the belief that it will enhance public confidence in the federal regulatory process as well as increase citizen awareness and participation in governmental decisions.

The Commission has, since its inception, implemented an open meetings policy (16 CFR PART 1012) which is similar to that prescribed in Section 3 of the enrolled bill. Accordingly, it is predicted that the enactment of S.5 will not have a significant impact on Commission costs or savings.

From its experience the Commission can report that the implementation of its openness policy has not, in any significant degree, increased normal operating costs. Whatever increased administrative burden there has been is, in the Commission's opinion, outweighed by the beneficial effects of the openness policy.

The Commission recommends approval of S.5.

Sincerely,

S. John Byington
Chairman

cc: The Honorable, The Speaker of the House of Representatives

cc: The Honorable, The President of the Senate

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

September 7, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C.

Attention: Assistant Director for
Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of the Civil Service Commission on enrolled bill S. 5, "To provide that meetings of Government agencies shall be open to the public, and for other purposes."

This bill, the "Government in the Sunshine Act" requires that meetings of agencies headed by two or more persons, such as the Civil Service Commission, shall be open to public observation with limited exemptions patterned on the exemptions in the Freedom of Information Act.

The Commission urged the appropriate Congressional committees and subcommittees to exempt from the legislation Commission meetings dealing with Government-wide personnel rules and practices and Government-wide labor-management relations policy. We sought this on the grounds that the Commission, unlike other multi-headed commissions, does not regulate, in the usual sense of that term, any segment of the economy affecting the general public. Rather, our primary mission is to provide leadership and regulatory direction to the central personnel program of the executive branch. The House Government Operations Committee expressed some support for the Commission's position by a statement in its report on the House version of the bill (Report 94-880, Part I, March 8, 1976, page 12) to the effect that Commission discussions on labor negotiation strategy for other agencies could come within the bill's exemptions.

The Commission shares the view that the opening of the vast majority of the meetings of most agencies is a very desirable and worthwhile end. However, we are greatly concerned about the heavy administrative burdens this legislation will impose on agencies with respect to scheduling and structuring their meetings and providing accommodations and facilities for the general public. We are also concerned that the presence of the general public during agency deliberations will inhibit the frankness and candor of discussions which is so vital to the formulation of

agency decisions. We fear that the ability of agencies to adopt flexible positions will be weakened by the presence of potential adversary parties at the deliberations of their heads.

Therefore, if the President signs this bill, we urge that he point out these concerns respecting the administration of its provisions and warn that close attention should be paid by the Congress to the implementation of the legislation in order that legislation to correct difficulties which are encountered can be quickly passed.

By direction of the Commission:

Sincerely yours,

Chairman

P.S. This is bad legislation but under the circumstances I think it should be signed but going on record that it may be necessary to amend at a later date.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
VICE CHAIRMAN

September 7, 1976

Mr. James M. Frey
Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This letter is in response to your request for the comments of this agency concerning enrolled bill S.5. We have reviewed the provisions of this bill. It is our view that the Government in the Sunshine Act, although creating a number of heavy burdens for the Commission, can be implemented. Generally, we support the bill.

Our most serious difficulty lies not with the opening of portions of Commission meetings to the public but with revising the Third exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(3). See § 5 of S.5. This section will require the Commission to reassess its policy in interpreting the confidentiality provisions of our statute with respect to disclosure of charge files to charging parties who allege employment discrimination on the basis of race, religion, sex, color or national origin. We regularly schedule cases to be presented for possible investigation or litigation (exempt from disclosure under §§ (c)(7) and (10) of S.5). Furthermore, we regularly discuss matters which are confidential by statutory mandate under §§ 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(b) and § 2000e-8(e). In addition, appeals from Freedom of Information Act decisions need to be analyzed because many requests are received from parties aggrieved or charged companies, and disclosure of their requests to the public would violate § 706(b) of Title VII.

Other causes for concern include the requirement for new regulations, new procedures for opening and closing Commission meetings, and, of course, the need for additional staff.

Also, it is noted that § (d) of the bill provides that actions to close meetings require the vote of a majority of the entire membership of the agency, not a majority of a quorum as is presently the custom of this Commission.

In conclusion, the Commission will be required to overcome a number of problems associated with implementation and management of S.5. On the whole, however, the Commission does support the principle of opening its meetings, except those portions exempted, to the public.

Sincerely,

Ethel Bent Walsh
Vice Chairman

THE CHAIRMAN
OF THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

SEP 7 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Miss Martha Ramsey

Dear Mr. Lynn:

This is in response to your request for the Board's views and recommendations on Enrolled Bill S. 5, the "Government in the Sunshine Act."

The Board has previously expressed views on various aspects of the legislation in the course of the legislative process.

On balance, the Board has no objection to the President's signing of the legislation.

Sincerely,

John E. Robson
Chairman

EXPORT-IMPORT BANK OF THE UNITED STATES
WASHINGTON, D.C. 20571

CABLE ADDRESS "EXIMBANK"
TELEX 89-461

September 3, 1976

The Honorable James T. Lynn
Director
Office of Management and Budget
17th and Pennsylvania Avenues, N. W.
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to the request of the Office of Management and Budget for the views and recommendations of the Export-Import Bank of the United States on enrolled bill, S. 5 "To provide that meetings of Government agencies shall be open to the public, and for other purposes." I am pleased to inform you that the Bank has no objection to signature by the President of the enrolled bill.

Eximbank fully supports the policy underlying the enrolled bill of providing the public with maximum information on the decision making processes of the U.S. Government. In general, the drafters of the enrolled bill have successfully balanced that policy against the need to protect the rights of individuals and the ability of Government agencies to perform their functions. Nevertheless, the provision requiring the maintenance of a verbatim transcript or electronic recording should not apply to an agency like the Bank, when virtually all of its meetings will be closed to the public under exemption (c)4 of the enrolled bill (relating to trade secrets and confidential information). As a result, considerable time and expense will be incurred by the Eximbank staff in complying with this requirement, without, however, any benefit being derived by the public.

I would note that the drafters of the enrolled bill recognized the validity of not requiring agencies that close meetings by virtue of exemptions (c)8, 9(A) or 10 (relating to bank reports, information likely to lead to financial speculation and adjudicatory proceedings or civil actions) to maintain transcripts or recordings, by

permitting them instead to keep a set of minutes. I recommend, therefore, that the President consider submitting remedial legislation to Congress at the earliest practicable time to permit agencies closing meetings not only under exemptions (c)8, 9(A) and 10, but under 4 as well to keep minutes instead of a verbatim transcript or electronic recording.

Sincerely yours,

R. Alex McCullough

R. Alex McCullough
Director

FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D. C. 20429

OFFICE OF THE CHAIRMAN

September 7, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Dear Mr. Lynn:

By enrolled bill request dated September 2, 1976, your Office requested the Corporation's views and recommendation on S. 5, 94th Congress, an enrolled bill cited as the "Government in the Sunshine Act."

The enrolled bill would provide generally that meetings of Presidentially appointed Federal agency members authorized to act on the agency's behalf shall be open to the public and would establish certain requirements and procedures applicable to the holding of such meetings. The bill contains a list of 10 exemptions from its open meeting and disclosure requirements. This list includes meetings or information involving internal personnel matters, material of a personal nature where disclosure would be an unwarranted invasion of privacy, accusations of a crime or, in some instances, investigatory records compiled for law enforcement purposes.

Of special interest to the FDIC are three further exemptions covering trade secrets and confidential financial or commercial information, information the premature public disclosure of which would "significantly endanger the stability of any financial institution," and "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." In this connection, the bill sets forth a special procedure whereby any agency a majority of whose meetings will be properly closed to the public pursuant to any of these three exemptions may provide by regulation for the closing of such meetings or portions thereof, so long as a majority of the agency members votes at the beginning of the meeting or portion thereof to close the meeting and a copy of such vote is made public. The agency would be required to make a public announcement of the date, place and subject matter of meetings so called, at the earliest practicable opportunity (except to the extent that to do so would disclose exempt information).

An agency would be required to make a verbatim transcript or electronic recording of each meeting or portion thereof closed to the public, except that for meetings closed under regulations issued pursuant to the special procedure described above, the agency may elect to make either a transcript, a recording, or minutes. If minutes are kept, they would have to 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 would also have to reflect the vote of each member on any roll call taken during the proceedings and identify all documents considered at the meeting.

The enrolled bill also contains provisions prohibiting ex parte communications by or with agency members or employees involved in the decisional process of a rule making or adjudicatory proceeding if a hearing on the record is required under the terms of the Administrative Procedure Act.

In our opinion, the enrolled bill contains provisions designed to accurately take into account the confidential nature of the bank regulatory process. Accordingly, we would interpose no objection to Presidential approval of the bill.

Very truly yours,

Robert E. Barnett

Robert E. Barnett
Chairman

FEDERAL POWER COMMISSION
WASHINGTON, D.C. 20426

SEP 3 1976

ENROLLED BILL, S. 5 - 94th Congress
To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Honorable James T. Lynn
Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Miss Martha Ramsey
Legislative Reference Division
Room 7201, New Executive Office Building

Dear Mr. Lynn:

This letter responds to Mr. Frey's request of September 2, 1976, for the Commission's views on S. 5, an Enrolled Bill, providing for meetings of Government Agencies to be open to the public.

The Federal Power Commission has no objection to the enactment of the Enrolled Bill.

The meetings of the Federal Power Commission have been open to the public since April 21 of this year. The policy of opening the meetings was instituted by FPC Administrative Order No. 160, issued April 1, 1976. The meetings are open to public observation subject to exemptions similar to those defined in 552b(c) of the Enrolled Bill. The Commission gives advance notice of the date, time, and place of each meeting, the subject matter, whether it is open, and the name and telephone number of the Commission official who is to respond to requests for information about the meeting. Our experience with open Commission meetings which were instituted on an experimental basis has been extremely positive.

Section 4 of the Enrolled Bill would add to the Administrative Procedure Act a new subsection, 5 U.S.C. 557(d)(1), on ex parte communications in agency proceedings. Ex parte communications between an interested person and a member of the agency, administrative law judge, or employee who is or may reasonably be expected to be involved in the decisional process of a proceeding are prohibited.

The Federal Power Commission recently broadened its rules against ex parte communications to clarify that those rules (18 C.F.R. 1.4(d)) apply not only to those participating in a decision, but also to all FPC employees, in order to assure fairness in its proceedings (Order No. 479, April 6, 1973). It may be noted that the applicable provisions of the Enrolled Bill are thus narrower than the Commission's rules, using the standard of those involved only in the decisional process.

Sincerely yours,

Richard L. Dunham

Richard L. Dunham
Chairman

Attachment:
Order No. 479

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

SEP 7 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20570

Dear Mr. Frey:

In accordance with your request, we have reviewed enrolled Bill S.5 with respect to its applicability to this Agency.

As you are no doubt aware, the National Labor Relations Board implements the National Labor Relations Act, as amended; our primary functions being to determine the representative status of labor organizations and whether unfair labor practices have been committed. Ours is a quasi-judicial Agency whose proceedings are conducted in accordance with the Administrative Procedure Act and our final agency decisions are published as a matter of public record.

The Bill provides that meetings of agencies shall be open to public observation but in Section 552b(c)(10) an exemption is set forth for "formal agency adjudication pursuant to the procedures in section 554 of this title". As a consequence, the Bill properly provides an exemption to this Agency for the conduct of its quasi-judicial functions.

The Bill further provides in Subsection (d)(4) that agencies who may properly close their meetings to the public may provide by regulation for the closing of such meetings where members of the agency vote to close such meetings, provided that a copy of the vote of each member is made available to the public. The Bill further requires a certification by the General Counsel or chief legal officer that in his or her opinion the meeting may be closed to the public and shall state each relevant exemptive provision.

Our major objection to the enrolled Bill therefore, is that since our meetings are properly exempted from the "open meeting" requirement, it is unnecessarily burdensome to require the Agency to comply with procedural requirements, e.g., the promulgation of regulations, the certification and the recorded vote of the Board Members.

In sum, we foresee no major interference with this Agency's operations as a quasi-judicial agency which would warrant our recommending that this Bill be vetoed despite our conclusion that the Bill would have been better structured had it provided a complete exemption for quasi-judicial agencies. Despite our reservations about the procedural requirements noted above which we previously voiced to Congress, we have no objection to the President's signing of the Bill.

Sincerely,

Betty Southard Murphy
Chairman

National Transportation
Safety Board

Washington, D.C. 20594

Office of
Chairman

September 3, 1976

Mr. James M. Frey
Assistant Director for Legislation
Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Dear Mr. Frey:

This is in reply to your request for the National Transportation Safety Board's comments on S. 5, an enrolled bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes".

The Safety Board does not recommend that S. 5 be disapproved.

Your thoughtfulness in soliciting our views is greatly appreciated.

Sincerely yours,

Webster B. Todd, Jr.
Chairman

cc: Honorable Warren G. Magnuson
Honorable Birch Bayh
Honorable Robert E. Jones
Honorable John J. McFall
Honorable Harley O. Staggers
Honorable Jack Brooks

LAW DEPARTMENT
Washington, DC 20260

September 7, 1976

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This responds to your request for the views of the Postal Service with respect to the enrolled bill:

S. 5, "To provide that meetings of Government agencies shall be open to the public, and for other purposes."

1. Purpose of Legislation as it Pertains to the Postal Service

Section 3 of the bill would add a new §552b, concerning open meetings, to title 5, United States Code. The bill would amend 39 U.S.C. §410(b)(1) to apply new §552b to the Postal Service.

With certain exceptions, this part of the bill would require every portion of every meeting of a collegial body heading an agency, such as the Postal Service Board of Governors, to be open to public observation. The members of the agency might vote to close a meeting to preserve the confidentiality of ten types of information specified in the bill. The agency would be required to maintain a complete transcript or electronic recording, or in some cases a detailed set of minutes, of each meeting or portion of a meeting closed to the public. The bill would also establish detailed requirements for the publication of information concerning a meeting, as well as

the votes of members on any proposal to close a meeting.

Section 4 of the bill would add a new §557(d), dealing with ex parte communications, to title 5, United States Code. Although chapters 5 and 7 of title 5 are generally inapplicable to the Postal Service under 39 U.S.C. §410(a), new subsection (d) would apply to certain Postal Service proceedings, such as those concerning mailability, and to rate and classification hearings conducted by the Postal Rate Commission, which are specifically subject to 5 U.S.C. §§556 and 557.

Except as otherwise authorized by law, new subsection (d) would forbid interested persons and agency personnel to make or cause any ex parte communications relevant to the merits of an agency proceeding under 5 U.S.C. §557. Any agency member who received or made a prohibited communication would be required to place it on the record of the proceeding. Furthermore, the bill would amend 5 U.S.C. §556(d) to permit an agency to consider a violation of the rule against ex parte communications sufficient grounds for a decision adverse to a party who knowingly committed the violation.

Section 5 of the bill would amend 5 U.S.C. §552(b)(3), dealing with freedom of information, to narrow one of the criteria for withholding information from public disclosure. As amended, the "third exemption" of the Freedom of Information Act would cover information specifically exempted from disclosure by statute only if the statute (a) left no discretion on the issue, or (b) established particular criteria

for withholding or referred to particular types of information to be withheld. It does not appear that this provision would impair the effectiveness of 39 U.S.C. §§410(c) or 412, concerning the disclosure of particular types of information.

Section 5 of the bill would also amend the Federal Advisory Committee Act to permit meetings of advisory committees to be closed only for the reasons which would permit the closing of an agency meeting under new 5 U.S.C. §552b(c). Although this amendment, like the Federal Advisory Committee Act itself, would not specifically apply to the Postal Service, we anticipate that the Postal Service would voluntarily comply with the spirit of its provisions.

2. Position of the Postal Service

The Postal Service does not oppose the enactment of this measure. Compliance with the provisions of new 5 U.S.C. §552b will be complicated and somewhat burdensome, but we do not believe that the new "sunshine" law would impair the power of the Board of Governors to direct the operations of the Postal Service.

3. Timing

We have no recommendations regarding the timing of Presidential action on this measure.

4. Cost or Savings

We have no reliable estimate as to the cost of this measure, although it is likely that it will increase the administrative expenses of the Board of Governors.

5. Recommendation of Presidential Action	The Postal Service does not object to Presidential approval of this measure.

Sincerely,

W. Allen Sanders

W. Allen Sanders
Assistant General Counsel
Legislative Division

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20550

nsf

September 7, 1976

OFFICE OF THE
DIRECTOR

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This refers to your request of September 2, 1976, for the comments of the National Science Foundation on the Enrolled Bill S. 5, the "Government in the Sunshine Act."

The National Science Foundation has no objection to approval of the bill. Although the bill would substantially affect the National Science Board, the activities of the Board can continue unimpaired if reasonable interpretations prevail.

A considerable part of the work of the National Science Board consists of review and deliberations concerning proposed research projects looking to Board approval. We believe that authority would exist under subsection (4) to close those portions of meetings devoted to such review and deliberations. Under the Freedom of Information Act the Foundation has consistently protected documents pertaining to research project applications because of the proprietary and privacy interests in those proposals. Under the Government in the Sunshine Act the comparable authority to close meetings would seem applicable when proposed research projects are considered.

We also believe that Board deliberations concerning budgets not yet submitted to the Congress may be closed under subsection (c)(9)(B). The bill is inexplicit on this point, however, and we would be most interested in OMB's view of its impact on budget deliberations.

Further, the bill would amend the Federal Advisory Committee Act to repeal the use of exemption 5 as a basis for closing Federal advisory committees. We believe that the National Science Foundation can operate its various advisory committees consistently with the bill's provisions. The Foundation has often used advisory committees or panels for research project proposal review. The Foundation has had adequate basis to close the meetings of such committees or panels

where necessary because of the trade secrets, privileged commercial or financial information, and privacy rights involved in the review of proposals. These factors have compelled the closing of meetings independently of exemption 5, and we expect that they would continue to do so in most situations. We note in this connection indications in the Conference Report that a subcommittee of the Senate Government Operations Committee plans to continue an inquiry into possible NIH peer review problems. Because NSF uses similar peer review procedures, NSF will wish to participate in Executive Branch advice to this subcommittee.

If events prove our interpretations of the bill to be inaccurate, we are concerned that the functioning of the National Science Board could be impaired. For this reason we recommend that the Office of Management and Budget monitor experience with the bill in NSF and other agencies to determine whether amending legislation should be proposed.

Sincerely yours,

R. C. Atkinson

Richard C. Atkinson
Acting Director

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SEP 7 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for a report on S. 5, an enrolled bill "To provide that meetings of Government agencies shall be open to the public and for other purposes."

If enacted, the bill will materially diminish our authority to safeguard hitherto confidential information of a personal character collected in the administration of the social security system. Except where disclosure is a "clearly unwarranted invasion of personal privacy", the bill will compel the Department to accommodate, for example, inquiries as to an individual's medical condition, wage history, amount of benefit entitlement, past and present places of employment or residence, current or previous marital or dependency status, or date of birth.

Accordingly, in the interest of protecting the privacy of the enormous number of individuals who are covered by the social security system, particularly with respect to the intensely personal medical material developed in social security disability claims, we strongly recommend that the President return the bill to the Congress without his approval. Because the bill primarily bears on regulatory agencies, there may be considerations in its support of which we are not fully cognizant. If so, we would suggest that the President make clear in an appropriate statement that his concern is wholly for maintaining the privacy of persons, particularly the disabled, who have been compelled to disclose information to the Government; and that he would welcome the opportunity to sign a revised bill that is appropriately modified to incorporate this concern.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SEP 7 1975

The Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for a report on S. 5, an enrolled bill "To provide that meetings of Government agencies shall be open to the public and for other purposes."

If enacted, the bill will materially diminish our authority to safeguard hitherto confidential information of a personal character collected in the administration of the social security system. Except where disclosure is a "clearly unwarranted invasion of personal privacy", the bill will compel the Department to accommodate, for example, inquiries as to an individual's medical condition, wage history, amount of benefit entitlement, past and present places of employment or residence, current or previous marital or dependency status, or date of birth.

Accordingly, in the interest of protecting the privacy of the enormous number of individuals who are covered by the social security system, particularly with respect to the intensely personal medical material developed in social security disability claims, we strongly recommend that the President return the bill to the Congress without his approval. Because the bill primarily bears on regulatory agencies, there may be considerations in its support of which we are not fully cognizant. If so, we would suggest that the President make clear in an appropriate statement that his concern is wholly for maintaining the privacy of persons, particularly the disabled, who have been compelled to disclose information to the Government; and that he would welcome the opportunity to sign a revised bill that is appropriately modified to incorporate this concern.

The enclosed statement explains the legal basis for our recommendation.

If, despite that recommendation, the President determines to sign the bill, we urge that his signing statement include both an expression of his grave concern at the threat to the personal privacy of the many millions of persons whose social security records may, in consequence of the bill, become public knowledge, and a recommendation that the Congress act to repeal this portion of the bill before its effective date.

Sincerely,

Secretary

Enclosure

EFFECT OF ENROLLED BILL S. 5 ON THE CONFIDENTIALITY OF SOCIAL SECURITY RECORDS

Section 552(a)(3) of title 5, United States Code, requires the Department, in common with other agencies of the Federal Government, to make its records promptly available in response to a request from any person. However, the requirement does not apply to matters that fall within any of a number of exemptions established by section 552(b). One of those exemptions, section 552(b)(3), is for matters "specifically exempted from disclosure by statute".

One such statute, section 1106 of the Social Security Act, prohibits the disclosure of virtually any records developed under the Social Security Act, except as the Secretary may by regulation provide otherwise.

Because section 1106 authorizes the Secretary to make exceptions to its prohibitions, and does not specify criteria applicable to those exceptions, there were some who had contended that the section did not meet the above-quoted section 552(b)(3) criterion. That is, it had been argued that the matters reached by section 1106 were not, given the reach of the Secretary's discretion under it, specifically exempted from disclosure. In 1975 the Supreme Court rejected an identical contention with respect to a Federal Aviation Act provision in the case of Administrator, FAA v. Robertson.

In response to that decision, section 5(b) of S. 5 would amend section 552(b)(3) to exempt from disclosure matters otherwise specifically exempted from disclosure by statute only if "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."

The Joint Explanatory Statement of the Committee of Conference observes, "The conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson . . . Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act" (at p. 25).

Despite this amendment, section 552(b) would continue, in some degree, to protect social security records. Section 552(b)(6) exempts from disclosure matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption is narrow in several respects. First, under a decision of the Supreme Court of April 21 of this year in Department of the Air Force v. Rose, the exemption for personnel and medical files is not absolute. Like the "similar" files to which the section refers, personnel and medical files must be disclosed when not a clearly unwarranted invasion of personal privacy. Second, the word "clearly" must be given weight. Thus, for example, should a credit card company seek to verify information supplied to it by an applicant covered under social security, it is debatable whether the Department could refuse to supply the individual's wage record on the ground that the privacy invasion is clearly unwarranted. Similarly, should an individual seek employment in circumstances in which his health was legitimately in question, it is far from certain that we could deny to his prospective employer information as to whether the individual has at any time filed a claim for disability insurance, or the basis for that claim.

Federal Home Loan Bank Board

320 First Street, N.W.
Washington, D.C. 20552

Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

September 7, 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to your Enrolled Bill Request of September 2, 1976, concerning S. 5, the "Government in the Sunshine Act".

The major thrust of the "Government in the Sunshine Act" is contained in section 3 of the enrolled bill which would add a new section 552b to Title 5 of the United States Code. This proposed section provides that except where an agency properly determines that a portion or portions of its meetings will disclose information relating to one or more of ten categories of information described therein, every portion of every meeting of an agency shall be open to public observation. Section 3 further contains some highly technical procedural requirements intended to implement and enforce this openness rule. Section 4 and 5 of the enrolled bill relate primarily to ex parte communications in formal agency adjudicatory proceedings, and conforming amendments to other acts, respectively. While the Federal Home Loan Bank Board has no objections to Sections 4 and 5, it cannot support Section 3 as it would apply to the Board.

Section 2 of the enrolled bill, captioned "DECLARATION OF POLICY" states, in part, that "the public is entitled to the fullest practicable information regarding the decisionmaking process 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 the individuals and the ability of the Government to carry out its responsibilities". The Board believes these objectives clearly merit emphasis, and the

public interest in "open government" is clear. Nevertheless, it is our judgment that Section 3 of the enrolled bill is too tightly drawn; it should emphasize principles or standards of openness rather than procedures which will inevitably delay the discharge of this agency's statutory obligations. In general, a better balancing of competing policy considerations would be in the public interest. We do not see a compelling need for general codification of this important and sensitive area, especially as the bill would affect the operations of the Board. As we have stated in commenting previously on a predecessor bill, sunshine can indeed be salutory; excessive exposure or inadequate protection against it can be harmful as well.

In the Board's view, the open forum, however attractive in concept, is set forth in Section 3 of the bill in such fashion as to give this agency serious concern. As you are aware, the responsibilities of the Federal Home Loan Bank Board involve complex and sensitive obligations concerning housing finance and consumer savings. These responsibilities, if they are to be effectively discharged, require that the Board be able to explore and discuss freely, inter se, with its staff, with other government agencies, and with the organizations and individuals concerned, the various avenues and approaches that are possible, and their respective strengths and weaknesses, as they bear on the public interest and the individual welfare of the institutions or persons affected. To explore avenues and approaches, agency members should be allowed to engage in informal work sessions during which discussions of various innovative proposals are discussed prior to public scrutiny. These informal work sessions are spontaneous and invite frank discussion of positions which may be ultimately modified or abandoned. The Board would like to stress that because of the broad definition of "meeting" contained in the bill, informal work sessions of this sort, which are at the very heart of an agency's work, are strongly deterred if not virtually destroyed. An opportunity to discuss and seriously consider various policy options, prior to public presentation of agency positions, is necessary to the discharge of the Board's responsibilities and serves the public interest.

Indeed, the open forum concept itself presupposes the opportunity for reflection and consideration prior to a public airing of views. Section 3, by reaching deep into the decision[illegible]king process of the Board, goes too far in the direction of public disclosure at the expense, we believe, of frank, sometimes contested, presentation of staff recommendations, or differences of approach among agency members themselves prior to final decision. We ask the President to consider whether the disclosure of agency discussion at the early stage required by the bill truly serves the public interest. We are not, by any means, suggesting that agency decisions should not be subject to searching scrutiny, but by reaching far behind agency decisions, the present bill, we believe, presents the real possibility of harming the effectiveness of this agency in meeting its statutory responsibilities and, we assume, the effectiveness of other agencies as well.

In addition to acting as a dampener to free and full discussion, prior to final decisions, the procedural constraints of the present bill could lead to delay in taking the preventive action which is so integral a part of this agency's oversight of financial institutions. Problems requiring immediate Board attention may not be addressed until a majority of the members of the agency determine by recorded vote that agency business requires that the seven days advance public notice requirement be dispensed with. Meetings entitled to be closed under one or more of the ten exemptive provisions require certification by the General Counsel or chief legal officer of the agency. A stenographer or electronic recording device would be required. These procedural contraints would almost certainly delay agency action in some instances. Such delay would be clearly contrary to the public interest.

The public's right to know of agency actions should not be considered an absolute right to reach into the very earliest, often tentative discussions of agency action, but must be tempered with the demands of efficient government and the need for the free flow of ideas within agencies. For these reasons we respectfully urge the President to reject the present bill in favor of a more balanced approach.

Sincerely,

Daniel J. Goldberg

Daniel J. Goldberg
Acting General Counsel

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

SEP 7 1976

Honorable James T. Lynn
Director, Office of Management and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of this Department concerning S. 5, an enrolled enactment

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

This enrolled enactment (to be cited as the "Government in the Sunshine Act") has as its principal purpose a requirement that meetings of agencies headed by two or more members, a majority of whom are appointed by the President, with the advice and consent of the Senate, shall generally be held in public.

The principal concern of this Department is with section 5(b) of the bill, totally unrelated to the main purpose of the bill, which would amend the Freedom of Information Act to modify drastically the exemption from that Act contained in section 552(b)(3) of title 5 United States Code. The existing (b)(3) exempts from the Freedom of Information Act matters which are "specifically exempted from disclosure by statute". Section 5(b) would add to that language the following: "(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;".

Unlike the passage of the Freedom of Information Act in 1966, and the amendments thereto in 1974, which were preceded by extensive notice, hearings, and debate, this amendment was adopted by the Conference Committee as a tag on to another different statute, without similar opportunities for comment and consideration of its effect on governmental operations in relation to the confidential information which it receives from its citizens. This change in the (b)(3) exemption

affects over 100 statutes which were enacted into law over a number of years when prior Congresses deemed that confidentiality should be applied. Some of these statutes are administered by this Department.

The Department believes that the impact of this change would warrant a veto by the President were this the sole aspect of legislation involved. However, the President may determine that the open agency meeting provisions of the bill are so important that he must give it his approval. We are enclosing a statement which we urge that the President use in a signing statement on the bill, and urge that amendatory legislation with respect to the (b)(3) Freedom of Information Act exemption be given the highest priority.

Enactment of this legislation may require additional appropriations to the Department, the amount of which cannot now be estimated because of the impossibility of estimating the number of additional requests for information which will be received and may have to be litigated under the revised (b)(3) exemption.

Sincerely,

Elliot L. Richardson

Enclosures

DRAFT PRESIDENTIAL MESSAGE

While I wholeheartedly endorse the Government in the Sunshine concept embodied in this legislation, I must object strongly to section (5)(b) of S. 5, a provision which is totally unrelated to the main provision of the bill.

That section of the Act amends exemption (3) of the Freedom of Information Act (5 USC 552(b)(3)) in a manner that brings into question confidentiality provided to information contained in documents submitted to the Government under more than 100 statutory provisions over many years.

Unlike the passage of the Freedom of Information Act in 1966, and the amendments in 1974, which were preceded by extensive notice, hearings and debate, this amendment to the Freedom of Information Act contained in S. 5 was adopted by the Conference Committee as a tag on to other legislation, without affording similar opportunities for consideration and comments from interested Government agencies and affected members of the public to inform the Congress of its effect. This procedure of the Congress clearly seems anomalous in the development of legislation to provide for "Government in the Sunshine" by the Executive Branch.

Enactment of this amendment to the Freedom of Information Act opens to question provisions of law holding confidential materials submitted to the Government by individual citizens and organizations under various programs on a voluntary or, under some circumstances, on a mandatory basis. This need for confidentiality was carefully considered by many past Congresses in enacting numerous statutes, and found necessary or desirable. Clearly, it is not fair to require the American public to supply information of a confidential nature to the

Government under penalty of law or not without a guarantee by the Government that such information will continue to be held on a confidential basis. Section 5(b) could be construed as applying to information already collected and in the hands of Government agencies under such pledges of confidentiality. Such a retroactive breach of the Government's word is to my mind unconscionable.

This legislation would allow the questioning of that pledge of confidentiality. Accordingly, I am unable to approve this provision of S. 5 and urge the Congress to reconsider its ill-advised action on this section.

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

September 7, 1976

Honorable James T. Lynn, Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

This is in response to your memorandum request of September 2, 1976, for the views of the Federal Maritime Commission with respect to S. 5, an enrolled bill

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

Although conceptually there may be laudable features in S. 5, an analysis of its overall practical impact leads to the conclusion that in many instances quite the opposite of its intended effect could well result.

For example, public participation in Commission meetings to deliberate and to reach adjudicative decisions would destroy many of the due process protections for parties now provided in the Administrative Procedure Act. Even if the public's presence were passive, such presence in and of itself would almost certainly impede a full and candid exchange on all aspects of the matter before the Commission. When the Commissioners sit in their quasi-judicial capacity, staff opinions and recommendations, internal memoranda, financial and business records of a confidential nature (including privileged rate data) and trade secrets are fully discussed. This is especially true in domestic offshore cargo rate cases, but other examples include deliberations on intermodal proceedings having environmental overtones and proceedings involving the level of military cargo rates under Commission General Order 29. Additionally, Commission actions undertaken to consider the issuance or revocation of freight forwarder licenses and certificates of financial responsibility for oil pollution and

passenger vessels often require the consideration of such sensitive data and information which, if indiscriminately revealed, could seriously prejudice the party involved -- whatever the outcome of the proceeding itself.

Furthermore, we believe the "goldfish bowl" objectives of S. 5 would lead to serious impairment of the Commission's ability to obtain information on a confidential basis concerning possible illegal activities on the part of carriers or conferences. The Commission must, perforce, rely principally upon such investigative leads in carrying out its statutory mission to prevent malpractices in our ocean-borne commerce. Fearing subtle reprisals by carriers if their communications with the Commission were subjected to public disclosure, shippers (and, indeed, other carriers) would most likely find it in their best interests to abide by a code of self-protective silence.

Perhaps of equal mischief are the more basic administrative pitfalls that passage of S. 5 would nurture. The seven-day public notice requirement would greatly limit the flexibility needed by the Commission in scheduling meetings. The closed meetings exception in S. 5 would be of little practical use to the Commission in its normal course of business. Moreover, requirements for verbatim records at closed meetings would impose additional expenses which no agency, particularly one as small as ours, should have to bear, nor should taxpayers be taxed further to support, at a time when all Federal agencies are being asked to cut their budgets.

In conclusion, it is our belief that any possible benefits to be derived from additional public participation or presence under the provisions of S. 5 are greatly outweighed by the burdens and detriments its enactment would impose upon the Commission in conducting our primary regulatory responsibilities. Nonetheless, despite our serious reservations about the resultant effects of this legislation upon implementation, we do recognize the strong public and Congressional support the bill has received since its inception.

Sincerely yours,

Karl E. Bakke

Karl E. Bakke
Chairman

NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

September 7, 1976

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management & Budget
Washington, DC 20503

Dear Mr. Frey:

We are hereby forwarding our comments with respect to S. 5, "Government in the Sunshine Act", as requested by your September 2, 1976, memorandum.

The National Mediation Board continues to unqualifiedly support the intent of S. 5 as expressed in the Section 2 Declaration of Policy clause. Without question, the public should be afforded the fullest practicable information concerning the decision making processes of the Federal Government. However, we have distinct reservations whether the present language of S. 5, as a practical matter, can be applied to this Board without adversely affecting the ability of the Government to effectively carry out its responsibilities. We frankly believe that the overall impact on the public associated with this legislation will be considerably more detrimental than beneficial.

Notably, in view of the sensitive nature of this agency's labor mediation responsibilities, it is frequently necessary for Board meetings to be convened on a prompt ad hoc basis. This condition, as well as the generally sensitive subject matter of Board deliberations, could well make application of the Bill's advance notice and public access requirements damaging to the Agency's effectiveness. For this reason, we have previously recommended that the National Mediation Board be exempt from the coverage of S. 5 and here reiterate such recommendation.

We trust these comments will be helpful to your consideration of potential Executive Branch response to S. 5.

Sincerely,

Rowland K. Quinn, Jr.
Executive Secretary

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

September 7, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

In compliance with your request, we have examined a facsimile of the enrolled bill (S. 5), "To provide that meetings of Government agencies shall be open to the public, and for other purposes."

The main provision of this bill would require that, subject to specified exemptions, meetings of certain Federal agencies headed by a multi-member body be open to public observation. This section would impose requirements concerning such matters as procedures for closing meetings, notice of meetings, and the making of verbatim transcripts or recordings of closed meetings. Also, provision is made for lawsuits challenging compliance with the various requirements.

Another major portion of the bill would regulate "ex parte communications" in certain types of administrative proceedings, that is, adjudication and rule making required to be determined on the record after opportunity for an agency hearing. These provisions would apply to all agencies (as defined in the Administrative Procedure Act, 5 U.S.C. 551(1)), including those not headed by a multi-member body. The bill would prohibit, subject to limited exceptions, the making, by agency personnel or other interested persons, of ex parte communications relevant to the merits of a covered proceeding and would provide for sanctions for violation of the prohibitions.

Another provision of the bill would amend -- and narrow somewhat -- the exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(3), for material specifically exempted from disclosure by statute. The bill would also amend subsection 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. I (1975 Supp.), so that it would provide that the grounds for closing advisory committee meetings are those set forth in the bill with regard to agency meetings.

Except for the provision regarding the issuance of regulations covering the open-meeting provisions, the bill would take effect 180 days after its enactment.

In our opinion, it is likely that implementation of the open-meeting provisions would cause considerable practical difficulty for many affected agencies. A particular source of concern is the broad and unclear definition of "meeting," proposed §552b(a)(2). The definition refers to "the deliberations of . . . [a quorum of agency members] where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." Among the issues presented by this definition are the meaning of "deliberations" and the meaning of "joint conduct or disposition of official agency business." What restrictions are to be placed upon informal, unplanned discussions among the requisite number of agency members? Perhaps, such matters could be adequately dealt with in implementing regulations. It should be noted that the policy section, §2, states, inter alia, that the purpose of the bill is to provide information to the public "while protecting . . . the ability of the Government to carry out its responsibilities."

Most of the exemptions set forth in proposed §552b(c) parallel those of the Freedom of Information Act, but the exemptions are unclear in a number of respects. For example, how is an agency to determine that opening a meeting is likely to "disclose information the premature disclosure of which would . . . be likely to significantly frustrate implementation of a proposed agency action" (§552b(c)(9)(B))? Further, the exemptions do not give adequate weight to the policies underlying the Freedom of Information Act's exemption for internal advice giving, 5 U.S.C. 552(b)(5).

The procedural provisions could hamper the functioning of various agencies, because of the time involved in complying and the bill's interference with informal dealings among agency members. The transcript or recording requirement could also result in substantial expense for some agencies. Another significant cost of implementation would be the expense of defending the lawsuits which are certain to arise.

A constitutional issue is raised by a possible application of the bill's judicial-review provision, §552b(h)(1).

It would provide that "any person" may bring a lawsuit challenging compliance with the open-meeting requirements. Nothing in the bill states that the plaintiff must have been aggrieved by the alleged violation. Article III of the Constitution limits the jurisdiction of the Federal courts to "cases" and "controversies." One aspect of these concepts is that there be an actual controversy between the parties. Thus, in some suits which would be permitted by the bill's language, e.g., a suit by a person who does not allege that he would have attended a closed meeting or that he was otherwise affected by the closing, the Government could assert that the matter is outside the jurisdiction of the Federal courts. We do not suggest, however, that the judicial review provision is unconstitutional on its face.

Except for the matter of defending lawsuits arising under the bill, its enactment would have relatively little effect upon the Department of Justice. Accordingly, with regard to the question whether the bill should receive Executive approval, we defer to agencies more directly affected by it.

Sincerely,

Michael M. Uhlmann

Michael M. Uhlmann
Assistant Attorney General
Office of Legislative Affairs

Washington Post
Tuesday, September 14, 1976

Citing Need for Openness, Ford Signs 'Sunshine Bill'

By Lou Cannon
Washington Post Staff Writer

his opponent is out on the hustings, as Carter was yesterday.

United Press International

After bill signing, Mr. Ford hands out pens to Rep. Brooks, Sen. Roth, Sen. Chiles, Rep. Fascell, Rep. Horton.