

## **ACUS 1984 on Sunshine Act**

4. Section 305.84–3 is added to Part 305 as follows:

§ 305.84–3 Improvements in the Administration of the Government in the Sunshine Act (Recommendation No. 84–3).

### **A. Periodic Agency Review of Sunshine Practices.**

Members of the public voice several criticisms of the manner in which agencies employ the Government in the Sunshine Act and conduct open meetings. Among the most significant are that meetings are often closed on technical legal grounds without substantive reason for doing so, that at times discussion in meetings is inadequate to allow those in attendance to understand fully the proceedings, and that frequently members of the public have insufficient access to explanatory materials and underlying documents to allow them to follow the discussion and comprehend the content of meetings. At issue is not so much compliance with the letter of the law as progress toward fuller realization of its general objective of enlarged, meaningful public access to information. To the extent that problems exist, they are a function of agency practice and are appropriately addressed in their particulars on an agency-by-agency basis.

### **B. Impact of Sunshine on the Collegiality of Agency Decisionmaking.**

The desirability of the collegial form of agency organization, as opposed to the agency headed by a single executive, has long been the subject of debate. Congress has, however, chosen to delegate certain administrative functions to collegial bodies.

One of the most frequently offered justifications for collegial decisionmaking is that stated by the First Hoover Commission's Committee on Independent Regulatory Commissions:

A distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best, each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience \* \* \*. The member of the commission must expose his reasons and judgments to the critical scrutiny of his fellow members and must persuade them to his point of view. He must analyze and understand the views of his colleagues if only to refute them.

Though no generally accepted standard for measuring the quality of agency

decisions under the Government in the Sunshine Act has been devised, one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decisionmaking process. The open meeting requirement has generated reluctance to discuss certain important matters; and discussions, when they occur, may not contribute to achieving a consensus position. In some agencies the pattern of decisionmaking has shifted from collegial exchanges to one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation procedure. The inhibition of collegial exchanges, in turn, impedes the members in the collective exercise of their responsibilities, and tends to weaken the role of the collegium vis-a-vis that of the staff and the agency chairman.

Congress was aware of the inherent and unavoidable tension between the values of openness in government and collegiality in decision making when it enacted the Government in the Sunshine Act, and it consciously chose a result that would maximize openness. Concessions were made in the statute to the need for maintaining the confidentiality of certain categories of information under discussion, but few if any concessions were made to the needs of the deliberative process as such. Although the legislative history indicates Congress believed that, after the initial period of adjustment, sunshine would not have a significant inhibiting effect on collegial exchanges, unfortunately this has not been the case.

### **Recommendation**

1. Agencies should continually strive to reflect fully in their activities the basic purpose of the Government in the Sunshine Act, which is to enlarge public access to information about the operations of government. Agencies are strongly encouraged to review periodically their sunshine policies and practices in light of experience and the spirit of the law for the purpose of making adjustments that would enlarge public access to meaningful information, such as (a) invoking the exemptions of the Act to close meetings only when there is substantial reason to do so; and (b) making open meetings more useful through comprehensible discussion of agenda items and provision of background material and documentation pertaining to the issues under consideration.
2. Under the Government in the Sunshine Act the degree of collegiality in the multi-member agencies has diminished. Congress should consider whether the present restrictions on closing agency meetings are advisable and, if not, how they might best be revised without undercutting the basic principle of the Act that "the public is entitled to the fullest practicable information regarding the decision making processes of the Federal Government."

If a new balance is to be struck between the values of collegiality and openness, the Administrative Conference suggests that agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities

(including enforcement priorities) in closed meetings, when the discussions are preliminary in nature or pertain to matters, such as budget or legislative proposals, which are to be considered in a public forum prior to final action.