

ACTION MEMORANDUM

September 13, 1977

TO: The Commission

FROM: Office of the General Counsel

RE: Inquiry from the Senate Committee on Governmental Affairs regarding administration of the Government Government in the Sunshine Act.

RECOMMENDATION: That the Commission send to Senator Chiles the enclosed letter in response to his inquiry.

ACTION REQUESTED BY: As soon as possible

OTHER OFFICES AND DIVISIONS CONSULTED: Office of the Secretary

NOVEL, UNIQUE, OR COMPLEX ISSUES: None

Background

The Commission has received a request from Senator Lawton Chiles, Chairman of the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs, requesting:

1. A copy of our current Sunshine Act regulations;
2. A copy of the calendar for each meeting which was closed under any of the Act's exemption provisions.
3. A copy of the General Counsel's certification, stating the particulars as to why the meeting was to be held in executive session; and
4. A statement concerning what procedures are followed to ensure that the general public is aware of impending meetings.

This information is requested for use by the subcommittee staff in preparation for its oversight hearings on the Government in the Sunshine Act (PL 94-409) ("Act"). In addition, Senator Chiles asked for our "comments and views on how the Act has affected [our] agency, and what recommendations [we] might have which would further the principles of the legislation."

Senator Chiles' first request will be included as Exhibit A. His second and third requests will be attached as Exhibit B, although (1) in order to protect the privacy of persons subject to actual or contemplated enforcement action we have removed from the closed calendars sent to Senator Chiles the names of the person or entity on the calendar and (2) we have attached to each closed calendar the appropriate General Counsel certifications for each item on the agenda, again after having first removed the name of the person or entity identified on the certification, and (3) we indicate that a small number of Sunshine Act certifications are missing from our files and that new record-keeping procedures which we will institute should prevent this from occurring again.

In addition, we have included a glossary of terms to enable the subcommittee staff to decipher such calendar abbreviations as "INJ" which describe the nature of the action under Commission consideration.

We have also included, as Exhibit C, examples of the topic summaries of agenda items we give to people who attend open Commission meetings. As you know, this practice was recently instituted to provide attendees of open meetings not otherwise familiar with the issues raised by scheduled open agenda items a better understanding of the Commission discussion that occurs. We point out to Senator Chiles, however, that this is still an informal Commission practice.

Briefly, we indicate that the Act has affected the Commission in the following manner:

1. It has caused a delay in scheduling agenda items, and in spite of the fact that subsection (d)(4) of the Act eliminates some procedural steps attendant upon the consideration of enforcement matters, those procedures which must be complied with nonetheless hamper the Commission's ability to deal expeditiously with some emergency matters. Since all identifying details must be removed from the public notice and certification anyway, we feel that the use of limited Commission resources to comply with these requirements outweighs any possible benefit the public receives by our complying with them.
2. The substance of Commission discussions of discrete items at either open or closed meetings has not been materially affected by the Act, but for those matters which contain both "open" and "closed" elements we have had to bifurcate Commission discussion. This, we point out, is cumbersome and time-consuming.

With respect to Senator Chiles' request for our recommendations to further the principles of the legislation, the staff has made the following technical suggestions relating to the Commission's administration of the Act. Rather than reiterating recommendations reflecting broad policy considerations made by the Commission during the initial consideration of the Act of Congress, it is the staff's feeling that the purpose of these hearings is to suggest ways in which the Act may be "fine-tuned" to better reflect actual agency experience. In our draft response to Senator Chiles we make the following suggestions:

1. Section 555(d)(4) of the Act should be amended to permit the Commission to close meetings by rule without either the public notice announcements required by that section or the certification required by subsection (f)(1) of the Act. As indicated above, insofar as law enforcement matters are concerned, the notice requirements and public release of a certification that cannot contain exempt information are formalities which burden the Commission and which do not appear to assist the public in any meaningful way.
2. We have requested that Exemption 5 replace Exemption 4 in subsection (d)(4). As explained in greater detail in the letter to Senator Chiles, in the experience of the Commission Exemption 5 bears a closer relationship to the other exemptions enumerated in subsection (d)(4).
3. We have requested that the requirement of a verbatim transcript or recording of a meeting closed pursuant to subsection (d)(4) be eliminated and that the detailed requirements imposed by subsection (f)(1) on minutes as a substitute for a transcript be modified. As matters now stand, we maintain a verbatim recording of all closed Commission meetings because it is felt that the requirements of subsection (f)(1) make it impractical to keep minutes. There is a danger that parties may seek these recordings by suit as a way to frustrate our law enforcement actions (as for example, suits making insubstantial claims are sometimes instituted by parties under the Freedom of Information Act to enjoin Commission enforcement actions). In addition, consistent with the above recommendation, we have suggested that Exemption 5 be added to the list of exemptions which justify the use of minutes in lieu of a transcript.
4. Finally, we indicate that the requirement of subsection (d)(3) of the Act which requires "a full written explanation" of the agency decision to close a meeting concerned with enforcement related matters be eliminated. Since the relevant information is exempt, there is little that can be said beyond citation to the specific exemption involved. The requirement, accordingly, serves little, if any, useful purpose.

CONCLUSION

The Office of the General Counsel recommends that the attached letter be sent to Senator Chiles in response to the request of the subcommittee.

James H. Schropp – 376-7170
Theodore S. Bloch – 376-7158

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

September 13, 1977

The Honorable Lawton Chiles
Chairman
Subcommittee on Federal Spending
Practices and Open Government
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Chiles:

This letter is in further response to your letter dated August 5, 1977, seeking from the Commission certain information pertaining to the administration of the Government in the Sunshine Act (P.L. 94-409) (the "Act"). Pursuant to your request, attached are a copy of the Commission's current regulations covering the Act's requirements, 17 CFR 200.400 et seq. (Exhibit A), and copies of the calendar for each meeting which was closed under any of the Act's exemptive provisions, to which are attached copies of each certification by the General Counsel, stating the reasons why the meeting was to be held in closed session (Exhibit B).

You have also requested a statement of the procedures followed to assure that the public is aware of Commission meetings. These procedures are set forth at 17 CFR 200.403-.405. In general, our rules provide that notices of prospective open meetings are to be posted on the public information board in the lobby of the Securities and Exchange Commission at least one week prior to the consideration of any matter listed therein; these notices are also submitted at that time to the Federal Register for publication. Should the Commission determine, by recorded vote, that earlier consideration of any matter not previously posted is necessary, a public announcement is made, posted in the lobby, and submitted to the Federal Register at the earliest practicable time. This announcement contains a brief description of the subject matter to be discussed, the date, place and time at which the Commission will consider the matter, whether the meeting, or any portions of it, will be open or closed, and the name and telephone number of a Commission official designated to respond to requests for information concerning the meeting at which the matter is to be discussed. In addition, the Wednesday edition of the Commission's daily publication, the "SEC News Digest," contains announcements of Commission meetings, both open and closed, for the following week, and revises that information as soon as practicable when changes from the previously announced schedule are made (see infra). The Digest has a current circulation of over 3,000, and is subscribed to by many persons who regularly follow the Commission's activities. In addition, to allow the public to better understand the discussion during open meetings, the Commission has informally begun to distribute to attendees at these meetings summaries of relevant background information pertaining to agenda items. We have attached several examples as Exhibit C.

Should the Commission decide, pursuant to subsection (e)(2) of the Act, 5 U.S.C. 552b(e)(2), to change the subject matter of a meeting or to modify its earlier determination to open or close a meeting, or any part of a meeting, it does so only if a majority of the Commission votes that the change is necessary, and no earlier announcement of the change was possible. A public announcement of the change and the vote of each member of the Commission on such change is made available at the earliest practicable time. Matters previously announced may be deleted, postponed, or carried over in whole or in part to the next scheduled meeting without notice; this is done only when unforeseen circumstances, such as the unexpected length of the discussions held, require such changes.

Since a majority of Commission meetings may be closed pursuant to Exemptions 4, 8, 9(A) or 10, of the Act, the Commission has published rules pursuant to subsection (d)(4) of the Act, 5 U.S.C. 552b(d)(4), providing for special public announcement procedures for those meetings. See 17 CFR 200.405. Pursuant to these rules, the Commission may publicly announce the time, place and subject matter of the meeting at the earliest practicable time; members of the Commission may vote, at the beginning of the meeting, to close an exempt meeting or portions thereof, and this vote is made publicly available. However, even with respect to those meetings which the Act permits to be closed pursuant to this abbreviated procedure, the Commission generally votes and provides public notice of such meetings at least a week before the meeting in question is scheduled. Accordingly, for most closed meetings, the same public announcement procedures described above for open meetings are followed. The subject matter of closed meetings is, of course, set forth in such a way that exempt information is not disclosed. This means, in practice, that the subject matter of these meetings is described without naming the individuals or entities which are the subjects of such actions or contemplated actions, e.g., “formal order of investigation” or “injunctive proceeding.” See the agendas in Exhibit B, provided pursuant to your second request for information.

Finally, you have sought our views as to how the Act has affected the Commission and asked what recommendations we might have to further the principles of the legislation.

The chief effect of the Act on the Commission has been that the procedural requirements of the Act cause a “built-in” delay in scheduling agenda items for Commission consideration. To some degree, the discipline which the Act imposes, by requiring that open agenda items, and certain classes of closed items, be scheduled at least a week in advance, has assisted the Commission to plan its work flow and to anticipate regulatory matters which will require its consideration. On the other hand, a large percentage of our work involves investigatory and enforcement matters which often require, and can always benefit from, prompt action.

These enforcement-related matters are clearly exempt from the open-meeting requirements of the Act; and while 5 U.S.C. 552b(d)(4) eliminates some of the procedural hurdles attendant upon the consideration of enforcement matters, the Act has nevertheless hampered the Commission’s ability to deal with some emergency enforcement problems. For example, frequently the Commission must consider the issuance of a subpoena, the filing of a complaint to enjoin an ongoing fraud, or the commencement of a formal investigation upon very short notice because of the nature and volatility of the matter involved. The requirement that a notice be published, a vote held, and the General Counsel’s certification obtained in order to

engage in such deliberations often entails procedural steps which seem to serve little purpose from the viewpoint of furthering the Sunshine Act's goals. Since the Commission may—and, as a practical matter, must—delete all identifying details from the public certification and public notice of meetings in this category, the notices which are released afford the public little knowledge concerning the Commission's closed law enforcement deliberations. On the other hand, the Commission is required to devote a portion of its limited manpower and resources to comply with these requirements.

With respect to the effect of the Act on actual Commission deliberations, it does not appear that the content of deliberations has substantially changed. In general, discussion at closed meetings has proceeded in the same fashion as it did before the Act, despite the fact that, pursuant to 5 U.S.C. 552b(f)(1), all Commission closed deliberations are presently being tape recorded. Similarly, in most cases, it appears that the discussion at open meetings generally follows the same lines as did comparable discussions held in private prior to the enactment of the Sunshine legislation. Problems have, however, arisen at times with respect to matters occurring at both open and closed meetings. For example, when considering rule proposals, the Commission's discussions sometimes have both broad policy aspects of a quasi-legislative nature (appropriate for open consideration) and elements involving the relationship between the proposed rule and the facts and circumstances of ongoing law enforcement investigations or litigation (appropriate for closed consideration). In those instances, it has generally been the Commission's practice to hold separate open and closed meetings on the aspects of the proposal. This bifurcation of the discussion is, of course, cumbersome and time-consuming.

With respect to your request for our recommendations, the Commission offers the following matters for the subcommittee's consideration:

1. Business could be facilitated, with no attendant interference with the purpose of the Sunshine Act, if 5 U.S.C. 552b(d)(4) were amended to permit eligible agencies to close deliberations within the exemptions set forth in that subsection solely by rule and without either the public notice requirements presently set forth in the proviso to subsection (d)(4) or the requirement in subsection (f)(1) of a publicly-available certification by the General Counsel. As noted above, in the case of most law enforcement matters within these exemptions, the notice requirements and public release of a certification are requirements which burden the Commission but do not appear to assist the public in any meaningful way. An internal, informal expression of opinion from the General Counsel that an enforcement matter was eligible for closure, coupled with a vote that the matter be closed and a modified minutes requirement (see below), would, we feel, be fully consistent with the Act's spirit and principles.

2. In the Commission's experience, it would better serve the apparent purposes of Exemption 4 if it were dropped from the list of those exemptions included in subsection (d)(4) and replaced by Exemption 5. Exemption 4 concerns the disclosure of “* * * trade secrets and commercial or financial information obtained from a person and privileged or confidential.” The legislative history indicates that

“This paragraph applies to meetings which disclose trade secrets or financial or commercial information obtained from any person

where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates.”

S. Rep. No. 94-354, 94th Cong., 1st Sess. At p. 23. Exemption 5, on the other hand,

“covers meetings which accuse an individual or corporation of a crime, or formally censure such person. An agency regulating financial or security matters may wish to censure a firm for failing to live up to its professional responsibilities, or an agency may consider whether to formally censure an attorney for his conduct in an agency proceeding. Opening to the public agency discussions of such matters could irreparably harm the person’s reputation. If the agency decides not to accuse the person of a crime, or not to censure him, the harm done to the person’s reputation by the open meeting could be very unfair.”

S. Rep. 94-354, supra at 22. Insofar as the Commission’s experience is concerned, we believe that Exemption 5 has a closer relationship to the other exemptions enumerated in subsection (d)(4) and should replace Exemption 4 in that provision.

3. In the case of a meeting closed pursuant to the subsection (d)(4) procedure, the requirement of a verbatim transcript or recording seems unnecessary, and may expose agencies to the threat of burdensome review procedures unlikely to result in the release of any significant information to the public. There is also some danger of frivolous and dilatory litigation seeking, for purposes unrelated to the Sunshine Act, to obtain these transcripts or recordings in order to frustrate law enforcement actions.¹ On the other hand, the detailed requirements imposed by 5 U.S.C. 552b(f)(1) on minutes as a substitute for a transcript (in the case of meetings closed pursuant to Exemptions 8, 9A, or 10) make it impractical to maintain minutes as specified in the Act. Accordingly, a verbatim recording is prepared of all closed Commission meetings.

To solve these problems, the fourth sentence of 5 U.S.C. 552b(f)(1) could be amended to read:

“Such minutes shall fully and clearly describe all agenda items discussed and shall provide a full and accurate summary of all actions taken and the record of any roll-call vote, reflecting the vote of each member on the question.”

¹ The Commission’s experience under the Freedom of Information Act has been that suits under that Act have occasionally been instituted to enjoin Commission enforcement actions until insubstantial claims under the FOIA are finally resolved by the courts.

Such an amendment would make the use of minutes feasible in the case of closed meetings at which law enforcement matters are considered. In addition, as noted above in connection with 5 U.S.C. 552b(d)(4), the Commission would suggest that Exemption 5 be added to those which justify the use of minutes in lieu of a transcript or recording.

4. Finally, the Commission believes that the requirement in 5 U.S.C. 552b(d)(3) that “a full written explanation” of agency action to close a meeting dealing with enforcement-related matters be provided is impractical, particularly in light of the requirement that such an explanation not include any exempt information. As a practical matter, there appears to be little which can be said by way of explanation—beyond citation to the particular exemption involved—which would not reveal exempt information. Accordingly, 5 U.S.C. 552b(d)(3) would appear to serve little useful purpose with respect to law enforcement related matters and should be eliminated.

I hope this letter has been responsive to the matters raised by your inquiry. The Commission will be pleased to submit any further information or to answer any other questions you may have about the Commission’s implementation of the Government in the Sunshine Act.

Sincerely,

Philip A. Loomis, Jr.
Commissioner

Enclosures: Exhibit A – Commission Regulations
Exhibit B – Calendars and Certifications²
Exhibit C – Background Information Summaries

² In gathering the materials requested by the Subcommittee, it came to our attention that a small number of Sunshine Act certifications appear to be missing from the Commission’s files. While the minutes of the closed meetings for which certifications are missing indicates that a Sunshine Act certification had been prepared for these items by the Office of the General Counsel, an exhaustive search of our files for them has not been productive. Our efforts to locate these certifications are continuing, and we will advise the Subcommittee if we are able to locate these documents. Those items for which copies of the certification are missing are indicated in the attachments to each day’s agenda. New recordkeeping procedures are being implemented to insure that copies of certifications are preserved in the future.