

GOVERNMENT IN THE SUNSHINE ACT
P.L. 94-409

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P.L. 94-409, see page 90 Stat. 1241

Senate Report (Government Operations Committee) No. 94-354,
July 31, 1975 [To accompany S. 5]

Senate Report (Rules and Administration and Judiciary Committees)
No. 94-381, Sept. 18, 1975 [To accompany S. 5]

House Report (Government Operations Committee) No. 94-880
(Part I), Mar. 8, 1976 [To accompany H.R. 11656]

House Report (Judiciary Committee) No. 94-880 (Part II),
Apr. 8, 1976 [To accompany H.R. 11656]

House Conference Report No. 94-1441, Aug. 26, 1976
[To accompany S. 5]

Senate Conference Report No. 94-1178, Aug. 27, 1976
[To accompany S. 5]

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DATES OF CONSIDERATION AND PASSAGE

Senate November 6, 1975; August 31, 1976

House July 28, August 31, 1976

The Senate bill was passed in lieu of the House bill after amending its language to contain much of the text of the House bill. The House Report (Parts I and II) and the House Conference Report are set out.

HOUSE REPORT NO. 94-880—PART I

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

* * * * *

EXPLANATION OF AMENDMENTS

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

The second amendment conforms one subparagraph of the ex parte communications provisions of the bill to the remainder of those provisions. The prohibition on such communications to an agency decisionmaking official applies to anyone who is an "interested person". Subparagraph (D) of the proposed section 557(d)(1) of title 5,

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MEETING

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

MEMBER

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

Subsection (b)

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

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

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Subsection (c)

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

The provision permits closing where the agency properly determines that the discussion is likely to come within one or more of the exemptions. It lets the agency withhold information contained in a

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transcript or recording where the disclosure of the information would in fact have the effect set forth in one or more exemptions. The burden of sustaining a closing or withholding is at all times upon the agency. The specific exemptions are:

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

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

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

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

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

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

Examples of statutes that could justify a closing or withholding under paragraph 3 include sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-5(b), 2000e-8(e)), and section 314(a)(3) of the Federal Election Campaign (2 U.S.C.

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§ 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

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

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

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

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

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

2. 95 S.Ct. 2140, 45 L.Ed.2d 164.

3. 47 S.Ct. 499, 274 U.S. 106, 71 L.Ed. 949.

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

In addition to the applicability of the general rule that allows such a discussion to be open if that is in the public interest, the committee notes that there may be circumstances where the official status of the individual in question affects whether this exemption should be invoked (e.g., a discussion of an individual's competence to perform his job might be open if he is a high government official, but closed if he is

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process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1) (A).

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

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

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

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

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

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

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

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

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

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

SECTION 5

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

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

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provisions of this bill and to overrule the decision of the Supreme Court in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1972)¹.

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

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

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

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

SECTION 6

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

7. 95 S.Ct. 2140, 45 L.Ed.2d 164.

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

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

INTRODUCTION

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

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

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

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

Our differences with H.R. 11656 are few but important. They include (1) the verbatim transcripts requirement for closed meetings, (2) the definition of "agency", (3) the definition of "meeting", (4) the identification of persons expected to attend a closed meeting, (5) the prescribed venue for actions brought under this legislation, (6) the