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## A Little Shade, Please

*The Government-in-the-Sunshine Act isn't working.*

Recently I received a questionnaire from the Administrative Conference of the United States, soliciting my views on the effects of the Government in the Sunshine Act. That act requires that meetings of multi-member federal agencies generally be open to the public.

The conference asked "what impact, if any, this legislation has had on the quality and character of decision-making in collegial agencies subject to the Sunshine Act."

In addition to answering the specific questions, I sent the conference the following reply:

The declared policy of the Sunshine Act was "to provide the public with the fullest practicable information regarding the decision-making processes of the Federal Government," while "protecting . . . the ability of the Government to carry out its responsibilities."

Unfortunately, the act failed to achieve the balance recognized in its declaration of policy, and over the seven years since enactment, court interpretations have exacerbated an already difficult situation. In short, the act is counterproductive: it seriously impairs the ability of those relatively few agencies that are subject to its strictures to fulfill their responsibilities, and it fails to provide the public with useful information about the decision-making processes of government.

The Sunshine Act applies only to agencies of the federal government headed by a collegial body composed of two or more members, a majority of whom are appointed by the president with the advice and consent of the Senate. It does not apply to Cabinet departments or single-headed agencies, even though they perform functions closely analogous to those performed by the multi-headed agencies.

For example, the attorney general, whose office is not subject to the act, has law enforcement responsibilities similar to those of such independent regulatory agencies as the Federal Trade Commission and the Securities and Exchange Commission, which are subject to the act. The Office of the Comptroller of the Currency, a single-headed agency not subject to the act, performs regulatory functions virtually identical to those of the Federal Reserve Board, a multi-headed agency covered by the act.

Thus, despite its broad purpose, the act does not apply in an even-handed manner to all agencies of government. Moreover, many of the agencies to which the act applies are those least in need of open government procedures. Consider, for exam-

ple, the independent regulatory agencies. Their members hold fixed terms and are drawn from both parties. These factors make them the least susceptible to untoward interference.

The act stifles spontaneity, informality and flexibility. It suffocates the free, open and uninhibited exchange of ideas within a collegial body that promotes sound decision-making—the very purpose of providing for a collegial body, rather than a single head, to run the agency.

The act tends to shift power in a multi-headed agency from the collegial body to its chairman. Deliberative meetings involving a quorum of the collegial body cannot be held beyond the public gaze unless one of the statutory exemptions applies. This rule applies to meetings with and briefings by staff as well as persons from outside the agency, whether or not regulated by it.

As a result, the chairman typically meets with staff or outsiders alone, formulating policy without the benefit of timely and meaningful comment from other members of the collegial body. Although it would be possible to have multiple meetings, or for the chairman to communicate the results of his meetings to the others by memoranda, efficiency, time limits and practicality usually dictate otherwise.

If the collegial body were to open such meetings to the public, their effectiveness, in terms of the free flow of ideas and exchange of views, would be crippled. As a practical matter, it is rarely done. Thus, members of the collegial body other than the chairman must rely upon information collected by their staff from the chairman's staff and on comments made when the issues have reached the final decision-making stage. In particular, the chairman's meetings with the staff have a powerful tendency to shape the staff's responses and recommendations, which might well be different if it were possible for the other members to be present.

Granted that the act's goals are sound, experience proves that those goals are not being achieved. Open meetings are stilted. Candid debate shrinks from the public gaze, with grandstanding a frequent substitute. The need for open exchange of views and formulation of ideas through trial and error, argument and debate, is met through the devices mentioned, which frustrate the purpose of the act and, as an unfortunate byproduct, tend significantly to shift power from the collegial body to its chairman.



By Zarko Karabatic

The act's ineffectiveness is well illustrated by one "shortcoming" often mentioned by the media. At open meetings, discussion proceeds on the basis of intra-agency memoranda used by the staff to prepare the members. Frequent reference is made to various points of law or fact contained in these memoranda. The memoranda themselves are not given to the public. Nor are they required to be given. An important exemption under the Freedom of Information Act—exemption 5—protects pre-decisional material that, if disclosed, might have the effect of impairing the decision-making process.

On this point, one can observe a direct conflict in purpose between the FOIA exemption, which preserves the privacy of pre-decisional written materials, and the Sunshine Act, which compels disclosure of pre-decisional oral discussion. This dichotomy distorts the decision-making process because of the restraining effect that the public's presence has on the oral discussion. And, of course, since the public does not have the written materials, it is, at best, difficult and, often, impossible for the public to follow the discussion in a meaningful way.

It is precisely the lack of an analog to this FOIA exemption that creates the problem for collegial agencies under the Sunshine Act. Congress determined to impose the open meeting requirements on some agencies despite the strong public policy supporting government privilege and successfully advanced when FOIA was considered in 1966. FOIA protects the whole deliberative process. The policy underlying this protection of written material applies with equal force to oral presentations, discussions and debate.

The Sunshine Act should tolerate more darkness. It should be amended to accord "pre-decisional" discussion the same sun screen that the written materials on which that discussion is typically based enjoy under FOIA—and for the same reasons. Such an exemption should not significantly diminish the public's knowledge of the agency's decision-making process. But, even if a significant diminution would result, this modicum of darkness will serve the public interest, for the effectiveness of multi-headed agencies is now being seriously impaired, and the important public purposes of having more than one head are being significantly undermined, by the strictures of the Sunshine Act.

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