The original documents are located in Box 55, folder "9/13/76 S5 Government in the Sunshine Act (1)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
SEP 13 1976

ceremony - Rose Garden
12 noon
statement released 9/13/76

THE WHITE HOUSE

WASHINGTON

ACTION

Last Day: September 13

September 10, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Enrolled Bill S. 5 - Government in the Sunshine Act

This is to present for your action S. 5, a bill that:

-- requires generally that meetings of the members of multiheaded Executive agencies be open to public observation with certain specified exceptions;

-- establishes procedures for closing certain meetings to the public;

-- provides for judicial review of agency action regarding open meetings and related provisions;

-- prohibits ex parte communications in certain administrative hearings;

-- amends the Freedom of Information and Federal Advisory Committee Acts.

BACKGROUND

The purpose of S. 5 is to increase the opportunity for the public to observe governmental decision-making and to thereby enhance the public's faith in the integrity of government. Congressional support for the bill during its consideration was overwhelming. The conference version of S. 5 passed the House by a unanimous recorded vote (384-0) and the Senate by voice vote on August 31, 1976.

S. 5 would require multiheaded agencies, e.g., the independent regulatory agencies and other agencies such as the Civil Service Commission, the United States Postal Service, the Export-Import Bank and the governing board of the National Science Foundation, to hold their meetings open to the public unless any of ten specific reasons for holding closed meetings is present. These agencies would be required to give advance

notice of meetings where possible. In addition, verbatim transcripts of certain closed meetings would be made available to the public. The bill affords judicial remedies when an agency has not complied with these procedures.

Additional discussion of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

Agency Recommendations

Of the twenty-four departments and agencies who reviewed this bill, only two recommend a veto. HEW disapproves on the grounds that the bill threatens the personal privacy of persons whose social security records may, in consequence of the bill, become public knowledge. The Federal Home Loan Bank Board expressed the fear that in some cases, opening meetings to the public would handicap its ability to discharge its responsibilities and obligations.

Staff Recommendations

OMB, Max Friedersdorf, Counsel's Office (Lazarus), NSC and I recommend approval of the enrolled bill and the signing statement which has been cleared by the White House Editorial Office (Smith).

RECOMMENDATION

That you sign S. 5 at Tab B.

That you approve the signing statement at Tab C.

Approve MC Disapprove _____

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 8 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 5 - Government in the Sunshine Act
Sponsor - Sen. Chiles (D) Florida and 40 others

Last Day for Action

September 13, 1976 - Monday

Purpose

Requires generally that meetings of the members of multiheaded Executive agencies be open to public observation with certain specified exceptions; establishes procedures for closing certain meetings to the public; provides for judicial review of agency action regarding open meetings and related provisions; prohibits ex parte communications in certain administrative hearings; and amends the Freedom of Information and Federal Advisory Committee Acts.

Agency Recommendations

Office of Management and Budget	Approval (Signing statement attached)
Consumer Product Safety Commission	Approval
Civil Service Commission	Approval
Equal Employment Opportunity Commission	Approval
Nuclear Regulatory Commission	Approval (Informally)
Civil Aeronautics Board	No objection
Export-Import Bank	No objection
Federal Deposit Insurance Corporation	No objection
Federal Power Commission	No objection
Interstate Commerce Commission	No objection (informal)
National Labor Relations Board	No objection
National Transportation Safety Board	No objection
United States Postal Service	No objection
National Science Foundation	No objection

Securities and Exchange Commission	No objection (Informally)
Department of Health, Education and Welfare	Disapproval
Federal Home Loan Bank Board	Disapproval
Department of Commerce	No recommendation (Signing statement attached)
Federal Maritime Commission	No recommendation
National Mediation Board	No recommendation
Department of Justice	Defers
Federal Communications Commission	No comment (informal)
Overseas Private Investment Corporation	No comment (informal)
Federal Reserve Board	No recommendation received

Discussion

The avowed purpose of S. 5 is to increase the opportunity for the public to observe governmental decisionmaking and to enhance, thereby, the public's faith in the integrity of government. The bill's sponsors have urged "that the Government should conduct the people's business in public." The various articulations of this theme by the sponsors and the difficulties in opposing "Sunshine" have led to overwhelming Congressional support for the bill during its consideration. The conference version of S. 5 passed the House by a unanimous recorded vote (384-0) and the Senate by voice vote on August 31, 1976. Efforts by OMB and other Executive agencies to remedy numerous drafting problems, and to remove or amend provisions in the bill, have either been successful or have resulted in acceptable compromises. Nevertheless, several agencies have serious concerns with features of the enrolled bill, and two recommend a veto.

S. 5 would require multiheaded agencies, e.g., the independent regulatory agencies and other agencies such as the Civil Service Commission, the United States Postal Service, the Export-Import Bank and the governing board of the National Science Foundation, to hold their meetings open to the public unless any of ten specific reasons for holding closed meetings is present; to give advance notice of meetings where possible; to make verbatim transcripts of certain closed meetings and make them available to the public; and to afford judicial remedies when an agency has not complied with these procedures.

Specifically, the enrolled bill contains the following provisions:

Open meetings -- The bill would require all agencies headed by a collegial body, a majority of whose members are appointed by the President and confirmed by the Senate, to open essentially all business meetings of two or more members for public observation unless a majority of members properly votes to close a meeting. About 50 agencies would be subject to this requirement according to the reports of the House and Senate committees.

A covered "meeting" would be defined as any gathering of a quorum of the agency members in which the deliberations determine or result in the joint conduct or disposition of agency business. This definition could include conference telephone calls, but would not prevent agency members from individually considering business that is sequentially circulated to them in writing. Whenever possible, the agency would have to provide one week's advance public notice of the date, place, and subject matter of the meetings, as well as state whether or not the meeting is open or closed to the public.

Exemptions from open meeting requirement -- A meeting, or portions of a meeting, could be closed, if deliberations are likely to concern:

(1) national defense or foreign policy matters classified by Executive Order;

(2) internal personnel rules and practices;

(3) information specifically exempted by other statutes from disclosure, provided that the statutes either (a) specifically require that the information be withheld from the public, or (b) establish particular criteria for withholding information or refer to particular types of information to be withheld;

(4) trade secrets or financial or commercial information obtained under a pledge of confidentiality;

(5) the accusation of a crime or formal censure;

(6) information the disclosure of which would constitute an unwarranted invasion of personal privacy;

(7) certain law enforcement investigatory information, including oral information that, if written, would be included in investigatory records compiled for law enforcement purposes;

(8) bank examination records and similar financial audits to be used by an agency regulating or supervising financial institutions;

(9) information either (a) used by an agency regulating currencies, securities, commodities, or financial institutions, where premature disclosure could lead to significant financial speculation or endanger the stability of any financial institution, or (b) which, if disclosed prematurely, would frustrate a proposed agency action, unless the agency has already disclosed the nature or content of its proposed action or is required by law to disclose such information prior to taking final action;

(10) the agency's involvement in Federal or State civil actions, an action in a foreign court or international tribunal, an arbitration, or a formal agency adjudication.

To avoid conflict with other law, the enrolled bill states that these exemptions do not authorize the closing of an agency meeting otherwise required by law to be open nor does it authorize the withholding of information normally accessible under the Freedom of Information Act, except that the exemptions of this bill would govern in any request for transcripts, recordings or minutes of a closed agency meeting.

Procedural requirements for closing meetings -- A majority record vote of either the whole agency or the subdivision authorized to act on behalf of the agency would be required to close all or a portion of a meeting. No proxy votes would be allowed and the agency would have to publish within one day the recorded vote of each member and an accompanying written explanation of the reasons for closing the meeting. Agencies, a majority of whose meetings concern the exemptions covering trade secrets, information that might lead to financial speculation, bank condition reports or agency litigation, arbitration, and adjudications, could provide by regulation for the closing of such meetings or relevant portions thereof. Closing procedures and the advance public notice requirements would not apply to meetings, or portions of meetings, closed by regulation. Verbatim transcripts or electronic recordings would be required for each meeting or portion closed to the public, except that agencies holding meetings closed under the bank reports, sensitive financial information, and adjudicatory or civil action exemptions may elect to make either a transcript, a recording, or minutes.

Regulations and reports -- Each agency would be required to promulgate implementing regulations within 180 days of enactment, following both consultation with the Chairman of the Administrative Conference and publication in the Federal Register for at least 30 days with opportunity for public comment. Each agency would also be required to report annually to Congress the numbers of open and closed meetings, reasons for closings, and descriptions of any litigation against the agency under the "open meeting" provisions.

Judicial review -- To ensure agency compliance with the above procedural requirements, S. 5 would permit an action to be brought by any person in the U.S. District Court in the district where the meeting was held, the district in which the agency headquarters are located, or the District of Columbia for any violation of the "open meeting" requirements. In each such suit, the burden would be on the agency. Although the court would be empowered to enforce the "open meetings" provision by declaratory judgment, injunctive relief, or other appropriate measures, the legislative history makes it clear that the court would not have jurisdiction to set aside agency action taken at an improperly closed meeting unless the violation was serious, intentional, or prejudicial. This is roughly the same as existing administrative law provisions.

In addition, the court could assess reasonable attorney fees and other litigant costs against the United States if the plaintiff substantially prevailed against the agency; the liability of individual agency officials has been eliminated. Such costs could also be assessed against the plaintiff when the court finds that the suit was initiated for "frivolous or dilatory purposes."

Ex parte communications -- The Administrative Procedure Act's provisions regarding statutorily required agency rulemaking hearings and adjudications would be amended to prohibit ex parte communications between agency officials and interested persons outside the agency. Any agency member, administrative law judge, or cognizant agency employee would be required to place any such communication on the public record of the proceeding. Violation of this prohibition could become the sole grounds for an adverse decision against the violating party, notwithstanding the normal rule that agency adjudications should be based upon the record as a whole.

Freedom of Information Act (FOIA) amendments -- The exemption in the FOIA from disclosure of information "specifically exempted from disclosure by statute" would be amended to conform to the counterpart Sunshine exemption; the FOIA exemption would be narrowed to include only information which a statute specifically requires to be withheld or information for which a statute establishes particular criteria for withholding or refers to particular types of matters to be withheld. This provision would overrule statutes which generally permit withholding information, as well as a 1975 Supreme Court decision upholding the current FOIA exemption. For example, the amended FOIA exemption would no longer support the general statutory authority of the Department of Health, Education and Welfare under the Social Security Act to issue regulations governing disclosure of information contained in social security files.

Federal Advisory Committee Act amendments -- This Act would be amended to make the basis for closing meetings of advisory committees the same as the exemptions for closing meetings of these multiheaded agencies. Currently, advisory committee meetings may be closed for the same reasons that documents may be withheld under the FOIA.

Comments

The enrolled bill accommodates many of the major objections raised by OMB, the Department of Justice, and the independent regulatory agencies, particularly the Federal Reserve Board (FRB) and the Securities and Exchange Commission (SEC). Important changes urged by these agencies and incorporated in the enrolled bill are:

-- Deletion of the provision permitting civil actions to be brought against the individual members of the agencies for asserted violations of the Act.

-- Limiting of the amendment to the Freedom of Information Act to avoid repealing many statutes which permit withholding of certain information.

-- Limiting of the venue provisions for enforcement of the Act.

-- Eliminating the requirements for a verbatim transcript for the sensitive meetings of the FRB and SEC.

-- Having meetings only of a more formal nature covered by the bill (the legislative history eliminates social gatherings).

Although Executive branch efforts to amend or delete unacceptable provisions were generally successful in the House, some objectionable features remain in the bill. Specifically, the Executive branch objections not fully accommodated in the enrolled bill concern:

-- The ambiguous and uncertain scope of the definition of agencies covered. In this regard, we urged that the agencies be listed to avoid unnecessary confusion and litigation, and, in particular, to make certain that such Presidential advisory bodies as the National Security Council and the Council of Economic Advisers would not be affected by the bill. Although the enrolled bill does not enumerate the agencies covered, the legislative history makes clear that the bill does not apply to these White House bodies. In addition, the reports of the Senate Government Operations and the House Judiciary Committees contain identical lists of agencies covered, thereby mitigating concerns in this regard.

-- The definition of "meeting." A meeting is defined in the enrolled bill as the "deliberations" of a quorum of agency members which result in the "joint conduct or disposition of official agency business." This definition makes the public notice and open meeting requirements of the bill dependent upon what occurs; the Administration had urged a more traditional definition -- a gathering held for the purpose of jointly conducting agency business, to afford a more meaningful standard upon which to demonstrate a valid reason for a closed meeting. In addition, in its attached views letter, Justice states that terms such as "deliberations" and "joint conduct or disposition of official agency business" are unclear and it is not certain how this definition applies to informal discussions among agency members.

Although the enrolled bill does not reflect the Administration's recommended definition, the compromise definition in the bill may well result in judicial application of a "purpose" test. Moreover, the legislative history makes clear that "informal gatherings" would not ordinarily be subject to the public notice and open meeting requirements. Likewise, the bill requires the courts to consider "orderly administration and the public interest" when determining whether or not to enjoin an agency action taken in a meeting.

-- Verbatim transcripts of all closed meetings. The Chairmen of the Federal Reserve Board and the Securities and Exchange Commission, among others, strongly objected to earlier requirements that transcripts be maintained for closed meetings dealing with sensitive financial and securities matters. To accommodate these concerns, the enrolled bill would give such agencies the option of whether to maintain transcripts, recordings, or minutes of these meetings, which is an acceptable compromise.

-- Freedom of Information Act (FOIA) Amendment. As discussed earlier, one provision in the FOIA allows information to be withheld from disclosure by Federal agencies if there is a general statutory authorization to do so. Section 5(b) of the enrolled bill would amend the FOIA to substantially narrow the scope of the current exemption by limiting it to situations in which a statute either requires that information be withheld, establishes particular criteria for withholding, or refers to particular types of matters to be withheld. Primarily because of the manner in which this FOIA amendment was developed, there is significant uncertainty as to which statutes will be judicially interpreted to be no longer a basis for withholding information. Only two such statutes are mentioned in the legislative history, section 1104 of the Federal Aviation Act of 1958 and section 1106 of the Social Security Act.

HEW strongly objects to this amendment because it precludes use of the Department's current authority under section 1106 of the Social Security Act, in conjunction with the current FOIA exemption, to issue regulations governing, and, therefore, restricting the disclosure of information contained in social security files. Consequently, HEW recommends that the enrolled bill be disapproved because the Department claims it would diminish HEW's authority to safeguard confidential information of a personal character collected in the administration of the social security system except where disclosure is a clearly unwarranted invasion of personal privacy. HEW states, in its attached views letter, that this amendment would force it to accommodate inquiries as to an individual's "medical condition, wage history, amount of benefit entitlement, past and present places of employment or residence, current or previous marital or dependency status, or date of birth."

Similarly, the Department of Commerce objects to the amendment alleging a lack of adequate consideration by the Congress and opportunity for agency comment on its effect on governmental operations involving information confidentially obtained -- a practice recognized in "over 100 statutes" enacted by prior

Congresses. (However, we note that this provision was the subject of deliberation and debate in both the House Government Operations and Judiciary Committees, and the Conference committee ultimately adopted the Judiciary committee version.)

In the event of approval of S. 5, both HEW and Commerce recommend that your signing statement urge the passage of legislation that would either repeal or remedy this provision. We concur with the latter view that remedial legislation may be warranted, because of the absence of an adequate legislative record as to what was intended and the uncertainty of judicial interpretation in this regard. However, we do not concur with recommendations of HEW that S. 5 warrants disapproval solely because of what is, in fact, substantial uncertainty on what information must be disclosed under the bill. We do not believe that it is Congress' intention, nor will it be judicially determined, that this amendment is intended to overturn in a wholesale fashion the guarantees against disclosure of information gathered by an agency on a pledge of confidentiality as sought under the Social Security Act and other statutes.

Moreover, we understand that the effect of this amendment is not that all previously exempt information will be made available to the public, since other exemptions in the FOIA should be applicable to significant portions of this information. Additional legislation may be needed to amend the statutes eliminated by this amendment if the other exemptions from public disclosure in FOIA are not available or are too burdensome to apply on a document-by-document basis. In a draft signing statement attached to this memorandum, we have proposed that you indicate your concern over the scope of this amendment and the likelihood that corrective legislation will be required.

Conclusion

Many of the agencies, in their enclosed enrolled bill letters, express serious reservations about the effect of this legislation on their operations. They claim, for example, that the bill will entail substantial administrative problems, that the requirement for verbatim transcripts will be burdensome, that the bill will be costly and that it may inappropriately open agency deliberations to public scrutiny. The Federal Home Loan Bank Board is so concerned over these possible effects that it recommends your disapproval of S. 5.

Implementing the "open meeting" and other provisions of S. 5 will be initially burdensome, the potential immediate increase in administrative costs to the government is uncertain, and the long-term budgetary impact is unknown. However, these concerns when presented as arguments against the enrolled bill's "open meeting" procedures were consistently and overwhelmingly rejected by Congress.

The bill, taken as a whole, is as reasonable an approach to the subject of "openness" in government as can be expected at this time, and we recommend its approval. Agency experience in implementing S. 5 will probably indicate the desirability of amendments, and these can be proposed as necessary. The attached signing statement notes the need for monitoring the bill's implementation in this regard.

Naomi R Sweeney

Acting Assistant Director
for Legislative Reference

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

9/3

To: J. Johnston 9-8-76 6:30 p.m.

SEP 8 1976

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Last Day for Action

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National Labor Relations Board	No objection
National Transportation Safety Board	No objection
United States Postal Service	No objection
National Science Foundation	No objection

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Department of Health, Education and Welfare	Disapproval
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-- Freedom of Information Act (FOIA) Amendment. As discussed earlier, one provision in the FOIA allows information to be withheld from disclosure by Federal agencies if there is a general statutory authorization to do so. Section 5(b) of the enrolled bill would amend the FOIA to substantially narrow the scope of the current exemption by limiting it to situations in which a statute either requires that information be withheld, establishes particular criteria for withholding, or refers to particular types of matters to be withheld. Primarily because of the manner in which this FOIA amendment was developed, there is significant uncertainty as to which statutes will be judicially interpreted to be no longer a basis for withholding information. Only two such statutes are mentioned in the legislative history, section 1104 of the Federal Aviation Act of 1958 and section 1106 of the Social Security Act.

HEW strongly objects to this amendment because it precludes use of the Department's current authority under section 1106 of the Social Security Act, in conjunction with the current FOIA exemption, to issue regulations governing, and, therefore, restricting the disclosure of information contained in social security files. Consequently, HEW recommends that the enrolled bill be disapproved because the Department claims it would diminish HEW's authority to safeguard confidential information of a personal character collected in the administration of the social security system except where disclosure is a clearly unwarranted invasion of personal privacy. HEW states, in its attached views letter, that this amendment would force it to accommodate inquiries as to an individual's "medical condition, wage history, amount of benefit entitlement, past and present places of employment or residence, current or previous marital or dependency status, or date of birth."

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In the event of approval of S. 5, both HEW and Commerce recommend that your signing statement urge the passage of legislation that would either repeal or remedy this provision. We concur with the latter view that remedial legislation may be warranted, because of the absence of an adequate legislative record as to what was intended and the uncertainty of judicial interpretation in this regard. However, we do not concur with recommendations of HEW that S. 5 warrants disapproval solely because of what is, in fact, substantial uncertainty on what information must be disclosed under the bill. We do not believe that it is Congress' intention, nor will it be judicially determined, that this amendment is intended to overturn in a wholesale fashion the guarantees against disclosure of information gathered by an agency on a pledge of confidentiality as sought under the Social Security Act and other statutes.

Moreover, we understand that the effect of this amendment is not that all previously exempt information will be made available to the public, since other exemptions in the FOIA should be applicable to significant portions of this information. Additional legislation may be needed to amend the statutes eliminated by this amendment if the other exemptions from public disclosure in FOIA are not available or are too burdensome to apply on a document-by-document basis. In a draft signing statement attached to this memorandum, we have proposed that you indicate your concern over the scope of this amendment and the likelihood that corrective legislation will be required.

Conclusion

Many of the agencies, in their enclosed enrolled bill letters, express serious reservations about the effect of this legislation on their operations. They claim, for example, that the bill will entail substantial administrative problems, that the requirement for verbatim transcripts will be burdensome, that the bill will be costly and that it may inappropriately open agency deliberations to public scrutiny. The Federal Home Loan Bank Board is so concerned over these possible effects that it recommends your disapproval of S. 5.

Implementing the "open meeting" and other provisions of S. 5 will be initially burdensome, the potential immediate increase in administrative costs to the government is uncertain, and the long-term budgetary impact is unknown. However, these concerns when presented as arguments against the enrolled bill's "open meeting" procedures were consistently and overwhelmingly rejected by Congress.

The bill, taken as a whole, is as reasonable an approach to the subject of "openness" in government as can be expected at this time, and we recommend its approval. Agency experience in implementing S. 5 will probably indicate the desirability of amendments, and these can be proposed as necessary. The attached signing statement notes the need for monitoring the bill's implementation in this regard.

Naomi R Sweeney

Acting Assistant Director
for Legislative Reference

Enclosures

SIGNING STATEMENT

I have today signed into law S. 5, known as the "Government in the Sunshine Act". I strongly endorse the concept which underlies this legislation -- that most of the decisionmaking business of regulatory agencies can and should be open to the public.

Under this new law, certain agencies, such as the Securities and Exchange Commission, the Civil Service Commission and the National Science Board -- approximately 50 in all -- are required to give advance notice of and hold their business meetings open to public observation, unless the agency votes to close a session for a specific reason set forth in the Act. Verbatim transcripts would be required to be maintained and made available to the public for many of the closed meetings.

Communications between agency officials and outside persons having an interest in a statutorily required hearing or an adjudication are prohibited. Furthermore, the provision of the Freedom of Information Act which permits an agency to withhold certain information when authorized to do so by statute has been narrowed to authorize such withholding only if the statute specifically prohibits disclosure or establishes particular criteria for the withholding or refers to particular types of matters to be withheld. The new Act also amends the Federal Advisory Committee Act to permit the closing of such committee meetings for the same reasons meetings may be closed under this Act.

I wholeheartedly support the objective of Government in the Sunshine. I am concerned, however, that in a few instances unnecessarily ambiguous and perhaps harmful provisions were included in S. 5.

The most serious problem concerns the Freedom of Information Act exemption for withholding information specifically exempted from disclosure by another statute. While that exemption may well be more inclusive than necessary, the amendment in this Act was the subject of many changes and was adopted without a clear or adequate record of what statutes would be affected and what changes are intended. Under such circumstances, it can be anticipated that many unintended results will occur including adverse effects on current protections of personal privacy, and further corrective legislation will likely be required.

Moreover, the ambiguous definition of the meetings covered by this Act, the unnecessary rigidity of certain of the Act's procedures, and the potentially burdensome requirement for the maintenance of transcripts are provisions which may require modification. Implementation of the Act should be carefully monitored by the Executive branch and the Congress with this in mind.

Despite these concerns, I commend the Congress both for its initiative and the general responsiveness of this legislation to the recommendations of my Administration that the "Government in the Sunshine Act" genuinely benefit the American people and their Government.

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

SEP 7 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C. 20503

Attention: Assistant Director for
Legislative Reference

Dear Mr. Lynn:

This letter is in response to the Office of Management and Budget's request for the views and recommendations of the Consumer Product Safety Commission on S.5, an enrolled bill

> "To provide that meetings of Government agencies shall be open to the public and for other purposes."

The bill, cited as the "Government in the Sunshine Act" would provide for open meetings of the heads of certain agencies and would prohibit ex parte communications between agency officials and outside parties regarding matters under adjudication or subject to formal rulemaking by the agency.

The Commission supports the President's signing of S.5 with the belief that it will enhance public confidence in the federal regulatory process as well as increase citizen awareness and participation in governmental decisions.

The Commission has, since its inception, implemented an open meetings policy (16 CFR PART 1012) which is similar to that prescribed in Section 3 of the enrolled bill. Accordingly, it is predicted that the enactment of S.5 will not have a significant impact on Commission costs or savings.

From its experience the Commission can report that the implementation of its openness policy has not, in any significant degree, increased normal operating costs. Whatever increased administrative burden there has been is, in the Commission's opinion, outweighed by the beneficial effects of the openness policy.

The Commission recommends approval of S.5.

Sincerely,

S. John Byington
Chairman

cc: The Honorable, The Speaker of the House of Representatives

cc: The Honorable, The President of the Senate

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

September 7, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D.C.

Attention: Assistant Director for
Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of the Civil Service Commission on enrolled bill S. 5, "To provide that meetings of Government agencies shall be open to the public, and for other purposes."

This bill, the "Government in the Sunshine Act" requires that meetings of agencies headed by two or more persons, such as the Civil Service Commission, shall be open to public observation with limited exemptions patterned on the exemptions in the Freedom of Information Act.

The Commission urged the appropriate Congressional committees and subcommittees to exempt from the legislation Commission meetings dealing with Government-wide personnel rules and practices and Government-wide labor-management relations policy. We sought this on the grounds that the Commission, unlike other multi-headed commissions, does not regulate, in the usual sense of that term, any segment of the economy affecting the general public. Rather, our primary mission is to provide leadership and regulatory direction to the central personnel program of the executive branch. The House Government Operations Committee expressed some support for the Commission's position by a statement in its report on the House version of the bill (Report 94-880, Part I, March 8, 1976, page 12) to the effect that Commission discussions on labor negotiation strategy for other agencies could come within the bill's exemptions.

The Commission shares the view that the opening of the vast majority of the meetings of most agencies is a very desirable and worthwhile end. However, we are greatly concerned about the heavy administrative burdens this legislation will impose on agencies with respect to scheduling and structuring their meetings and providing accommodations and facilities for the general public. We are also concerned that the presence of the general public during agency deliberations will inhibit the frankness and candor of discussions which is so vital to the formulation of

agency decisions. We fear that the ability of agencies to adopt flexible positions will be weakened by the presence of potential adversary parties at the deliberations of their heads.

Therefore, if the President signs this bill, we urge that he point out these concerns respecting the administration of its provisions and warn that close attention should be paid by the Congress to the implementation of the legislation in order that legislation to correct difficulties which are encountered can be quickly passed.

By direction of the Commission:

Sincerely yours,

Bob

Chairman

P.S. This is bad legislation but under the circumstances I think it should be signed but going on record that it may be necessary to amend at a later date.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE
VICE CHAIRMAN

September 7, 1976

Mr. James M. Frey
Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This letter is in response to your request for the comments of this agency concerning enrolled bill S.5. We have reviewed the provisions of this bill. It is our view that the Government in the Sunshine Act, although creating a number of heavy burdens for the Commission, can be implemented. Generally, we support the bill.

Our most serious difficulty lies not with the opening of portions of Commission meetings to the public but with revising the Third exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(3). See § 5 of S.5. This section will require the Commission to reassess its policy in interpreting the confidentiality provisions of our statute with respect to disclosure of charge files to charging parties who allege employment discrimination on the basis of race, religion, sex, color or national origin. We regularly schedule cases to be presented for possible investigation or litigation (exempt from disclosure under §§ (c)(7) and (10) of S.5). Furthermore, we regularly discuss matters which are confidential by statutory mandate under §§ 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(b) and § 2000e-8(e). In addition, appeals from Freedom of Information Act decisions need to be analyzed because many requests are received from parties aggrieved or charged companies, and disclosure of their requests to the public would violate § 706(b) of Title VII.

Other causes for concern include the requirement for new regulations, new procedures for opening and closing Commission meetings, and, of course, the need for additional staff.

Also, it is noted that § (d) of the bill provides that actions to close meetings require the vote of a majority of the entire membership of the agency, not a majority of a quorum as is presently the custom of this Commission.

In conclusion, the Commission will be required to overcome a number of problems associated with implementation and management of S.5. On the whole, however, the Commission does support the principle of opening its meetings, except those portions exempted, to the public.

Sincerely,

Ethel Bent Walsh

Ethel Bent Walsh
Vice Chairman

THE CHAIRMAN
OF THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

SEP 7 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Miss Martha Ramsey

Dear Mr. Lynn:

This is in response to your request for the Board's views and recommendations on Enrolled Bill S. 5, the "Government in the Sunshine Act."

The Board has previously expressed views on various aspects of the legislation in the course of the legislative process.

On balance, the Board has no objection to the President's signing of the legislation.

Sincerely,

John E. Robson

John E. Robson
Chairman

EXPORT-IMPORT BANK OF THE UNITED STATES
WASHINGTON, D.C. 20571

CABLE ADDRESS "EXIMBANK"
TELEX 89-461

September 3, 1976

The Honorable James T. Lynn
Director
Office of Management and Budget
17th and Pennsylvania Avenues, N. W.
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to the request of the Office of Management and Budget for the views and recommendations of the Export-Import Bank of the United States on enrolled bill, S. 5 "To provide that meetings of Government agencies shall be open to the public, and for other purposes." I am pleased to inform you that the Bank has no objection to signature by the President of the enrolled bill.

Eximbank fully supports the policy underlying the enrolled bill of providing the public with maximum information on the decision making processes of the U.S. Government. In general, the drafters of the enrolled bill have successfully balanced that policy against the need to protect the rights of individuals and the ability of Government agencies to perform their functions. Nevertheless, the provision requiring the maintenance of a verbatim transcript or electronic recording should not apply to an agency like the Bank, when virtually all of its meetings will be closed to the public under exemption (c)4 of the enrolled bill (relating to trade secrets and confidential information). As a result, considerable time and expense will be incurred by the Eximbank staff in complying with this requirement, without, however, any benefit being derived by the public.

I would note that the drafters of the enrolled bill recognized the validity of not requiring agencies that close meetings by virtue of exemptions (c)8, 9(A) or 10 (relating to bank reports, information likely to lead to financial speculation and adjudicatory proceedings or civil actions) to maintain transcripts or recordings, by

permitting them instead to keep a set of minutes. I recommend, therefore, that the President consider submitting remedial legislation to Congress at the earliest practicable time to permit agencies closing meetings not only under exemptions (c)8, 9(A) and 10, but under 4 as well to keep minutes instead of a verbatim transcript or electronic recording.

Sincerely yours,

R. Alex McCullough

R. Alex McCullough
Director

FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C. 20429

OFFICE OF THE CHAIRMAN

September 7, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Dear Mr. Lynn:

By enrolled bill request dated September 2, 1976, your Office requested the Corporation's views and recommendation on S. 5, 94th Congress, an enrolled bill cited as the "Government in the Sunshine Act."

The enrolled bill would provide generally that meetings of Presidentially appointed Federal agency members authorized to act on the agency's behalf shall be open to the public and would establish certain requirements and procedures applicable to the holding of such meetings. The bill contains a list of 10 exemptions from its open meeting and disclosure requirements. This list includes meetings or information involving internal personnel matters, material of a personal nature where disclosure would be an unwarranted invasion of privacy, accusations of a crime or, in some instances, investigatory records compiled for law enforcement purposes.

Of special interest to the FDIC are three further exemptions covering trade secrets and confidential financial or commercial information, information the premature public disclosure of which would "significantly endanger the stability of any financial institution," and "information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." In this connection, the bill sets forth a special procedure whereby any agency a majority of whose meetings will be properly closed to the public pursuant to any of these three exemptions may provide by regulation for the closing of such meetings or portions thereof, so long as a majority of the agency members votes at the beginning of the meeting or portion thereof to close the meeting and a copy of such vote is made public. The agency would be required to make a public announcement of the date, place and subject matter of meetings so called, at the earliest practicable opportunity (except to the extent that to do so would disclose exempt information).

An agency would be required to make a verbatim transcript or electronic recording of each meeting or portion thereof closed to the public, except that for meetings closed under regulations issued pursuant to the special procedure described above, the agency may elect to make either a transcript, a recording, or minutes. If minutes are kept, they would have to fully and clearly describe all matters discussed, provide a full and accurate summary of any actions taken and the reasons expressed therefor, and include a description of each of the views expressed on any item. The minutes would also have to reflect the vote of each member on any roll call taken during the proceedings and identify all documents considered at the meeting.

The enrolled bill also contains provisions prohibiting ex parte communications by or with agency members or employees involved in the decisional process of a rule making or adjudicatory proceeding if a hearing on the record is required under the terms of the Administrative Procedure Act.

In our opinion, the enrolled bill contains provisions designed to accurately take into account the confidential nature of the bank regulatory process. Accordingly, we would interpose no objection to Presidential approval of the bill.

Very truly yours,

Robert E. Barnett

Robert E. Barnett
Chairman

FEDERAL POWER COMMISSION
WASHINGTON, D.C. 20426

SEP 3 1976

ENROLLED BILL, S. 5 - 94th Congress
To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Honorable James T. Lynn
Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Miss Martha Ramsey
Legislative Reference Division
Room 7201, New Executive Office Building

Dear Mr. Lynn:

This letter responds to Mr. Frey's request of September 2, 1976, for the Commission's views on S. 5, an Enrolled Bill, providing for meetings of Government Agencies to be open to the public.

The Federal Power Commission has no objection to the enactment of the Enrolled Bill.

The meetings of the Federal Power Commission have been open to the public since April 21 of this year. The policy of opening the meetings was instituted by FPC Administrative Order No. 160, issued April 1, 1976. The meetings are open to public observation subject to exemptions similar to those defined in 552b(c) of the Enrolled Bill. The Commission gives advance notice of the date, time, and place of each meeting, the subject matter, whether it is open, and the name and telephone number of the Commission official who is to respond to requests for information about the meeting. Our experience with open Commission meetings which were instituted on an experimental basis has been extremely positive.

Section 4 of the Enrolled Bill would add to the Administrative Procedure Act a new subsection, 5 U.S.C. 557(d)(1), on ex parte communications in agency proceedings. Ex parte communications between an interested person and a member of the agency, administrative law judge, or employee who is or may reasonably be expected to be involved in the decisional process of a proceeding are prohibited.

The Federal Power Commission recently broadened its rules against ex parte communications to clarify that those rules (18 C.F.R. 1.4(d)) apply not only to those participating in a decision, but also to all FPC employees, in order to assure fairness in its proceedings (Order No. 479, April 6, 1973). It may be noted that the applicable provisions of the Enrolled Bill are thus narrower than the Commission's rules, using the standard of those involved only in the decisional process.

Sincerely yours,

Richard L. Dunham

Richard L. Dunham
Chairman

Attachment:
Order No. 479

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 CFR §§ 1.4 (d) and 1.30 (f))

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., and Rush Moody, Jr.

Ex parte communications in proceedings pending before the Commission; Prohibition of participation by investigative or prosecuting officers in Commission decisions	)	Docket No. R-476

ORDER NO. 479

ORDER REVISING §§ 1.4 (d) AND 1.30 (f) OF THE RULES OF PRACTICE AND PROCEDURE

(Issued April 6, 1973)

This order amends Sections 1.4 (d) and 1.30 (f) of the Commission's Rules of Practice and Procedure, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations. Section 1.4 (d) of the Rules of Practice and Procedure sets forth the prohibition against ex parte or off-the-record communications to any Commissioner, member of his personal staff, administrative law judge or Commission employee participating in a decision of contested on-the-record proceeding. The Commission believes that the prohibition should not be limited to those who participate in the decision making but should apply to all Commission employees in order to assure fairness in its proceedings. The amendment excepts communications of governmental agencies which do not have an interest in the proceedings and whose duties are not affected. In addition it excepts procedural questions under defined guidelines and communications otherwise authorized by law.

The section is further amended to provide that recipients of oral communications must prepare a sworn statement of the communication within forty-eight hours after its occurrence which is to be placed in the public files. The communicator shall receive a copy of the statement and

be allowed a reasonable opportunity to file a written response.

Under Section 1.30 (f) of the Rules of Practice and Procedure, employees who participate in the investigation or trial of a case cannot advise or participate in the Commission decision. The section currently provides an exception for applications for initial licenses and proceedings involving the validity or application of rates. As the Commission does not believe that current practice should or does admit to this exception, we are eliminating it.

The Commission finds:

(1) The amendment of §§ 1.4 (d) and 1.30 (f) of the Commission's Rules of Practice and Procedure, as herein ordered, is necessary and appropriate to carry out the provisions of the Federal Power and Natural Gas Acts.

(2) Since these amendments involve matters of agency procedure and practice, the notice requirements of 5 U.S.C. 553 do not apply.

(3) Good cause exists for making the amendments to the Commission's Rules of Practice and Procedure adopted herein effective on issuance of this order.

The Commission, acting pursuant to the Federal Power Act, as amended, particularly Sections 308 and 309 thereof (49 Stat. 859; 16 U.S.C. 825 g, 825 h) and the Natural Gas Act, as amended, particularly Sections 15 and 16, thereof (52 Stat. 829, 830; 15 U.S.C. 717 n, 717 o), orders:

(A) Section 1.4, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by revising paragraph (d). As so amended § 1.4 (d) reads as follows:

§ 1.4 Appearances and practice before the Commission.

* * * * *

(d) Ex parte communications. In order to avoid all possibilities of prejudice, real or apparent, to the public interest and persons involved in proceedings pending before the Commission --

(1) Except as permitted in subparagraph (2) of this paragraph, no person who is a party to, or his counsel, agent, or other person acting on his behalf, and no interceder in, any on-the-record proceedings, shall submit ex parte, off-the-record communications to any member of the Commission or of his personal staff, to the Administrative Law Judge, or to any other employee of the Federal Power Commission, regarding any matter pending before the Commission in any contested on-the-record proceeding, and no Commissioner, member of his personal staff, Administrative Law Judge, or any other employee of the Federal Power Commission, shall request or entertain any such ex parte, off-the-record communications. For the purposes of this paragraph, the term "contested on-the-record proceeding" means a proceeding required by statute, constitution, published Commission rule or regulation or order in a particular case, to be decided on the basis of the record of a Commission hearing, and in which a protest or a petition or notice to intervene in opposition to requested Commission action has been filed; the term "interceder" shall include any individual outside the Commission, whether in private or public life, partnership, corporation, association, or other agency, other than a party or an agent of a party, who volunteers a communication.

(2) The prohibitions contained in subparagraph (1) of this paragraph do not apply to a communication:

(i) From an interceder who is a local, State, or Federal agency which has no official interest in and whose official duties are not affected by the outcome of the on-the-record proceedings before the Commission to which the communication relates;

(ii) From an interceder relating to matters of procedure only;

(iii) From a party to, or his counsel, agent, or other person acting on his behalf, in an on-the-record proceeding, if the communication relates to matters of procedure only and is directed to the Secretary of the Commission, staff counsel, or any other employee in the presence of or with the prior approval of staff counsel;

(iv) From any person when otherwise authorized by law.

(3) All written communications prohibited by subparagraph (1) of this paragraph shall be delivered to the Secretary of the Commission who shall place the communication in public files associated with the case, but separate from the record material upon which the Commission can rely in reaching its decision.

(4) A Commissioner, member of his immediate staff, Administrative Law Judge, or any other employee of the Federal Power Commission who receives an oral offer of any communication concerning any matter pending before the Commission in an on-the-record proceeding shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he will not consider the communication. The recipient shall prepare a sworn statement setting forth the substance of the communication and the circumstances thereof within forty-eight (48) hours and deliver the statement to the Secretary of the Commission for compliance with the procedures established in subparagraph (3). The Secretary shall mail a copy of the sworn statement to the communicator and allow him a reasonable opportunity to file a written response, **which if any, shall be placed in the public files.**

(5) Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which the Secretary has associated with the record may be filed in writing with

the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. Where the communication contains assertions of fact not a part of the record and of which the Commission cannot take official notice, the Commission in lieu of receiving rebuttal material normally will direct that the alleged factual assertion on any proposed rebuttal be disregarded in arriving at a decision. Nor will the Commission normally permit any rebuttal of ex parte endorsements or oppositions by civic or other organizations by the submission of counter endorsements or oppositions.

(6) The prohibitions contained in subparagraph (1) of this paragraph shall apply from the time the Commission announces that an on-the-record hearing will be held.

(B) Section 1.30, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by revising paragraph (d). As so amended § 1.4 (d) reads as follows:

§ 1.30 Decisions.

* * * * *

(f) No participation by investigative or prosecuting officers. In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, shall, in that or any factually related proceeding, participate or advise as to the findings, conclusions or decision, except as a witness or counsel in public proceedings.

(C) The amendments herein ordered shall be effective as of the date of issuance of this order.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

SEP 7 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20570

Dear Mr. Frey:

In accordance with your request, we have reviewed enrolled Bill S.5 with respect to its applicability to this Agency.

As you are no doubt aware, the National Labor Relations Board implements the National Labor Relations Act, as amended; our primary functions being to determine the representative status of labor organizations and whether unfair labor practices have been committed. Ours is a quasi-judicial Agency whose proceedings are conducted in accordance with the Administrative Procedure Act and our final agency decisions are published as a matter of public record.

The Bill provides that meetings of agencies shall be open to public observation but in Section 552b(c)(10) an exemption is set forth for "formal agency adjudication pursuant to the procedures in section 554 of this title". As a consequence, the Bill properly provides an exemption to this Agency for the conduct of its quasi-judicial functions.

The Bill further provides in Subsection (d)(4) that agencies who may properly close their meetings to the public may provide by regulation for the closing of such meetings where members of the agency vote to close such meetings, provided that a copy of the vote of each member is made available to the public. The Bill further requires a certification by the General Counsel or chief legal officer that in his or her opinion the meeting may be closed to the public and shall state each relevant exemptive provision.

Our major objection to the enrolled Bill therefore, is that since our meetings are properly exempted from the "open meeting" requirement, it is unnecessarily burdensome to require the Agency to comply with procedural requirements, e.g., the promulgation of regulations, the certification and the recorded vote of the Board Members.

In sum, we foresee no major interference with this Agency's operations as a quasi-judicial agency which would warrant our recommending that this Bill be vetoed despite our conclusion that the Bill would have been better structured had it provided a complete exemption for quasi-judicial agencies. Despite our reservations about the procedural requirements noted above which we previously voiced to Congress, we have no objection to the President's signing of the Bill.

Sincerely,

Betty Southard Murphy
Chairman

National Transportation
Safety Board

Washington, D.C. 20594

Office of
Chairman

September 3, 1976

Mr. James M. Frey
Assistant Director for Legislation
Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Dear Mr. Frey:

This is in reply to your request for the National Transportation Safety Board's comments on S. 5, an enrolled bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes".

The Safety Board does not recommend that S. 5 be disapproved.

Your thoughtfulness in soliciting our views is greatly appreciated.

Sincerely yours,

Webster B. Todd, Jr.
Chairman

cc: Honorable Warren G. Magnuson
Honorable Birch Bayh
Honorable Robert E. Jones
Honorable John J. McFall
Honorable Harley O. Staggers
Honorable Jack Brooks

LAW DEPARTMENT
Washington, DC 20260

September 7, 1976

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This responds to your request for the views of the Postal Service with respect to the enrolled bill:

S. 5, "To provide that meetings of Government agencies shall be open to the public, and for other purposes."

1. Purpose of Legislation as it Pertains to the Postal Service

Section 3 of the bill would add a new §552b, concerning open meetings, to title 5, United States Code. The bill would amend 39 U.S.C. §410(b)(1) to apply new §552b to the Postal Service.

With certain exceptions, this part of the bill would require every portion of every meeting of a collegial body heading an agency, such as the Postal Service Board of Governors, to be open to public observation. The members of the agency might vote to close a meeting to preserve the confidentiality of ten types of information specified in the bill. The agency would be required to maintain a complete transcript or electronic recording, or in some cases a detailed set of minutes, of each meeting or portion of a meeting closed to the public. The bill would also establish detailed requirements for the publication of information concerning a meeting, as well as

the votes of members on any proposal to close a meeting.

Section 4 of the bill would add a new §557(d), dealing with ex parte communications, to title 5, United States Code. Although chapters 5 and 7 of title 5 are generally inapplicable to the Postal Service under 39 U.S.C. §410(a), new subsection (d) would apply to certain Postal Service proceedings, such as those concerning mailability, and to rate and classification hearings conducted by the Postal Rate Commission, which are specifically subject to 5 U.S.C. §§556 and 557.

Except as otherwise authorized by law, new subsection (d) would forbid interested persons and agency personnel to make or cause any ex parte communications relevant to the merits of an agency proceeding under 5 U.S.C. §557. Any agency member who received or made a prohibited communication would be required to place it on the record of the proceeding. Furthermore, the bill would amend 5 U.S.C. §556(d) to permit an agency to consider a violation of the rule against ex parte communications sufficient grounds for a decision adverse to a party who knowingly committed the violation.

Section 5 of the bill would amend 5 U.S.C. §552(b)(3), dealing with freedom of information, to narrow one of the criteria for withholding information from public disclosure. As amended, the "third exemption" of the Freedom of Information Act would cover information specifically exempted from disclosure by statute only if the statute (a) left no discretion on the issue, or (b) established particular criteria

for withholding or referred to particular types of information to be withheld. It does not appear that this provision would impair the effectiveness of 39 U.S.C. §§410(c) or 412, concerning the disclosure of particular types of information.

Section 5 of the bill would also amend the Federal Advisory Committee Act to permit meetings of advisory committees to be closed only for the reasons which would permit the closing of an agency meeting under new 5 U.S.C. §552b(c). Although this amendment, like the Federal Advisory Committee Act itself, would not specifically apply to the Postal Service, we anticipate that the Postal Service would voluntarily comply with the spirit of its provisions.

2. Position of the Postal Service

The Postal Service does not oppose the enactment of this measure. Compliance with the provisions of new 5 U.S.C. §552b will be complicated and somewhat burdensome, but we do not believe that the new "sunshine" law would impair the power of the Board of Governors to direct the operations of the Postal Service.

3. Timing

We have no recommendations regarding the timing of Presidential action on this measure.

4. Cost or Savings

We have no reliable estimate as to the cost of this measure, although it is likely that it will increase the administrative expenses of the Board of Governors.

5. Recommendation of Presidential Action

The Postal Service does not object to Presidential approval of this measure.

Sincerely,

W. Allen Sanders

W. Allen Sanders
Assistant General Counsel
Legislative Division

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20550

OFFICE OF THE
DIRECTOR

September 7, 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This refers to your request of September 2, 1976, for the comments of the National Science Foundation on the Enrolled Bill S. 5, the "Government in the Sunshine Act."

The National Science Foundation has no objection to approval of the bill. Although the bill would substantially affect the National Science Board, the activities of the Board can continue unimpaired if reasonable interpretations prevail.

A considerable part of the work of the National Science Board consists of review and deliberations concerning proposed research projects looking to Board approval. We believe that authority would exist under subsection (4) to close those portions of meetings devoted to such review and deliberations. Under the Freedom of Information Act the Foundation has consistently protected documents pertaining to research project applications because of the proprietary and privacy interests in those proposals. Under the Government in the Sunshine Act the comparable authority to close meetings would seem applicable when proposed research projects are considered.

We also believe that Board deliberations concerning budgets not yet submitted to the Congress may be closed under subsection (c)(9)(B). The bill is inexplicit on this point, however, and we would be most interested in OMB's view of its impact on budget deliberations.

Further, the bill would amend the Federal Advisory Committee Act to repeal the use of exemption 5 as a basis for closing Federal advisory committees. We believe that the National Science Foundation can operate its various advisory committees consistently with the bill's provisions. The Foundation has often used advisory committees or panels for research project proposal review. The Foundation has had adequate basis to close the meetings of such committees or panels

where necessary because of the trade secrets, privileged commercial or financial information, and privacy rights involved in the review of proposals. These factors have compelled the closing of meetings independently of exemption 5, and we expect that they would continue to do so in most situations. We note in this connection indications in the Conference Report that a subcommittee of the Senate Government Operations Committee plans to continue an inquiry into possible NIH peer review problems. Because NSF uses similar peer review procedures, NSF will wish to participate in Executive Branch advice to this subcommittee.

If events prove our interpretations of the bill to be inaccurate, we are concerned that the functioning of the National Science Board could be impaired. For this reason we recommend that the Office of Management and Budget monitor experience with the bill in NSF and other agencies to determine whether amending legislation should be proposed.

Sincerely yours,

R. C. Atkinson

Richard C. Atkinson
Acting Director

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SEP 7 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for a report on S. 5, an enrolled bill "To provide that meetings of Government agencies shall be open to the public and for other purposes."

If enacted, the bill will materially diminish our authority to safeguard hitherto confidential information of a personal character collected in the administration of the social security system. Except where disclosure is a "clearly unwarranted invasion of personal privacy", the bill will compel the Department to accommodate, for example, inquiries as to an individual's medical condition, wage history, amount of benefit entitlement, past and present places of employment or residence, current or previous marital or dependency status, or date of birth.

Accordingly, in the interest of protecting the privacy of the enormous number of individuals who are covered by the social security system, particularly with respect to the intensely personal medical material developed in social security disability claims, we strongly recommend that the President return the bill to the Congress without his approval. Because the bill primarily bears on regulatory agencies, there may be considerations in its support of which we are not fully cognizant. If so, we would suggest that the President make clear in an appropriate statement that his concern is wholly for maintaining the privacy of persons, particularly the disabled, who have been compelled to disclose information to the Government; and that he would welcome the opportunity to sign a revised bill that is appropriately modified to incorporate this concern.

The enclosed statement explains the legal basis for our recommendation.

If, despite that recommendation, the President determines to sign the bill, we urge that his signing statement include both an expression of his grave concern at the threat to the personal privacy of the many millions of persons whose social security records may, in consequence of the bill, become public knowledge, and a recommendation that the Congress act to repeal this portion of the bill before its effective date.

Sincerely,

Secretary

Enclosure

EFFECT OF ENROLLED BILL S. 5 ON THE CONFIDENTIALITY OF SOCIAL SECURITY RECORDS

Section 552(a)(3) of title 5, United States Code, requires the Department, in common with other agencies of the Federal Government, to make its records promptly available in response to a request from any person. However, the requirement does not apply to matters that fall within any of a number of exemptions established by section 552(b). One of those exemptions, section 552(b)(3), is for matters "specifically exempted from disclosure by statute".

One such statute, section 1106 of the Social Security Act, prohibits the disclosure of virtually any records developed under the Social Security Act, except as the Secretary may by regulation provide otherwise.

Because section 1106 authorizes the Secretary to make exceptions to its prohibitions, and does not specify criteria applicable to those exceptions, there were some who had contended that the section did not meet the above-quoted section 552(b)(3) criterion. That is, it had been argued that the matters reached by section 1106 were not, given the reach of the Secretary's discretion under it, specifically exempted from disclosure. In 1975 the Supreme Court rejected an identical contention with respect to a Federal Aviation Act provision in the case of Administrator, FAA v. Robertson.

In response to that decision, section 5(b) of S. 5 would amend section 552(b)(3) to exempt from disclosure matters otherwise specifically exempted from disclosure by statute only if "such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

The Joint Explanatory Statement of the Committee of Conference observes, "The conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson . . . Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act" (at p. 25).

Despite this amendment, section 552(b) would continue, in some degree, to protect social security records. Section 552(b)(6) exempts from disclosure matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption is narrow in several respects. First, under a decision of the Supreme Court of April 21 of this year in Department of the Air Force v. Rose, the exemption for personnel and medical files is not absolute. Like the "similar" files to which the section refers, personnel and medical files must be disclosed when not a clearly unwarranted invasion of personal privacy. Second, the word "clearly" must be given weight. Thus, for example, should a credit card company seek to verify information supplied to it by an applicant covered under social security, it is debatable whether the Department could refuse to supply the individual's wage record on the ground that the privacy invasion is clearly unwarranted. Similarly, should an individual seek employment in circumstances in which his health was legitimately in question, it is far from certain that we could deny to his prospective employer information as to whether the individual has at any time filed a claim for disability insurance, or the basis for that claim.

Federal Home Loan Bank Board

320 First Street, N.W.
Washington, D.C. 20552

Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

September 7, 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to your Enrolled Bill Request of September 2, 1976, concerning S. 5, the "Government in the Sunshine Act".

The major thrust of the "Government in the Sunshine Act" is contained in section 3 of the enrolled bill which would add a new section 552b to Title 5 of the United States Code. This proposed section provides that except where an agency properly determines that a portion or portions of its meetings will disclose information relating to one or more of ten categories of information described therein, every portion of every meeting of an agency shall be open to public observation. Section 3 further contains some highly technical procedural requirements intended to implement and enforce this openness rule. Section 4 and 5 of the enrolled bill relate primarily to ex parte communications in formal agency adjudicatory proceedings, and conforming amendments to other acts, respectively. While the Federal Home Loan Bank Board has no objections to Sections 4 and 5, it cannot support Section 3 as it would apply to the Board.

Section 2 of the enrolled bill, captioned "DECLARATION OF POLICY" states, in part, that "the public is entitled to the fullest practicable information regarding the decisionmaking process of the Federal Government" and that "it is the purpose of this Act to provide the public with such information while protecting the rights of the individuals and the ability of the Government to carry out its responsibilities". The Board believes these objectives clearly merit emphasis, and the

public interest in "open government" is clear. Nevertheless, it is our judgment that Section 3 of the enrolled bill is too tightly drawn; it should emphasize principles or standards of openness rather than procedures which will inevitably delay the discharge of this agency's statutory obligations. In general, a better balancing of competing policy considerations would be in the public interest. We do not see a compelling need for general codification of this important and sensitive area, especially as the bill would affect the operations of the Board. As we have stated in commenting previously on a predecessor bill, sunshine can indeed be salutory; excessive exposure or inadequate protection against it can be harmful as well.

In the Board's view, the open forum, however attractive in concept, is set forth in Section 3 of the bill in such fashion as to give this agency serious concern. As you are aware, the responsibilities of the Federal Home Loan Bank Board involve complex and sensitive obligations concerning housing finance and consumer savings. These responsibilities, if they are to be effectively discharged, require that the Board be able to explore and discuss freely, inter se, with its staff, with other government agencies, and with the organizations and individuals concerned, the various avenues and approaches that are possible, and their respective strengths and weaknesses, as they bear on the public interest and the individual welfare of the institutions or persons affected. To explore avenues and approaches, agency members should be allowed to engage in informal work sessions during which discussions of various innovative proposals are discussed prior to public scrutiny. These informal work sessions are spontaneous and invite frank discussion of positions which may be ultimately modified or abandoned. The Board would like to stress that because of the broad definition of "meeting" contained in the bill, informal work sessions of this sort, which are at the very heart of an agency's work, are strongly deterred if not virtually destroyed. An opportunity to discuss and seriously consider various policy options, prior to public presentation of agency positions, is necessary to the discharge of the Board's responsibilities and serves the public interest.

Indeed, the open forum concept itself presupposes the opportunity for reflection and consideration prior to a public airing of views. Section 3, by reaching deep into the decisionmaking process of the Board, goes too far in the direction of public disclosure at the expense, we believe, of frank, sometimes contested, presentation of staff recommendations, or differences of approach among agency members themselves prior to final decision. We ask the President to consider whether the disclosure of agency discussion at the early stage required by the bill truly serves the public interest. We are not, by any means, suggesting that agency decisions should not be subject to searching scrutiny, but by reaching far behind agency decisions, the present bill, we believe, presents the real possibility of harming the effectiveness of this agency in meeting its statutory responsibilities and, we assume, the effectiveness of other agencies as well.

In addition to acting as a dampener to free and full discussion, prior to final decisions, the procedural constraints of the present bill could lead to delay in taking the preventive action which is so integral a part of this agency's oversight of financial institutions. Problems requiring immediate Board attention may not be addressed until a majority of the members of the agency determine by recorded vote that agency business requires that the seven days advance public notice requirement be dispensed with. Meetings entitled to be closed under one or more of the ten exemptive provisions require certification by the General Counsel or chief legal officer of the agency. A stenographer or electronic recording device would be required. These procedural contraints would almost certainly delay agency action in some instances. Such delay would be clearly contrary to the public interest.

The public's right to know of agency actions should not be considered an absolute right to reach into the very earliest, often tentative discussions of agency action, but must be tempered with the demands of efficient government and the need for the free flow of ideas within agencies. For these reasons we respectfully urge the President to reject the present bill in favor of a more balanced approach.

Sincerely,

Daniel J. Goldberg

Daniel J. Goldberg
Acting General Counsel

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

SEP 7 1976

Honorable James T. Lynn
Director, Office of Management and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of this Department concerning S. 5, an enrolled enactment

"To provide that meetings of Government agencies shall be open to the public, and for other purposes."

This enrolled enactment (to be cited as the "Government in the Sunshine Act") has as its principal purpose a requirement that meetings of agencies headed by two or more members, a majority of whom are appointed by the President, with the advice and consent of the Senate, shall generally be held in public.

The principal concern of this Department is with section 5(b) of the bill, totally unrelated to the main purpose of the bill, which would amend the Freedom of Information Act to modify drastically the exemption from that Act contained in section 552(b)(3) of title 5 United States Code. The existing (b)(3) exempts from the Freedom of Information Act matters which are "specifically exempted from disclosure by statute". Section 5(b) would add to that language the following: "(other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;".

Unlike the passage of the Freedom of Information Act in 1966, and the amendments thereto in 1974, which were preceded by extensive notice, hearings, and debate, this amendment was adopted by the Conference Committee as a tag on to another different statute, without similar opportunities for comment and consideration of its effect on governmental operations in relation to the confidential information which it receives from its citizens. This change in the (b)(3) exemption

affects over 100 statutes which were enacted into law over a number of years when prior Congresses deemed that confidentiality should be applied. Some of these statutes are administered by this Department.

The Department believes that the impact of this change would warrant a veto by the President were this the sole aspect of legislation involved. However, the President may determine that the open agency meeting provisions of the bill are so important that he must give it his approval. We are enclosing a statement which we urge that the President use in a signing statement on the bill, and urge that amendatory legislation with respect to the (b)(3) Freedom of Information Act exemption be given the highest priority.

Enactment of this legislation may require additional appropriations to the Department, the amount of which cannot now be estimated because of the impossibility of estimating the number of additional requests for information which will be received and may have to be litigated under the revised (b)(3) exemption.

Sincerely,

Elliot L. Richardson

Enclosures

DRAFT PRESIDENTIAL MESSAGE

While I wholeheartedly endorse the Government in the Sunshine concept embodied in this legislation, I must object strongly to section (5)(b) of S. 5, a provision which is totally unrelated to the main provision of the bill.

That section of the Act amends exemption (3) of the Freedom of Information Act (5 USC 552(b)(3)) in a manner that brings into question confidentiality provided to information contained in documents submitted to the Government under more than 100 statutory provisions over many years.

Unlike the passage of the Freedom of Information Act in 1966, and the amendments in 1974, which were preceded by extensive notice, hearings and debate, this amendment to the Freedom of Information Act contained in S. 5 was adopted by the Conference Committee as a tag on to other legislation, without affording similar opportunities for consideration and comments from interested Government agencies and affected members of the public to inform the Congress of its effect. This procedure of the Congress clearly seems anomalous in the development of legislation to provide for "Government in the Sunshine" by the Executive Branch.

Enactment of this amendment to the Freedom of Information Act opens to question provisions of law holding confidential materials submitted to the Government by individual citizens and organizations under various programs on a voluntary or, under some circumstances, on a mandatory basis. This need for confidentiality was carefully considered by many past Congresses in enacting numerous statutes, and found necessary or desirable. Clearly, it is not fair to require the American public to supply information of a confidential nature to the

Government under penalty of law or not without a guarantee by the Government that such information will continue to be held on a confidential basis. Section 5(b) could be construed as applying to information already collected and in the hands of Government agencies under such pledges of confidentiality. Such a retroactive breach of the Government's word is to my mind unconscionable.

This legislation would allow the questioning of that pledge of confidentiality. Accordingly, I am unable to approve this provision of S. 5 and urge the Congress to reconsider its ill-advised action on this section.

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

September 7, 1976

Honorable James T. Lynn, Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

This is in response to your memorandum request of September 2, 1976, for the views of the Federal Maritime Commission with respect to S. 5, an enrolled bill

> To provide that meetings of Government agencies shall be open to the public and for other purposes.

Although conceptually there may be laudable features in S. 5, an analysis of its overall practical impact leads to the conclusion that in many instances quite the opposite of its intended effect could well result.

For example, public participation in Commission meetings to deliberate and to reach adjudicative decisions would destroy many of the due process protections for parties now provided in the Administrative Procedure Act. Even if the public's presence were passive, such presence in and of itself would almost certainly impede a full and candid exchange on all aspects of the matter before the Commission. When the Commissioners sit in their quasi-judicial capacity, staff opinions and recommendations, internal memoranda, financial and business records of a confidential nature (including privileged rate data) and trade secrets are fully discussed. This is especially true in domestic offshore cargo rate cases, but other examples include deliberations on intermodal proceedings having environmental overtones and proceedings involving the level of military cargo rates under Commission General Order 29. Additionally, Commission actions undertaken to consider the issuance or revocation of freight forwarder licenses and certificates of financial responsibility for oil pollution and

passenger vessels often require the consideration of such sensitive data and information which, if indiscriminately revealed, could seriously prejudice the party involved -- whatever the outcome of the proceeding itself.

Furthermore, we believe the "goldfish bowl" objectives of S. 5 would lead to serious impairment of the Commission's ability to obtain information on a confidential basis concerning possible illegal activities on the part of carriers or conferences. The Commission must, perforce, rely principally upon such investigative leads in carrying out its statutory mission to prevent malpractices in our ocean-borne commerce. Fearing subtle reprisals by carriers if their communications with the Commission were subjected to public disclosure, shippers (and, indeed, other carriers) would most likely find it in their best interests to abide by a code of self-protective silence.

Perhaps of equal mischief are the more basic administrative pitfalls that passage of S. 5 would nurture. The seven-day public notice requirement would greatly limit the flexibility needed by the Commission in scheduling meetings. The closed meetings exception in S. 5 would be of little practical use to the Commission in its normal course of business. Moreover, requirements for verbatim records at closed meetings would impose additional expenses which no agency, particularly one as small as ours, should have to bear, nor should taxpayers be taxed further to support, at a time when all Federal agencies are being asked to cut their budgets.

In conclusion, it is our belief that any possible benefits to be derived from additional public participation or presence under the provisions of S. 5 are greatly outweighed by the burdens and detriments its enactment would impose upon the Commission in conducting our primary regulatory responsibilities. Nonetheless, despite our serious reservations about the resultant effects of this legislation upon implementation, we do recognize the strong public and Congressional support the bill has received since its inception.

Sincerely yours,

Karl E. Bakke

Karl E. Bakke
Chairman

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

OFFICE OF THE
CHAIRMAN

September 8, 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Executive Office Building
Washington, D. C. 20503

ATTN: Assistant Director for Legislative
Reference Division

Dear Mr. Lynn:

The Nuclear Regulatory Commission appreciates the opportunity to comment on the enrolled bill designated the Government in the Sunshine Act (S.5).

While the Commission has previously expressed to the Congress its reservations regarding the cumbersome procedures established by prior versions of the Open Meeting section of the enrolled bill, it fully accepts the underlying judgment that openness and public accountability are essential aspects of the administrative process in our democratic structure. These have been cardinal points for the Commission since its birth. The procedures of the bill remain difficult, and this will impose upon us and the other regulatory bodies subject to the bill special challenges to assure that its purposes of greater public accountability are in fact achieved. Its full impact upon agency resource requirements and agency efficiency cannot now be assessed. We believe it would be appropriate for the President to establish mechanisms for following agency efforts under the bill, to assess its budgetary impacts and to identify simplifying changes that may be required to make the bill more workable or to avoid unintended reductions in the effectiveness with which Commissioners are able to direct the work of their own agencies while carrying forward the fundamental premises of the measure.

Section 4 of the enrolled bill, Ex Parte Communications, puts into statutory form provisions already largely embodied in NRC's practice and procedure.

While the matters mentioned above should be frankly recognized in approving and effectuating the Open Meeting section of the enrolled bill, the Commission's awareness of the overwhelming congressional endorsement of the measure and its agreement with its fundamental premises leads it to recommend that the President sign the bill into law.

Sincerely,

Marcus A. Rowden
Chairman

NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

September 7, 1976

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management & Budget
Washington, DC 20503

Dear Mr. Frey:

We are hereby forwarding our comments with respect to S. 5, "Government in the Sunshine Act", as requested by your September 2, 1976, memorandum.

The National Mediation Board continues to unqualifiedly support the intent of S. 5 as expressed in the Section 2 Declaration of Policy clause. Without question, the public should be afforded the fullest practicable information concerning the decision making processes of the Federal Government. However, we have distinct reservations whether the present language of S. 5, as a practical matter, can be applied to this Board without adversely affecting the ability of the Government to effectively carry out its responsibilities. We frankly believe that the overall impact on the public associated with this legislation will be considerably more detrimental than beneficial.

Notably, in view of the sensitive nature of this agency's labor mediation responsibilities, it is frequently necessary for Board meetings to be convened on a prompt ad hoc basis. This condition, as well as the generally sensitive subject matter of Board deliberations, could well make application of the Bill's advance notice and public access requirements damaging to the Agency's effectiveness. For this reason, we have previously recommended that the National Mediation Board be exempt from the coverage of S. 5 and here reiterate such recommendation.

We trust these comments will be helpful to your consideration of potential Executive Branch response to S. 5.

Sincerely,

Rowland K. Quinn, Jr.
Executive Secretary

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

September 7, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

In compliance with your request, we have examined a facsimile of the enrolled bill (S. 5), "To provide that meetings of Government agencies shall be open to the public, and for other purposes."

The main provision of this bill would require that, subject to specified exemptions, meetings of certain Federal agencies headed by a multi-member body be open to public observation. This section would impose requirements concerning such matters as procedures for closing meetings, notice of meetings, and the making of verbatim transcripts or recordings of closed meetings. Also, provision is made for lawsuits challenging compliance with the various requirements.

Another major portion of the bill would regulate "ex parte communications" in certain types of administrative proceedings, that is, adjudication and rule making required to be determined on the record after opportunity for an agency hearing. These provisions would apply to all agencies (as defined in the Administrative Procedure Act, 5 U.S.C. 551(1)), including those not headed by a multi-member body. The bill would prohibit, subject to limited exceptions, the making, by agency personnel or other interested persons, of ex parte communications relevant to the merits of a covered proceeding and would provide for sanctions for violation of the prohibitions.

Another provision of the bill would amend -- and narrow somewhat -- the exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(3), for material specifically exempted from disclosure by statute. The bill would also amend subsection 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. I (1975 Supp.), so that it would provide that the grounds for closing advisory committee meetings are those set forth in the bill with regard to agency meetings.

Except for the provision regarding the issuance of regulations covering the open-meeting provisions, the bill would take effect 180 days after its enactment.

In our opinion, it is likely that implementation of the open-meeting provisions would cause considerable practical difficulty for many affected agencies. A particular source of concern is the broad and unclear definition of "meeting," proposed §552b(a)(2). The definition refers to "the deliberations of . . . [a quorum of agency members] where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." Among the issues presented by this definition are the meaning of "deliberations" and the meaning of "joint conduct or disposition of official agency business." What restrictions are to be placed upon informal, unplanned discussions among the requisite number of agency members? Perhaps, such matters could be adequately dealt with in implementing regulations. It should be noted that the policy section, §2, states, inter alia, that the purpose of the bill is to provide information to the public "while protecting . . . the ability of the Government to carry out its responsibilities."

Most of the exemptions set forth in proposed §552b(c) parallel those of the Freedom of Information Act, but the exemptions are unclear in a number of respects. For example, how is an agency to determine that opening a meeting is likely to "disclose information the premature disclosure of which would . . . be likely to significantly frustrate implementation of a proposed agency action" (§552b(c)(9)(B))? Further, the exemptions do not give adequate weight to the policies underlying the Freedom of Information Act's exemption for internal advice giving, 5 U.S.C. 552(b)(5).

The procedural provisions could hamper the functioning of various agencies, because of the time involved in complying and the bill's interference with informal dealings among agency members. The transcript or recording requirement could also result in substantial expense for some agencies. Another significant cost of implementation would be the expense of defending the lawsuits which are certain to arise.

A constitutional issue is raised by a possible application of the bill's judicial-review provision, §552b(h)(1).

It would provide that "any person" may bring a lawsuit challenging compliance with the open-meeting requirements. Nothing in the bill states that the plaintiff must have been aggrieved by the alleged violation. Article III of the Constitution limits the jurisdiction of the Federal courts to "cases" and "controversies." One aspect of these concepts is that there be an actual controversy between the parties. Thus, in some suits which would be permitted by the bill's language, e.g., a suit by a person who does not allege that he would have attended a closed meeting or that he was otherwise affected by the closing, the Government could assert that the matter is outside the jurisdiction of the Federal courts. We do not suggest, however, that the judicial review provision is unconstitutional on its face.

Except for the matter of defending lawsuits arising under the bill, its enactment would have relatively little effect upon the Department of Justice. Accordingly, with regard to the question whether the bill should receive Executive approval, we defer to agencies more directly affected by it.

Sincerely,

Michael M. Uhlmann

Michael M. Uhlmann
Assistant Attorney General
Office of Legislative Affairs

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 8 Time: 630pm

FOR ACTION: Dawn Bennett
Max Friedersdorf
Ken Lazarus
Robert Hartmann
NSC/S
Dick Parsons

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: September 9 Time: 300pm

SUBJECT:

S. 5 - Government in the Sunshine Act

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
__x__ For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 8 Time: 630pm

ACTION: Dawn Bennett
Max Friedersdorf
Ken Lazarus
Robert Hartmann
NSC/S
Dick Parsons

cc (for information): Jack Marsh
Jim Connor
Ed Schmults
Bill Baroody

FROM THE STAFF SECRETARY

DUE: Date: September 9 Time: 300pm

SUBJECT:

S. 5 - Government in the Sunshine Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

__X__ For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

Recommend approval. Since bill signing ceremony is scheduled, signing statement should be more laudatory.

Ken Lazarus 9/9/76

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please James M. Cannon

MEMORANDUM

5031

NATIONAL SECURITY COUNCIL

September 9, 1976

MEMORANDUM FOR: JAMES M. CANNON

FROM: Jeanne W. Davis

SUBJECT: Enrolled Bill S. 5 - Government in the Sunshine Act

The NSC staff concurs in OMB's memorandum to the President on the Government in the Sunshine Act.

Rec. 9/9/76 – 9:30 am

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 8 Time: 630pm

FOR ACTION: Dawn Bennett
Max Friedersdorf
Ken Lazarus
Robert Hartmann
NSC/S
Dick Parsons

cc (for information): Jack Marsh
Jim Connor
Ed Schmults
Bill Baroody

FROM THE STAFF SECRETARY

DUE: Date: September 9 Time: 300pm

SUBJECT:

S. 5 - Government in the Sunshine Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

__X__ For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

9/9/76 - Copy sent for researching. nm
9/9/76 - Researched copy returned. nm

Ok as Edited

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
for the President

Rec. 9/9/76 - 9:30 am

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: To OJS 9-7 1:48 pm

Date: September 8 Time: 630pm

FOR ACTION: Dawn Bennett
Max Friedersdorf
Ken Lazarus
Robert Hartmann
NSC/S
Dick Parsons

cc (for information): Jack Marsh
Jim Connor
Ed Schmults
Bill Baroody

FROM THE STAFF SECRETARY

to Rec 9-9 10:53 am

DUE: Date: September 9 Time: 300pm

SUBJECT:

S. 5 - Government in the Sunshine Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

X For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

THE WHITE HOUSE

WASHINGTON

September 11, 1976

SIGNING CEREMONY FOR THE
GOVERNMENT IN THE SUNSHINE ACT

Monday, September 13, 1976
12:00 p.m. (15 minutes)
The Rose Garden

From: Jim Cannon

I. PURPOSE

To highlight your signing of the bill which:

-- requires generally that meetings of the members of multiheaded Executive agencies be open to public observation with certain specified exceptions;

-- establishes procedures for closing certain meetings to the public;

-- provides for judicial review of agency action regarding open meetings and related provisions;

-- prohibits ex parte communications in certain administrative hearings;

-- amends the Freedom of Information and Federal Advisory Committee Acts.

II. BACKGROUND, PARTICIPANTS AND PRESS PLAN

A. Background: The purpose of the act is to increase the opportunity for the public to observe governmental decision-making and to enhance the public's faith in the integrity of government. The bill's sponsors -- Senator Lawton Chiles (D. - Fla.) and 40 others -- have urged "that the Government should conduct the people's business in public." Congressional support for the bill was overwhelming; the conference version of the bill passed the House by a unanimous recorded vote (384-0) and the Senate by voice vote on August 31, 1976.

The act requires multiheaded agencies, e.g., the independent regulatory agencies and other agencies such as the Civil Service Commission, the United States Postal Service, the Export-Import Bank and the governing board of the National Science Foundation, to hold their meetings open to the public unless any of ten specific reasons for holding closed meetings is present. These agencies are required to give advance notice of meetings where possible. In addition, verbatim transcripts of certain closed meetings will be made available to the public. The act affords judicial remedies when an agency has not complied with these procedures.

B. Participants: Attached at Tab A.

C. Press Plan: Full coverage.

III. TALKING POINTS

To be supplied by Bob Orben.

PARTICIPANTS

Senator Charles Percy
Senator Jacob Javits
Congressman Paul McCloskey
Congressman Frank Horton
John Childers - Minority Counsel, Senate Government Operations (Senator Percy)
Gary Klein - Minority Counsel, Senate Government Operations (Senator Javits)
Paul Hoff - Special Counsel, Senate Government Operations (Senator Ribicoff)
James Davidson - Counsel, Intergovernmental Relations Subcommittee, Senate Government Operations (Senator Muskie)
Eric Hirschorn - Counsel, Government Information and Individual Rights Subcommittee, House Government Operations (Abzug)
Amber Shultz - Assistant to McCloskey
Dave Lovenheim - Administrative Assistant to Horton
Phil Carlson - Minority Counsel, House Government Operations
Tom Sullivan - Minority Counsel, Government Information and Individual Rights Subcommittee (Steiger)
Allen Coffey - Minority Counsel, Administration Practices Subcommittee, House Judiciary
Bill Shattuck - Counsel, Administrative & Governmental Relations
Ken Guenther, Federal Reserve Board
Tom O'Connell, Federal Reserve Board
Harvey Pitt, Securities & Exchange Commission
Chuck Platte, Federal Trade Commission
Bob Carlstrom, Office of Management and Budget
William Nichols - General Counsel, Office of Management and Budget
Robert Bedell - Assistant General Counsel, Office of Management and Budget
Harold Tyler - Deputy Attorney General, Justice

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

DATE: 9-14-76

TO: Bob Linder

FROM: D. Evans, LRD

Attached are the Agriculture views letter on S. 5 and the EPA views letter on H.R. 8800. Please have included in the appropriate enrolled bill files. Thanks.

OMB FORM 38
REV AUG 73

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

September 13, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20530

Dear Mr. Lynn:

We would like to offer our views on the enrolled enactment of S. 5, a bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes," commonly known as the "Government in the Sunshine Act."

This Department recommends that the President approve the bill. While we have some concerns, which we discuss below, with the basic provisions of the bill, we do not believe that these concerns would justify a veto of the bill.

S. 5 provides generally, with specified, limited exceptions, that every portion of every meeting of an agency subject to the bill shall be open to public observation. This requirement applies to an agency headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency. Such an agency is required to announce publicly, at least one week in advance of a meeting, the date, place and subject matter of the meeting; whether the meeting is to be open or closed to the public; and other details.

The bill specifies ten exemptions -- most of which are similar to the exemptions contained in the Freedom of Information Act -- under which an agency may close a meeting, i.e., bar the public from attendance, and it details the procedure for closing a meeting. Before a meeting is closed, the General Counsel or the chief legal officer of the agency would have to certify that the meeting may be properly closed and state each relevant exemption. If a meeting is closed, the agency must make a verbatim transcript or electronic recording of the meeting, except that for a meeting closed under certain exemptions the agency may elect to make either a transcript, a recording, or minutes. Copies of the nonexempt portions of the transcript, recording, or minutes must be promptly made available to the public, at cost, and the complete transcript, recording, or minutes of the closed meeting must be kept for a specified period of time. The bill also provides for judicial enforcement of the Act.

Other provisions of the bill would generally prohibit ex parte communications between agency officials and persons outside the agency in connection with the merits of a formal rulemaking or adjudicatory proceeding, require an official to make public any such contact, and make such ex parte communications grounds for ruling against a party in an agency proceeding. The bill would also amend exemption three of the Freedom of Information Act (FOIA) relating to matters specifically exempted from disclosure by statute and would amend the Federal Advisory Committee Act to make advisory committee meetings subject to the exemptions in the Government in the Sunshine Act rather than the exemptions contained in the FOIA as is now the case.

The open meeting provisions of the bill are inapplicable to the Department of Agriculture since it is headed by a single Secretary. However, such provisions are applicable to the Commodity Credit Corporation (CCC) Board of Directors, six members of which are appointed by the President, with the advice and consent of the Senate, in addition to the Secretary of Agriculture who is an ex officio director and Chairman of the Board.

Most of the deliberations of the CCC Board involve matters which are national and international in scope with substantial effect on agricultural commodities and products and the prices thereof. Premature disclosure of such deliberations could cause drastic price changes and could seriously frustrate the implementation of the Board's actions. While this Department supports the objective of the bill of bringing openness to the Government and enhancing the integrity of the governmental process, we believe that the bill will create administrative burdens and increased costs and could have an adverse impact on the operations of CCC. However, we do not feel that these concerns are of sufficient magnitude to warrant a Presidential veto. Further, we believe that some meetings of the CCC Board, where necessary and properly certified under the bill, can be closed to the public.

With regard to the ex parte provisions of the bill, we have no objection to these changes so far as formal adjudications are concerned. Ex parte communications with the administrative law judges are generally restricted now by provisions in 5 U.S.C. 554(d) and the rules of practice of this Department (see, e.g., 9 CFR 202.8(c)).

We are concerned, however, with the extension of the restrictions on ex parte communications during hearings in formal rulemaking under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.). The administrative law judges who preside at formal rulemaking hearings under the Act do not make either the initial or final decisions which result from the hearings. Experience indicates that many interested parties who appear at such hearings lack the sophisticated knowledge to participate fully in these proceedings without advice, and guidance by the presiding

officer is very helpful in developing a full record for the decision-maker's consideration. Therefore, the present rules of practice in such proceedings do not bar ex parte communications with any officer or employee of the Department until the hearing record is closed. (7 CFR 900.16). Thus, the provisions of S. 5 would necessitate some changes in these rulemaking hearings which might affect the quality of the hearing record. Again, however, this would not justify a veto of the bill.

This Department has no objection to the changes that would be made by the bill to the FOIA and the Federal Advisory Committee Act. While the FOIA amendment will narrow somewhat exemption three of that Act, we do not believe it will have an adverse impact on our programs.

It is extremely difficult to estimate the possible costs of complying with the provisions of S. 5. However, we believe that at least $25,000 annually would be needed to comply with the administrative details of the bill. Additional costs could be associated with time spent by CCC Board Members in discussing and voting on whether to close meetings, time spent by attorneys and other staff in examining matters to be considered, and litigation arising from actions under the bill.

Sincerely,

John A. Knebel
Acting Secretary

STATEMENT BY THE PRESIDENT

I have today signed into law S. 5, known as the "Government in the Sunshine Act". I strongly endorse the concept which underlies this legislation -- that most of the decisionmaking business of regulatory agencies can and should be open to the public.

Under this new law, certain agencies, such as the Securities and Exchange Commission, the Civil Service Commission and the National Science Board -- approximately 50 in all -- are required to give notice in advance and hold their business meetings open to public observation, unless the agency votes to close a session for a specific reason permitted by the Act. Verbatim transcripts would be required to be maintained and made available to the public for many of the closed meetings.

Communications between agency officials and outside persons having an interest in a statutorily required hearing or an adjudication are prohibited. Furthermore, the provision of the Freedom of Information Act which permits an agency to withhold certain information when authorized to do so by statute has been narrowed to authorize such withholding only if the statute specifically prohibits disclosure, or establishes particular criteria for the withholding, or refers to particular types of matters to be withheld. The new Act also amends the Federal Advisory Committee Act to permit the closing of such committee meetings for the same reasons meetings may be closed under this Act.

I wholeheartedly support the objective of Government in the Sunshine. I am concerned, however, that in a few instances unnecessarily ambiguous and perhaps harmful provisions were included in S. 5.

The most serious problem concerns the Freedom of Information Act exemption for withholding information specifically exempted from disclosure by another statute. While that exemption may well be more inclusive than necessary, the amendment in this Act was the subject of many changes and was adopted without a clear or adequate record of what statutes would be affected and what changes are intended. Under such circumstances, it can be anticipated that many unintended results will occur including adverse effects on current protections of personal privacy, and further corrective legislation will likely be required.

Moreover, the ambiguous definition of the meetings covered by this Act, the unnecessary rigidity of certain of the Act's procedures, and the potentially burdensome requirement for the maintenance of transcripts are provisions which may require modification. Implementation of the Act should be carefully monitored by the Executive branch and the Congress with this in mind.

Despite these concerns, I commend the Congress both for its initiative and the general responsiveness of this legislation to the recommendations of my Administration that the "Government in the Sunshine Act" genuinely benefit the American people and their Government.

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FOR IMMEDIATE RELEASE SEPTEMBER 13, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

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FOR IMMEDIATE RELEASE September 13, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

GOVERNMENT IN THE SUNSHINE ACT (S. 5)

The President today signed the Government in the Sunshine Act of 1976.

BACKGROUND

The purpose of this Act is to increase the opportunity for the public to observe governmental decision-making and to enhance the public's faith in the integrity of government. The bill was sponsored by Senator Lawton Chiles (D.-Fla.) and 40 others who urged "that the Government conduct the people's business in public."

GOVERNMENT IN THE SUNSHINE ACT (S. 5)

The Act requires multiheaded agencies, e.g., the independent regulatory agencies and other agencies such as the Civil Service Commission, the United States Postal Service, the Export-Import Bank and the governing board of the National Science Foundation, to hold their meetings open to the public unless any of ten specific reasons for holding closed meetings is present. These agencies will be required to give advance notice of meetings where possible. In addition, verbatim transcripts of certain closed meetings will be made available to the public. The Act affords judicial remedies when an agency has not complied with these procedures.

The Act has five key features:

-- Requires generally that meetings of the members of multiheaded Executive agencies be open to public observation with certain specified exceptions;

-- Establishes procedures for closing certain meetings to the public;

-- Provides for judicial review of agency action regarding open meetings and related provisions;

-- Prohibits ex parte communications in certain administrative hearings; and,

-- Amends the Freedom of Information and Federal Advisory Committee Acts.

# # # # #

SIGNING STATEMENT

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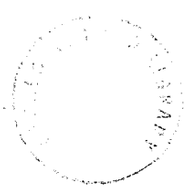

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