Sunshine Laws

- **By:** Fritz Messere
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In the United States, the term *sunshine law* is typically used to refer to state laws providing for public access to government meetings and public records as well as to the Government in the Sunshine Act (5 U.S.C. 552b), which governs access to business meetings of some 50 federal agencies, commissions, and boards. The Government in the Sunshine Act was signed into law on September 13, 1976, by President Gerald Ford. The legislation was sponsored by Senator Lawton Chiles (D-Florida) and Rep. Bella Abzug (D-NY) and was modeled on the earlier Florida Sunshine Act. This entry discusses the Government in the Sunshine Act, state sunshine laws, and new challenges to government transparency.

Government in the Sunshine Act

Passed partly in response to the Watergate scandal, the Government in the Sunshine Act and other anti-secrecy measures were enacted to make sure that government agencies deliberations were open to public scrutiny. The Government in the Sunshine Act works in concert with the Federal Advisory Committee Act of 1972, which required that meetings of federal advisory committees serving the executive branch be open to public observation.

The Government in the Sunshine Act calls for all agencies “headed by a collegial body composed of two or more individual members … and any subdivision thereof authorized” acting on behalf of a federal agency to open business meetings to public observation. While it does not stipulate that an agency must hold meetings, it does include procedural requirements that must be followed when the organization, board, or commission decides to meet, either in open or closed session. The law does not apply to Congress. While sessions for the House of Representatives are typically open, the Senate occasionally holds closed meetings to discuss treaties or personnel issues.

Generally, agencies must make a public announcement giving at least 1 week notice prior to each meeting. The notice must provide the time, place, and subject of the meeting. In addition, the agency must provide the name and phone number of a designated official or contact information regarding whether the meeting is to be open or closed. According to the law, meetings cannot be presumptively closed. To close a meeting, a board or commission covered by the law must vote in advance and make a written copy of the vote available to the public. A majority of the board or commission must vote in favor of closure and must also provide a full written explanation of its actions for closing part or all of a meeting.

The law provides for a limited number of exemptions under which meetings can be closed. The exemptions are similar to those included in the Freedom of Information Act; they can be summarized as:

- 1. Issues of national defense and foreign policy
- 2. Discussion of internal personnel rules and practices
- 3. Statutory exemptions provided under law
- 4. Proprietary information that would injure parties if made public
- 5. Accusation of crime or formal censure
- 6. Personal privacy
- 7. Investigatory records such as those collected by law enforcement
- 8. Financial institution reports
- 9a. Financial speculation and stability
- 9b. Frustration of proposed agency action
- 10. Issuance of subpoena, participation in civil action or proceeding, or formal agency adjudication

When an agency decides to close a meeting, the agency's general counsel must certify that the closure falls under one of the exemptions enumerated in the law. Some executive agencies, such as the Federal Trade Commission, hold many closed meetings because much of its work encompasses issues that fall under Exemption 10. Lastly, agencies must provide Congress with an annual report regarding their policies, an accounting of the number of meetings held, and whether exemptions applied to the meetings.

In addition to providing rules for conducting federal agency meetings, Section 4 of the legislation enacts a general prohibition on ex parte communication between government agency decision makers and other outside interested parties. This section of the law was included as a result of recommendations by the American

Bar Association. The provisions of Section 4 apply to all executive agencies, regardless of whether they are headed by a board or an administrator.

The law requires that the agency keep a copy of the minutes of closed meetings for a minimum of 2 years. While the presumption of closure may be challenged by anyone through the federal district courts, the courts have generally interpreted the law strictly. In one example, the U.S. Circuit Court of Appeals for the District of Columbia ruled in 1985 that the law did not apply to the president's Council of Economic Advisors since the purpose of the council was strictly advisory. However, many examples illustrate the significance of the law. The law has opened the door for gavel-to-gavel coverage of important hearings and meetings on C-SPAN and has paved the way for creating electronic databases for services such as Congress.gov (formerly Thomas), a source for federal legislative information.

The law is not without detractors. Critics of the Sunshine Act assert that opening meetings has a tendency of subverting truly open debate at meetings since the participants may be concerned that their remarks will be transcribed or broadcast. Also, because meetings are open, many chairs of agencies and commissions are reluctant to bring an item to the floor unless they are sure of the outcome of a vote.

Journalists frequently complain that commission and agency meetings often seem scripted, with commissioners reading from prepared statements and voting in predetermined ways. Others have pointed to unintended consequences of the law. In 1995, Stephen Calkins, then general counsel to the Federal Trade Commission, noted that when two justices or judges are in discussions on how to reconcile divergent views, they could ask another judge sitting on a case to join the discussion. The Sunshine Act prevents commissioners at federal agencies from such informal discussions whenever the number of participants would constitute a quorum, such as at the Federal Communications Commission. As a result, critics point out that administrators can resort to using memos or deputizing aides to meet in a commissioner's place as examples of circumventing the Sunshine Act. Today, with growing concern over individual privacy, agencies need to balance public accountability without harming individual privacy rights.

State Sunshine Laws

Since the 1970s, most states have passed parallel legislation designed to open state and local government agencies to same level of scrutiny required in the federal law. All 50 states have enacted open meetings laws, but it is difficult to make

generalizations about the success of these laws. In 2015, the Center for Public Integrity ranked each state's public records law and found that most states faired poorly because of many exemptions and loopholes. The Reporters Committee for Freedom of the Press concluded that the best laws are those that define a meeting by specifying the number of members of the board, agency, or commission who must be present to constitute a quorum.

Similar to the federal law, most state open meetings statutes provide for closed meetings or "executive sessions" in cases where personnel matters or invasion of privacy may be at issue. Other reasons for meeting in "executive session" may include issues of public safety and labor negotiations. Most states include a provision in their legislation that bars any final actions from being adopted in "executive session." Therefore, boards or commission must reconvene in public before adopting a final determination. Similar to the federal legislation, most open meetings statutes require a notification to the public as to when a meeting is to be held. The notification must be given far enough in advance so that interested parties can attend and most laws provide for actions to be taken if the law is violated.

Rapid advances in electronic communications have had a major impact on government transparency. For example, the Florida Sunshine Law mandates that cities keep a permanent record of all emails sent or received by public employees. The North Dakota law defines all email correspondence as a meeting and requires that emails to and from public officials must be made public upon request. Some states have enacted "sunshine laws" that require reporting of the amounts of money or emoluments that pharmaceutical companies pay physicians in connection with marketing activities related to new prescription drugs. One study in the *Journal of the American Medical Association* found that reporting in some cases was spotty and that companies failed to provide specific information identifying the recipients of gifts.

Challenges to Transparency

As government administration evolves so do issues related to sunshine laws. New capabilities to engage the public through technology can provide more access for citizens; however, with the increasing use of private contractors for some traditional government functions, to whom open records laws apply becomes a legitimate question. There are also questions over the applicability of open

meetings and open records laws to electronic data collection and the use of electronic memoranda.

See also Congress and Journalism; Freedom of Information Act (FOIA); Government, Federal, U.S., Coverage of; Government, State, U.S., Coverage of; Secrecy and Leaks

Fritz Messere

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