

**Government in the Sunshine Act Project  
Presentation to Regulation Committee  
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## **Background:**

The Government in the Sunshine Act (“the Sunshine Act”), 5 U.S.C. 552b, the federal “open meetings” law was enacted in 1976. It applies to boards and commissions that head agencies where a majority of the board/commission members are principal officers of the United States (*i.e.*, nominated by the President and confirmed by the Senate).

Several observations have consistently been made about the Sunshine Act:

1. Meetings have become inauthentic and ceased being fora for real deliberation.
2. Instead of considering matters jointly, board and commission members are isolated from each other.
3. Most of the real deliberation takes place out of public view by means of notation votes, serial meetings of less than a quorum of members, or use of staff as intermediaries.

This current study is somewhat open-ended, so that previously unidentified problems regarding the Sunshine Act or its implementation can be ascertained. Nevertheless, five aspects of the operation of the Sunshine Act merit attention.

**1. Does the Sunshine Act prohibit or discourage members of board and commission from engaging in discussions that would improve their decision-making, by failing to exempt certain preliminary or exploratory discussions? *If so, how can such an exemption be included in the Sunshine Act while preserving transparency? What metrics can be used to gauge the effect of any such changes?***

Discussion: One major long-term Sunshine Act issue has been whether all discussions among a quorum of board/commission members should be considered “meetings,” as defined in 5 U.S.C. § 552b(a)(2),<sup>1</sup> that must either be open to the public or closed solely pursuant to the ten exceptions enumerated in section 552b(c) (“the enumerated exemptions”). Both the United States Supreme Court and the influential first edition of the *Interpretive Guide to the Government in the Sunshine Act* have asserted that discussions among board/commission members need not be considered “meetings” if they are “informal background discussions that clarify and expose varying views” rather than discussions “focused on discrete proposals or issues so as to cause or be likely to cause individual participating members to form reasonably firm positions regarding

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<sup>1</sup> The Act defines “meeting” as follows:

“the term meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, . . .”

matters pending or likely to arise before the agency.”<sup>2</sup> While a few board/commissions have sought to interpret the Sunshine Act to permit “gatherings” that are not “meetings,” *i.e.*, interactions that are not likely to lead members to take firm positions on matters before the agency, most appear to avoid any discussion of substantive issues among a quorum of members in non-public sessions (unless one of the enumerated exceptions applies). Many suggest that board/commission members’ inability to informally exchange views undermines collegiality and leads agencies to avoid holding meetings. This study will examine these issues.

**2. Do agencies rely excessively on notation voting? Should limits be placed on the practice? What salutary practices that agencies should adopt with regard to notation voting?**

Discussion: The Sunshine Act’s legislative history made clear that the Sunshine Act was not intended to preclude agencies’ use of notation voting.<sup>3</sup> Notation voting undoubtedly has appropriate uses, particularly when an agency must decide a large number of non-controversial matters. However, notation voting serve as one means of avoiding the need to hold open public meetings. This study will examine the process of notation voting, when it is used, and whether it is abused.

**3. Do agencies make public sufficient information before open meetings so that public attendees can understand the matters being discussed and follow the discussion that occurs in open meetings?**

Discussion: A 1995 ACUS committee report expressed concern about the inadequacy of agency efforts to ensure that members of the public who attended open meetings could follow the proceedings.<sup>4</sup> Often attendees lacked access to the documents discussed at the meetings, making it difficult to understand the discussion. This study will seek to determine how, if at all, agencies have been addressing such concerns.

**4. What, if any, implications do e-mail and similar modes of communications have for the effectiveness of the Sunshine Act?**

Discussion: The Sunshine Act reflects an implicit assumption that board/commission deliberation occurs in meetings, a synchronous forum where statement and response

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<sup>2</sup> RICHARD K. BERG, STEPHEN H. KLITZMAN, & GARY J. ELDES, AN INTERPRETIVE GUIDE TO THE SUNSHINE ACT 14-15 (2d ed. 2005)(quoting first edition); *ITT v. FCC*, 466 U.S. 463 (1984).

<sup>3</sup> H. Rep. No. 94-1441 at 11; S. Rep. No. 94-1178 at 11, 94<sup>th</sup> Cong., 2d Sess. (1976); *Communications Systems Inc. v. Federal Communications Commission*, 595 F.2d 797, 800-801 (D.C. Cir. 1978). See BERG, ET AL., *supra* note 2, at 30-39.

<sup>4</sup> *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, reprinted in, 49 ADMIN. L. REV. 421 (1997).

happen very close in time. But much deliberation may take place in settings where communication is asynchronous, *i.e.*, where there is a lapse in time between statement and response. Technological changes since the adoption of the Sunshine Act have made it easier to communicate via memoranda or letter and have lead to e-mail and other computer-mediated communications (CMC). It is worth considering how heavily board/commission members are relying on e-mail and other modes of CMC. Perhaps written communications should be subject to disclosure under the Freedom of Information Act, by removing FOIA's "deliberative process privilege" for communications between commission/board members.<sup>5</sup>

#### **5. How often are exemptions invoked?**

Discussion: While the enumerated exemptions and their scope do not appear to have raised significant controversy, the frequency with which exemptions are invoked seems worthy of attention.

### **Research Plan:**

#### **Surveys**

**Questionnaire to Board/Commission General Counsel Offices (sent June 2011).** I sent a 19-question questionnaire to the General Counsels of "Sunshine" boards/commissions. The questionnaire tracked the 11-question questionnaire sent to agencies in 2001 by the authors of the second edition of *The Interpretive Guide to the Government in the Sunshine Act*.<sup>6</sup> It seeks basic information, such as the percentage of open and closed meetings (and the exemptions most often relied upon to justify closure), descriptions of practices or guidelines with regard to the Sunshine Act, and information regarding the filing of Sunshine Act reports. Other questions relate to notational voting, efforts to ensure that the public can follow meetings, policies regarding board/commission member interactions via e-mail, and information required of potential attendees to gain access to meetings. I have received substantive responses from approximately 32 General Counsel's offices.<sup>7</sup> I have supplemented at least two of the responses to the survey with follow up questions.

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<sup>5</sup> FOIA's deliberative process privilege is set forth in U.S.C. § 552(b)(5).

<sup>6</sup> A sample survey letter is reprinted in Exhibit B to *The Interpretive Guide to the Government in the Sunshine Act* 230-31 (2d ed.).

<sup>7</sup> I have received some responses indicating that the Sunshine Act does not apply to the entity.

## **Board/Commission Member Survey**

I am preparing to send out a 25-question survey to current members of boards and commissions. This second survey will ask the following types of questions:

- How often do members change their minds as a result of discussion in open meetings and closed meetings?
- What is the relative importance of various sources of information available to board/commission members for discovering their colleagues' views?
- What is the relative importance of various modes of interaction for resolving differences in commissioners' positions or narrowing issues in dispute?
- What influence do the views of other commissioners, the commission chair, personal staff, and agency staff have on commissioners' voting decisions?
- How do agencies use notational voting, particularly where either disagreement exists between board/commission members or questions involve novel matters of policy, fact, or law?
- Would closed brainstorming sessions for preliminary exploration of general issues be fruitful?
- How often do board/commissions members explain their views at open Sunshine Act meetings, and, for those who do not do so regularly, why do they not provide such explanations more often?
- How often do partisan affiliations significantly inhibit the ability of a board or commission to work together?

Obtaining a significant response rate will be crucial to this phase of the study. While, consistent with ACUS policy, I cannot promise to treat the responses as confidential (should ACUS receive a valid FOIA request for example),<sup>8</sup> Chairman Verkuil is making a personal appeal to respondents via a letter that will be sent with the survey. Respondents can complete the survey on Survey Monkey.

## **Other Research**

**Beneficiaries of the Sunshine Act.** I have spoken with a few journalists and representatives of public interest groups. I have had trouble identifying the members of the "open government"

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<sup>8</sup> However, I can and will promise that any report will report responses in an aggregate basis and that any text answer they provide will not be attributed to them.

community that have a deep interest in or knowledge of the Sunshine Act and/or board/commission open meetings.<sup>9</sup>

**State Practice.** I have reviewed state open meetings laws and practices with respect to some issues. My review of state law has been heavily dependent upon ANN TAYLOR SCHWING, *OPEN MEETING LAWS 2D* (2000), the major treatise on the subject.

**Review of Sunshine Act Regulations.** I have reviewed the Sunshine Act regulations of boards and commissions, particularly with regard to their definition of the term “meeting.”

**In-depth interviews.** I have conducted a few interviews with former board/commission members, scholars, or others who have studied these issues previously, and one two members of general counsel’s offices.

**Non-“Sunshine” Agencies.** One profitable approach might be to compare the practices at board and commissions not bound by the Sunshine Act with those that are. I have been in contact with two such entities<sup>10</sup> and have not received responses to relatively basic inquiries. Moreover, given the difficulty of getting answers from “Sunshine” agencies, getting responses from agencies from agencies that are not even subject to the Act is not promising.

**Previous Studies:**

These studies provide a backdrop for the present research project:

1978 — David M. Welborn, William Lyons & Larry Thomas, *Implementation and Effects of the Federal Government in the Sunshine Act, Background Report for Recommendation 84-3*

1986 — Rogelio Garcia, *Government in the Sunshine: Public Access to Meetings Held Under the Government in the Sunshine Act, 1979-1984* (Congressional Research Service)

1988— GAO, *Government in the Sunshine Act Compliance at Selected Agencies* (GAO/GGD 88-97)

1995 — *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, reprinted in. 49 ADMIN. L. REV. 421 (Spring 1997)

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<sup>9</sup> The Open Government Community has a much greater interest in FOIA issues.

<sup>10</sup> The Indian Gaming Commission and Amtrak.