AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATIONS

BE IT RESOLVED that the American Bar Association offers the following guidelines to Federal agencies and courts with respect to the interpretation of the term "meeting" as used in the Government in the Sunshine Act:

1. So long as discussions are not "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating [agency] members to form reasonably firm positions regarding matters pending or likely to arise before the agency, "the definition of meeting" does not include:

   (a) Spontaneous casual discussions among agency members of a subject of common interest.

   (b) Briefings of agency members by staff or outsiders. A key element would be that the agency members be primarily receptors of information or views and only incidentally exchange views with one another.

(c) General discussions of subjects which are relevant to an agency's responsibilities but which do not pose specific problems for agency resolution.

(d) Exploratory discussions, so long as they are preliminary in nature, there are no pending proposals for agency action, and the merits of any proposed agency action would be open to full consideration at a later time.

2. If agencies intend to hold discussions described in subsection (b), (c), and (d), appropriate mechanisms, such as monitoring by general counsel or other agency representatives, should be undertaken to ensure that such discussions do not proceed to the point of becoming "meetings." In addition, agencies should memorialize such discussions through notes, minutes or recording as assurance to the public of compliance with the Act.

REPORT

The Government in the Sunshine Act, 5 U.S.C. §552b, was enacted in September 1976, to take effect on March 12, 1977. The Act, one of several statutes enacted in the 1970's to provide greater "openness" in government, requires in general that meetings of the members of collegial agencies be open to the public unless the meeting has been formally closed because the matters to be discussed fall within one of the statutory exemptions.

In September, 1985, the Administrative Law Section formed a Steering Committee (Task Force on Government in the Sunshine) to conduct a review of current issues under the Sunshine Act and to report back to the Council. This examination was undertaken primarily in response to three events in the past two years which have drawn attention to the Sunshine Act and certain problems which have arisen in its administration.

First, the Administrative Conference of the United States concluded, after a comprehensive study of experience with the Act, that "one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decisionmaking process. The open meeting requirement has generated reluctance to discuss certain important matters; and discussions, when they occur may not contribute to achieving a consensus position. In some agencies the pattern of decisionmaking has shifted from collegial exchanges to one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation procedure. The inhibition of collegial exchanges . . . tends to weaken the role of the collegium vis-a-vis that of the staff and the agency chairman." In a carefully restrained recommendation, however, the Conference did not call directly for relaxation of the Act's open meeting requirements, but urged Congress to consider whether the Act's restrictions are advisable and if not how they might best be revised without undercutting the basic principle of the public's access to the fullest practicable information about the government's decisionmaking process. The Conference further suggested that there might be some relaxation in the requirement for open meetings "when the discussions are preliminary in nature or pertain to matters, such as budget or legislative proposals, which are to be considered in a public forum prior to final action."[1]

Second, in April 1984 the Supreme Court in Federal Communications Commission v. ITT World Communications Inc., 466

[1] Administrative Conference Recommendation 84-3, 1 C.F.R. §305.84-3 (adopted June, 1984).

U.S. 463, adopted a narrower definition of the term "meeting" for purposes of the open meeting requirement than had been employed by the Court of Appeals for the D.C. Circuit and urged by proponents of a broad interpretation of the Act. At issue in the ITT case was the participation of three members of the Federal Communications Commission in a series of conferences with their European counterparts "intended to facilitate joint planning of telecommunications facilities through an exchange of information on regulatory policies," 466 U.S. at 465. The three members were not a quorum of the full Commission, and the statutory definition of "meeting" requires the presence of a quorum, but they were a quorum of a subdivision of the Commission, the Telecommunications Committee. On this basis the Court of Appeals for the D.C. Circuit had concluded that the discussion of telecommunications policy by a quorum of a subdivision of the Commission with their foreign counterparts was a covered meeting. The Supreme Court disagreed, and set forth a narrower test of a "meeting".

> [The] statutory language contemplates discussions that "effectively predetermine official actions." [citation omitted] Such discussions must be "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978) . . . . ITT alleged neither that the [Telecommunications] Committee formally acted upon applications for certification at the Consultative Process sessions nor that those sessions resulted in firm positions on particular matters pending or likely to arise before the Committee. Rather, the sessions provided general background information to the Commissioners and permitted them to engage with their foreign counterparts in an exchange of views by which decisions already reached by the Commission could be implemented. As we have noted, Congress did not intend the Sunshine Act to encompass such discussion.
> [466 U.S. at 471-72.]

Third, the Nuclear Regulatory Commission, in response to the Supreme Court's ITT decision, acted to revise the definition of "meeting" in its Sunshine Act regulation to incorporate the key language from the Supreme Court's opinion, and in so doing served notice that it read that case to permit "informal preliminary briefings" and "generalized background discussions [in which] Commissioners can decide what topics

should become the subject of more particularized proposals," 50 F.R. at 20890 (May 21, 1985). The NRC action inspired considerable unfavorable comment in the news media and in Congress, and although the rule change was effected on an interim basis, the NRC has not, so far as we know, used the more liberal provisions.

While these events have served both as background and as catalysts, the Steering Committee was given a broad charge to consider the experience under the Sunshine Act and, in particular, what the American Bar Association might usefully recommend to the agencies and to Congress on the basis of that experience. In pursuing this task we have not engaged in much original research but have relied primarily on the report to the Administrative Conference by Professors Welborn, Lyons and Thomas, and the reported cases, particularly F.C.C. v. ITT World Communications. We have, in addition, solicited written comments from agencies and other interested groups, and met once with a group of agency general counsels and their representatives and once with a group of public interest group and media representatives.

We have broken down our inquiry into four parts: First, an examination of the ITT World Communications case and its impact, actual and potential, on agency practices. Second, a look at whether a statutory exemption should be created under the Sunshine Act for agency deliberations on proposed legislation, budgets and the like.
Finally, general consideration of whether the Sunshine Act as a whole should be reevaluated after ten years of operation.

I. ITT World Communications and Its Implications for Administration of the Sunshine Act

The Nuclear Regulatory Commission's revision of its Sunshine regulation to conform to or, perhaps, to test the limits of what is permitted by the Supreme Court's ITT decision raises the initial question -- Will ITT make a significant change in the administration of the Act? In fairness to NRC it must be emphasized that while most agencies have from the beginning simply tacked the statutory definition of "meeting" in their regulations, the NRC in 1977 had defined "meeting" in terms which appeared to go beyond the general understanding of the meaning of the Act even before the ITT decision.[2] It is understandable that

[2] The definition had excluded "gatherings of a social or ceremonial nature" and briefings by representatives of other

given the context in which the NRC operates and the broad public interest in its deliberations, the amendment of its rules would provoke interest and controversy. It does not follow, however, that the ITT opinion has broad implications for all agencies administering the Sunshine Act (or even for the NRC), and this question was the first we sought to address.

It is important to note that whether a given "gathering" of agency members is a "meeting" has significant consequences for administration of the Act. Although there are a variety of grounds upon which a meeting may be legally closed, somewhat elaborate procedures must be followed to close a meeting,[3] and even then a transcript or, in some cases, detailed minutes must be maintained,[4] and the circumstances under which such materials must later be made available to the public are by no means clear.[5] Furthermore, even if a meeting is not closed to the public, some formalities must be followed, including public announcement, ordinarily, at least a week in advance, and notice in the Federal Register.[6] On the other hand, if a "gathering" is not a "meeting," no announcement or procedures are required because the Act has no application.

The Sunshine Act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." (Emphasis added). The first part of the definition is simple enough; it is the passage we have underlined which has presented problems or, from the agencies' point of view, opportunities.

The Supreme Court's language quoted earlier in this report constitutes a gloss on the underlined passage of the definition. It draws on the language of the Administrative

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agencies or departments or representatives of foreign governments or international bodies "where such briefings or discussions are informational in nature and are not conducted with specific reference to any particular matter then pending before the Commission." See 50 F.R. 20889. The language, therefore, impliedly included staff briefings within the definition of meeting although a number of other agencies excluded them. See note 12 infra.

3 5 U.S.C. §552b(d).

4 5 U.S.C. §552b(f).

5 See Clark-Cowlitz Joint Operating Agency v. FERC, 775 F.2d 359 (D.C. Cir. 1985), petition for rehearing granted.

6 5 U.S.C. §552b(e).

Conference's Interpretive Guide, but it must be borne in mind that the controlling question is what the Court meant and not what the authors of the Guide meant by this language.

It has been suggested that the Supreme Court's opinion should be limited to the facts before the Court. Concededly, when the Supreme Court construed "official agency business" in the context of the case as measured by the subject matter formally delegated to the Telecommunications Committee (thus rejecting the D.C. Circuit's essentially circular definition that it meant anything the members were expressly or impliedly authorized to do in the course of their official duties), it was relatively easy to conclude that whatever else the Consultative Process was, it was not part of the decisionmaking process of the Telecommunications Committee. But it cannot be assumed that the Supreme Court got carried away or that it was unaware that the definition of "meeting" was controversial and "one of the most troublesome problems in interpreting and applying the Sunshine Act."[7] We conclude, therefore, that the Supreme Court meant what it said in ITT World Communications, and that it intended to provide guidance to the agencies and the courts in applying the definition of "meeting."

There are, nevertheless, obstacles to translating the opinion into guidelines for determining when a given gathering is a "meeting." First, the definition of what is not a meeting is negative. Whether stated in terms of the statutory language, i.e., any discussions that do not "determine or result in the joint conduct of official agency business," or in terms of the Supreme Court's gloss, any discussions not "sufficiently focused on discrete proposals," etc., it will cover a multitude of different situations which are beyond the periphery of the definition of what is a meeting.

The problem is compounded by the fact that there are a number of variables exceedingly difficult to state in the abstract, for example, the range of circumstances surrounding the discussion and the relationship of the subject matter of the discussion to anticipated or possible agency action.

But undoubtedly most frustrating to efforts to state firm guidelines is the fact that any description of hypothetical gatherings is likely to be stated in conclusory terms which do not really resolve practical problems. For example, there is general agreement, even among strong advocates of open meetings, that "casual" conversations are not covered. Indeed, the Conference Report explained the final revision of the definition of meeting as "intended to permit casual discussions between agency members." But "casual" is not a very precise term. It's dictionary meanings include "produced as a result of chance,"

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[7] Interpretive Guide 3.

"occurring without specific motivation," "occasional," "informal," "without significance," etc. Chance and infrequency are not meaningful qualifications with respect to members of a collegium who presumably see each other nearly every day, so that the essential element of a casual discussion would appear to be its informality or lack of significance. "Informal" is another word frequently called upon to explain what kinds of discussion are not covered, as in "informal background discussions [that] clarify issues and expose varying views."[8] Yet informality, with its reference to the form of the discussion, seems an inappropriate test, given that the Act's legislative history indicates the test of a meeting is what actually happens rather than the members' purpose in coming together. Other terms that have been used to limn the statutory distinction, such as "preliminary," "exploratory," and "tentative," may provide somewhat more guidance, but they are likewise largely conclusory and their applicability to a particular discussion is more easily determined in retrospect than at the time the discussion commences.

The difficulty of specifying in advance those characteristics of a particular discussion which will cause it to fall short of becoming a meeting has been urged by opponents of the NRC rule as a reason for not importing the Supreme Court's view of the Act into agency rules. Even if that view is correct, they argue, the test can only be applied retrospectively and is not a reliable basis for deciding whether to hold a gathering which is not to be treated as a meeting. This argument seems to us to prove too much for its logic points to permitting no discussion of agency business among the requisite number of agency members without treating it as a meeting. Yet this result seems to us clearly not to have been intended by Congress,[9] and it would have a serious impact on the ability of agencies to conduct day-to-day business.

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[8] FCC v. ITT World Communications, 466 U.S. at 469, quoting from the Senate Committee Report.

[9] The argument, on analysis, seems to be saying that although Congress, after much deliberation, wrote a higher threshold test, "deliberations [which] determine or result in the joint conduct or disposition of official agency business," agencies should apply the statute as if it read "discussions which are about official agency business," lest a given discussion unintentionally drift over the line. But Congress can hardly have gone to such pains to articulate a narrower standard had it not expected the agencies to use the leeway such a standard provides, and if they are to do so, they must attempt to set out in advance, whether by regulation or internal guidelines, the elements or characteristics of a discussion which will cause it to fall short of being a meeting.

Therefore, without minimizing the difficulties in the task, we believe it is worthwhile to attempt to set forth in some detail those types of gathering which are not meetings, as the Supreme Court has defined the term. We should recall that a meeting first of all consists of "deliberations," and "deliberation" is defined as the act of weighing and examining reasons for and against a choice or measure; a discussion and consideration by a number of persons of the reasons for and against a measure. (Webster's Third Intl. Dictionary). It is the element of the participants trying to reach a decision (whether or not they do so) which distinguishes deliberations from more "casual" or "informal" discussions. To quote the Interpretive Guide "the question is whether the discussion is decision-oriented."[10]

This analysis certainly does not sweep away the difficulties, but at least it helps us to know what to look for. It seems to us that there are at least three paradigmatic situations which are clearly or arguably outside the definition of meeting:

1. The casual, in the sense of spontaneous or unplanned, discussion among colleagues of a subject of common interest. Examples are given in NRC General Counsel Plaine's memorandum of December 6, 1985: "I read an article in _____ the other day about the nuclear industry and I wonder whether any of the rest of you read it and what you thought of it." "I just got back from visiting _____ and I'd like to tell you my perceptions of how they run the regulatory program in that country, and some of their perceptions of how we do business, and discuss with you whether anything I learned suggests areas we ought to explore further in a more formal setting." A key element of this type of discussion is its spontaneity. While it may include all the members of the agency it seems to us that with respect to this kind of gathering it is essential that there be no conscious policy of involving all the members, simply because such a requirement would be inconsistent with the casual nature of the discussion.

2. The briefing of agency members, whether by staff or by outsiders.[11] Indeed, briefings have long been fairly generally recognized as outside the scope of the term "meeting." The original NRC regulation excluded "briefings of the Commission by representatives of other agencies . . . or representatives of foreign governments or international bodies where such briefings or discussions are informational in nature and are not conducted

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[10] Interpretive Guide 9n.

[11] While a briefing may be outside the "meeting" definition, we do not mean to suggest that limitations on ex parte communications would not be applicable.

with specific reference to any particular matter then pending before the Commission." Several other agencies have long excluded briefings from the definition of meeting.[12] The key elements here are that the members are primarily receptors of information or views and only incidentally exchanging views with each other. Obviously, a briefing can very easily turn into a serious exchange of views, particularly if the briefing relates to a discrete issue before the agency. Consequently, an important variable in this situation is the subject matter of the briefing and how directly it is related to possible agency action.

3. The serious "general" discussion among agency members. By hypothesis, this discussion is not casual; it is likely to have been planned, perhaps with a written agenda, and announced and scheduled to secure maximum member attendance. The key element, therefore, is that it is not "focused on discrete proposals or issues." Obviously, this kind of "non-meeting" presents the hardest case and the rationale for recognition draws very heavily on the Supreme Court's decision. It is also extremely difficult to describe in hypothetical terms because the presence of the key element essentially depends on the relationship of the subject matter to what the agency is or might be doing about it. The category might be broken down into two subcategories:

a) The general discussion of a subject which is relevant to the agency's responsibilities but does not pose specific problems for agency resolution. For example, a discussion of general foreign trade or balance of payments problems by the International Trade Commission would be permissible if the Commission acts only with respect to specific industries or products, whereas a general discussion by the members of the SEC of insider trading would be a more difficult case because it might be impossible to separate the subject of insider trading from the question of what the SEC should do about it.

b) Closest to the borderline is the "exploratory" discussion of a problem area. The key element here is that the discussion is preliminary in the sense that there are not hard proposals for action before the agency and consequently the merits of anything the agency decides to do would be open to full consideration at a later time. Thus, the discussion cannot "predetermine" agency action and the members are not deliberating in the sense of confronting and weighing choices. Yet in any such discussion there is always the possible resolution of deciding not to do anything, so that the "issue" of whether the agency ought to turn its attention and resources to the problem

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12 See 12 C.F.R. §505b.2 (FHLBB); 49 C.F.R. §804.3 (Natl. Transportation Safety Board); 12 C.F.R. §311.2(b) (FDIC).

may be sufficiently discrete to come within the statutory definition. In short, the status of "preliminary" or "exploratory" discussions of a problem within the agency's authority to address is the hardest case, for even if one accepts a particular verbal formulation, such as that set out in the Interpretive Guide,[13] the difficulties of application are intimidating. Yet inasmuch as whether a particular discussion is exploratory or decision-oriented depends on the total factual context, it is likely to be more difficult to resolve a hypothetical situation than a real one. In other words one may say of a meeting, as Justice Stewart said of obscenity, "I know it when I see it."

Summary

Thus, we may conclude that agencies are free to treat certain discussions of agency business, certainly, casual discussions and briefings, and probably, "general" and "exploratory" discussions, as not covered by the Sunshine Act. Should they do so? We must emphasize that it is not our purpose to urge agencies to close any discussions now open. Open meetings serve valuable functions. Furthermore, while this study has not focused on the adequacy of the available grounds for closing meetings, we believe that, putting aside the problems of legislative and budget discussions, discussed later in this report, the exemptions in the Act are sufficient to protect information for which there is a legitimate need for confidentiality.

But the fact is that the Sunshine Act has had an inhibiting effect on the initiation of discussions among agency members. This is the conclusion of the Welborn report, and it is confirmed by our meeting with agency general counsels. Quite apart from the evident preference of many members for closed meetings, the sheer logistical difficulties in invoking the machinery of the Act has made difficult if not impossible the maintenance of close day-to-day working relationships in those agencies, by far the majority, where three or even two members constitute a quorum.[14]

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13 "A discussion which significantly furthers the decisional process by narrowing issues, discarding alternatives, etc., should be treated as a meeting even though it does not and is not expected to achieve a complete resolution. On the other hand, those exchanges of views which are not of a nature to foreclose or narrow discussion at subsequent collegial gatherings might be treated as outside the definition without loss to the values the Sunshine Act seeks to achieve." Interpretive Guide 10n.

14 One agency general counsel reported the agency members were very concerned about complying with the Act. As a result three members, a quorum, did not even go to lunch together. The

We believe that a sensible and sensitive application of the principles announced in the ITT case can ease the somewhat stilted relationships that exist in some agencies. However, it is important to establish procedures which provide, insofar as possible, credibility for the agency process and assurance to the public that these principles are not being abused. The first sentence of section 552b(b) enjoins agency members not to "jointly conduct or dispose of agency business other than in accordance with" the requirements of the Act, and if this prohibition is to an extent redundant, it is a reminder to the members that when they are in a gathering which is not being treated as a meeting, they have a duty to conduct themselves accordingly.

Therefore, we believe it is the obligation of each agency, and particularly its general counsel's office, to brief the members on the requirements of the Act and to provide guidance on what kinds of discussion are permissible outside the meeting context.

It was suggested in our meetings that if agencies are to use the added flexibility that the ITT decision provides, there should be policing mechanisms designated to provide a record of what was discussed so as to assure the public that the discussions did not rise to the threshold of a "meeting." Obviously, there are problems in proceduralizing "non-meeting meetings." For example, casual discussions would cease to be casual if each one was to be attended by a representative of the general counsel or extensively memorialized. Briefings and general discussions present somewhat less of a problem in this respect. Certainly, they could be monitored by the general counsel or his representative and notes taken.

It remains to be considered whether a broad reading of the ITT case would check the loss of collegiality which the Administrative Conference pointed to and which has been confirmed by our discussions with agency counsels. It was the well nigh unanimous view of those to whom we spoke, both proponents and critics of sunshine, that the impact of the case on collegiality is likely to be slight. It is true that to the extent it would contribute to more normal interpersonal relationships among agency members, it would have some tendency to increase collegiality. But since the line between "preliminary" or "general" discussions and "meetings" is likely to remain hazy, conscientious agency members are likely to feel inhibited whenever such discussions move to address agency choices. Ultimately, it is those exchanges of views which are part of the

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members were reluctant to discuss among themselves even housekeeping matters. The result has been to increase staff power, because it is at the staff level that discussions may occur.

process of reaching a group decision where collegiality is most important, and those discussions are clearly meetings under the Act.

II. Possible Statutory Exemption for Agency Deliberations on Proposed Legislation, Budgets and the Like

In Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921 (D.C. Cir. 1982), the Court ruled that none of the Sunshine Act's exemptions provides a blanket exemption for discussions at any stage of the budget preparation process. The Court specifically refused to apply Exemption 9(B) (protection of premature disclosure), Exemption 2 (matters relating solely to internal personnel rules and practices), and Exemption 6 (protection of personal privacy).

Absent future consideration of this basic issue by the Supreme Court, it appears likely that an agency's consideration of budget proposals generally will not be exempt from the Sunshine Act. The same general approach would seem to apply to an agency's consideration of legislative proposals. Under these circumstances, the Task Force solicited written and oral comments from a number of agencies as well as public interest and media organizations. No clear consensus emerged from the oral and written comments received. In some instances, agencies closed meetings to discuss budget proposals where they would impact upon law enforcement policies (Exemption 7). Other agencies indicated that they did not consider the budget and legislative area to be of particular sensitivity. Public interest groups and media organizations, on the other hand, felt that the public had a compelling interest in access to information on budget discussions. For example, because the decrease in the size of an enforcement or oversight office could dramatically affect an agency's performance, such groups felt the public should be a party to that process. In addition, faced with the fiscal constraints of Gramm-Rudman, such groups believed that the allocation of limited monies will become all the more critical. Accordingly, strong opposition was voiced to any change in the law that would alter the public's access to information on budgetary matters. Similar, although less vocal, opposition was expressed toward exempting legislative discussions.

We understand the reluctance of some agencies to hold candid budget discussions in open meetings, and we realize that the alternative to closed meetings on the budget may be no meetings at all. Yet this argument appears to prove too much, for there is ample evidence that Sunshine requirements have discouraged the holding of meetings on a broad range of subjects and inhibited the freedom of expression at such meetings as are held. We do believe that there are few, if any, subjects of more moment to the agency than how it plans to allocate its resources

and prioritize its tasks. While it is true, as the Welborn report points out, that the agency's decision on its proposed budget is preliminary in the sense that the proposal must first be passed upon by OMB and then by the Appropriations Committees of Congress, nevertheless, it is doubtful that these reviews are, in effect, de novo. As a practical matter the agency decision sets parameters to the subsequent reviews. Consequently, unless the entire Sunshine principle is to be reconsidered, we cannot recommend a special exemption for budget discussions.

We reach a similar conclusion with respect to discussion of legislative proposals, recognizing that the elements of the equation are somewhat different. On the one hand, the formulation of the agency position is likely to be more preliminary to the ultimate legislative decision than in the case of the budget, simply because the Congressional examination is likely to be more thorough and more open. But for this very reason we do not see why the agency members cannot candidly consider the pros and cons of a legislative proposal, as they would of a proposed rule. In short, we do not believe the case has been made for a special exemption.

III. Reevaluation of the Sunshine Act

In our discussion with agency general counsels and their representatives, it became obvious that the provision of guidelines on what constitutes a "meeting" (see Part I above) would not address the broader question of the impact the Sunshine Act has had upon collegiality in multi-member agencies. For that reason, the Task Force was urged to reevaluate the Sunshine Act as a whole, particularly in view of the fact that the Act is about to have its 10th anniversary.

The Task Force has carefully considered whether it should urge a general reevaluation of the Sunshine Act. In so doing, it has examined in detail the Welborn Report prepared for the Administrative Conference as well as the resulting Recommendation 84-3, adopted on June 28, 1984.

The examination undertaken by the Administrative Conference was extremely thorough and spanned a considerable period of time. Drafters of the Welborn Report submitted detailed questionnaires to affected agencies in an attempt to determine the Sunshine Act's impact on those agencies. Although the Task Force has met with agency general counsels and representatives of interested groups, it has not had the time nor the inclination for the type of comprehensive examination undertaken by the Administrative Conference. Based on the informal discussions the Task Force has had with interested persons, it has concluded that it has little to add to the thorough analyses undertaken by the Administrative Conference and

that no clear consensus has emerged on whether the Act is in need of any significant revision. Under the circumstances, the Task Force believes the most meaningful contribution the Section of Administrative Law can make is to provide guidance, within the constraints of existing law, on what types of informal gatherings and discussions are permitted without bringing into play the requirements of the Sunshine Act. To go beyond that point and to attempt to strike a balance between the public's need for access to information and the need for collegiality among agency members is an extremely difficult and delicate question and one which the Task Force finds itself unable to resolve. Accordingly, the Task Force does not urge that the Sunshine Act be reevaluated at the present time.

February, 1987

Edward J. Grenier, Jr.
Chairman, Section of
Administrative Law

General Information Form

160

To Be Appended to Reports with Recommendations

No. _____
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Submitting Entity Section of Administrative Law

Submitted By Edward J. Grenier, Jr., Chairman

1. Summary of Recommendation(s).

Provide guidelines on definition of "meeting" in Government in the Sunshine Act.

2. Approval by Submitting Entity.

April 25, 1986; reviewed, no changes made, October 11, 1986

3. Background. (Previous submission to the House or relevant Association position.)

In August 1974, the American Bar Association adopted a resolution favoring enactment of the Government in the Sunshine Act with suggested amendments. The ABA filed amicus brief in U.S. Supreme Court in FCC v. ITT, 466 U.S. 463, supporting result ultimately reached by the Court, concerning the meaning of "meeting" in the Government in the Sunshine Act.

We first submitted this recommendation to the House for action at the Annual Meeting in August 1986. We withdrew it and agreed to defer action until the Mid-year 1987 Meeting at the request of the ABA-ANPA Task Force (Special Committee on Cooperation with the American Newspaper Publishers Association).

4. Need for Action at This Meeting.

To provide guidance to federal agencies and courts faced with questions under the Government in the Sunshine Act.

5. Status of Legislation. (If applicable.)

N/A

6. Financial Information. (Estimate of funds required, if any.)

N/A

7. Disclosure of Interest. (If applicable.)

None

8. Referrals.

A copy of the Resolution and Report was sent to all Section and Division chairs in late June, 1986. A copy was recirculated to all Section and Division Chairs and to ABA affiliated entities in November 1986.

9. Contact Person. (Prior to meeting.)

Thomas M. Susman (202) 429-1600

10. Contact Person. (Who will present the report to the House.)

Richard H. Keatinge (213) 626-5241