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94TH CONGRESS
1st Session

SENATE

REPORT
No. 94-854

GOVERNMENT IN THE SUNSHINE ACT

REPORT

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

TO ACCOMPANY

S. 5

TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC, AND FOR OTHER PURPOSES

JULY 31, 1975.—Ordered to be printed

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GOVERNMENT IN THE SUNSHINE ACT

JULY 31, 1975.—Ordered to be printed

Mr. CHILES, from the Committee on Government Operations, submitted the following

REPORT

[To accompany S. 5]

The Committee on Government Operations, to which was referred the bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

SUMMARY OF THE LEGISLATION

S. 5, the "Government in the Sunshine Act," is founded on the proposition that the government should conduct the public's business in public. The bill requires congressional committees and all Federal agencies subject to the legislation to conduct their meetings in the open, rather than behind closed doors. As a result of this legislation, the public will, for the first time, have the right to observe most of the meetings held by all congressional committees, and by 47 Federal agencies.

The bill also establishes for the first time a clear, statutory prohibition against private ex parte communications between agencies and outside parties on matters being adjudicated by the agency. This provision assures that decisions required by law to be made solely on the basis of a public record will not be influenced by secret discussions that some of the parties to the proceeding, or the public, do not know about.

The bill will help increase the public's faith in the integrity of government, enable the public to better understand the decisions reached by the Government, and better acquaint the public with the process by which agency decisions are reached.

S. 5 in no way changes the substantive laws governing Congress or any agency. It in no way increases the right of the public to actively

participate in any meeting. What it does do is end the secrecy in which many Government decisions are now made.

OPEN CONGRESSIONAL MEETINGS

Title I amends the rules of the House and Senate governing committee meetings, except hearings, by requiring such meetings to be open except in certain specified circumstances.

Sections 101 and 102 require the Senate and the House to hold mark-ups and other committee meetings, other than hearings, in public unless the committee or subcommittee votes to close the meeting on one of five specific grounds. These exceptions cover such matters as national defense and foreign policy, personnel matters, criminal or civil investigations, personal privacy, and trade secrets. The meeting may be closed only if a quorum of the committee votes to close the meeting. Section 104 imposes the same requirements on the meetings of joint committees. Presently, the Senate rules provide that mark-ups and other voting sessions of most committees are closed, unless the committee votes to open them in specific instances, or unless the committee votes to adopt on its own a general, open meeting rule. In the House, such meetings are open unless the committee votes to close them, but the applicable rule does not limit the reasons which a committee may invoke to close the meeting.

Title I does not affect the rules now governing committee hearings because the law already requires them to be open unless committees close them on one or more specified grounds.

Section 103 requires that all meetings of conference committees be open unless either the House or Senate managers determine by a majority vote that the meeting should be closed. The bill does not specify the grounds that may justify closing the meeting of a conference committee. Presently there are no rules governing open conference committees. The House has already passed a rule identical to section 103, but its implementation is contingent upon the Senate passing the same rule.

Section 105 explicitly states that title I is enacted pursuant to the rulemaking authority of both Houses. It recognizes the right of either House to alter the rules as they apply to such House, or to enact other rules.

OPEN AGENCY MEETINGS

Section 201 applies to the Federal Election Commission and the 46 other Federal agencies headed by two or more Commissioners or similar officers appointed by the President with the advice and consent of the Senate. The bill requires meetings between heads of such agencies to be open to the public. A list of the agencies covered by this section is included in the section-by-section analysis of subsection 201(a).

Section 201(a) establishes the basic principle that all meetings between the heads of these collegial agencies must be open to the public. The term "meeting" is defined to include agency deliberations where at least a quorum of the agency's members meet to conduct or dispose of official agency business. Chance encounters which do not involve substantive discussions, and social events at which business is not discussed, would not be covered by the section. Nor does the bill cover

discussions between less than a quorum of the Commission, or discussions between a Commissioner and any number of staff employees.

Subsection (b) provides that meetings can be closed by the agency only by a majority vote of all agency members. As in the case of committee meetings, the bill requires that a meeting may be closed only on one of ten specified grounds. These grounds are based in most respects on the exceptions contained in the Freedom of Information Act. At the same time, an agency may decide that it would, on balance, be in the public interest to conduct in the open even those meetings which fall under one of the exceptions. Closed meetings are never mandated.

To insure that the public knows about agency meetings, and has a chance to attend, the bill requires advance notice of each meeting and its subject matter. If any agency closes any meeting it must announce its decision ahead of time, along with an explanation of its action, and make a verbatim record of the meeting. After the meeting, it must release to the public every major portion of the meeting that did not in fact involve sensitive matters. The bill also provides that if an agency must close a majority of its meetings because its discussions involve certain specified types of sensitive information, the agency may follow expedited procedures when announcing the meeting, or deciding to close it to the public.

The remaining provisions in section 201 establish procedures for enforcing the section's open meeting provisions in court.

EX PARTE CONTACTS

Section 202 establishes an across-the-board statutory prohibition of ex parte contacts between agency decisionmakers and all persons outside the agency where the purpose of the contact is to discuss the merits of any matter being formally adjudicated by the agency. The new rule will prevent secret communications between the agency and an outside person interested in the outcome of a proceeding. The section, applicable to all agencies in the executive branch, whether or not they are multiheaded, replaces the very limited provisions in the Administrative Procedure Act now governing ex parte communications.

Section 202 applies to formal agency adjudications and rulemaking proceedings which are adjudicative in nature (so-called formal "on-the-record" rulemaking). In such cases all communications between agency officials and any outside person must either be on the public record, or have been preceded by reasonable notice to all parties. Whenever any communication occurs in violation of this section, the material submitted, or a record of the oral conversation held, must be placed in the public record of the proceeding. Whenever any person knowingly engages in such illegal communications with agency officials about a pending case, the agency may, in its discretion, take action on the merits against such party. This last provision reflects case law approving similar remedial action which agencies have taken on their own. See, e.g., *Jacksonville Broadcasting Corporation* v. *FCC*, 348 F. 2d 75 (1965).

Section 202 strengthens ex parte provisions now in the Administrative Procedure Act in a number of ways. It extends the persons governed by it to include all those agency employees involved in the de-

cisionmaking process, including commissioners. Currently only hearings examiners are covered. It broadens the type of agency proceedings covered so as to include not only formal adjudications, but also formal rulemaking proceedings governed by the same rules as formal adjudications. It specifies that the prohibition against ex parte communications shall start at an early point in the proceedings. It applies to all communications "relevant to the merits of the proceedings." It precisely spells out for the first time the corrective steps that an agency official must take if an ex parte communication does take place. And it specifically provides for sanctions that an agency may impose against any person violating the rules on ex parte communications.

Background and Purpose of the Legislation

This bill represents the logical extension of legislation passed by Congress over the last decade designed to open the government's decisionmaking process to the public.

In 1955 the House of Representatives created a Special Subcommittee on Government Information chaired by Rep. John E. Moss (D.-Calif.). The investigative and legislative hearings held by that panel contributed significantly to the creation and enactment in 1966 of the Freedom of Information Act, 5 U.S.C. 552. In 1972, while major oversight hearings were underway regarding the administration and operation of the Freedom of Information Act, in particular, and government information policy in general, another attempt to open the people's business to public view culminated in the enactment of the Federal Advisory Committee Act, 5 U.S.C. App. I. In addition to its other provisions, this statute establishes the presumption that the meetings of advisory committees and study panels should be open to the public.

In 1974 the Congress enacted new legislation amending and strengthening the public's right to gain access under the Freedom of Information Act to information in the government's possession.

This bill is fully in accord with the principles and aims of the previous legislation.

One important effect of the bill will be to increase the public's confidence in government. Mr. Lou Harris, a leading pollster, summed up the current public mood during committee hearings on the Government in the Sunshine legislation as follows:

> At this point in our history, the people are roundly fed up with what they feel is incompetence, inefficiency, corruption, lack of real public interest, and just plain lack of decency in the governing circle of this country. I do not say that idly, Mr. Chairman. Most of all, people are firmly wedded to the notion that if the Federal Government were opened up, rather than gross inefficiencies and lack of candor resulting, to the contrary, an opening of the Federal decisionmaking process would indeed lead to wiser, sounder, more creative and better decisions. (Hearings on S. 260, 1974, p. 163.)

The committee is confident that the public will be favorably impressed by the integrity, competence, and dedication of the great majority of agency heads. Open meetings will thus help increase the

public's confidence in government by permitting the public to observe firsthand the responsible way agency heads carry out their duties.

On the other hand, where the government is not functioning as well as it could public exposure should help insure that the quality of work remains at the highest possible level. The committee believes that it would be far less damaging to government if the facts, regardless of their nature, were disclosed openly to the public and the press, rather than emerging only indirectly through speculation or scandal.

Press speculation or partial leaks of information are often more damaging than the actual facts. (See, e.g., Hearings on S. 260, 1974, pp. 16, 217, 295.) Where the press must rely on leaks for its information there will inevitably be inaccuracies as well as partisan or self-serving statements.

As John Gardner, Chairman of Common Cause, said when testifying in strong support of S. 5:

> Secrecy is fatal to accountability. Citizens cannot hold government officials accountable—if they do not know what government officials are doing. All of the great instruments of accountability that the citizen must depend on—Congress, the courts, the electoral process, the press—may be rendered impotent if the information crucial to their functions is withheld. (Hearings on S. 260, 1974, p. 51.)

The public is naturally more distrustful of government conducted in secret. This suspicion arises in large part from the fact that meetings are closed, not from any specific evidence that improper or illegal activities are taking place behind closed doors. Regardless of what the public actually learns about the government, the fact that this bill opens meetings formerly closed should in itself remove an important source of any distrust the public may have of government.

In addition, this bill should enhance greatly the public's understanding of the decisions reached by the government. The Freedom of Information Act enables the public to review many of the domuments on which government decisions are based. These represent a record of what has already transpired. Yet up to now the public has not had a full opportunity to learn how or why government official make the important policy decisions which they do. All too often the meetings at which such decisions are made are closed to the public. Interested persons must content themselves with elementary minutes, or background papers tangentially related to the official agenda. Formal statements in support of agency actions are frequently too brief, or too general, to fully explain the Commission's reasoning, or the compromises that were made. As a result, the public may not understand the reasons an agency has acted in a certain way, or even what exactly it has decided to do. By requiring important decisions to be made openly, this bill will create better public understanding of agency decisions.

The committee believes that this openness will significantly increase cooperation between the public and government agencies. It will enhance the public's comprehension of the difficult choices agencies must often make, and provide a greater appreciation of the problems they face. Moreover, openness will better demonstrate what facts and policy considerations the agency found important in reaching its decision, and what alternatives it considered and rejected. As citizens listen to debate

between the heads of an agency, they will be able to identify precisely the issues that are of most concern to the agency.

Greater public understanding of the exact nature and reason for agency decisions should also promote greater compliance. Members of the public directly affected by an agency's action will no longer have to guess what exactly is expected of them as a result of a particular decision. They will know not only what the agency decided, but the purpose and intent of the agency's actions.

Finally, as all elements of the public gain an equal opportunity to learn about the issues and problems confronting agencies, wider and more informed public debate of the agency's policies becomes possible. Increased public interest and discussion cannot help but contribute to improve decisionmaking process.

One of the leading scholars on administrative law, Professor Kenneth Culp Davis of the University of Chicago Law School, summarized his strong support of the Government in the Sunshine legislation as follows:

> Open meetings would at first cause consternation and opposition. But gradually open meetings would be accepted. Making more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on one side and media and pressure groups of the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced. (See *Government in the Sunshine: Responses to Subcommittee Questionnaire*, Government Operations Committee Print, 1973, p. 67.)

The success Congress and the committee have recently had in opening its activities to the public confirms the effectiveness and practicality of S. 5.

In the first year after the House in 1973 adopted a rule requiring committees to hold their bill-drafting meetings in public, unless the committee voted to close the meeting, 80 percent of all mark-ups were open to the public. Previously, every committee but one conducted its mark-ups in private (Hearings on S. 260, 1974, p. 47). In 1974, the number of open committee mark-ups in the House increased to 88 percent. In 1975 the House confirmed the success of such open government legislation by re-enacting its rule on open committee meetings. At the same time it strengthened one of its provisions.

This committee believes that its own experience with open mark-ups has clearly been a success. Since the committee adopted a rule requiring open mark-ups, it has not voted to close a single one. Conducting mark-ups in public has not interfered with the orderly and efficient conduct of business.

The Senate Committee on Banking, Housing and Urban Affairs, and the Committee on Interior and Insular Affairs have had similar rules since 1973. These committees also conclude without hesitation that the open-meeting rule has neither interfered with their work, nor inhibited free and open discussions. (Hearings, pp. 92–94, p. 104.)

Over the last 2 years the Government Operations Committee, the Banking, Housing, and Urban Affairs Committee, and the Interior Committee have dealt effectively in open sessions with such important and often controversial legislation as the Congressional Budget and Impoundment Control Act of 1973, the Energy Reorganization Act of 1973, the Housing and Community Development Act of 1974, the Export-Import Bank, and legislation concerning energy allocation, land use policy, consumer protection, and surface mining and mineral leasing.

Open meeting laws are also a widely accepted and successful part of State law. Forty-nine States now have open meetings laws, and thirty-five States have constitutional provisions relating to open government.

State laws on open government have developed largely since 1950, when only one law was in effect. In the last few years especially, such legislation has gained wide acceptance at the State level. Nine new laws were passed during 1972–73. In 1974, ten States strengthened existing legislation. Moreover, no open meeting law has been repealed except to be strengthened. Several States have also recently amended their constitutions to add more comprehensive provisions on open government.

Forty-nine States open state-level agencies. Forty-four States provide for open meetings of county and city level nonlegislative agencies, as well as city councils and county boards. Currently, State legislatures in 35 States open committee deliberations to the public. In contrast, only 17 States opened committee meetings to the public as a matter of course in 1972. The appendix to this report contains a summary of the open meeting laws in all 50 States.

The State of Florida has the most comprehensive open meetings law in the country. The Florida law opens to the public all discussions and deliberations of government where "official acts are to be taken." Since its passage in 1967, Florida's "Sunshine Law" has been well received by the judiciary. The courts have neither significantly limited the broad scope of the law, nor riddled it with exceptions. Indeed, the judicial acceptance of this strong open government law has fostered the development of similar laws in other States.

Governor Reubin Askew of Florida, testifying on the Florida law before the committee, stated that ". . . Predictions that too much sunshine would lead to unnecessary embarrassment of public employees, costlier land acquisitions, and other problems have not been borne out by the Florida experience." A major study of the Florida law by the Center for Governmental Responsibility polled city councilmen across the State and found that 77 percent favored the law, though several exemptions, similar to those in S. 5, were proposed.

The committee received views in support of open meeting laws from the Attorney General's Office in a number of other States as well. The Attorney General of California told the committee that open meeting requirements have generally had a "salubrious effect" in that State. The Attorney General of Washington believes the law in that State "has been beneficial to the citizens" of the State and "has led to increasing awareness by those deliberative bodies affected by it for the need to adequately prepare themselves for meetings." The Attorney General

of North Carolina concludes that the State's open meetings bill "has substantially improved the governmental process," and that it has "helped increase public confidence in government."

The all but universal trend at the State level in favor of Government in the Sunshine legislation is clear evidence that such legislation is both practical and beneficial. Such widespread adoption of the legislation would not have occurred had the States found them unsuccessful or unworkable. One recent commentary on such State laws in fact concluded that "contemporary arguments by commentators in opposition to such laws are virtually nonexistent." (45 Mississippi Law Journal 1151, 1162.)

In short, this committee is convinced that past experience with open meeting legislation constitutes strong grounds for believing that the Federal Government will benefit significantly from general legislation requiring meetings in both the executive and legislative branches to be open.

Section 202, prohibiting ex parte contacts, answers a similar need to insure openness in the way the Government decides formal adjudication and rulemaking proceedings.

Ex parte contacts made secretly between one party to the proceeding and an agency official prevent other interested parties from countering the arguments presented. It may also make it impossible for the public to understand why an agency decided the case as it did. Such contacts make it difficult for Congress to exercise effective oversight of the practices and policies of regulatory agencies. In short, ex parte contacts are totally inconsistent with the principle of open government.

Although the undesirability of ex parte contacts has long been recognized, the Administrative Procedure Act contains no general provision specifically prohibiting them. Section 202 amends the Administrative Procedure Act to clarify and reemphasive the extreme seriousness with which ex parte contacts should be viewed. It provides clear notice to all concerned that ex parte contacts are not only illegal, but may actually result in the agency finding on the merits against a party who knowingly violates the provision.

The need for regulation of ex parte contacts in adjudicative proceedings was first dramatized by the exposure of improper influence in the granting of broadcast licenses by Federal agencies in the 1950's. The 1961–62 Administrative Conference attempted to deal with the problem by recommending that each agency promulgate a code of behavior governing ex parte contacts. While a number of the agencies did formulate such rules, they vary greatly in the types of contacts covered. Furthermore, rules adopted by an agency may be modified or repealed by the same agency at any time. Such rules lack the authority and permanence of a general statutory prohibition of ex parte contacts.

In 1963 Administrative Law Section of the American Bar Association undertook a study of the Administrative Procedure Act, including a review of its ex parte provisions. In 1970 the House of Delegates of the American Bar Association endorsed enactment of a broad rule prohibiting ex parte contacts. Between 1970 and 1974 an Association committee drafted language implementing this resolution. Section

202 of the bill follows closely the wording developed by the American Bar Association.

In 1884 Woodrow Wilson stated:

> Light is the only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments—light blazed full upon every feature of legislation—light that can penetrate every recess or corner in which any intrigue might hide; light that will open to view the innermost chambers of Government.

The committee fully agrees.

History of Legislation

The legislation was initially introduced as S. 3881 on August 9, 1972, by Senator Lawton Chiles.

While there was informal consideration of the bill during the 92d Congress, no legislative action was taken. As a consequence of these discussions, a more developed and comprehensive proposal was drafted and offered by Senator Chiles in the 93d Congress. Introduced on January 9, 1973, with several cosponsors, the measure (S. 260) contained two titles, one pertaining to congressional committee proceedings and one governing executive branch agency meetings. A new section regarding ex parte communications was added to the latter title.

In the summer of 1973, the Subcommittee on Reorganization, Research, and International Organizations, chaired by Senator Ribicoff, solicited the views of public administration experts, legal scholars, representatives of the media, and professional organizations. (See *Government in the Sunshine: Responses to Subcommittee Questionnaire*, Senate Government Operations Committee Print 1973). An overwhelming majority of the responses to the questionnaire strongly supported Government in the Sunshine legislation.

Two days of hearings on S. 260 were held by the subcommittee on May 21 and 22, 1974, under the direction of Senator Chiles. An additional day of hearings was held on October 15.

The bill was reintroduced by Senator Chiles as S. 5 on January 15, 1975.

On May 12, the Subcommittee on Federal Spending Practices, Efficiency, and Open Government, meeting in open session, unanimously adopted an amended version of S. 5. The full committee met in open session on June 18 and July 9, and the bill, as further amended, was ordered reported by the full committee on July 9th by a unanimous vote.

In preparing this legislation the committee has consulted with a large number of legal experts both within the government and the private sector. It received comments on the legislation from 43 agencies of the government.

During its consideration of S. 5 the committee made a large number of amendments to the bill in response to suggestions by members of Federal agencies, Congress and the public. These amendments further insure that the Government will be able to open their activities to the

public without imposing unnecessary procedural burdens on the Government, or interfering with the Government's effectiveness. The following is a summary of some of the more important amendments adopted by the committee.

Sections 101 through 103 have been revised to conform in most respects to S. Res. 9 and S. Res. 12 and the provision in the Congressional Budget Act of 1974, Public Law 93-344, enacted by Congress in 1974. A number of the procedural requirements contained in the original bill were eliminated.

Section 201 was amended in a number of ways. The scope of section 201(a) was limited so that is applies only to those multiheaded agencies headed by Officials appointed by the President with the advice and consent of the Senate. The definition of "meeting" was redrafted to exclude many discussions which are informal in nature. Subsection (b) was amended to provide agencies with additional flexibility to close meetings where necessary. A number of paragraphs were added specifying additional grounds justifying a closed meeting, and the scope of other paragraphs, such as the one governing adjudication, was broadened. Another amendment provides that an agency may withhold information about a meeting for the same reasons that may require the agency to close the meeting in the first place. Other wording added to subsection (b) clarifies the right of an agency to close a meeting where it determines that the meeting can be reasonably expected to involve sensitive matters. Absolute certainty is not required on the part of the agency. The section is not intended to require such a showing of certainty in any judicial proceeding invoking this section.

Amendments to subsection (c), (d) and (e) relieve agencies of a number of the procedural requirements contained in the original bill. One amendment to subsection (c) authorizes agencies in certain cases to issue general regulations specifying in advance the meetings that must be closed. Another amendment gives agencies the right to change on short notice the agenda of their meetings, or to revise their prior decisions to open or close meetings. The public announcement an agency must make of its meetings was expanded to include notice in the Federal Register either before or after the meetings is held.

Instead of requiring an agency to maintain a transcript or electronic recording of all its meetings, subsection (e) was amended to require a verbatim record of only those meetings closed to the public. Meetings discussing cases in adjudication were exempted from the requirement of a verbatim record in all cases. Other changes provide that agencies will not have to edit the transcripts in great detail, nor provide written explanations of any deletions it makes in the transcripts released to the public.

Other amendments to section 201 prevent district courts from overturning agency action taken at a meeting improperly closed to the public, and strictly limit the ability of a court to assess the costs of litigation against an individual agency member.

The wording in section 202 governing ex parte contacts was changed in several ways. One amendment limits the authority of an agency to rule on the merits against a party committing an ex parte violation. As now worded, an agency may rule against such a party only where the violation was knowing. Similarly, wording was added making a

communication by one person, on behalf of another, ex parte only where it was done with the knowledge of the other person. Another amendment deletes a provision in the original bill that exempted ex parte communications from certain types of persons who were neither parties, intervenors, nor Government officials. The provision granting the district court jurisdiction to enforce the requirements of the section was deleted.

Finally, provisions were added to section 203 clarifying the relationship between this bill and the Freedom of Information Act and the Privacy Act.

Section-by-Section Analysis

INTRODUCTORY SECTIONS

Section 1. This section states that the bill may be cited as the "Government in the Sunshine Act."

Section 2. This section establishes as the policy of the United States the principle that the public should have the fullest practicable knowledge about the decisionmaking process of the Government. It is the purpose of the bill to implement this policy without infringing upon the rights of individual citizens and the ability of the Government to carry out its responsibilities. The provision thus reaffirms the principle that openness is desirable in a democratic Government. It is the intent of this bill that governmental bodies conduct their deliberations in public to the greatest extent possible. At the same time, the section explicitly recognizes that the bill must also protect the ability of the Government to carry out its responsibilities, and protect the rights of individuals, such as the right of privacy, or the right to a fair and impartial trial. The bill's provisions have been drafted in full recognition of the fact that Government, if it is truly to serve the public, must not only be open, but also effective and fair.

Section 3. This section defines "person" in the same way as the Administrative Procedure Act, and should be interpreted in the same way as that act. The definition includes an individual, but excludes an agency.

Title I—Congressional Procedures

SECTION 101—SENATE COMMITTEES

Section 101(a). Paragraph (1) strikes the portion of section 133(b) of the Legislative Reorganization Act now governing executive sessions of Senate committees. The present rule provides that markups and other voting sessions of the committee will be closed unless the committee votes to open them in specific instances, or unless the committee votes to adopt on its own a general open meeting rule.

Paragraph (2) amends the Legislative Reorganization Act to provide new rules governing all meetings of a Senate committee or subcommittee discussing committee business, with the exception of hearings. The section establishes a presumption in favor of openness of all Senate committee meetings in accordance with the general policy of the bill. Openness should be the rule and secrecy the exception. The new rule requires that all committee meetings, other than hearings, shall be open unless a majority of the members of the committee or

subcommittee present decide by record vote to close the meeting, or a portion of the meeting, on one of five specified grounds.

These five grounds are designed to cover those instances when it may be necessary for a committee to meet in closed session. Even if a matter does come within one of these five provisions, the committee must decide in each particular case whether the need for secrecy outweighs the general need for openness in Government. Since this judgment must be made in each case, with full recognition of all the facts, the rule requires the committee to vote on each meeting separately. The committee may not adopt general rules closing certain types of meetings. If a committee discussion of a particular matter is extended over several days, the committee should vote at the beginning of each day's meeting whether to close the meeting. Where only a portion of a committee meeting needs to be closed to the public, the committee should arrange for the remainder to be open.

The five grounds which a committee may invoke to close a meeting are listed in clauses (1) through (5) of the new rule.

Section 101(a)(1) exempts matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States.

This exemption is similar to that in the Freedom of Information Act, as amended (5 U.S.C. 552(b)(1)). The meaning that the terms "national defense" and "foreign policy" have under that act should provide guidance to Congress in implementing this provision. However, since the section applies to the Congress, not the executive branch, the exemption does not expressly rely on the status any material may have under executive branch rules of classification.

Section 101(a)(2) exempts matters relating solely to committee staff personnel or internal staff management or procedure. The provision recognizes that discussions involving such matters as the hiring of a particular individual to serve on the staff of the committee should be be closed so as to enable a candid discussion of the individual's qualifications.

Section 101(a)(3) exempts matters which will tend to charge an individual with crime or misconduct; injure the professional reputation of any individual, or expose any individual to public contempt or obloquy; or represent a clearly unwarranted invasion of an individual's privacy.

Any committee must be aware of the effect publicity arising from one of its meetings may have on an individual's reputation. Special care must be taken not to unfairly injure an individual's reputation by unconfirmed or misleading statements. However, the language of the exemption should not be read as justifying the closing of every committee meeting that may in some way affect an individual's reputation. Such restrictiveness would not be in accord with the intent of either the bill or this clause. In each case, the committee will have to balance the possible harm to the individual against the need for openness in Government. The possibility that one member of the committee might make a casual remark concerning some individual might not constitute grounds for closing a meeting, whereas formal consideration of committee action in some way censuring an individual might justify closing the meeting.

In deciding whether to close a particular meeting, different standards should apply to private individuals and public officials. The public has a right to know fully about the actions of Government officials

in their public capacity. What is considered an invasion of privacy of a private citizen may be justified when the official conduct of a public employee is involved.

Section 101 (a)(4) exempts discussions that would disclose the identity of an informer or law enforcement agent, or that would disclose information relating to the investigation or prosecution of any civil or criminal violation of law that must be kept confidential in the interests of effective law enforcement.

It is expected that this provision will be applicable primarily to meetings concerning such aspects of a committee investigation as the issuance of a subpena. Premature disclosure of the committee's decision to issue the subpena could destroy its effectiveness.

Section 101 (a)(5) exempts matters disclosing trade secrets or commercial or financial information where such matter is required to be kept secret by a statute, or where the information was obtained on a confidential basis and disclosure would cause undue injury to a person's competitive position.

Trade secrets and commercial or financial information must meet the same tests under this exemption. The information can not be generally applicable to an industry, but must "pertain specifically to a given person." The information discussed at the meeting must directly involve such sensitive matters, not merely be peripherally related to them.

The criteria established in clause 5(A) is applicable only to statutes which specifically requiring trade secrets or commercial or financial information to be kept confidential. General statutes which permit government officials to withhold information in the public interest do not meet this test. For example, it does not include the general type of statute involved in *Administrator, FAA* v. *Robertson*, 95 S. Ct. 2140 (1975).

Clause 5(B) establishes an alternative basis for closing meetings under this provision. Two criteria must be met. First, the government must have obtained the information under a pledge of confidentiality. Secondly, the information must be kept confidential in order to prevent undue injury to the competitive position of the person to whom the information specifically relates. In deciding whether the competitive injury would be "undue," the committee will have to balance the legitimate public interest in attending the meeting against the degree to which disclosure would substantially and unfairly injure a person's business interests.

Section 101(b). This subsection is a conforming amendment repealing the present provision in the Standing Rules of the Senate governing the meetings, other than hearings, of all standing committees.

Section 101(c). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new provision governing Senate committees enacted by section 101(a) of the bill.

SECTION 102—HOUSE COMMITTEES

This section amends the rules of the House of Representatives now governing all meetings, other than hearings, by adopting exactly the same rules as section 101(a) adopts for the Senate. The present rules of the House provide that all such meetings, except those involving internal committee budgets or personnel matters, will be open unless

the committee votes to close them. Since the rules do not specify the grounds that justify closing a meeting, a committee may close a meeting for any reason.

Section 102 would require House committees to close their meetings only under the same specified circumstances as permit a Senate committee to close its meetings under section 101(a). Public understanding of the rules governing open meetings in the Congress will be enhanced if the same open-meeting rules govern committee meetings in both Houses. However, this provision is included with full recognition of the right of the House of Representatives to establish its own rules governing committee meetings. Section 105 of the bill specifically reserves the right of the House of Representatives to adopt different rules should it wish to do so.

SECTION 103—CONFERENCE COMMITTEES

Section 103(a). This subsection adds a new provision to the Legislative Reorganization Act to govern conference committees. The rule provides that conferences between the Senate and the House will be open to the public unless the managers of either the Senate or House in open session decide to close the meeting on that particular day by a rollcall vote of the majority of such managers present.

The provision is identical to a resolution the House has already approved this year, House Rule XXVIII, clause 6. The House action must await Senate action before it can become effective. While the provision establishes a presumption of openness, either House reserves the right to close a meeting of a conference committee should it so wish.

Section 103(b). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new rule on House-Senate conferences.

SECTION 104—JOINT COMMITTEES

Section 104(a). This subsection amends the Legislative Reorganization Act by adopting rules governing joint committee meetings. The rules are identical to the rules section 101(a) establishes for the meetings of Senate committees and section 102(a) establishes for the meetings of House committees. They should be interpreted and administered in the same way.

Section 104(b). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new rules governing the meetings of joint committees.

SECTION 105—EXERCISE OF RULEMAKING POWERS

This section specifies that the rule changes contained in title I are enacted pursuant to the rulemaking authority of the Senate and the House of Representatives.

It recognizes that under the Constitution either House retains the full right to subsequently change the rules established by title I insofar as they apply to such House, regardless of the actions of the other House. It is in no way the intent of the committee to interfere with the right of the House of Representatives to adopt other rules governing the opening of committee meetings should it so wish.

TITLE II—AGENCY PROCEEDINGS

SECTION 201—OPEN MEETINGS

Section 201(a). This subsection extends the principles of open government to Federal agencies by requiring meetings between the various heads of a multiheaded agency to be open to the public. The Declaration of Policy in section 2 applies with equal force to title I and title II. Subsection (a) also defines the specific agencies, and the specific types of meetings, subject to the open meeting requirement.

AGENCIES INCLUDED

Subsection 201(a) defines "agency" as in the Administrative Procedure Act. A governmental body may fall within the Administrative Procedure Act definition, and thus fall within section 201, assuming it qualifies under the other tests established by the subsection, even if that agency is not actually governed by the other provisions of the Administrative Procedure Act.

Section 201 does not apply, however, to all agencies. To be subject to the section's open meeting provisions, the collegial body comprising the agency must consist of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate. Because of the unique nominating and confirmation process governing appointments to the Federal Election Commission, this agency is included by specific reference. The term "collegial body comprising the agency" does not refer to a single individual who heads an agency with the assistance of staff, nor to the staff of an agency. The term is limited solely to the two or more individuals serving on the commission or board which heads the agency, though it does include meetings of such a body when agency staff or outside individuals are also present.

The subsection does not cover bodies typically known as advisory committees. However, it does include other bodies comprised of part-time Government employees which meet from time to time to review agency activities and give guidance to staff, approve staff actions, review and approve the agency's proposed budget, and so on. Such a board would constitute "the collegial body comprising the agency" even though day-to-day supervision is provided by a single Administrator.

Any body that is subject to this bill shall not at the same time be subject to the provisions of the Federal Advisory Committee Act. Similarly, any body that is now governed by the Federal Advisory Committee Act, or which is determined in the future to be governed by that act, is not governed by this bill. The committee will rely on the continuing oversight of the Subcommittee on Reports, Accounting, and Management to insure that any body that is properly subject to the Advisory Committee Act will continue to follow the provisions of that act.

The following is a list of agencies that in the committee's judgment are covered by this section. It is based on consultations with the Department of Justice. In the final analysis, however, the wording of section 551 of title 5 and this subsection, rather than this list, must govern:

Board for International Broadcasting;
Civil Aeronautics Board;

Commodity Credit Corporation (Board of Directors);
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Reserve Board;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors);
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Parole Board;
Railroad Retirement Board;
Renegotiation Board;
Securities and Exchange Commission;
Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights;
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

S. 5 does not mandate open meetings in the case of single-headed agencies, such as the Departments of Defense, Commerce, or Treasury,

because of the different nature of such agencies. Multiheaded agencies operate on the principle of give-and-take discussion between agency heads. There is a tradition of public dissent; though the agency takes a final action, it does not necessarily speak with one voice. The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking.

The single-headed agency operates differently. Only the single head is ultimately responsible for agency actions, while the staff functions as extensions of the head. Opening staff meetings presents many complications, not the least of which is determining which of the innumerable staff meetings that occur every day should be open. While these difficulties may not be insurmountable, they require a different approach than used in section 201.

It is the committee's hope that each agency not covered by section 201 will closely examine its internal procedures and take on its own every step it can to open up its decisionmaking process, including meetings, to the public. This might include, for example, opening to the public meetings between agency officials and outside parties, and providing the public with more information about why an agency took a particular decision, and the alternatives it considered.

Section 201(a) covers all multiheaded agencies, because the principle of openness applies to all such agencies regardless of the particular nature of its responsibilities. While many of those covered are regulatory, others have more general policymaking roles. The decisions of one may involve no less important policy questions than the decisions of the other. Opening one type of meeting to the public is as important as opening another type. The notion of including some multiheaded agencies in section 201 and excluding others would do violence to the fundamental purpose of the legislation, which is to open Government to the people wherever and whenever possible.

Section 201(a) provides that all meetings of the individual Commissioners, board members, or the like, except those discussions exempted by subsection (b), must be open to the public. Included within this requirement are meetings of agency subdivisions authorized to take action on behalf of the agency. The open meeting requirement applies to panels of a Commission, or regional boards, consisting of two or more agency heads and authorized to take action on behalf of the agency. To be a subdivision of an agency covered by this subsection, the panel need not have authority to take agency action which is final in nature. Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the subsection to open their meetings to the public.

Some agencies do not vest all power in the multiheaded body, but reserve certain functions for the chairman alone. In such cases, meetings of the chairman with staff members, or even with other individual agency heads, acting solely as informal advisers, would not have to be open.

Interagency meetings between members of one agency and officials from other agencies would not come within the provisions of this section unless a majority of the members of one or more of the agencies attended the meeting. Similarly, interagency committees are excluded from this section.

DEFINITION OF MEETING

The definition in subsection (a) of the meetings required to be open to the public is a critical part of the section. A meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business. In addition to business meetings of the agency, it includes hearings and meetings with the public.

To be a meeting the discussion must be of some substance. Brief references to agency business where the commission members do not give serious attention to the matter do not constitute a meeting. A chance encounter where passing reference is made to agency business, such as setting a time or place for the agency heads to meet, would not be a meeting. A luncheon attended by a majority of the Commissioners would not be a meeting subject to the bill simply because one Commissioner made a brief, casual remark about an agency matter which did not elicit substantial further comment. The words "deliberation" and "conduct" were carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of this section.

The definition of meetings includes the conduct, as well as the disposition, of official agency matters. It is not sufficient for the purposes of open government to merely have the public witness final agency votes. The meetings opened by section 201(a) are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny.

To constitute a meeting for purposes of this section the requisite number of agency heads must at least be potentially involved in the discussion. The use of the word "joint" is intended to exclude instances where one or more agency member gives a formal speech concerning agency business, and other members of the commission are in the audience. The word also excludes instances where a single agency head, authorized to conduct a meeting on behalf of the agency, or to take action on behalf of the agency, meets with members of the public, or staff. In all cases, the meeting must involve at least two agency members for the deliberations to be joint.

The deliberations must also involve "official agency business." Discussions among all the agency heads about a purely social gathering do not concern official business of the agency, and would not come within the terms of the subsection. On the other hand, the mere setting of the gathering is not determinative whether a gathering is a meeting for purposes of this subsection. Discussions held in the board room or the Chairman's office are not the only gatherings covered. Conference telephone calls and meetings outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the require-

ments of this subsection. The test is what the discussion involves, not where or how it is conducted.

The reference to the number of individual agency members required to take action means a quorum. In some cases this may mean a simple majority. In other cases, such as a hearing or a meeting conducted by agency members on behalf of the agency, it may be less than a majority of the agency, and as few as two agency members. In three-member agencies, two members will constitute a quorum. This situation will require special sensitivity and judgment. It is not the intent of the bill to prevent any two agency members, regardles of agency size, from engaging in informal background discussions which clarify issues and expose varying views. When two members are less than a quorum, such discussions would not in any event come under the section's open meeting requirements. When two members constitute a quorum. however, the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions. Members of such agencies must use their judgment in these situations, again with the awareness that this bill carries a presumption of openness. Their discussions should remain informal and preliminary to avoid the open meeting requirement.

EFFECT OF SUBSECTION 201(a)

Any meeting falling outside the definition in subsection (a) is not subject to any of the other provisions of the bill. If a meeting does come within the terms of section 201(a), it must be open to the public unless it involves matters described in subsection (b). Except as otherwise provided in the bill, the agency must provide the public with certain information about the meeting, whether or not it is open to the public, and keep a verbatim record of meetings closed to the public unless they involve cases of adjudication. These requirements are described elsewhere in the section.

When a meeting must be open, the agency should make arrangements for a room large enough to accommodate a reasonable number of persons interested in attending. Holding a meeting in a small room, thereby denying access to most of the public, would violate this section and be contrary to its clear intent.

Nothing in subsection (a) requires an agency to permit the public to actively participate in the meeting. Other statutes and agency regulations and policies continue to govern such participation. Section 201(a) only gives the public the right to attend meetings, to listen and to observe.

Section 201(b). The requirements of section 201(a) establish a presumption in favor of open meetings. Subsection (b) allows an agency to close a meeting under certain circumstances, but these are exceptions to the underlying rule of openness. Agencies wishing to close a particular meeting will have the burden of justifying their actions. This approach reflects the philosophy of the bill that most government business can and should be conducted in the public eye. Workable limitations on openness are provided, but this section assures that openness is no longer to be conceived as an exception to the rule of secrecy.

Subsection (b) establishes 10 grounds on which an agency may vote to close meetings or portions of meetings to the public despite the rule of openness established by subsection (a). These exemptions apply equally to agency subdivisions authorized to take agency action. Closing a meeting on these grounds is permissive, not mandatory. The agency should not automatically close a meeting because it falls within an exception. The phrase "Except where the agency finds that the public interest requires otherwise," emphasizes that an agency may still decide that the public good achieved by opening the meeting outweighs the advantages to be gained by closing it.

In addition to closing a meeting, an agency may, on the same 10 grounds, withhold information about the meeting otherwise required by subsections (c) and (d) to be disclosed. For example, an agency need not disclose the subject matter of a closed meeting, or supply a list of those persons attending the meeting, and their affiliation, if that would disclose the very information that the meeting itself was closed to protect.

As with sections 101, 102, and 104, this section provides specific exemptions rather than grants of broad, discretionary authority to agencies to close their meetings. This is in accordance with the bill's policy that most meetings should be open, and closed meetings an exception. These exemptions should not be used to circumvent the spirit of openness which underlies this legislation.

The 10 exemptions apply when the agency "properly" determines that a closed meeting is appropriate. Improper determinations are subject to enforcement proceedings detailed in subsections (g) and (h). In making its determination, the agency's must fairly conclude that the meeting "can reasonably be expected" to fall within one of the 10 exemptions. Thus an agency wishing to close a meeting need not meet the test of absolute certainty, for it might not be possible to know exactly what information the meeting will disclose. Rather, there must only be a reasonable likelihood, based on the nature of the issue, past experience with the similar discussions, and the expressed intent of agency members to raise a sensitive matter. Where the possibility that a meeting will involve exempt matters is fairly remote, the meeting should begin as an open one. If the discussion does become sensitive, the agency may always vote to close the session.

The 10 grounds provided in the act for closing a meeting are as follows:

Section 201(b)(1). This paragraph covers meetings which disclose information specifically required to be kept secret by an Executive order in the interests of national defense or foreign policy, and which is properly classified pursuant to such Executive order.

The wording exactly follows the 1974 amendment to the Freedom of Information Act, 5 U.S.C. section 552(b)(1). The phrases "national defense" and "foreign policy" should be given the same meaning as in the Freedom of Information Act.

Subsection (e) requires an agency to keep a transcript or electronic recording of a meeting closed to the public, and subsection (g) allows a court to examine the record or other information before ordering its release or opening a meeting. A court should therefore be able to determine whether an agency is acting properly if it relies on this pro-

vision to close a meeting to the public. A holding analogous to that in *E.P.A.* v. *Mink, et al.*, 410 U.S. 73 (1973), in which the court declined to permit in camera inspection of classified documents, would be contrary to the intent of this exemption. It is expected that courts will at their discretion examine documents in camera to determine the propriety of the agency's action. Such examination need not be automatic, but in many situations will definitely be necessary. Before ordering in camera inspection, the court may at its discretion allow the Government the opportunity to establish by means of testimony or detailed affidavits submitted by a head of the agency that the meeting, or information related to it, is clearly exempt from disclosure under this section.

Once an agency properly classifies information relating to national defense or foreign policy pursuant to an Executive order, another agency cannot legally declassify it. If an agency subject to this section receives information properly classified by another agency, and public disclosure of the information is prohibited, the meeting must be closed. The agency would have no discretion, for the law provides that in such a case the agency must accept on its face the classification placed on the material by the originating agency. At the same time, the agency may request the classifying agency to review the classification and remove the restrictions prior to the meeting.

Section 201(b)(2). This paragraph exempts meetings which concern solely the agency's own internal personnel rules and practices. The purposes of this clause are to protect the privacy of staff members and to facilitate the agency's internal administration. It is not intended to cover an agency's discussion of personnel matters relating to any other agency, or to individuals working for private employers. This wording parallels the Freedom of Information Act, 5 U.S.C. 552(b)(2). This exemption does not include directions to agency personnel concerning their responsibility vis à vis the public, such as manuals explaining job functions. It includes only internal management matters.

In some cases it will be appropriate for an agency to open a meeting concerning matters of general public interest even though it involves internal personnel rules and practices. For example, an agency might open a discussion of the propriety of an employee's actions disclosing agency information to the public.

Section 201(b)(3). This paragraph applies to meetings which disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of the personal privacy of an individual. This may include a discussion of an individual's drinking habits or health, or review of a grant application which requires assessing an individual's professional competence. Or it may include reviewing an individual's finances to determine his eligibility for financial aid.

It is not intended that agencies will close all meetings that involve personal information about individuals. Such restrictiveness is not in accord with the policy of either the bill or this exemption. Moreover, public officials and private individuals should be subject to different considerations. For instance, a meeting might be closed under this paragraph if it concerned the competence of the president of an entity regulated by the agency. Yet if the discussion centered on the alleged

incompetence with which a Government official has carried out his duties it might well be appropriate to keep the meeting open, since in that case the public has a special interest in knowing how well agency employees are carrying out their public responsibilities. This paragraph must not be used by an agency to shield itself from political controversy involving the agency and its employees about which the public should be informed.

The main purpose of this exemption is to protect an individual's privacy. It would clearly not be appropriate, therefore, to invoke this paragraph when the individual involved prefers the meeting to be open. The procedures an individual may follow if he wishes a meeting to be closed under this paragraph is detailed in subsection 201 (c) (1).

Section 201(b)(4). This paragraph covers meetings which accuse an individual or corporation of a crime, or formally censure such person. The term "formally censuring any person" includes formal reprimands. An agency may discuss a company's alleged crimes, such as the submission of fraudulent documents, and consider whether to refer the case to the Department of Justice for prosecution. 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.

This paragraph insures that where serious charges of this nature are formally discussed by the agency, the agency has the latitude to close the meeting, even if the discussion does not come within the precise terms of paragraph (5), governing investigatory files, or any other part of subsection (b). The provision should not be interpreted as grounds for closing every meeting placing a company in a bad light. To be applicable, the meeting must consider formal agency action accusing a person of a crime or formally censuring a person.

Section 201(b)(5). This paragraph applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. A meeting could be closed, however, only to the extent that disclosure of records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; disclose investigative techniques and procedures; or endanger the life or physical safety of law enforcement personnel. This exemption is the same as the comparable provision in the Freedom of Information Act, as amended in 1974, 5 U.S.C. section 552(b)(7), and should be interpreted in a manner consistent with that act. It is included in recognition of the fact that premature public disclosure of certain matters concerning an investigation could jeopardize these investigations and hinder the ability of the agencies to fulfill their statutory duties.

The investigatory records to be disclosed must have been "compiled for law enforcement purposes," involving specific persons. General records such as annual surveys are not included in this exemption. The provision would be applicable to certain discussions of the legal strategy and tactics to be used in a specific investigation, such as the issuance of a subpena where public knowledge of the discussion might lead to the destruction of documents. It would apply to a discussion identifying a particular individual as a confidential source who supplied specific information. It would not, however, apply to the information supplied by the confidential source in a civil law enforcement investigation which does not disclose the identity of the source. If agency consideration of the matter has advanced to the point where it specifically discusses the initiation, conduct, or disposition of a particular case of adjudication, paragraph (9), rather than this paragraph, will apply. As in the case of the rest of subsection (b), an agency may not be held to a showing of obsolute certainty before invoking this provision. The meeting may be closed if the agency properly determines, on the basis of its general experience and knowledge of the particular facts, that the meeting can reasonably be expected to fall within the terms of the paragraph.

Section 201(b)(6). 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.

The trade secret exemption draws on current case law and commentary regarding exemptions for trade secrets and commercial or financial information found in other laws, especially the Freedom of Information Act, 5 U.S.C. section 552(b)(4). Rather than repeat the original wording contained in the Freedom of Information Act, paragraph (6) reflects as clearly as possible the present direction of the law.

Paragraph (b)(6) involves three tests. First, the information must be either (*a*) a trade secret, or (*b*) financial or commercial in nature. For example information relating to oil or gas reserves collected by an oil company, a technological invention of commercial value, and the level of a company's anticipated price rises, would all be covered by this paragraph.

Second, the information, whether a trade secret or financial or commercial information, must have been directly or indirectly obtained from a person as defined by section 3 of the bill. It includes information one agency has obtained from a person and in turn provided to another agency.

The third test is posed in the alternative. The first criteria is satisfied if there was no legal way for the agency to obtain the information, whether by voluntary or involuntary means without a pledge of confidentiality. This requirement is not satisfied if an agency could have subpenaed the information, or if a statute required the person to furnish it to the agency, whether or not the agency actually subpenaed the information. Pledges of confidentiality do not satisfy this clause

where the agency could have gone to court and obtained the information without giving such a pledge. The purpose of this test is to avoid impairing the Government's ability to obtain necessary information, where governmental access to information must depend on the voluntary cooperation of private individuals and businesses.

The third test may also be satisfied, and a meeting closed, if the information must be kept secret in order to prevent substantial injury to the competitive position of the person to whom the information relates. This may include information an agency can obtain involuntarily from a person. The "competitive position" affected by public disclosure must be that of the person "to whom such information relates." It does not apply to persons who can only make a general demonstration of commercial interest in the information to be disclosed. On the other hand, it does include a person possessing a trade secret which he has not yet used, but which he is likely to put to commercial use in the future.

Section 201(b)(7). This paragraph applies in certain specific instances where premature disclosure of information would destroy an agency's ability to perform its functions effectively. Subparagraph (A) applies to such agencies as the Federal Reserve Board, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and similar agencies that regulate currencies, securities, commodities, or financial institions. The term "financial institutions" is intended to include banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, exchanges dealing in securities or commodities, such as the New York Stock Exchange, investment companies, investment advisers, self-regulatory organizations subject to 15 U.S.C. § 78s, and institutional managers as defined in 15 U.S.C. 78m(f). These agencies often discuss sensitive financial matters. When premature discussion of issues by these agencies would either (*i*) lead to serious financial speculation, or (*ii*) seriously endanger the stability of a financial institution, the meeting may be closed. A Federal Reserve Board discussion of the precarious financial state of a member bank could be closed under this provision. A securities and Exchange Commission discussion whether to suspend trading in a certain stock would also be included. Certain extremely sensitive financial actions cannot be disclosed until several months after they are taken. The wording therefore applies to an agency discussion of action already taken, as well as to a proposed action. This exemption, as all others, is prefaced by the phrased "can reasonably be expected" to disclose certain information. An agency seeking to close a meeting would therefore not have to conclude to an absolutue certainty that serious speculation would occur.

Subparagraph (B) applies to actions by any agency when premature disclosure of its plans would seriously frustrate effective implementation of its actions. An example would include discussion of the strategy an agency will follow in collective bargaining with its employees. Public disclosure might make it impossible to reach an agreement. Or an agency may consider imposing an embargo on the foreign shipment of certain goods. If this were publicly known, all the goods might be exported before the agency had time to act, and the effectiveness of the proposed action destroyed. The discussion could involve

agency approval of a proposed merger, if premature public disclosure of the proposal would make it impossible for the two sides to reach an agreement.

Subparagraph (C) applies to premature disclosure of an agency's plans to purchase a particular piece of land for itself. Public knowledge of the proposed action might drive up the price of the parcel under consideration, or lead to considerable land speculation.

The last sentence in paragraph (7) provides that an agency may not close a meeting pursuant to this paragraph if it has already publicly announced the content or nature of the action under consideration. Since the paragraph only applies when an agency feels it must act in secret, it would be contrary to the intent of this provision for an agency to rely on it when the public is already aware of the actions being considered, or where the Administrative Procedure Act or other statute requires the agency to publicly announce its proposal before taking final action. Thus, if an agency has already announced a proposed rule, or generally disclosed the nature or content of its proposed action, or if it must do so under the requirements of the Administrative Procedure Act before finally adopting the rule, discussion of the proposal to issue a rule, or take other action, could not be closed under this paragraph. Discussion of a complaint that has already been issued, or which must be issued, before final agency action is taken may be closed under other paragraphs, but not this one. The proviso in the last sentence of the paragraph will be applicable even if an agency has not already disclosed the exact wording of the proposal, or disclosed every detail of a proposed action. If the agency has already disclosed enough of the content or nature of the rule to give the public an idea of what the agency is proposing, it may not invoke paragraph (7).

The words "serious" and "seriously" qualify both subparagraphs (A) and (B). Without such a qualification, the provision could be read as endorsing a closed meeting even though, for example, the amount of speculation it might produce would be insignificant, or implementation of a proposed action would only be minimally "frustrated" by an open meeting. "Serious" means that there must be a balancing test, just as elsewhere in this bill, to determine how the public interest is best served.

Section 201(b)(8). This paragraph applies to meetings which disclose information contained in or relating to examination, operating, or condition reports on financial institutions. These reports are prepared by or for the use of such banking agencies as the Federal Reserve Board, Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board. This provision is identical to exemption (b)(8) of the Freedom of Information Act and should be interpreted in the same way.

Section 201(b)(9). This paragraph applies to meetings concerning the agency's participation, or preparation to participate, in a civil action in Federal or State court, or the initiation, conduct, or disposition of agency adjudication governed by section 554 of title 5, United States Code, or similar provision.

The first portion of the paragraph applies to an agency discussion of its participation in a civil action in Federal or State court. This

includes discussions concerning whether the agency should either bring an action itself or ask the Department of Justice to bring it. The second portion of the paragraph refers to formal adjudications conducted by the agency itself. The paragraph refers to an adjudication "otherwise involving a determination on the record after opportunity for a hearing" in order to include formal agency adjudications on the record not governed by section 554 of the Administrative Procedure Act. The paragraph only covers proceedings which follow sections 556 and 557 of the Administrative Procedure Act, or similar procedures.

The committee felt that it would be inappropriate for several reasons to require agencies to open meetings discussing specific cases of adjudication. Public disclosure of an agency's legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action. Public discussions of the guilt or innocence of a particular individual in agency adjudication could unfairly injure a person's reputation, or make it impossible for him to receive a fair or impartial hearing. Adjudications of the type covered by this paragraph must already be decided solely on the information in the record. Unlike other cases, the entire record on which the agency must make its decision in adjudication is open to inspection by any member of the public. Section 202 of the bill, prohibiting ex parte contacts, will help insure that such decisions are in fact based solely on the record. Finally, many aspects of the adjudicative process, such as the trial before an administrative law judge or appellate arguments before the commission are generally open now to the public.

To fall within the provisions of this paragraph the discussion must concern a particular case of adjudication. If the agency discusses a particular series of cases, each of which meets the requirements of this paragraph, the meeting may also be closed. The paragraph would not apply when an agency discusses its adjudication policies in general, such as the policy that should be adopted towards all those that may violate a particular law.

Although a proceeding may technically involve an agency adjudication or proceeding in district court, it may still be possible for the agency to open its deliberations to the public. For instance, the agency may only be discussing a legal point. Or the discussion may involve a formal rule making proceeding where general agency policy, rather than the facts of a particular case, are determinative. Holding such meetings in the open would increase public understanding of the laws the agency administers, and the agency's interpretation of them. In other cases, a particular aspect of the adjudicative process may be required by other law to be open. In such event, this provision would not permit an agency to close a meeting otherwise required to be open.

Section 201(b)(10). This paragraph applies to meetings which involve information required to be kept secret by another statute. In such case, the agency must close its meetings notwithstanding the permissive nature of section 201(b).

Statutes which permit Government officials to withhold information on general discretionary grounds such as "in the public interest" are not included here. Thus, the statute involved in *Administrator, FAA* v. *Robertson*, 95 S. Ct. 2140 (1975), would not qualify for this exemption. Nor would the provisions of the Freedom of Information Act

apply since that statute permits but does not require the agency to keep any information from the public. The provision only refers to statutes which require specific types of information to be withheld from the public, or which describe by particular criteria the type of information that must not be disclosed. For example, individual's income tax return could be discussed in private under this provision, pursuant to 26 U.S.C. 6103. The limitations on the public disclosure of information imposed on agencies by the Privacy Act, 5 U.S.C. 552a(b), would also apply. The statute governing disclosure of information about complaints received by the Equal Employment Opportunity Commission, 42 U.S.C. 2000e–5(b), would come within this paragraph.

Section 201(c). Subsection (c) establishes the procedures an agency must follow if it wishes to close a meeting under subsection (b). The subsection will be inapplicable when an agency meeting remains open. In those cases where an agency meeting must be closed, this subsection permits closure in a way that will not interfere with the efficient or expeditious conduct of agency business.

Paragraph (1) provides that a meeting may be closed only by a majority vote of the entire membership of the agency. The vote of a simple majority of a quorum would not suffice to close the meeting. Subdivisions of the agency are subject to the same requirements. Each vote must be recorded and must be made public by the agency within one day. Where a meeting of agency heads is convened to discuss the matter, no proxies are allowed. The voting procedures specified in paragraph (1) are equally applicable to the other votes an agency may be required to take pursuant to this bill. Closing an agency meeting, or denying the public information about it, is a significant decision. It should not be taken without the concurrence of a majority of the entire body, and in accordance with the other procedures specified in this paragraph.

If an agency needs to close only certain portions of a meeting, its vote must be in specific reference to those portions. It is recognized in section 201 that an agency may have to close a portion of a meeting, but that the remainder of the meeting may remain open. In such cases the closed portions of the meeting are governed by the same procedures as if it were a separate meeting. Thus references throughout section 201 to meetings that an agency wishes to close are also intended to refer to a portion or portions of a meeting which an agency wishes to close.

Generally, a separate vote must be taken on each meeting, or portion of a meeting, the agency wishes to close. A single vote can be taken, however, to close a series of meetings, where all the meetings will be held within a 30-day period and involve the same "particular matters." The latter phrase means more than general similarity of content. It must involve the same agenda item, such as a particular bank application, a proposal to suspend trading in a particular security, or the like. This provision was added so that the agency would not have to vote repeatedly on whether to close the same discussion which stretches over more than one meeting. The procedures governing the closing of meetings also apply should an agency wish, pursuant to subsection (b), to withhold information about the meeting otherwise required by subsections (c) and (d) to be disclosed.

Agency members will not normally need to meet to decide whether to close a subsequent meeting or to decide upon the agenda for the meeting. It is anticipated that the agencies will instead use notation voting, or similar procedures, to determine whether to close the meeting. As is currently the case, the agenda may be prepared by informal means which do not require the convening of all the agency heads. Nothing in this subsection is intended to prohibit such procedures. If, however, a matter of unusual importance has generated great public interest, the agency heads may choose to have a separate preliminary meeting to decide whether to close a meeting. Where the agency has such a preliminary meeting, it too would have to be open unless closed pursuant to subsection (b). Such a meeting would be subject to the same notice requirements, and exceptions, as any other meeting.

In some cases a person may believe that an agency meeting directly affecting him would constitute an invasion of personal privacy (section 201(b)(3)), accuse him of criminal charges (section 201(b)(4)), or disclose information affecting him in an investigatory file (section 201(b)(5)). The subsection specifically recognizes the right of a person in such circumstances to ask the agency to close the meeting. If one member of the agency concludes that the person may be directly and adversely affected by holding the meeting in public, the entire agency must vote on whether to close the meeting. The purpose of this clause is to insure that an agency considers any person's legitimate concern that an open meeting may harm him in a direct and personal manner. It should help guarantee, for instance, that an agency does not inadvertently overlook the possibility that a particular discussion, if held in public, would constitute an invasion of personal privacy or disclose the identity of a confidential source.

Section 201(c)(2). Paragraph (2) requires an agency to publish a full written explanation of its decision to close any meeting within one day of the vote to do so. A list of persons expected to attend the closed meeting, and their affiliations must accompany the explanation except as provided by subsection (b). The explanation should not only refer to the specific paragraph in subsection (b) which the agency is invoking, but explain why the specific discussion falls within the paragraph cited, the relative advantages and disadvantages to the public of holding the meeting in closed or open session, and why the agency concluded on balance that the public interest would best be served by closing the meeting. The explanation and the accompanying list need not disclose information described in subsection (b), where such disclosure would have the same undesirable effect as opening the meeting itself. In all but the most extraordinary circumstances, however, the agency should be able to give some specific explanation of its action. In such case, the agency must do so in as detailed terms as possible.

Section 201(c)(3). Paragraph (3) provides that any agency which will be closing a majority of its meetings under paragraph (6), (7)(A), (8), or (9) of subsection (b) may do so by regulation, and under expedited procedures. The agency can qualify under this subsection if it must close a majority of its meetings under any one of these paragraphs, or under two or more of these paragraphs. Paragraph (3) will largely apply to agencies which regulate financial institutions,

securities, or commodities, and which will often have to conduct their sensitive business in private, and on short notice. It will also apply to agencies whose primary or sole task is to conduct cases of adjudication. Agencies which may possibly issue regulations pursuant to these provisions include the Federal Reserve Board, the Securities and Exchange Commission, and the National Labor Relations Board.

The records of agency meetings over the past several years should indicate whether an agency may properly close a majority of its meetings under this paragraph. Even if it could close a majority of its meetings, an agency should examine whether it will really need to close such a large number of its meetings under the specific paragraphs cited in subsection (c)(3). Full recognition must be given to the fact that this bill establishes a new principle of openness that is equally applicable to all agencies.

The issuance of any regulations pursuant to subsection (c)(3) shall be governed by subsection (f). The regulations should fully document, on the basis of the past history of agency meetings, the likelihood that it will have to close a majority of its meetings pursuant to paragraph (6),(7)(A), (8) or (9). The regulation should also specify in detail the types of meetings to which the regulations apply and which exemption is relied upon as the grounds for closing each type of meeting.

An agency that has properly issued such regulations may announce in advance of a particular meeting that it proposes to close the meeting pursuant to its regulations. The agency then need only vote at the beginning of the meeting itself that the meeting should in fact be closed.

An agency which operates under regulations authorized by this paragraph need not comply with the remainder of subsection (c), or the notice requirement imposed by subsection (d), with respect to any meeting closed by regulation. One-week notice to the public of the meeting would not be necessary. The agency must, however, provide a public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity. This announcement should be similar to that required by subsection (d). Disclosure of information about a meeting governed by subsection (c)(3) is also subject to subsection (b), so that information otherwise required to be disclosed in the public announcement of the meeting, may be withheld if it falls within the provisions of subsection (b). As used in this subsection, the term "earliest practicable opportunity" has the same meaning as in subsection (d). If an agency subject to this paragraph wishes to change the subject matter of a previously announced meeting, it may do so at the earliest practicable opportunity, just as in the case of a meeting governed by subsection (d).

Section 201(d). This subsection requires advance public notice of all agency meetings. Such information must be made available by an agency in order to make the public's right to attend a meeting meaningful.

The subsection requires the agency in most cases to publicly announce the date, place, subject matter of a meeting, and whether open or closed, at least one week beforehand. The identification of the subject matter must be adequate to inform the general public thoroughly, referring, for example, to a specific docket number, the name of the

applicant, the identity of the proposed rule, and the like. Reference to a generic subject matter, such as "consumer complaints," or "applications for new routes," does not meet the requirements of this subsection.

If a majority of the entire membership of the agency votes that agency business requires a meeting to be held with less than 7 days notice, the required public notice must still be provided at the earliest practicable date. This provision allows agencies to schedule a meeting where consideraion of an emergency matter can not be delayed 7 days. It recognizes that the public interest in obtaining rapid agency action may at times override the public interest in receiving advance notice of meetings. This clause does not, however, allow an agency to wait until the last moment to schedule a meeting, when agency business truly requires it, if the meeting could have been scheduled in time to give the public a week's notice.

When notice of a meeting is provided less than 7 days in advance, it must still be provided "at the earliest practicable opportunity." In most cases this should still permit several days notice to the public. If the need is genuine, however, the announcement may be made only hours in advance of the meeting. In the unusual case, the announcement may have to be issued simultaneously with the convening of the meeting. Or a meeting which has already started as an open one, may suddenly have to be closed if some sensitive matters unexpectedly arises. Even if, in such circumstances, the public does not in fact learn of the meeting until after it has occurred, the announcement must be made to provide a record of such meetings.

After a meeting is scheduled and public announcement provided, the subject matter of the meeting or the decision to open or close the meeting, may be changed if two conditions are satisfied. First, a majority of the entire membership of the agency must vote that agency business requires the change, and that earlier announcement of the change was not possible. Second, an agency must publicly announce the change at the earliest practicable opportunity. The same considerations as discussed above apply to the timing and nature of such announcements.

This procedure anticipates cases when agency business requires that a matter be added to an agenda on a few days or even a few hours notice. For example, a motor carrier may apply for an emergency temporary operating license in order to provide fuel, food, clothing or the like to those who need it immediately. Agency action within days or hours may be necessary. In such a case, the matter could be added to the already announced agenda of the meeting, or the agency could call a separate meeting to consider the matter. The decision to close a meeting previously open to the public might also occur on short notice, or even at the meeting itself, when a new subject or new facts arise. The provision is designed to provide the flexibility necessary to insure expeditious agency action.

Whenever an agency provides public announcement of its meetings, it should use a variety of means to insure that the information reaches the public as quickly and reliably as possible. Agencies may wish to issue a weekly calendar of scheduled meetings. Such calendars could be mailed to those who express special interest in being informed about the agency's activities. Agencies should also use public bulletin boards, press releases, and recorded telephone messages de-

scribing the status of agency meetings scheduled for the next 7 days. There is no requirement that announcement of the meeting or any changes made concerning such meetings appear in the Federal Register prior to the meeting. However, this should be done whenever possible. In any event, the information must be printed in the Federal Register as soon as possible following the first public announcement. Even if this does not occur until after the meeting, such notice will provide a record of all agency meetings in a single publication widely available to members of the public.

The subsection also requires an agency, when announcing its meetings, to include the name and telephone number of an agency employee whom the public may contact for more information about the meeting. This is a practice already followed with success by some agencies in connection with meetings between agency officials and members of the public.

Section 201(e). This subsection requires that a complete verbatim transcript or electronic recording be made of each meeting the agency votes to close, unless it is a meeting concerned solely with adjudicative matters covered by subsection 201(b)(9). Where an agency makes an electronic recording of the meeting, rather than a written transcript, the tape should be coded, or other records kept, adequate to identify each speaker. The agency must on its own initiative promptly provide to the public the complete transcript or electronic recording of any item on the agenda where no significant portion of its discussion would disclose information falling within subsection (b). If only one or two brief references to sensitive matters were made in a lengthy discussion of an item on the agenda, the record of the discussion, minus the one or two references, must be made public. Agencies need not edit a transcript or electronic recording of the Commission's discussion of a particular matter word by word so as to make abbreviated portions of the record of the meeting available to the public. Where sensitive matters are an integral part of the record of the discussion of a matter, no part of the record need be made public. The reference to each item on the agenda, or the testimony of each witness, includes each easily identifiable segment of a meeting. Even if an agency does not in fact have a formal agenda for the meeting, or receive testimony, the phrase would include the agency's discussion of each separate issue or other equivalent matter which it takes up at the meeting.

The subsection does not require the agency to follow any specified procedure in determining whether to make the record of a meeting available to the public. It does not require, for example, that a record of the vote be provided the public, or even that a formal vote on the matter be taken.

The requirement that agencies keep a transcript or electronic recording of a closed meeting constitutes an integral part of the open meeting requirements of the bill. Subsection (e) should be used to inform the public about the bulk of the discussion of any item on the agenda where the consideration of sensitive matters occurs in an easily identifiable segment of the discussion occupying only a small portion of the time devoted to the entire agenda item. Or it may be that an entire discussion does not in fact involve any sensitive matters jusifying the closing of a meeting, even though the agency reasonably expected it

would when it closed the discussion. In yet other instances a meeting will be closed because it involves matters which are sensitive at the time, such as the regulation of financial institutions, that would cause financial speculation if disclosed prematurely. Later, however, the discussion's sensitive nature may disappear. An agency must then publicly release the record of its meeting at a later date when paragraph 7 no longer applies. Finally, subsection (e) will permit interested members of the public to learn what transpired at a meeting which a court later holds was improperly closed.

The transcripts and recordings that may be made public must be promptly placed in a public document room. The agency must do this on its own initiative, rather than waiting until it receives a particular request. Where a meeting was unnecessarily closed to the public it should take the agency a week or less to make the record available to the public. The room for storing the transcript or electronic recording must be easily accessible to the public in an unrestricted area of the building. In the case of electronc recordings some provision must, of course, be made to permit members of the public to listen to them, and to identify each speaker. Copies of transcripts, or transcriptions of the tapes identifying all speakers, must be provided at the actual cost of duplication or transcription. If a person requests a copy of a tape, rather than a transcription of it, this should also be provided at the actual cost of copying.

When people ask for copies of the records of meetings available to the public, agencies should follow procedures similar to those adopted under the Freedom of Information Act, 5 U.S.C. section 552(a)(4)(A). Regulations should be promulgated, pursuant to subsection (f), which specify a uniform schedule of fees. The fees should be limited to reasonable standard charges for duplication, which may include appropriate pro rata labor costs. Fees should not be used to discourage requests for copies of the record of a meeting. Documents should be furnished at a reduced or zero charge when the agency determines that such action is in the public interest, or will primarily benefit the general public.

The transcripts or tapes must be maintained by the agency for 2 years, or for 1 year after the conclusion of the proceeding to which they relate, whichever occurs later. If an agency discusses the initiation of a proposed investigation at a closed meeting, the record should be retained until the investigation, and any agency adjudication arising from it, is completed and final agency action taken.

Section 201(f). This subsection requires each agency to promulgate regulations implementing the requirements of subsections (a) through (e) within 180 days after enactment of the act. The regulations should, for example, describe how the agency will publicly announce its meetings, establish procedures for closing meetings where necessary, specify how the public can obtain records of formerly closed meetings, and at what cost. Any agency that invokes the provisions of subsection 201(c)(3) must issue implementing regulations pursuant to this subsection.

If an agency does not promulgate regulations within 180 days, any person may bring a proceeding in the U.S. District Court for the District of Columbia to compel issuance of the regulations. Any per-

son has the right to challenge the adequacy of the regulations that are issued by the agency in the District of Columbia of Appeals. A person may invoke this provision, for instance, to challenge the applicability of subsection (c)(3) to a particular agency. If an issue is too speculative or remote, the Court of Appeals may refuse to entertain the suit. Any person has standing to bring an action since the bill is designed to protect the right of the general public to attend agency meetings. Thus, standing to bring action under this section cannot be limited to only those persons who may be directly affected by particular agency action taken at the meeting. Any person with sufficient interest in the matter to want to bring suit under this section will be able to do so.

Section 201(g). This subsection gives the U.S. district courts jurisdiction to enforce the requirements of subsections (a) through (e) by declaratory judgment, injunction, or other appropriate relief. Any person may bring an action in the district where he resides or has his business, or where the agency is headquartered, prior to or within 60 days after, the meeting to which the violation relates. If the agency fails to announce the meeting when required by subsection (d), the suit may be brought within 60 days after the date that any public announcement is actually made. If an agency provides no public announcement at all, the 60-day requirement is inapplicable.

Before instituting a suit, the plaintiff must first notify the agency and give it a reasonable period of time, not to exceed 10 days, to correct the violation, or to prevent it from occurring in the first place. If the plaintiff is seeking to open a meeting which has not yet been held, he need not give the agency more than 2 days to act. Under certain circumstances, reasonable notice will be less than the maximum possible period. Where the meeting will be held in less than 2 days, for example, a reasonable length of time might be only several hours. While a person waits for a response to his request that the agency correct an asserted violation, the 60-day statute of limitations shall be tolled.

It is important that actions brought under this subsection be handled expeditiously in order for public participation to be meaningful. Accordingly, the defendant must serve his answer within 20 days after service of the complaint.

The burden of proof is on the agency to sustain its conduct. This is in accord with the presumption of openness established in the bill. Those who wish to operate in secrecy should have to justify it. Furthermore, in most cases the agency will be the only party in possession of information that might justify closing the meeting. The burden must therefore be on the agency to produce any facts that may support its action. In deciding cases, the court may examine in camera any transcript or recording of a closed meeting, and take additional evidence as needed. In appropriate cases, it may also permit attorneys for all parties to examine the record of the meeting and argue the case in camera.

Under subsection (g) the court may grant appropriate equitable relief. This may include ordering an agency to open a meeting it had planned to close, ordering the release of the record of an improperly closed meeting, or issuing a declaratory judgment.

The subsection specifically provides that it does not confer any jurisdiction on district courts to invalidate agency action taken at an illegally closed meeting. This provision is also intended to prohibit the district court from enjoining any action taken at an improperly closed meeting, or compelling the agency to take any action, where the action in question is not directly related to the requirements of this bill. Any relief the district court does grant pursuant to this subsection is subject to the requirement that it be with due regard for orderly administration and the public interest, as well as the interests of the parties. Normally it should not be necessary for a court to enjoin the holding of a meeting in order to correct violations of this section. The court may do so, however, where, for example, the agency's violation is flagrant, or where the matter does not demand immediate action, and the public interest in the matter is great.

As in the case of subsection (f), any member of the public has standing to bring suit under this subsection. The subsection authorizes suit to be brought against an individual member of the agency, as well as the agency itself. This provision is required by subsection (i), which permits a court to assess costs against an individual member of an agency in certain extraordinary cases. As in other instances when a Government official is named as a defendant in a suit, the Federal Government should defend individual agency members sued under this subsection.

Section 201(h). This subsection allows any Federal court otherwise authorized by law to review other agency action to also review an agency's compliance with this section. If the action an agency took at a closed meeting was not otherwise reviewable by the court, this subsection would not make that action, or the agency's compliance with this subsection reviewable. Review of agency compliance with this section may be conducted under this subsection at the request of any person who may otherwise properly participate in the judicial review proceeding pursuant to 5 U.S.C. section 702, or other applicable law. For example, a company challenging the validity of an agency rule, may include in its challenge the fact that the agency adopted the rule in a meeting improperly closed to the public.

The reviewing court can afford any relief it deems appropriate. This may include ordering the release of a transcript of an improperly closed meeting. It may also include reversing an agency action on the grounds that it was taken at a meeting improperly closed to the public. It is expected that a court will reverse an agency action solely on such grounds only in rare instances where the agency's violation is intentional and repeated, and the public interest clearly lies in reversing the agency action.

Section 201(i). This subsection allows the court to assess against any party the reasonable attorney fees and other litigation costs incurred by any party who substantially prevails in an action brought pursuant to subsection (f), (g), or (h). Other litigation costs may include reasonable fees for attorneys and expert witnesses. This portion of the subsection is based on similar provisions in the Freedom of Information Act (5 U.S.C. 552(a)(4)(E)) and the Privacy Act (5 U.S.C. 552a(g)(2)(B)).

Cost may be assessed against an individual agency member, rather than against the agency itself or the United States, only when the

agency member has intentionally and repeatedly violated section 201. Costs may only be assessed against the plaintiff under this subsection when he has brought a suit for frivolous or dilatory reasons. The committee feels these provisions will, on the one hand, help assure compliance with the section, and, on the other hand, prevent unnecessary litigation against an agency already in compliance.

Section 201(j). This subsection requires agencies subject to section 201 to annually report to Congress on their compliance with the section. The report must include the number of meetings open and closed to the public, reasons for closing the meetings, and a description of any litigation brought against the agency under this section.

SECTION 202—PROHIBITION OF EX PARTE COMMUNICATIONS

Section 202(a). This subsection amends the provisions of the Administrative Procedure Act governing adjudication and formal rulemaking (4 U.S.C. 557) by establishing a broad prohibition against ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act, whether or not the agency is subject to section 201 of the bill. Such a prohibition is presently implied by section 556(e) of the Administrative Procedure Act which states that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision." Yet the act contains no general statutory prohibition against ex parte contacts. If a court now wishes to invalidate an agency proceeding because of ex parte contacts, it must rely on constitutional standards, rather than specific provisions. See e.g., *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F. 2d 221 (1959). Section 202 provides for the first time a clear, statutory prohibition of ex parte contacts of general applicability.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section do not repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The rule forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption includes, for example, requests by one party to a proceeding for subpenas, adjournments, and continuances.

Paragraph (1) forbids contacts between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The wording "interested persons" is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. As used in this section, "person" has the same meaning as elsewhere in the Administrative Procedure Act.

The rule applies to interested persons who "make or knowingly cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of knowingly causing an ex parte contact.

Contacts are prohibited with any agency members, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional proceess. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The ex parte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relevant to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have any effect on the way the case is decided. It excludes general background discussions about an entire industry which do

not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not directly discuss the merits of a pending adjudication it is not prohibited by this section.

A request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

Paragraph (2) is the inverse of paragraph (1). It prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1).

Paragraph (3) states that if an ex parte communication is made or received by an agency official, he must place on the proceeding's public record: (A), any illegal written communication, (B), a memorandum stating the substance of any illegal oral communication, and (C), any oral or written statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the materials relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. Agency officials who make an ex parte contact are under the same obligation to record it publicly as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

Paragraph (4) states that the officer presiding over the agency hearings in the proceedings may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected because of the violation. This provision accompanies section 202(d), which authorizes an agency to consider a violation of this section as grounds for ruling against a party on the merits. Paragraph (4) insures that the record of the proceeding contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion. As in the case of

subsection (d), the presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus a showing should be required where, among other factors, there is a reasonable likelihood that the illegal contact will be shown to have been made knowingly, but not where the violation was clearly inadvertent.

Paragraph (5) requires that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communication before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency, if it wishes, may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

Section 202(b). This subsection is only a conforming amendment. It deletes from the Administrative Procedure Act the limited provision in section 554(d) now governing ex parte communications. This part of the present law is no longer necessary upon adoption of section 202(a).

Section 202(c). This subsection adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act. The term includes an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. As in subsection (a), "public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Section 202(d). This subsection amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provision apply to both formal parties, and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in an illegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes." For

example, the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

The subsection specifies that an agency may rule against a party for making an ex parte communication only when the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, the committee concluded that an agency should not definitively rule against a party simply because of an inadvertent violation.

It is expected that an agency will rule against a party under this subsection only in rare instances. However, the committee felt it very important that an agency have this option available where the circumstances justify it, and where the agency must emphasize the seriousness with which it views violations of the ex parte rules.

SECTION 203—EFFECT ON OTHER LAWS

Section 203(a). This subsection provides that nothing in section 201 increases or decreases the public's access to documents or other records under the Freedom of Information Act, 5 U.S.C. section 552. Access to the actual documents or other written matter discussed or referred to at a meeting subject to section 201 will continue to be governed, as before, by the Freedom of Information Act.

The availability of transcripts or electronic recordings required by section 201(e) are exempted from this general rule. Section 201(e) imposes a separate responsibility on an agency to keep verbatim records and to make them available to the public on its own initiative unless they concern matters falling within subsection (b) of section 201. If an agency properly withholds the transcripts or electronic recordings under section 201(e), it need not disclose the material pursuant to a Freedom of Information Act request, even though the nature of the information is such that it would otherwise have to be disclosed under that act.

Except to the extent section 201(e) is inconsistent, the other provisions of the Freedom of Information Act will continue to apply to the transcripts or electronic recordings of meetings, and to any request made under the Freedom of Information Act for access to such records. Thus, the transcripts or electronic recordings must be indexed in accordance with the Freedom of Information Act and publicly disclosed except to the extent section 201(b) would apply to such information. An agency response to a request under the Freedom of Information Act for a transcript or electronic recording of a meeting would be subject to the time limits for agency action established by that act. A member of the public may invoke the enforcement provisions of that act to insure that agency treatment of the transcripts or electronic recordings comply with its provisions.

Section 203(a) also provides that the storage of transcripts or electronic recordings required by section 201(e) are not subject to the Federal Records Act, chapter 33 of title 44, United States Code. Such material need not be kept beyond the period specified in section 201(e). The committee expects, however, that in accordance with the principles established in the Federal Records Act, the agency will choose to permanently retain transcripts or electronic recordings of meetings of special interest. This subsection also specifies that nothing in title II authorizes the withholding of any information from Congress.

Section 203(b). This subsection states that section 201 may not be used to deny requests by an individual for information under the Privacy Act, section 552a of title 5, United States Code, including information which might be contained in transcripts or electronic recordings of properly closed meetings. The principles of the Privacy Act govern whether or not an agency may withhold information from the public in general. The applicability of the Privacy Act should in no way be limited by enactment of this bill.

SECTION 204—EFFECTIVE DATE

This section provides that title II will become effective 180 days after enactment. The provisions of 201(f), requiring the promulgation of regulations within 180 days from enactment, become effective immediately. This will assure that agencies will have promulgated the necessary regulations, and have established the necessary procedures, to allow complete compliance with section 201 once it does become effective. The 180-day period will also give the agencies an opportunity to review their regulations governing ex parte contacts and to revise them in accordance with section 202 of the bill.

ESTIMATED COST OF THE LEGISLATION

It is estimated that title I, opening meetings of congressional committees, and section 202 of title II, regulating ex parte contacts in formal agency procedings, will impose no additional cost.

While it is difficult to estimate the probable cost of section 201, it is anticipated that most of the added cost will be for additional clerical and administrative work required by the section. The committee estimates that this additional cost will be minimal.

Open meetings will require no tape recorders, no transcripts and no editing of tapes. The only cost to an agency of an open meeting will be the very small cost of providing the necessary public announcement. An agency closing a meeting will have the additional cost of making a transcript of the proceeding, or the cost of making an electronic recording. The estimated cost of section 201 will therefore depend on the number of meetings closed to the public. Since most of the agency meetings should be open to the public, the committee expects that the total cost of transcripts for closed meetings will be relatively minor. The cost of the verbatim record will be further reduced if an agency relies on an electronic recording. The cost of electronic equipment has been estimated to be only a few thousand dollars per agency. The cost of providing copies of the transcripts or tapes to the public will be borne by the member of the public requesting the copy.

In a few cases, section 201 may require an agency to hire one additional employee to handle the added clerical and administrative work.

ROLLCALL VOTE IN COMMITTEE

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, the rollcall vote taken during committee consideration of this legislation is as follows:

Final Passage: Ordered Reported: 8 yeas—0 nays.

Yeas:

Chiles
Nunn
Glenn
Ribicoff
Percy
Javits
Roth
Brock
(Proxy)
Jackson
Muskie
Metcalf
Weicker

Nays:

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

(2 U.S.C. 72a note)

LEGISLATIVE REORGANIZATION ACT OF 1946 AS AMENDED THROUGH MARCH 7, 1975

* * * * * * *

TABLE OF CONTENTS

TITLE I—CHANGES IN RULES OF SENATE AND HOUSE

RULE-MAKING POWER OF THE SENATE AND HOUSE

SEC. 101. * * *

* * * * * * *

COMMITTEE PROCEDURE

(2 U.S.C. 190a)

SEC. 133. (a) * * *

(b) [Meetings for the transaction of business of each standing committee of the Senate, other than for the conduct of hearings, shall be open to the public except during executive sessions for marking up bills or for voting or when the committee by majority vote orders an executive session.] Each such committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded. The results of rollcall votes taken in any meeting of any such standing committee of the Senate upon any measure, or any amendment thereto, shall be announced in the committee report on that measure unless previously announced by the committee, and such announcement shall include a tabulation of the votes cast in favor of and the votes cast in opposition to each such measure and amendment by each member of the committee who was present at that meeting.

* * * * * * *

SENATE COMMITTEE RULES

(2 U.S.C. 190a–2)

SEC. 133B. * * *

OPEN SENATE COMMITTEE MEETINGS

SEC. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.

OPEN CONFERENCE COMMITTEE MEETINGS

SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to a clearly unwarranted invasion of the privacy of an individual;

(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.

OPEN JOINT COMMITTEE MEETINGS

SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.

CHAPTER 5, TITLE 5, U.S. CODE

§ 551. Definitions.

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to [act.] *act; and*

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

* * * * * * *

§ 554. Adjudications.

(a) * * *

* * * * * * *

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. [Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

[(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

[(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.]

Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) * * *

* * * * * * *

(d) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(2) no member of the body comprising an agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of this subsection, shall place on the public record of the proceeding:

(A) written communications transmitted in violation of this subsection;

(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; the agency, administrative law judge, or other employee presiding at the hearing many, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge.

STANDING RULES FOR CONDUCTING BUSINESS IN THE SENATE OF THE UNITED STATES

* * * * * * *

RULE XXV

STANDING COMMITTEES

* * * * * * *

7(a) * * *

[(b) Meetings for the transaction of business of each standing committee of the Senate, other than for the conduct of hearings (which are provided for in section 112(a) of the Legislative Reorganization Act of 1970), shall be open to the public except during closed sessions for marketing up bills or for voting or when the committee by majority vote orders a closed session: *Provided*, That any such closed session may be open to the public if the committee by rule or by majority vote so determines.]

RULES OF THE HOUSE OF REPRESENTATIVES

FIRST SESSION, NINETY-FOURTH CONGRESS

* * * * * * *

RULE XI

RULES OF PROCEDURE FOR COMMITTEES

* * * * * * *

Committee Rules

2. (a) * * *

* * * * * * *

Open Meetings and Hearings

[(g)(1) Each meeting for the transaction of business, including the markup of legislation, of each standing committee or subcommittee thereof shall be open to the public except when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of the meeting on that day shall be closed to the public. *Provided, however*, That no person other than members of the committee and such congressional staff and such departmental representatives as they may authorize shall be present at any business or markup session which has been closed to the public. This paragraph does not apply to open committee hearings which are provided for by clause 4(a)(3) of Rule X or by subparagraph (2) of this paragraph, or to any meeting that relates solely to internal budget or personnel matters.]

(g)(1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.

APPENDIX

SUMMARY OF STATE OPEN MEETINGS LAWS[1]

	Date of latest action	Includes statement of public policy	Provides for open legisla-ture	Provides for open legislative committees	Opens state agencies
Alabama	1915				yes
Alaska	1972	yes	yes	yes	yes
Arizona	1974	yes	yes	yes	yes
Arkansas	1967	yes			yes
California	1974	yes			yes
Colorado	1974	yes	yes	yes	yes
Connecticut	1971				yes
Delaware	1955				yes
Florida	1967				yes
Georgia	1972		yes	yes	yes
Hawaii	1959				yes
Idaho	1961				yes
Illinois	1973	yes			yes
Indiana	1971	yes			yes
Iowa	1967				yes
Kansas	1972	yes	yes	yes	yes
Kentucky	1974	yes	yes	yes	yes
Louisiana	1972				yes
Maine	1973	yes	yes	yes	yes
Maryland	1954				yes
Massachusetts	1970				yes
Michigan	1968		yes	yes	yes
Minnesota	1973		yes	yes	yes
Mississippi	1975				
Missouri	1973		yes	yes	yes
Montana	1963	yes	yes	yes	yes
Nebraska	1972	yes			yes
Nevada	1960	yes			yes
New Hampshire	1973		yes	yes	yes
New Jersey	1974	yes		yes	yes
New Mexico	1974			yes	yes
New York	no law				
North Carolina	1971	yes	yes	yes	yes
North Dakota	1957				yes
Ohio	1961		yes		yes
Oklahoma	1959				yes
Oregon	1973	yes	yes	yes	yes
Pennsylvania	1959				yes
Rhode Island	1974				yes
South Carolina	1972	yes	yes	yes	yes
South Dakota	1965		yes	yes	yes
Tennessee	1974	yes	yes	yes	yes
Texas	1973		yes	yes	yes
Utah	1953	yes	yes	yes	yes
Vermont	1973	yes	yes	yes	yes
Virginia	1974				yes
Washington	1973	yes			yes
West Virginia	1975				
Wisconsin	1959		yes	yes	yes
Wyoming	1973	yes			yes

[1] Compiled by Dr. John B. Adams for the Freedom of Information Foundation, Columbia, Missouri

Opens county & local agencies	Opens county boards	Opens city councils	Forbids closed exec. sessions	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violations	[2] "Score"
yes	yes	yes				yes	5
yes	yes	yes			yes		8
yes	yes	yes		yes	yes	yes	10
yes	yes	yes		yes	yes	yes	8
yes	yes	yes		yes		yes	7
yes	yes	yes	yes	yes	yes		10
yes	yes	yes					4
yes	yes	yes					4
yes	yes	yes	yes	yes	yes	yes	8
yes	yes	yes		yes	yes	yes	9
yes	yes	yes					4
yes	yes	yes					4
yes	yes	yes		yes		yes	7
yes						yes	4
yes	yes	yes		yes		yes	6
yes	yes	yes			yes	yes	9
yes	yes	yes		yes	yes	yes	10
yes	yes	yes				yes	5
yes	yes	yes		yes		yes	9
							1
yes	yes	yes		yes			5
yes	yes	yes		yes			7
yes	yes	yes	yes	yes		yes	9
							unscored
yes	yes	yes		yes			7
yes	yes	yes					7
yes	yes	yes			yes	yes	7
yes	yes	yes				yes	6
yes	yes	yes				yes	7
	yes	yes			yes		6
yes	yes	yes		yes	yes	yes	8
							no law
yes	yes	yes		yes			8
yes	yes	yes	yes				5
yes	yes	yes					5
yes	yes	yes			yes	yes	6
yes	yes	yes		yes			8
yes	yes	yes				yes	5
							1
yes	yes	yes		yes			8
yes	yes	yes					6
yes	yes	yes	yes	yes	yes	yes	11
yes	yes	yes				yes	7
yes	yes	yes				yes	7
yes	yes	yes				yes	8
yes	yes	yes		yes			5
yes	yes	yes		yes		yes	7
							unscored
yes	yes	yes				yes	7
yes	yes	yes			yes		6

[2] "Score" means the total number of "yes" answers. It provides a rough index of the law's comprehensiveness.

STATE OPEN MEETINGS STATUTES

Alabama—Title 14, Ch. 70 § 393 (1915)
Alaska—§ 44.62.310 (1972)
Arizona—§ 38-431 (1974)
Arkansas—§ 12-2801 (1967)
California—§ 11120 Gov. Code (1974)
Colorado—3-33-1 (1974)
Connecticut—§1-21 (1971)
Delaware—29 § 5109 (1955)
Florida—§ 286.011 (1967)
Georgia—§ 40-3301 (1972)
Hawaii—§ 92-1 (1959)
Idaho—§ 59-1024 (1961)
Illinois—Ch. 102, § 41 (1973)
Indiana—§ 57-601 (1971)
Iowa—Ch. 28A (1967)
Kansas—§ 75-4317 (1972)
Kentucky—HB 100-1974 session
Louisiana—Title 42 § 6 (1972)
Maine—Title 1, Ch. 13, § 401 (1973)
Maryland—Art. 41, § 14 (1954)
Massachusetts—Ch. 30A, § 11a (1970)
Michigan—4.1800 (1968)
Minnesota—471.705 (1973)
Mississippi—(1975 Law)
Missouri—610.010 (1973)
Montana—Art. II of 1972 const. 82-3402 (1963)
Nebraska—84-1401 (1972)
Nevada—241.010 (1960)
New Hampshire—Title VI, Ch. 91-A (1973)
New Jersey—10: 4-1 (1974)
New Mexico—Ch. 91 of 1974 session
New York—(No Law)
North Carolina—143-318.1 (1971)
North Dakota—44-04-19 (1957)
Ohio—121.22 (1961)
Oklahoma—25 § 201 (1959)
Oregon—Ch. 172 of 1973 session
Pennsylvania—(1974 Law)
Rhode Island—(1974)
South Carolina—Article 2.2, § 1-20 (1972)
South Dakota—1-25-1 (1965)
Tennessee—Ch. No. 442 of 1974 session
Texas—17 § 6252 (1973)
Utah—52-4-1 (1953)
Vermont—1 U.S.A. 312 (1973)
Virginia—2.1-340 (1974)
Washington—42.30.010 (1973)
West Virginia—(1975 Law)
Wisconsin—SB 462 of 1974 session
Wyoming—9-692.10 (1973)

TEXT OF S. 5 AS REPORTED

A BILL To Provide That Meetings of Government Agencies and of Congressional Committees Shall be Open to the Public, and for Other Purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title.—This Act may be cited as the "Government in the Sunshine Act."

Sec. 2. Declaration of Policy.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information, while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Sec. 3. Definitions.—For purposes of this Act the term, "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

TITLE I—CONGRESSIONAL PROCEDURES

Sec. 101. Senate Committee Meetings.—(a) The Legislative Reorganization Act of 1946 is amended—

(1) by striking out the first sentence of section 133(b);

(2) by adding after section 133B the following:

"OPEN SENATE COMMITTEE MEETINGS

"Sec. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Paragraph 7(b) of Rule XXV of the Standing Rules of the Senate is repealed.

(c) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133B the following:

"133C. Open Senate committee meetings.".

SEC. 102. House of Representatives committee meetings.—Clause 2 (g) (1) of Rule XI of the Rules of the House of Representatives is amended to read as follows:

"(g) (1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.".

SEC. 103. (a) CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(a) of this Act, the following new section:

"OPEN CONFERENCE COMMITTEE MEETINGS

"SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to the public except when the managers of either the Senate or the House of Representatives in open session determine, by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.".

(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133C, as added by section 101(c) of this Act, the following:

"133D. Open conference committee meetings.".

SEC. 104. (a) JOINT COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133D, as added by section 102(a) of this Act, the following new section:

"OPEN JOINT COMMITTEE MEETINGS

"SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Titile I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133D, as added by section 103(b) of this Act, the following:

"133E. Open joint committee meetings.".

SEC. 105. EXERCISE OF RULEMAKING POWERS.—The provisions of this title are enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

TITLE II—AGENCY PROCEDURES

SEC. 201. (a) This section applies, according to the provisions thereof, to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate. Except as provided in subsection (b), all meetings of such collegial body, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public. For purposes of this section, a meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.

(b) Except where the agency finds that the public interest requires otherwise, (1) subsection (a) shall not apply to any agency meeting, or any portion of an agency meeting, or to any meeting, or any portion of a meeting, of a subdivision thereof authorized to take action on behalf of the agency, and, (2) the requirements of subsections (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency, or the subdivision thereof conducting the meeting, properly determines that such portion or portions of its meeting, or such information, can be reasonably expected to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) relate solely to the agency's own internal personnel rules and practices;

(3) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial ajudication, (C) constitute an unwarranted invasion of personal

privacy, (D) disclose the identity of a confidential source, (E) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

(6) 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;

(7) disclose information which must be withheld from the public in order to avoid premature disclosure of an action or a proposed action by—

(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would (i) lead to serious financial speculation in currencies, securities, or commodities, or (ii) seriously endanger the stability of any financial institution;

(B) any agency where such disclosure would seriously frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

This paragraph shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal;

(8) disclose 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;

(9) specifically concern the agency's participation in a civil action in Federal or State court, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

(10) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

(c)(1) Action under subsection (b) shall be taken only when a majority of the entire membership of the agency, or of the subdivision thereof authorized to conduct the meeting on behalf of the agency, votes to take such action. A separate vote of the agency members, or the members of a subdivision thereof, shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (b), or with respect to any information which is proposed to be withheld under subsection

(b). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed. Whenever any person whose interests may be directly affected by a meeting requests that the agency close a portion or portions of the meeting to the public for any of the reasons referred to in paragraphs (3), (4), or (5) of subsection (b), the agency shall vote whether to close such meeting, upon request of any one of its members. Within one day of any vote taken pursuant to this paragraph the agency shall make publicly available a written copy of such vote.

(2) If a meeting or portion thereof is closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) of this subsection, make publicly available a full written explanation of its action closing the meeting, or portion thereof, together with a list of all persons expected to attend the meeting, and their affiliation.

(3) Any agency, a majority of whose meetings will properly be closed to the public, in whole or in part, pursuant to paragraphs (6), (7)(A), (8), or (9) of subsection (b), or any combination thereof, may provide by regulation for the closing of such meetings, or portions of such meetings, so long as a majority of the members of the agency, or of the subdivision thereof conducting the meeting, votes at the beginning of such meeting, or portion thereof, to close the meeting, and a copy of such vote is made available to the public. The provisions of this subsection, and subsection (d), shall not apply to any meeting to which such regulations apply: Provided, That the agency shall, except to the extent that the provision of subsection (b) may apply, provide the public with public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity.

(d) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency, or of the members of the subdivision thereof conducting the meeting, determines by a vote that agency business requires that such meetings be called at an earlier date, in which case, the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable opportunity. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph if, (1) a majority of the entire membership of the agency, or of the subdivision thereof conducting the meeting, determines by a vote that agency business so requires, and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change at the earliest practicable opportunity. Immediately following the public announcement required by this par-

agraph, notice of such announcement shall also be submitted for publication in the Federal Register.

(e) A complete transcript or electronic recording adequate to fully record the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (9) of subsection (b). The agency shall make promptly available to the public, in a place easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, where no significant portion of such discussion or testimony contains any information specified in paragraphs (1) through (10) of subsection (b). Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(f) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the enactment of this Act, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (a) through (e) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (a) through (e) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(g) The district courts of the United States have jurisdiction to enforce the requirement of subsections (a) through (e) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Before bringing such action, the plaintiff shall first notify the agency of his intent to do so, and allow the agency a reasonable period of time, not to exceed ten days, to correct any violation of this section, except that such reasonable period of time shall not be held to exceed two working days where notification of such violation is made prior to a meeting which the agency

has voted to close. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public the transcript or electronic recording of any portion of a meeting improperly closed to the public. Except to the extent provided in subsection (h) of this section, nothing in this section confers jurisdiction on any district court to set aside or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(h) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section, and afford any such relief as it deems appropriate.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (f), (g), or (h) of this section. Costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentially and repeatedly violated this section, or against the plaintiff where the court finds that the suit was initiated by the plaintiff for frivolous or dilatory purposes. In the case of apportionment of costs against an agency, the costs may be assessed by the court against the United States.

(j) The agencies subject to the requirements of this section shall annually report to Congress regarding their compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section.

SEC. 202. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

"(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably

be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of this subsection, shall place on the public record of the proceeding:

"(A) written communications transmitted in violation of this subsection;

"(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

"(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

"(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

"(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge.".

(b) The second sentence of section 554(d) of title 5, United States Code, is amended to read as follows: "Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.".

(c) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.".

(d) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.".

SEC. 203. (a) Except as specifically provided by section 201, nothing in section 201 confers any additional rights on any person, or limits

the present rights of any such person, to inspect or copy, under section 552 of title 5, United States Code, any documents or other written material within the possession of any agency. In the case of any request made pursuant to section 552 of title 5, United States Code, to copy or inspect the transcripts or electronic recordings described in section 201(e), the provisions of this Act shall govern whether such transcript or electronic recordings shall be made available in accordance with such request. The requirements of chapter 33, of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in section 201(e). This title does not authorize any information to be withheld from Congress.

(b) Nothing in section 201 authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to that individual under section 552a of title 5, United States Code.

SEC. 204. The provisions of this title shall become effective one hundred and eighty days after the date on which this Act is enacted, except that the provisions of section 201 requiring the issuance of regulations to implement such section shall become effective upon enactment.

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