Upon reflection, it seems to us that the cumulative effects of the pernicious provisions of H.R. 11656 outweigh the bill's usefulness. Unless the Horton substitute can be adopted, we are impelled to conclude that the bill should be recommitted for more careful draftsmanship.

PAUL N. MCCLOSKEY, Jr.,
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HOUSE REPORT NO. 94-880—PART II

[page 1]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

* * * * * * * * * *

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PURPOSE

The purpose of the proposed legislation is to amend the Administrative Procedure Act provisions of title 5, United States Code, to provide, subject to the exceptions in the bill, that all meetings of agencies headed by a collegial body of two or more members shall be open to public observation. The new section added to title 5 would provide for procedures and court jurisdiction to implement this purpose. In addition, the bill would add language to existing provisions of the Administrative Procedure Act to bar ex parte communications in connection with adjudication and formal rule making under the provisions of that Act now codified as a part of title 5.

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EXPLANATION OF COMMITTEE AMENDMENTS

Page 2, lines 19 through 23
(Definition of "meeting")

This amendment would change the definition of "meeting" in § 552b (a) (2) to read: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

New section 552b requires advance notice of the date and place of meetings, their subject matter, and whether it will be open or closed to the public. The revised language of the definition of "meeting" makes it possible to identify the meeting and its purpose to satisfy this requirement of advance notice. It makes it clear that there must be at least

provisions are, therefore, appropriate in view of the purpose of the new section and of court enforcement of its specific provisions concerning the conduct of the meetings.

Page 12, lines 13 and 14 and
lines 19 through 23; and
Page 13, lines 2 and 3

(Striking Subsection (i) referring to Review of Agency Actions)

While subsection (h) of section 552b provides that any court, acting under the jurisdiction provided therein to enforce the requirement of subsections (b) through (g) of the section cannot set aside, enjoin or invalidate any agency action by reason of the violation concerned, subsection (i) would permit such invalidation incident to a review on the merits. The amendment strikes subparagraph (i) from the section. Section 706 of title 5 is the section of the Administrative Procedure Act concerning the scope of judicial review and details the basis for invalidation of agency action. Included therein is item (2)(D) which provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "without observance of procedure required by law". Adequate authority is therefore provided by law to inquire into matters governed by the new section in the event of such subsequent judicial review. The exception in subsection (h) in lines 13 and 14 of page 12 referring to subsection (i) is also deleted as a conforming amendment as is the reference to subsection (i) in original subsection (j) which would then be re-lettered.

Page 12, line 24; Page 13, lines 11 and 20;
Page 14, lines 5, 9 and 14

These are conforming amendments to change subsection designations as the result of the deletion of subsection (i).

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Page 12, lines 19 through 23

(Deletion of Provision Concerning Assessment of Attorneys Fees and Costs Against Individual Agency Members)

The provision is deleted because it was concluded that it is not desirable or even possible to assess costs against individual members for actions taken by a collegial body based upon the participation by those agency members in agency action.

Page 18, line 8

(Amendment to Information Permitted to be Withheld Conforming Amendment to that Added to 552b(c)(3) on page 3)

As introduced, the bill would have also amended the Freedom of Information Act provisions of § 552(b)(3) to limit the exception for information covered by statutes to only information covered by statutes which require that information of a particular type or criteria be withheld. This would not provide an exception for statutes which

permit the agency to determine whether such information should be released or not. The amendment was made because the language is unduly restrictive.[1] (For example, the section concerning release of atomic energy information permits a continuous review of restricted data to permit declassification where information may be declassified "without undue risk to the common defense and security." 42 U.S.C. 2162)

OUTLINE OF PROVISIONS OF THE BILL

Section 1 of the bill provides that the Act is to be cited as the "Government in the Sunshine Act".

Section 2 of the bill states that the bill is intended to provide the public with the fullest practicable information as to Governmental decisionmaking processes.

Section 3(a) of the bill adds a new Section 552b to title 5 and provides for open meetings by the agencies defined in the section.

Subsection (a) provides for definitions in addition to those applicable to the Administrative Procedure Act provisions of title 5. The term "agency" is to include Government authorities as defined in the Administrative Procedure Act provisions of section 551 and the Freedom of Information Act provisions of Section 552(e) with the further qualification that it is to be an agency headed by a "collegial" body of two or more members "a majority of whom are appointed to such position by the president with the advice and consent of the Senate".

The bill, as referred to the Committee on the Judiciary, would have defined "meeting" as the deliberations of the agency members required to take action concerning the joint conduct or disposition of agency business. The Judiciary Committee amendment is to strike

[1] Note the discussion concerning similar language and on identical amendment to the language of exception (3) of subsection (c) of new section 552b in the explanations of committee amendments and in the general statement of the committee in this report.

the previous definition of meeting and provide that the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency. The definition includes an exception that the term "meeting" will not include meetings required or permitted by subsection (d) of new Section 552b. Subsection (d) of the amended bill concerns the closing of agency meetings and the manner in which those meetings can be closed by votes of the agency.

A "member" means an individual who belongs to the collegial body heading an agency.

Subsection (b) of the bill as amended by the Judiciary Committee refers in subparagraph (b)(1) to "members", as described in Section (a)(2), as two or more members of an agency, but at least the number of agency members required to take action on behalf of the agency. This subparagraph provides that the members so described shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g) of this section, which contain the requirements for meetings covered by the section. Subparagraph (b)(2) contains the language of original section (b) and states the basic requirement of the bill that every portion of every meeting of an agency is to be open to public observation unless falling within the exceptions of subsection (a).

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;

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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;

The committee considered the various suggestions concerning changes in the description of agencies covered by the bill and concluded that the general definition provides the best approach and therefore did not change the language as contained in the bill referred to the committee.

Meetings Subject to New Section 552b

A considerable portion of the testimony presented to the committee concerning the definition of "meeting" is included in the new section. The language of the bill as referred to the committee provided that a meeting would consist of "deliberations" which concern the joint conduct or disposition of agency business. It was pointed out that this language could make it difficult to identify a meeting in advance of that meeting, or to determine whether the "meeting" was one actually covered by the provisions contained in the bill. The subcommittee

considering the bill recommended language which was intended to remedy this situation and provide the basis for adequate and meaningful notice required by the bill of the date and place of meetings, their subject matter, and whether they would be open or closed to the public. This language underwent further modification before the Full Committee and the language ultimately approved by the committee was to provide that "meeting" would be defined as "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d)". This definition makes it possible to determine and define the basic purpose of the meeting. As is indicated in the outline of provisions of the bill and also in the explanation of committee amendments, this definition must be read in the light of the amendment made to subsection (b) of new section 552b which prohibits the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. The definition of "meeting" contains the qualification that the term "meeting" for the purposes of the section will not include meetings required or permitted by subsection (d), a subsection which concerns the closing of meetings. As a result, it will be possible for agencies to make the necessary decisions concerning opening or closing meetings prior to the holding of covered meetings without being subject to the detailed procedures provided for in the balance of section 552b.

Clarification Concerning Exceptions

The committee considered the provisions of the exemption provided in subsection (c)(3) of section 552b concerning the disclosure of in-

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formation required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. This exemption was discussed at page 9 of the report of the Committee on Government Operations, which pointed out that, under the original language of this bill, a statute that permits withholding rather than actually requiring it would not come within the exception provided in the paragraph. While the committee agrees that the language concerning criteria or types of information should be retained, it was felt that limiting the exemption to information required to be withheld by statute would be too restrictive. Rather, the exemption should extend to those statutes which require or permit information to be withheld from the public where the statute establishes criteria or refers to particular types of information.[2]

The exemptions contained in subsection (c) of the new section are based on the exemptions presently contained in the Freedom of Information Act provisions of section 552 of Title 5. The latter exemptions relate to governmental records and in most instances, this same or similar language can be applied to information being presented at a meeting. However, it was brought to the attention of the committee that in connection with exemption No. 7, the exemption relating to investigatory records compiled for law enforcement purposes, it was important to qualify the provision to the extent that the exemption would be clearly applicable in addition to records to information

which if written would be contained in such records. This is in the nature of a technical amendment which the committee feels is consistent with the basic purpose of the exemption in its original form. In the course of subcommittee consideration of this exemption, there was a discussion of whether there should be a change in the language to cover matters discussed at the agency meetings at an early stage of the investigation when it was not clear whether enforcement proceedings would actually be instituted. However, after a discussion, it was felt that the existing language was adequate to meet the situation.

Exemption 9 of subsection (c) of new section provides an exception relating to the withholding of information where premature disclosure would, in the case of an agency which regulates currency, securities, commodities or financial institutions, be likely to lead to significant financial speculation or significantly endanger the ability of a financial institution. The exemption would also apply to information where premature disclosure would likely significanty frustrate the implementation of proposed agency action. However, the latter exemption would not be available where the content or nature of the agency action has been disclosed to the public. It was objected that the time when this bar to the application of the exemption would go into effect was not clear by the use of the term "where". Accordingly, the committee recommended an amendment to substitute the word "after" so that the exemption would not be available after the content or nature of the proposed action had been disclosed by the agency. In a conforming amendment, the term "unless" was inserted so that the agency disclosure required by law would also be covered. A similar amendment was made to the same provision which in effect provided that the exemp-

[2] This would clarify the fact that statutes such as 50 U.S.C. 403(d)(3) concerning security information and 8 U.S.C. 222 concerning confidential records of the State Department concerning visas and related matters, are included.

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tion would not be available after publication of agency notice of rulemaking pursuant to section 553(d) of Title 5.

The committee also added a clarification to the exemption No. 10 which concerns agency participation in litigation or related matters. The qualification is to add the term "or proceeding" to the reference to agency participation in a civil action so that the exemption would clearly apply to information relating to the agency's participation in a civil action or proceeding.

Transcript Requirement

Subsection (f)(1) of the new section requires that a complete transcript or an electronic recording which is adequate to record the proceedings shall be made of each agency meeting or portion of a meeting closed to the public with the single exception of meetings closed to the public pursuant to paragraph 10 of subsection (c). The committee considered the difficulties incident to the review of the transcript of closed meetings required by the original provisions of the bill. The bill would have required that each deletion authorized by an exception in the section would be made by recorded vote of the agency taken subsequent to the meeting. It was pointed out this would require a considerable expenditure of the time of the senior officials of the agency and that this would be cumbersome and time-consuming. It

was determined that the intent of the bill could be adequately carried out by deleting this provision and similarly deleting the provision requiring a written explanation of the reason and statutory basis for each deletion. These amendments would not change the requirements of the section making revised copies of the transcript or transcription of the electronic recordings available to any person upon payment of the cost of duplication or its transcription. Further, it is provided that if the agency determines it to be in the public interest, the material can be made available to the public without cost. The complete verbatim copy of the transcription or the complete electronic recording of each meeting closed to the public would be maintained by the agency for at least two years after the meeting or until one year after the conclusion of the agency proceeding with respect to which the meeting was held, whichever occurs later.

COURT JURISDICTION UNDER SECTION 552b(h)

Subsection (h) provides jurisdiction in the district courts of the United States to enforce the requirements of sections (b) through (f) of the new section. Such actions may be brought by any person against the agency prior to or within sixty days after the meeting at which the alleged violation of the section occurred. The time limit would be varied in the event that a public announcement of the meeting had not been made in accordance with the requirements of the section. The original version of the bill would have provided jurisdiction in the courts to bring such actions against the agency or its members. The committee recommended the deletion of the provision for joinder of members for since the subsection authorizes an action against the agency, there would be no necessity to join individual members to gain court jurisdiction. Further, as is discussed below, the

committee also amended the bill to delete the provision authorizing the assessment of court costs against individual agency members. As was pointed out in the explanation of the committee amendments, these amendments remove the objection that individual agency members would be subjected to suit for official acts and possibly being asessed costs and attorneys fees in these circumstances. In line with these principles, the committee recommends the deletion of the provision in original subsection (j) which would have permitted the asessment of costs against individual members of an agency.

Objections were raised at the hearings on the bill concerning the breadth of the provisions concerning venue for actions authorized by the bill. The committee concluded that there should be no limitation upon the jurisdiction provided in the bill nor persons who could bring the actions contemplated by the bill. However, the bill concerns meetings and matters relating to meetings that have a definite relation to certain locations, and the practical aspects concerning government action and court consideration of these matters make it logical to provide venue in the district where the agency meeting is held, where the agency has its headquarters, or in the District Court for the District of Columbia.

SCOPE OF JUDICIAL REVIEW

Subsection (i) of subsection 552b as contained in the bill referred to the committee would have provided that any federal court other-

foreign relations is discussed in most meetings of OPIC's Board of Directors in connection with the Board's determination of policy issues with respect to OPIC's operations, the review of policy issues in projects to be considered by the Board of Directors and the review of events regarding actual or potential claims under OPIC insurance contracts or events that would affect an OPIC-financed project.

Since the majority of the meetings of OPIC's Board of Directors, or portions thereof, could properly be closed to the public for reasons of national security, OPIC's inability to adopt regulations pertaining to the closing of meetings under such circumstances would constitute an additional and unwarranted administrative burden. This is especially true because the need to discuss classified information cannot regularly be predicted in advance of a scheduled meeting, may necessitate special meetings on short notice, and, in the case of meetings of OPIC's Board of Directors, may not arise until after the meeting commences.

2. *Requirement of a Verbatim Transcript of Closed Meetings.*— OPIC still objects to the inclusion in the bill of the provisions requiring that a mandatory transcript be made of each meeting, or portion thereof, closed to the public. As long as the transcript requirement remains, the provisions of the bill permitting the closure of meetings do not provide adequate protection from public disclosure of information discussed at meetings. The exemptions merely provide standards to be used in determining whether any information to be discussed at a meeting is of such a nature as to justify withholding it from the public. Since the bill provides for *de novo* review by the courts, a judge could overrule an agency's determination (for instance, in the case of privileged business information) that such information is privileged even though it was furnished to the agency and discussed at a meeting on the assumption that information and the discussion

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would not become available to others. This risk will clearly be a deterrent to full and free discussion of sensitive issues which the bill purports to protect.

Furthermore, in view of the fact that classified information, confidential business information and matters with respect to potential adjudication of claims would be discussed regularly at meetings of OPIC's Board of Directors, the costs of preparing a verbatim transcript of such meetings, or of editing any transcript or summary in order to delete discussions of sensitive materials, would be very high and burdensome. We have already provided information with respect to the administrative burden involved to the various Committees that have considered this matter.

As a workable alternative to the requirement for a verbatim transcript of all closed meetings or portions thereof, OPIC recommends an approach similar to that adopted by the Senate and the House in applying the open meeting concept to their own proceedings. Thus, for instance, a majority of a Committee may vote both to close one of its meetings to the public and either to have such closed meeting transcribed or not. To impose a more stringent requirement on the Executive Branch would result in a double standard of openness, one of flexibility for the Congress and the other of rigidity for executive agencies.

GENERAL COMMENTS

For the reasons set forth in pages 1 to 3 of our letter of November 26, 1975, to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, we reiterate our view that it is, in any event, inappropriate to include OPIC within the scope of the bill. OPIC is not a regulatory agency. It operates more like a private financial institution than a government agency. OPIC's Board of Directors must be free to examine and candidly discuss, as would the Board of Directors of a private financial institution, all aspects of underwriting policy, applications pending before the Board for insurance or financing, and matters concerning insurance claims. Involved in these discussions are candid assessments of individuals, companies and events and the liberal use of privileged business information and governmental information kept secret for reasons of foreign relations. Such discussions must be carried out in a confidential manner that is not adequately protected by the bill.

The requirement that a verbatim transcript must be maintained within respect to any closed meeting, and that any person may sue to obtain access to any such transcript, would result in the ever-present concern of the private sector entities who deal with OPIC as well as of participants in meetings of OPIC's Board, that a judge could later hold that matters either given or spoken with the understanding that they be treated in confidence were not entitled to such protection. Such a concern, particularly among OPIC's private Directors, and among the private companies with which OPIC deals, will inevitably result in less than a full and free exchange of ideas, and could materially undermine the Congressional mandate that OPIC achieve greater private participation in its programs.

Sincerely yours,

GERALD D. MORGAN, JR.,
Vice President and General Counsel.

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U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., April 5, 1976.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Civil Service Commission is herewith submitting a voluntary report on H.R. 11656, a bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes," cited as the "Government in the Sunshine Act."

The Commission submitted a similar report to the Subcommittee on Administrative Law and Government Relations but we understood that the Subcommittee was not able to reach the Commission's proposed amendment to the bill. We accordingly again urge amendment to H.R. 11656 based on the considerations stated herein.

Unlike certain other central agencies designed to service the Federal Government, such as the General Services Administration, the Commission is a three-member body. But, unlike most such multi-headed Commissions, the Civil Service Commission does not regulate any segment of the economy affecting the general public. The Commission's primary mission is to provide leadership and regulatory direction to the central personnel programs of the executive branch.