



Administrative Conference Draft Recommendation

Government in the Sunshine Act in the 21st Century

Committee on Regulation | March 20, 2014 Meeting Draft

In the late 1960s and 1970s, in the wake of increasing public vigilance concerning the activities of government sparked by the Vietnam War and Watergate, Congress passed and the President signed a series of transparency laws designed to promote greater accountability and transparency in government decisionmaking. The Government in the Sunshine Act, enacted in 1976, focused specifically on the transparency of meetings of multi-member agencies.¹ For any meeting involving a quorum of board or commission members, the agency must announce the event at least seven days in advance in the Federal Register and permit attendance by interested members of the public.²

Notwithstanding its broad title, the Government in the Sunshine Act applies only to agencies that are headed by a group of board or commission members rather than an individual chairperson.³ The Act also contains a number of exceptions,⁴ and many ways of conducting business fall outside its ambit. Specifically, any discussion among a group of agency members smaller than a quorum does not trigger the Act.⁵ The Act also does not apply when members

¹ Pub. L. No. 94-409, 90 Stat. 1241 (1976) (5 U.S.C. § 552b (2006)).

² 5 U.S.C. § 552b.

³ There are approximately 70 such agencies in the federal government. RICHARD K. BERG, STEPHEN H. KLITZMAN, & GARY J. EDLES, *AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT* 259–63 (2d ed. 2005).

⁴ 5 U.S.C. § 552b(c).

⁵ *See id.* § 552b(a)(2) (defining “meeting” as any gathering featuring deliberations of “at least the number of individual agency members required to take action on behalf of the agency”); *see also* S. REP. NO. 94-354, at 19 (1975).



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communicate with one another and reach a decision via the exchange of written documents, a procedure known as “notational voting.”⁶

The research conducted for the project shows that board and commission members dispose of a significant amount of business via means that are not subject to the Sunshine Act, relying especially heavily upon notational voting. For instance, of 32 agencies surveyed in connection with the research underlying this project, 14 (approximately 40%) reported that they disposed of more than 75% of matters using that procedure.⁷ As a consequence, many government transparency advocates have argued that agencies undermine the spirit of the Sunshine Act by relying excessively on methods of conducting business that fall outside of its scope.⁸ Agencies, in turn, contend that they could not operate efficiently were they required to reach all substantive decisions in public meetings.⁹

The Administrative Conference has addressed the Sunshine Act on two occasions, issuing recommendations designed to address concerns relating to the Act’s negative effects on collegial interactions among board and commission members, on the one hand, and to agencies’ overreliance upon means of conducting business that fall outside the Act’s scope, on the other. In 1984, the Conference recommended that “agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities . . . in closed meetings, when the discussions are preliminary in nature or pertain to matters . . . which are to be considered in a public forum prior to final action.”¹⁰ In 1995, a special committee convened by the Conference recommended that Congress establish a pilot program (lasting from five to

⁶ *Comm’ns Sys., Inc. v. Fed. Comm’ns Comm’n*, 595 F.2d 797, 798–99, 801 (D.C. Cir. 1978).

⁷ Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* 57 (Mar. 10, 2014) (citing to research conducted by Professor Bernard Bell), available at <http://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20CIRCULATED%203-10-14.pdf>.

⁸ *Id.* at 25.

⁹ *Id.* at 19–20.

¹⁰ Administrative Conference of the United States, Recommendation 84-3, ¶ 2, 49 Fed. Reg. 29,942 (July 25, 1984).



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seven years) that would allow members to meet privately so long as they provide a detailed summary of the meeting no later than 5 days after it has occurred.¹¹ In exchange, pilot program participants would agree to refrain from using notational voting on “important substantive matters,” instead addressing those issues in open meetings, and would “hold open public meetings, to the extent practicable, at regular intervals, at which it would be in order for members to address issues discussed in private sessions or items disposed of by notation.”¹² Because the Administrative Conference was defunded shortly after the special committee issued its report, this recommendation was never forwarded to the full Assembly for consideration in Plenary Session.

In the surveys conducted for this project, although agency officials express many of the same frustrations with the operation of the Sunshine Act that they voiced in the prior Administrative Conference studies, they indicated that they generally are able to conduct business under the existing regime and consider any legislative amendment of the statute to be unnecessary.¹³ Though governmental transparency advocates would prefer that agencies render more of their decisionmaking in open meetings, curtailing or eliminating the use of notational voting would prove disruptive to agencies’ ability to function effectively.¹⁴ At the same time, agencies can achieve greater transparency within the existing framework by apprising the public of their decisionmaking procedures and providing notice of business transacted outside of open meetings. In particular, agencies can exploit technological advances in order to disseminate information widely without incurring unreasonable costs. This recommendation highlights a number of best practices undertaken by agencies covered by the Act and encourages other agencies to consider these innovations and implement them as

¹¹ Administrative Conference of the United States, *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 427 (1997) (the meeting summary “would indicate the date, time, participants, [and] subject matters discussed, and [would contain] a review of the nature of the discussion”).

¹² *Id.* at 427–28.

¹³ Bull, *supra* note 7, at 17, 19–22.

¹⁴ *Id.* at 19–20.



appropriate, while preserving agency discretion to tailor the proposals to fit the needs of their individual programs.

RECOMMENDATION

1. Each covered agency should develop a succinct, public document that discusses the mechanisms for attending and participating in open meetings and discloses the agency's procedures for closing meetings and the Sunshine Act exceptions upon which the agency typically relies. It should also describe the types of business the agency conducts outside of open meetings (including via notational voting) and how the results are revealed to the public. Each such agency should post a copy of this document on its website and in other places in which it can be accessed by interested members of the public.

2. For open meetings, agencies should post a meeting agenda as far in advance of the meeting as possible. To the extent permitted under relevant agency policies, agencies should also post all documents to be considered during the course of the meeting on the agency website. In the event that the agency does not post meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred.

3. Agencies should create listservs that allow interested stakeholders and members of the public to obtain meeting notices and other announcements relevant to upcoming open meetings.

4. Agencies should consider providing webcasts of open meetings. If practicable, agencies should consider providing real-time streaming video of ongoing meetings, but, if this does not prove viable, agencies should consider providing an archived webcast after the meeting has occurred.

5. Consistent with legal obligations and policies concerning the protection of confidential information, agencies should provide a complete description of all substantive business conducted outside of open meetings, including matters disposed of in closed



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meetings, via notational voting, or through a series of one-on-one meetings of board or commission members.

6. Board and commission members of covered agencies should avoid email or other electronic exchanges in which the entire group can engage in an iterative exchange of messages. Email exchanges involving a substantive discussion over a relatively short period of time should be limited to groups of members smaller than a quorum. If the members actually intend to hold a “virtual meeting” via a series of electronic exchanges, they should consider using a web forum allowing members of the public to view the written exchanges.