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View § 552b. Open meetings

United States Code Annotated Title 5. Government Organization and Employees

Notes of Decisions (63)

Any subdivision thereof

Government in the Sunshine Act applies only where a subdivision of an agency deliberates upon matters that are within that subdivision's formally delegated authority to take official action for the agency. F.C.C. v. ITT World Communications, Inc., U.S.Dist.Col.1984, 104 S.Ct. 1936, 466 U.S. 463, 80 L.Ed.2d 480. Administrative Law And Procedure 124

Under provision of this section defining "agency" to mean the agency headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the president with the advice and consent of the Senate and "any subdivision thereof" authorized to act on behalf of the agency, the term "any subdivision thereof" means a subdivision of the "collegial body" type of agency. Hunt v. Nuclear Regulatory Commission, C.A.10 (Okla.) 1979, 611 F.2d 332, certiorari denied 100 S.Ct. 1084, 445 U.S. 906, 63 L.Ed.2d 322. Administrative Law And Procedure 124

Hunt v. Nuclear Regulatory Commission
United States Court of Appeals, Tenth Circuit. November 23, 1979 611 F.2d 332
1985

611 F.2d 332
United States Court of Appeals,
Tenth Circuit.

Brian Dennis HUNT, Plaintiff-Appellant,

v.

NUCLEAR REGULATORY COMMISSION et al., Defendants-Appellees.

No. 79-1647. Argued Nov. 6, 1979. Decided Nov. 23, 1979. Certiorari Denied Feb. 25, 1980.

See 100 S.Ct. 1084.

Action was brought under the Sunshine Act to prohibit Nuclear Regulatory Commission's Atomic Safety and Licensing Board from conducting in camera hearings concerning report on nuclear steam supply system to be used as a component in proposed nuclear power plant. The United States District Court for the Northern District of Oklahoma, H. Dale Cook, Chief Judge, 468 F.Supp. 817, sustained a motion to dismiss, and plaintiff appealed. The Court of Appeals, McWilliams, Circuit Judge, held that: (1) the Atomic Safety and Licensing Board is not a subdivision of the Nuclear Regulatory Commission, and (2) the Sunshine Act did not apply in camera hearing sessions conducted by the Nuclear Regulatory Commission's Atomic Safety and Licensing Board on report concerning nuclear steam supply system to be used in proposed nuclear power plant.

Affirmed.

West Headnotes (3)

Change View

1 **Administrative Law and Procedure** Meetings in General
Under Sunshine Act defining "agency" to mean the agency headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the president with the advice and consent of the Senate and "any subdivision thereof" authorized to act on behalf of the agency, the term "any subdivision thereof" means a subdivision of the "collegial body" type of agency. 5 U.S.C.A. § 552b(a)(1).

1 Cases that cite this headnote

2 **Electricity** Generating Facilities in General
The Sunshine Act did not apply in camera hearing sessions conducted by Nuclear Regulatory Commission's Atomic Safety and Licensing Board on report concerning nuclear steam supply system to be used in proposed nuclear power plant. 5 U.S.C.A. § 552b et seq.; Atomic Energy Act of 1954, § 1 et seq., 42 U.S.C.A. § 2011 et seq.; Energy Reorganization Act of 1974, §§ 2 et seq., 201(a, b)(1), 42 U.S.C.A. §§ 5801 et seq., 5841(a)(1), (b)(1).

3 Cases that cite this headnote

3 **Statutes** Legislative History in General
Reference to legislative history is proper, "however clear" the language of a statute may appear to be; such reference is permissible in order to make certain that the apparent "clearness" is not superficial in nature.

8 Cases that cite this headnote

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Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

Opinion

McWILLIAMS, Circuit Judge.

The issue here is whether the Government in the Sunshine Act, 5 U.S.C. s 552b, Et seq. (1976), applies to an adjudicatory hearing before the Atomic Safety and Licensing Board. The trial court held that the Act did not apply. We agree.

The Public Service Company of Oklahoma filed an application with the Nuclear Regulatory Commission, hereinafter generally referred to as the Commission, requesting that it be granted a construction permit to build and operate a nuclear power plant, to be located some 23 miles east of Tulsa, Oklahoma and known as the Black Fox Station. As a part of the Commission's proceedings, the Commission's adjudicatory arm, the Atomic Safety and Licensing Board, hereinafter generally referred to as the Board, commenced hearings on Public Service Company's application, such hearings being held in Tulsa, Oklahoma. During the course of these hearings, an internal report of the General Electric Company, which company was under contract to supply the Nuclear Steam Supply System for the proposed Black Fox Station, became pertinent and relevant to the issues then under consideration by the Board. General Electric was reluctant to produce its report, known as the Reed Report, without protective orders, claiming that the report contained trade secrets. An agreement was worked out between the parties whereby the Reed Report, or at least the pertinent portions thereof, were produced with the understanding that the hearings of the Board which concerned the Reed Report would be held In camera, i. e., a closed hearing not open to the public.

It was in this general setting that Brian Dennis Hunt, a resident of Tulsa, Oklahoma, brought the present action against the Commission and the Board. Jurisdiction was based on 5 U.S.C. s 552b(h)(1). The complaint generally alleged the background facts summarized in the paragraph immediately above. The gist of the complaint was that the Government in the Sunshine Act precluded the Board from holding hearings closed to the general public. The relief sought was a temporary restraining order, and a preliminary and permanent injunction enjoining the Board from holding closed hearings "on any matter relating to the Reed Report." General Electric and the Public Service Company of Oklahoma were permitted to intervene as defendants. Each filed

an answer, admitting that all hearings before the Board relating to the Reed Report were to be closed hearings, i. e., not open to the public, and denying that the Sunshine Act covered the hearings of the Board. A motion opposing the request for a temporary restraining order, as well as a motion to dismiss, were filed on behalf of the Commission and the Board.

At the conclusion of a hearing on Hunt's request for a temporary restraining order, the trial court, after denying the request for a temporary restraining order, indicated, with the apparent approval of all concerned, that the entire case boiled down to a single issue: Did the Sunshine Act cover and apply to the adjudicatory hearing then about to take place before the Board? The trial court stated that if the Act by its terms did apply, then injunctive relief was in order; but that if the Act did not cover the Board's hearing, then the entire action should be dismissed. The parties were then ***334** granted three days to file simultaneous briefs, all concerned being desirous of a speedy determination of the matter.

The trial court later ruled that the Sunshine Act by its terms did not encompass the hearings of the Board, and accordingly dismissed the action. The trial court's order now appears as Hunt v. Nuclear Regulatory Commission, 468 F.Supp. 817 (N.D.Okl.1979). From that dismissal order Hunt prosecutes the present appeal.

In this Court Hunt asked for an injunction pending final disposition of his appeal. In this regard Hunt sought an order of this Court enjoining the Commission from issuing a construction permit to Public Service Company for the construction and operation of the Black Fox Station, pending final disposition of the appeal. We declined to take immediate action on Hunt's motion for injunction pending appeal, and accelerated the briefing of the appeal proper. Briefing is now complete and the case has been orally argued, again on an expedited basis. Accordingly, the appeal is itself ripe for final determination.

Before examining the Sunshine Act, reference should first be made to the nature of both the Commission and the Board and the relationship between the two. The Atomic Energy Act of 1954, 42 U.S.C. s 2011, Et seq., gave the Atomic Energy Commission the authority, among other things, to regulate nuclear power. The Energy Reorganization Act of 1974, 42 U.S.C. s 5801, Et seq., transferred the licensing and related regulatory functions of the Atomic Energy Commission to the Nuclear Regulatory Commission. The Nuclear Regulatory Commission is composed of five members appointed by the President by and with the advice and consent of the Senate. 42 U.S.C. ss 5841(a)(1) and 5841(b)(1). The 1974 Act also requires that "a quorum for the transaction of (Nuclear Regulatory Commission) business shall consist of at least three members present." 42 U.S.C. s 5841(a)(1).

Pursuant to statutory authority, the Nuclear Regulatory Commission provides a comprehensive agency process for consideration of the public health and safety and of the environmental aspects of nuclear power plant licensing. Utility companies wishing to construct or operate a nuclear power plant must make detailed health, safety, and environmental submissions. The Commission's staff initially reviews these submissions and subsequent to that review the Commission participates as an independent party to the licensing process. In accordance with the Administrative Procedure Act, 5 U.S.C. s 551, Et seq., adjudicatory hearings are then held on all construction permit applications. Any person whose interest may be affected by the proceeding may intervene as a party to such hearings. 42 U.S.C. s 2239(a). The hearings are conducted for the Commission by three-member Atomic Safety and Licensing Boards.

Atomic Safety and Licensing Boards are provided for by 42 U.S.C. s 2241. That statute reads as follows:

Atomic safety and licensing boards; establishment; membership; functions; compensation

(a) Notwithstanding the provisions of 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and

licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

*335 (b) Board members may be appointed by the Commission from private life, or designated from the staff of the Commission or other Federal agency. . . .

The composition of an Atomic Safety and Licensing Board varies from hearing to hearing and, we are informed, is typically composed of an environmental scientist, a nuclear engineer, and a lawyer. The licensing board in an individual case is selected by the Commission from a panel of some 60 full and part-time members.[1] Advice and consent of the Senate is not required in this selection process. An appeal from a decision of an Atomic Safety and Licensing Board is heard by a three-member Atomic Safety and Licensing Appeal Board, also composed of scientists and lawyers. The Nuclear Regulatory Commission itself has discretionary power to review a decision of an Appeal Board. Finally, the several Courts of Appeals have exclusive jurisdiction to review all final orders of the Commission entered in licensing proceedings. 42 U.S.C. s 2239 and 28 U.S.C. ss 2341-44. See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

As above indicated, Hunt relies totally on the provisions of 5 U.S.C. s 552b of the so-called Sunshine Act in his effort to "open up" the Board's hearings. That statute provides as follows:

s 552b. Open Meetings

(a) For purposes of this section

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "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 determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every Meeting of an agency shall be open to public observation. (Emphasis added.)

Except as provided for in 5 U.S.C. s 552b(b), which provision we need not reach in the present case because of our view that the statute itself does not apply to the Atomic Safety and Licensing Board, the statute in the last clause thereof provides that "every portion of every Meeting of an agency shall be open to public observation." (Emphasis added.) However, in preceding sections of the statute the term "meeting of an agency," is so defined as to clearly mean that the mandate for open hearings does not apply to an adjudicatory hearing before an Atomic Safety and Licensing Board, though it would apply to a meeting of the Nuclear Regulatory Commission itself.

5 U.S.C. s 552b(a)(1) defines the term "agency" as that word is used in 5 U.S.C. s 552b(b). The term "agency" as used in the statute is defined as meaning an agency which, inter alia, is headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate. An Atomic Safety and Licensing Board is clearly Not an agency within the meaning of the statute. Members of such a Board are not appointed by the President, but by the Nuclear Regulatory Commission.

1 ***336** The last clause in 5 U.S.C. s 552b(a)(1) provides that the mandate that all meetings of agencies be open applies not only to agencies whose members, or a majority thereof, are appointed by the President with the advice and consent of the Senate, but also applies to any subdivision of such collegial body authorized to act on behalf of such an agency.[2] In our view, an Atomic Safety and Licensing Board is not a subdivision of the Nuclear Regulatory Commission. This is not an instance where an agency, i. e. a collegial body, a majority of whose members are appointed by the President, has divided itself into sub-groups to conduct the business of the agency. No member of the Commission is on the Board with which we are here concerned.

Any possible doubt on this particular matter is cleared up by ensuing sections in the statute. 5 U.S.C. s 552b(a)(2) defines the term "meeting" as the deliberations of at least the number of individual agency members required to take action on behalf of the agency. This language is entirely consistent with the premise that the "subdivision" mentioned in 5 U.S.C. s 552b(a)(1) is a subdivision of the "collegial body" and that such subdivision must be composed of a sufficient number of the members of the collegial body as to permit action on behalf of the collegial body.

If there still be any doubt on this particular matter, such should be resolved by the provision of 5 U.S.C. s 552b(a)(3). That particular section defines the term "member" as that term is used in the definition of both the term "agency" and the term "meeting." The statute defines the term "member" as an individual "who belongs to a collegial body heading an agency." No member of the present Board belongs to the "collegial body heading the agency."

2 Based on our reading of 5 U.S.C. s 552b we are of the definite view that the Sunshine Act does not apply to the Board here involved. Since Hunt relies totally on the provisions of 5 U.S.C. s 552b to open up the Board hearings involving the Reed Report, the trial court acted properly in dismissing the action. Our analysis of the statute parallels that of the trial court, and we therefore are generally in accord with the trial court's reasoning. 468 F.Supp. 817 (N.D.Okl.1979).

We could well let the entire matter rest at this point, since in our view the statute is clear and unambiguous. However, we would briefly note that our understanding of the statute is in accord with the legislative history of the Act, is in accord with regulations of the Commission implementing the Act, and is in accord with an "Interpretative Guide to the Government in the Sunshine Act," published by the Office of the Chairman of the Administrative Conference of the United States.

3 Reference to legislative history is said to be quite proper, "however clear" the language of a statute may appear to be. Such reference is permissible in order to make certain that the apparent "clearness" is not superficial in nature. Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976) and United States v. American Trucking Ass'ns, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940). We do not propose to here dwell at length on the legislative history of the Sunshine Act. Such is fully reviewed in the trial court's order. ***337** 468 F.Supp. 817, 820-21 (N.D.Okl.1979). The reader of this opinion is directed to the trial court's order for legislative history.

In promulgating its proposed regulations implementing the Sunshine Act, the Nuclear Regulatory Commission defined the term "commission" to mean "the collegial body of five commissioners or a quorum thereof . . . or any subdivision of that collegial body authorized to act on its behalf, and shall not mean any body not composed of

members of that collegial body." 41 Fed.Reg. 55882 (1976). In that regard the Commission commented:

> The definition of Commission is taken from the definition of 'agency' in the Act, 5 U.S.C. 552b(a)(1). Subdivisions of the Commission not composed of Commission members such as the Atomic Safety and Licensing Board, or the Advisory Committee on Reactor Safety, are specifically excluded from the definition. 41 Fed.Reg. 55880 (1976).

This proposed regulation of the Nuclear Regulatory Commission as finalized provides that the "Commission" means the collegial body of five Commissioners and any subdivision of that collegial body, but does Not "mean any body not composed of members of that collegial body." 10 C.F.R. s 9.101(a) (1979).[3] In line with the foregoing, the Commission commented that the legislative history of the Sunshine Act plainly supports the conclusion that an Atomic Safety and Licensing Board is not subject to the Act. 42 Fed.Reg. 12875 (1975).

Under the Administrative Conference Act, 5 U.S.C. ss 574(2), 575(c)(14) (1976), the Office of the Chairman of the Administrative Conference of the United States is generally charged with advising and assisting federal agencies on matters relating to administrative procedure. Under the Sunshine Act, the Office of the Chairman is specifically charged to consult with each agency subject to the Sunshine Act and to review any regulations proposed for promulgation under the Act by such agency. 5 U.S.C. s 552b(g).

With regard to the question of the applicability of the open meeting requirement to lower-level agency boards and tribunals, the Office of the Chairman in the "Interpretative Guide to the Government in the Sunshine Act" commented as follows:

It should be noted that 'subdivision thereof' refers back to 'collegial body,' not to 'agency.' Subdivisions made up entirely of employees other than members of the collegial body are not covered by the Act, even though they may be authorized to act on behalf of the agency. The basis for excluding subdivisions made up of agency employees is well stated in the Senate Report:

'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.'[4]

Since the judgment of the trial court is being affirmed, Hunt's request for injunction pending appeal is rendered moot.

Judgment affirmed.

Footnotes

1 The Board members in the instant case are two full-time Commission employees and one part-time consultant from private life.

2 At oral argument opposing counsel were in agreement that the ultimate question in this case is whether the term "any subdivision thereof" as used in 5 U.S.C. s 552b(a)(1) means any subdivision of a "collegial body" or any subdivision of an "agency." Hunt agreed that if the term "any subdivision thereof" means any subdivision of a "collegial body," then under such interpretation the Atomic Safety and Licensing Board is not a subdivision of the Nuclear Regulatory Commission. In our view the term "any subdivision thereof" can only mean subdivision of a collegial body. In this statute we are not concerned with an "agency" in the broad sense of that word. The statute itself limits the Sunshine Act to any agency headed by a collegial body, a majority of whose members are appointed by the President with the advice and consent of the Senate. That is the only type of an agency covered by the Act. Hence, the term "any

subdivision thereof" can only mean a subdivision of the "collegial body" type of agency.

3 We are advised that a rule that the open meeting requirement of the Sunshine Act applies only to meetings in which members of the collegial body heading the agency are present and participating has been promulgated by such agencies as Civil Aeronautics Board, Civil Service Commission, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, United States Parole Commission, as well as numerous other agencies.

4 R. Berg and S. Klitzman, An Interpretative Guide to the Government in the Sunshine Act, Office of the Chairman of the Administrative Conference of the United States (June 1978).

End of Document

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§ 552b. Open meetings
United States Code Annotated
Title 5. Government Organization and Employees
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 552b

§ 552b. Open meetings

Currentness

Open meetings

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "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 determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to--

(1) disclose matters that are (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) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

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

NOTES OF DECISIONS (63)

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

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, 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, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(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) disclose information the premature disclosure of which would--

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,
except that subparagraph (B) 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; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, 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 this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members 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 (c), or with respect to any information which is proposed to be withheld under subsection (c). 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.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the

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

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be 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 determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. 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 subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such 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, a complete copy of the minutes, 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 portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, 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 person, promulgate regulations to implement the requirements of subsections (b) through (f) 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. Subject to any limitations of time provided by law, 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 (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) 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 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. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty 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 the transcript, electronic recording, or minutes 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 parties, 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 such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) 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 such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(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 (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(3) A brief description of litigation or formal complaints concerning the implementation of this section by the agency.

(4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

Credits

(Added Pub.L. 94-409, § 3(a), Sept. 13, 1976, 90 Stat. 1241, and amended Pub.L. 104-66, Title III, § 3002, Dec. 21, 1995, 109 Stat. 734.)

Notes of Decisions (63)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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RELATED TOPICS

Records

General Statutory Disclosure Requirements

Purpose and Intent of Freedom of Information Act Exemption

68 A.L.R. Fed. 842 (Originally published in 1984)

What is "agency" within meaning of Federal Sunshine Act (5 U.S.C.A. § 552b)

Kevin W. Brown, J.D.

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§ 1. Generally

[Cumulative Supplement]

104 S.Ct. 1936
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION et al., Petitioners
v.
ITT WORLD COMMUNICATIONS, INC. et al.

No. 83-371. Argued March 21, 1984. Decided April 30, 1984.

Telecommunications carrier brought suit alleging that FCC's negotiations with foreign officials were ultra vires and seeking that future meetings conform to requirements of the Government in the Sunshine Act. The United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, dismissed the ultra vires count on jurisdictional grounds and ordered the FCC to comply with the Sunshine Act. The United States Court of Appeals for the District of Columbia Circuit, 699 F.2d 1219, affirmed the District Court's judgment in part and reversed in part and reversed the Commission's order, and petition for certiorari was filed. The Supreme Court, Justice Powell, held that: (1) district court lacked jurisdiction over a suit which challenged FCC conduct as ultra vires after the agency had addressed that challenge in an order reviewable only by the Court of Appeals; (2) meetings between three members who constituted a quorum of Federal Communications Commission's telecommunications committee and representatives of European nations did not constitute "meetings" for purposes of Sunshine Act; and (3) informal international conferences attended by members of Federal Communications Commission were not meetings "of an agency" within meaning of Government in the Sunshine Act.

Reversed and remanded.

West Headnotes (5)

Change View

1 **Federal Courts** Other Particular Cases
Exclusive jurisdiction for review of final Federal Communications Commission orders lies in Court of Appeals. 28 U.S.C.A. § 2342(1); Communications Act of 1934, § 402(a), as amended, 47 U.S.C.A. § 402(a).

35 Cases that cite this headnote

2 **Federal Courts** Other Particular Cases
District court lacked jurisdiction over a suit which challenged Federal Communications Commission conduct as ultra vires after the agency had addressed that challenge in an order reviewable only by the Court of Appeals. 28 U.S.C.A. § 2342(1); Communications Act of 1934, § 402(a), as amended, 47 U.S.C.A. § 402(a).

60 Cases that cite this headnote

3 **Telecommunications** Administrative Procedure in General
Meetings between three members who constituted a quorum of Federal Communications Commission's telecommunications committee and representatives of European nations did not constitute "meetings" for purposes of Government in the Sunshine Act. 5 U.S.C.A. § 552b(a)(2), (b).

5 Cases that cite this headnote

4 **Administrative Law and Procedure** Meetings in General
Government in the Sunshine Act applies only where a subdivision of an agency deliberates upon matters that are within that subdivision's formally delegated authority to take official action for the agency. 5 U.S.C.A. § 552b (b).

10 Cases that cite this headnote

5 **Telecommunications** Administrative Procedure in General
Informal international conferences attended by members of Federal Communications Commission were not meetings "of an agency" within meaning of Government in the Sunshine Act since sessions were not convened by the FCC and since procedures were not subject to FCC's unilateral control. 5 U.S.C.A. § 552b(b).

15 Cases that cite this headnote

Syllabus [a1]

The Government in the Sunshine Act, 5 U.S.C. § 552b(b), requires that "meetings" *****1937*** of a federal agency be open to the public. Section 552b(a)(2) 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." Members of petitioner Federal Communications Commission (FCC) participate with their European and Canadian counterparts in the Consultative Process, a series of conferences intended to facilitate joint planning of telecommunications facilities through exchange of information or regulatory policies. In this case, three FCC members who constituted a quorum of the FCC's Telecommunications Committee, a subdivision of the FCC, attended such conferences at which they were to attempt to persuade the European nations to cooperate with the FCC in encouraging competition in the overseas telecommunications market. Respondents, who at the time, along with another corporation, were the only American corporations that provided overseas record telecommunications and who opposed the entry of new competitors, filed a rulemaking petition with the FCC requesting it to disclaim any intent to negotiate with foreign governments or to bind it to agreements at the conferences. Respondents alleged that such negotiations were ultra vires the FCC's authority and that, moreover, the Sunshine Act required the Consultative Process to be held in public. The FCC denied the petition. Respondent ITT World Communications, Inc., then filed suit in Federal District Court, similarly alleging that the FCC's negotiations with foreign officials at the Consultative Process were ultra vires the agency's authority and that future meetings of the Consultative Process must conform to the Sunshine Act's requirements. The District Court dismissed the ultra vires count on jurisdictional grounds but ordered the FCC to comply with the Sunshine Act. Considering on consolidated appeal the District Court's judgment and the FCC's denial of the rulemaking petition, the Court of Appeals affirmed the District Court's ruling that the Sunshine Act applied to meetings of the Consultative Process, but reversed the District Court's dismissal of the ultra vires count, and further held that the FCC had erroneously denied the rulemaking petition.

****464*** Held:

1. The District Court lacked jurisdiction over respondent's ultra vires claim. Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies by statute in the Court of Appeals. Litigants may not evade this requirement by requesting the District Court to enjoin action that is the outcome of the agency's order. Yet that is what respondents sought to do, since, in substance, the complaint in the District Court raised the same issues and sought to enforce the

same restrictions upon FCC conduct as did the rulemaking petition that was denied by the FCC. Pp. 1939-1940.

2. The Sunshine Act does not require that Consultative Process sessions be held in public. Pp. 1940-1942.

(a) Such sessions do not constitute a "meeting" as defined by § 552b(a)(2). The Sunshine Act does not extend to deliberations of a quorum of a subdivision upon matters not within the subdivision's formally delegated authority. Such deliberations lawfully could not "determine or result in the joint conduct or disposition of official agency business" within the meaning of the Act. Here, the Telecommunications Committee at the Consultative Process session did not consider or act upon applications for common carrier certification, its only formally delegated authority. Pp. 1940-1942.

(b) Nor were the sessions in question a meeting "of an agency" within the meaning of the Sunshine Act. The Consultative Process was not convened by the FCC, and its procedures were not subject to the FCC's unilateral control. P. 1942.

***1938** 226 U.S.App.D.C. 67, 699 F.2d 1219 (1983), reversed and remanded.

Attorneys and Law Firms

Albert J. Lauber, Jr., argued the cause for petitioners. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman, Frank A. Rosenfeld, Bruce E. Fein, Daniel M. Armstrong,* and *C. Grey Pash, Jr.*

Grant S. Lewis argued the cause for respondents. With him on the briefs were *John S. Kinzey, Charles C. Platt, Howard A. White,* and *Susan I. Littman.*

Opinion

Justice POWELL delivered the opinion of the Court.

The Government in the Sunshine Act, 5 U.S.C. § 552b, mandates that federal agencies hold their meetings in public. ***465** This case requires us to consider whether the Act applies to informal international conferences attended by members of the Federal Communications Commission. We also must decide whether the District Court may exercise jurisdiction over a suit that challenges agency conduct as ultra vires after the agency has addressed that challenge in an order reviewable only by the Court of Appeals.

I

Members of petitioner Federal Communications Commission (FCC) participate with their European and Canadian counterparts in what is referred to as the Consultative Process. This is a series of conferences intended to facilitate joint planning of telecommunications facilities through an exchange of information on regulatory policies. At the time of the conferences at issue in the present case, only three American corporations-respondents ITT World Communications, Inc. (ITT), and RCA Global Communications, Inc., and Western Union International-provided overseas record telecommunications services. Although the FCC had approved entry into the market by other competitors, European regulators had been reluctant to do so. The FCC therefore added the topic of new carriers and services to the agenda of the Consultative Process, in the hope that exchange of information might persuade the European nations to cooperate with the FCC's policy of encouraging competition in the provision of telecommunications services.

Respondents, opposing the entry of new competitors, initiated this litigation. First, respondents filed a rulemaking petition with the FCC concerning the Consultative Process meetings. The petition requested that the FCC disclaim any intent to negotiate with foreign governments or to bind it to agreements at the meetings, arguing that such negotiations were ultra vires the agency's authority. Further, the petition contended that the Sunshine Act required the Consultative Process sessions,

as "meetings" of the FCC, to be *466 held in public. See 5 U.S.C. § 552b(b).[1] The FCC denied the rulemaking petition, and respondents filed an appeal in the Court of Appeals for the District of Columbia Circuit.

Respondent ITT then filed suit in the District Court for the District of Columbia. The complaint, like respondents' rulemaking petition, contended (i) that the agency's negotiations with foreign officials at the Consultative Process were ultra vires the agency's authority and (ii) that future meetings of the Consultative Process must conform to the requirements of the Sunshine Act. The District Court dismissed the ultra vires count on jurisdictional grounds, but ordered the FCC to comply with the Sunshine Act.[2] Respondent ITT **1939 appealed, and the Commission cross-appealed.

The Court of Appeals for the District of Columbia Circuit considered on consolidated appeal the District Court's judgment and the FCC's denial of the rulemaking petition. The District Court judgment was affirmed in part and reversed in part. 226 U.S.App.D.C. 67, 699 F.2d 1219 (1983). The Court of Appeals affirmed the District Court's ruling that the Sunshine Act applied to meetings of the Consultative Process. It reversed the District Court's dismissal of the ultra *467 vires count, however. Noting that exclusive jurisdiction for review of final agency action lay in the Court of Appeals, that court held that the District Court nonetheless could entertain under 5 U.S.C. § 703 [3] a suit that alleged that FCC participation in the Consultative Process should be enjoined as ultra vires the agency's authority. The case was remanded for consideration of the merits of respondents' ultra vires claim.

The Court of Appeals also concluded that the FCC erroneously had denied respondents' rulemaking petition. Consistent with its affirmance of the District Court, the Court of Appeals held that the FCC had erred in concluding that the Sunshine Act did not apply to the Consultative Process sessions. Further, the court found the record "patently inadequate" to support the FCC's conclusion that attendance at sessions of the Consultative Process was within the scope of its authority. 226 U.S.App.D.C., at 95, 699 F.2d, at 1247. Although remanding to the FCC, the court suggested that the agency stay consideration of the rulemaking petition, as the District Court's action upon respondents' complaint might moot the question of rulemaking.

We granted certiorari, to decide whether the District Court could exercise jurisdiction over the ultra vires claim and whether the Sunshine Act applies to sessions of the Consultative Process.[4] 464 U.S. 932, 104 S.Ct. 334, 78 L.Ed.2d 304 (1983). We reverse.

*468 II

1 2 We consider initially the jurisdiction of the District Court to enjoin FCC action as ultra vires. Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order. See Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 69, 91 S.Ct. 203, 208, 27 L.Ed.2d 203 (1970); Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 419-422, 85 S.Ct. 551, 556-558, 13 L.Ed.2d 386 (1965). Yet that is what respondents have sought to do in this case. In substance, the complaint filed in the District Court raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied by the FCC. See supra, at 1938.[5] The appropriate procedure for obtaining judicial review of the **1940 agency's disposition of these issues was appeal to the Court of Appeals as provided by statute.

*469 The Administrative Procedure Act authorizes an action for review of final agency action in the District Court to the extent that other statutory procedures for review are inadequate. 5 U.S.C. §§ 703, 704. Respondents contend that these provisions confer jurisdiction in the present suit because the record developed upon consideration of the rulemaking petition by the agency does not enable the Court of Appeals fairly to

evaluate their ultra vires claim. If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, see Harrison v. PPG Industries, Inc., 446 U.S. 578, 593-594, 100 S.Ct. 1889, 1898-1899, 64 L.Ed.2d 525 (1980), or in some circumstances refer the case to a special master, see 28 U.S.C. § 2347(b)(3). Indeed, in the present case, the Court of Appeals has remanded the case to the agency for further proceedings. We conclude that the District Court lacked jurisdiction over respondents' ultra vires claim.

III

The Sunshine Act, 5 U.S.C. § 552b(b), requires that "meetings of an agency" be open to the public. Section 552b(a)(2) defines "meetings" 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." Under these provisions, the Sunshine Act does not require that Consultative Process sessions be held in public, as the participation by FCC members in these sessions constitutes neither a "meeting" as defined by § 522b (a)(2) nor a meeting "of the agency" as provided by § 552b(b).

A

3 Congress in drafting the Act's definition of "meeting" recognized that the administrative process cannot be conducted entirely in the public eye. "[I] nformal background discussions [that] clarify issues and expose varying views" are a necessary part of an agency's work. See ***470** S.Rep. No. 94-354, p. 19 (1975). The Act's procedural requirements[6] effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit.[7] Section 552b(a)(2) therefore limits the Act's application to ****1941** meetings "where at least a quorum of the agency's members ... conduct or dispose of official agency business." S.Rep. No. 94-354, at 2.

Three Commissioners, the number who attended the Consultative Process sessions, did not constitute a quorum of the seven-member Commission.[8] The three members were, however, a quorum of the Telecommunications Committee. That Committee is a "subdivision ... authorized to act on behalf of the agency." The Commission had delegated to the ***471** Committee, pursuant to § 5(d)(1) of the Communications Act of 1934, 48 Stat. 1068, as amended, 47 U.S.C. § 155(d)(1), the power to approve applications for common carrier certification.[9] See 47 CFR § 0.215 (1983). The Sunshine Act applies to such a subdivision as well as to an entire agency. § 552b(a) (1).

It does not appear, however, that the Telecommunications Committee engaged at these sessions in "deliberations [that] determine or result in the joint conduct or disposition of official agency business." This statutory language contemplates discussions that "effectively predetermine official actions." See S.Rep. No. 94-354, at 19; accord, id., at 18. 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) (hereinafter Interpretive Guide).[10] On the cross-motions for summary judgment, however, respondents alleged neither that the 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.[11] Rather, the sessions ***472** 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 discussions.

The Court of Appeals did not reach a contrary result by finding that the Commissioners were deliberating upon matters within their formally delegated authority. Rather, that court inferred from the members' attendance at the sessions an undisclosed authority, not formally delegated, to engage in discussions on behalf of the Commission. The court then concluded that these discussions were deliberations

that resulted in the conduct of official agency business, as the discussions "play[ed] an integral role in the Commission's policymaking processes." 226 U.S.App.D.C., at 89, 699 F.2d, at 1241.

4 ***1942** We view the Act differently. It applies only where a subdivision of the agency deliberates upon matters that are within that subdivision's formally delegated authority to take official action for the agency. Under the reasoning of the Court of Appeals, any group of members who exchange views or gathered information on agency business apparently could be viewed as a "subdivision ... authorized to act on behalf of the agency." The term "subdivision" itself indicates agency members who have been authorized to exercise formally delegated authority. See Interpretive Guide, at 2-3. Moreover, the more expansive view of the term "subdivision" adopted by the Court of Appeals would require public attendance at a host of informal conversations of the type Congress understood to be necessary for the effective conduct of ***473** agency business.[12] In any event, it is clear that the Sunshine Act does not extend to deliberations of a quorum of the subdivision upon matters not within the subdivision's formally delegated authority. Such deliberations lawfully could not "determine or result in the joint conduct or disposition of official agency business" within the meaning of the Act.[13] As the Telecommunications Committee at the Consultative Process sessions did not consider or act upon applications for common carrier certification-its only formally delegated authority-we conclude that the sessions were not "meetings" within the meaning of the Sunshine Act.

B

5 The Consultative Process was not convened by the FCC, and its procedures were not subject to the FCC's unilateral control. The sessions of the Consultative Process therefore are not meetings "of an agency" within the meaning of § 552b(b). The Act prescribes procedures for the agency to follow when it holds meetings and particularly when it chooses to close a meeting. See n. 6, supra. These provisions presuppose that the Act applies only to meetings that the agency has the power to conduct according to these procedures. And application of the Act to meetings not under agency control would restrict the types of meetings that agency members could attend. It is apparent that Congress, in enacting requirements for the agency's conduct of its own meetings, did not contemplate as well such a broad substantive ***474** restraint upon agency processes. See S.Rep. No. 94-354, at 1.

IV

For these reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Parallel Citations

104 S.Ct. 1936, 55 Rad. Reg. 2d (P & F) 1459, 80 L.Ed.2d 480, 10 Media L. Rep. 1685

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 552b(b) provides:
"Members [of a federal agency] shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation."
Subsection (c) contains exceptions, that are not relevant to the present case. Section 552b(a)(2) defines "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."
Section 552b(a)(1) defines the term "agency" to include "any agency ... headed by a collegial body composed of two or more individual members ... and any subdivision thereof authorized to act on behalf of the agency."

2 The District Court had jurisdiction over the Sunshine Act claim under 5 U.S.C. § 552b(h)(1).

3 Title 5 U.S.C. § 703 provides in part:
"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action ... in a court of competent jurisdiction."
The Court of Appeals accepted respondents' contention that review in the Court of Appeals was inadequate to vindicate respondents' claims. See infra, at 1940.

4 The finding of the Court of Appeals that the administrative record was inadequate to support the FCC's denial of a petition for rulemaking on the issue of the scope of the FCC's authority to negotiate is not before the Court.

5 ITT urges that the ultra vires claim, unlike the petition for rulemaking, focuses on past rather than future agency conduct. It is true that the complaint in the District Court sought, in addition to prospective relief, a declaration that the Commission had violated the Administrative Procedure Act. See App. 71. But the gravamen of both the judicial complaint and the petition for rulemaking was to require the agency to conduct future sessions on the terms that ITT proposed. Indeed, it seems questionable whether a complaint that sought only a declaration that past conduct was unlawful would present to the District Court a case or controversy over which it could exercise subject-matter jurisdiction. Cf. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241, 57 S.Ct. 461, 463-464, 81 L.Ed. 617 (1937). In any event, even if the question of the lawfulness of the agency's past conduct were the central element of respondents' judicial complaint, the District Court under the doctrine of primary jurisdiction should have dismissed the complaint, as respondents could have challenged the agency's past conduct by motion before the agency for a declaratory ruling, 47 CFR § 1.2 (1983). See Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 421, 426, 85 S.Ct. 551, 558, 561, 13 L.Ed.2d 386 (1965); Far East Conference v. United States, 342 U.S. 570, 574, 577, 72 S.Ct. 492, 494, 496, 96 L.Ed. 576 (1952).

6 Meetings within the scope of the Act must be held in public unless one the of the Act's exemptions is applicable. § 552b(b). The agency must announce, at least a week before the meeting, its time, place, and subject matter and whether it will be open or closed. § 552b(e)(1). For closed meetings, the agency's counsel must publicly certify that one of the Act's exemptions permits closure. § 552b(f)(1). Most closed meetings must be transcribed or recorded. Ibid.

7 The evolution of the statutory language reflects the congressional intent precisely to define the limited scope of the statute's requirements. See generally H.R.Rep. No. 94-880, pt. 2, p. 14 (1976), U.S.Code Cong. & Admin.News 1976, p. 2183. For example, the Senate substituted the term "deliberations" for the previously proposed terms-"assembly or simultaneous communication," H.R.11656, 94th Cong., 2d Sess., § 552b

(a)(2) (1976), or "gathering," S. 5, 94th Cong., 1st Sess., § 201(a) (1975) -in order to "exclude many discussions which are informal in nature." S.Rep. No. 94-354, p. 10 (1975); see id., at 18. Similarly, earlier versions of the Act had applied to any agency discussions that "concer[n] the joint conduct or disposition of agency business," H.R.11656, supra, § 552b(a)(2). The Act now applies only to deliberations that "determine or result in" the conduct of "official agency business." The intent of the revision clearly was to permit preliminary discussion among agency members. See 122 Cong.Rec. 28474 (1976) (remarks of Rep. Fascell).

8 Since the Consultative Process sessions at issue here, held in October 1979, the Commission's membership has been reduced to five. Pub.L. 97-253, § 501(b), 96 Stat. 805 (effective July 1, 1983).

9 Common carriers "in interstate or foreign communication by wire or radio" or "radio transmission of energy," 47 U.S.C. § 153(h), must obtain from the Commission a certificate of public convenience or necessity before undertaking construction or operation of additional communications lines. 47 U.S.C. § 214. Permits must be obtained also for construction of radio broadcasting stations. 47 U.S.C. § 319.

10 The Office of the Chairman of the Administrative Conference of the United States prepared the Interpretive Guide at Congress' request, § 552b(g), and after extensive consultation with the affected agencies. See Interpretive Guide, at v.

11 Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss or for Summary Judgment 6-11, 46-50, and Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment 23-27, in Civ. No. 80-0428 (Dist.Ct. DC).

12 This point is made by the memorandum amicus curiae submitted to the Court by the American Bar Association: "The ... decision [of the Court of Appeals] places ... agencies in an untenable position. [U]nder the court's decision, [agency] members may not meet with persons from outside the agency to discuss any matter within the official concern of the agency without complying with the provisions of the Sunshine Act. Such a result would have a pronounced (and deleterious) effect on the interaction between the agencies and the public...." Memorandum, at 5-6.

13 Ultra vires action by a subdivision would be of no legal effect.

End of Document

RELATED TOPICS

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General Statutory Disclosure Requirements

Purpose and Intent of Freedom of Information Act Exemption

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What is "agency" within meaning of Federal Sunshine Act (5 U.S.C.A. § 552b)

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§ 1. Generally

[Cumulative Supplement]

This annotation collects and analyzes the federal cases and selected administrative decisions which have considered what administrative bodies are "agencies" within the meaning of the Government in the Sunshine Act of 1976 (Sunshine Act, 5 U.S.C.A. § 552b).

Under the Federal Sunshine Act, federal agencies are generally required to open their meetings to the public. The statute defines an "agency" subject to the Act to be any agency as defined under the Freedom of Information Act (FOIA, 5 U.S.C.A. § 552(e)), which is also headed by a "collegial body" of two or more members, a majority of whom are appointed by the President, subject to the approval of the Senate. The FOIA in turn incorporates the definition of "agency" specified in the provisions of the Administrative Procedures Act (APA) (5 U.S.C.A. § 551(1)).

The text of 5 U.S.C.A. §§ 522b(a)(1) (Sunshine Act), 552(e) (FOIA), and 551(1) (APA) is as follows:

§ 552b. Open meetings

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e) of this title [5 U.S.C.A. § 552(e)], headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title [5 U.S.C.A. § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

§ 551. Definitions

For the purpose of this subchapter [5 U.S.C.A. §§ 551 et seq.]—

(1) agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title [5 U.S.C.A. § 552]

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12 [12 U.S.C.A. § 1738, 1739, 1743, and 1744]; chapter 2 of title 41 [41 U.S.C.A. §§ 101 et seq.]; or sections 1622 [50 App. U.S.C.A. § 1622], 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix

The scope of the term "agency" under 5 U.S.C.A. § 552b has occasionally been disputed. In the following cases, particular administrative bodies were found to be "agencies" subject to the provisions of the Sunshine Act.

Where the Council on Environmental Quality (CEQ) acknowledged that it was generally an "agency" under the Sunshine Act (5 U.S.C.A. § 552b), but claimed that it was not an "agency" in its capacity of advising the President, the court in Pacific Legal Foundation v Council on Environmental Quality (1980) 205 App DC 131, 636 F2d

1259, found that the CEQ was, in fact, an agency required to hold all "meetings" in public. The court reasoned that the CEQ met the Freedom of Information Act (FOIA) definition of "agency" which includes any establishment in the executive branch of the government, including the Executive Office of the President. The court also observed that the CEQ consisted of three members appointed by the President subject to Senate approval. The court rejected the contention of the CEQ that a statement of a Senator, made during Senate debate on the Sunshine legislation, that the bill would not cover agencies whose essential function is to "make policy," indicated that the CEQ should be exempted from the open meetings requirement, the court noting that the wording of the Senate bill did not correspond to the wording of the statute as eventually enacted. The court further rejected the contention that because a list of agencies contained in a Senate committee report, which included agencies the committee deemed to be covered by the Sunshine legislation, did not include the CEQ, the CEQ should be treated as exempt. The court noted that the list was merely illustrative. Finally, relying on precedent decided under the FOIA,[1] the court rejected the argument that the CEQ, although an agency generally, was not an "agency," in its capacity as adviser to the President. Once a unit is found to be an agency, this determination will not vary according to its specific function in each individual case, the court stated.

Ruling on an inquiry from the Government Printing Office (GPO) which had questioned whether it was authorized to open an account for the National Railroad Passenger Corp. (Amtrak) for printing notices submitted by Amtrak pursuant to the Sunshine Act, the Comptroller General of the United States in 57 Comp. Gen. 773 decided that Amtrak was an "agency" under 5 U.S.C.A. § 552b for which the GPO was authorized to print notices, and the like. The opinion stated that Amtrak's status as an "agency" depended first on whether it was headed by a "collegial body" under § 552b and, second, whether it met the description of an agency under the provisions of the FOIA (5 U.S.C.A. § 552(e)). Considering the first issue, the Comptroller General decided that the board of directors of Amtrak (the board) which was comprised of (1) the Secretary of Transportation, ex officio, and the president of the corporation, ex officio, (2) eight members appointed by the President of the United States, by and with the advice and consent of the Senate, (3) three members elected annually by the common stockholders of the corporation, and (4) four members elected annually by the preferred stockholders of the corporation, was in fact a "collegial body" under § 552b. The Comptroller General reasoned that since the Secretary of Transportation's membership on the board is a statutory ex officio position, it automatically and necessarily accompanies the appointment as Secretary and should therefore, be viewed as an appointment "to such position" for the purposes of § 552b(a)(1). Thus, with the eight members appointed directly by the President, a majority of the board qualified as presidential appointees and the board was a "collegial body," the opinion stated. The Comptroller General noted that, as there were no preferred stockholders, the de facto membership of the board was reduced by four, and stated that the applicability of § 552b to Amtrak was confirmed by the legislative history of the Sunshine Act because a congressional conference committee report specifically mentioned Amtrak as an agency covered by the Act. Finally, the Comptroller General concluded that Amtrak was clearly an "agency" under the FOIA despite a provision of the Rail Passenger Act of 1970 (45 U.S.C.A. § 541) denying it agency status because it was a "government controlled corporation" under the FOIA.

Caution

Although the Comptroller General in the above opinion decided that the ex officio appointment of the Secretary of Transportation to the Amtrak board of directors constituted an appointment "to such position" by the President within the meaning of the Sunshine Act and, therefore, concluded that a majority of the members of the Amtrak board were appointed in the manner required by the Act, a similar line of reasoning was rejected by the court in Symons v Chrysler Corp. Loan Guarantee Bd. (1981) 216 App DC 80, 670 F2d 238, 68 ALR Fed 825, infra. In Symons, ex officio appointments to the Chrysler Corporation Loan Guarantee Board were held not to

constitute appointments "to such position" within the language of the Sunshine Act, and the board in that case was found not to be an "agency."

The courts ruled that the particular government bodies involved in the following cases were not "agencies" required to open their meetings to the public under the Sunshine Act.

The Atomic Safety and Licensing Board (the Board), a body within the Nuclear Regulatory Commission (NRC), is not an "agency" under 5 U.S.C.A. § 552b, the court ruled in Hunt v Nuclear Regulatory Com. (1979, CA10 Okla) 611 F2d 332, cert den 445 US 906, 63 L Ed 2d 322, 100 S Ct 1084. Stating that an "agency," as used in the statute, must be headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, the court ruled that the Board was clearly not an agency within the meaning of the statute because its members were not appointed by the President but by the NRC. The court further determined that the term "any subdivision thereof" in § 522b(a)(1) refers to "collegial body" rather than "agency" so that the Board was not included within the definition of "agency" by virtue of being a subdivision of an agency. Moreover, the case did not present an instance, the court pointed out, where a collegial body, a majority of whose members are appointed by the President, has divided itself into subgroups to conduct the business of the agency, because no member of the NRC is on the Board. The court concluded that the legislative history of the Sunshine Act supports the view that the Board is not an "agency" under the statute.

In Symons v Chrysler Corp. Loan Guarantee Bd. (1981) 216 App DC 80, 670 F2d 238, 68 ALR Fed 825, the court ruled that the Chrysler Corporation Loan Guaranty Board (the Board), a body whose voting members were the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Comptroller General of the United States, and whose nonvoting members were the Secretaries of Labor and Transportation, was not an "agency" required to hold open meetings under 5 U.S.C.A. § 552b. The court observed initially that in order to be covered by the Sunshine Act, an "agency" must: (1) fall within the definition of "agency" found in the Freedom of Information Act (5 U.S.C.A. § 552(e)), which includes any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of government, or any independent regulatory agency, and (2) be headed by a "collegial body" composed of two or more members, a majority of whom are appointed "to such position" by the President. Focusing on the interpretation of the phrase "to such position," the court agreed with the Board's argument that it was not covered by § 552b because none of its members were appointed to positions on the Board by the President as required by the literal terms of the statute, but rather served ex officio, by virtue of their appointment, concededly by the President, to other high government offices. The court reasoned that this interpretation gave effect to the plain meaning of the statute. Thus, while agreeing that the Sunshine Act is a broadly remedial statute dedicated to the principle of open government, the court stated that this remedial purpose did not give the judiciary license to disregard entirely the plain meaning of the words used. The court rejected both the argument that the phrase "to such position" could be read to include presidential appointments to positions other than the "collegial body" itself, and the interpretation that the phrase was mere surplusage in the statute. The latter construction is not favored by law and would violate the fundamental rule that, in construing statutes, the court should give effect, if possible, to every word used by the Congress, the court reasoned. The court declined to interpret the dirth of legislative history on the phrase "to such position" as indicating that the phrase was surplusage. Rather, the court noted that the only legislative history on point, the testimony of the Congresswoman who shared the subcommittee which originally considered the Sunshine legislation, supported the court's interpretation. Noting, finally, that a list of "agencies" which Congress had intended to be covered by the Sunshine Act included no body, a majority of whose members were appointed ex officio, the court concluded that Congress had not chosen a broad, all

encompassing definition of "agency" in the Sunshine Act, but rather a more narrow definition specifically limited by statute.

Related Annotations are located under the Research References heading of this Annotation.

CUMULATIVE SUPPLEMENT

Cases:

Sunshine Act (5 U.S.C.A. § 552b) applies only where subdivision of agency deliberates upon matters that are within subdivision's formally delegated authority to take official action for agency; § 552b does not extend to deliberations of quorum of subdivision upon matters not within subdivision's formally delegated authority, since such deliberations could not determine or result in joint conduct or disposition of official agency business. F.C.C. v. ITT World Communications, Inc., 466 U.S. 463, 104 S. Ct. 1936, 80 L. Ed. 2d 480, 10 Media L. Rep. (BNA) 1685 (1984).

Sunshine Act, which provides that agency meetings shall generally be open to public, did not apply to United States Department of Commerce, where term "agency" was defined as agency headed by "collegial body composed of two or more individual members," and Department of Commerce was headed by single person, not collegial body. Parravano v Babbitt (1993, ND Cal) 837 F Supp 1034, 94 Daily Journal DAR 1543, 24 ELR 20604, partial summary judgment den, dismd on other grounds (ND Cal) 861 F Supp 914, 94 Daily Journal DAR 14271, 25 ELR 20203.

Defense Nuclear Facilities Safety Board was "agency" within meaning of federal Sunshine Act, 5 U.S.C.A. § 552b. Energy Research Foundation v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581, 18 Media L. Rep. (BNA) 1294 (D.C. Cir. 1990).

Governmental body which is not agency under Freedom of Information Act is necessarily not agency under Sunshine Act since Sunshine Act expressly incorporates Freedom of Information Act definition of agency; Council of Economic Advisers is not collegial group subject to Sunshine Act. Rushforth v Council of Economic Advisers (1985, DC Dist Col) 762 F2d 1038.

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[END OF SUPPLEMENT]

RESEARCH REFERENCES

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Meaning of term "agency" for purposes of Freedom of Information Act (5 U.S.C.A. § 552), 57 A.L.R. Fed. 295
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What is an "agency" for purposes of 28 U.S.C.A. § 1345, granting original jurisdiction to United States District Courts of civil actions by any agency of the United States, 51 A.L.R. Fed. 874
What are "records" of agency which must be made available under the Freedom of Information Act (5 U.S.C.A. § 552(a)(3)(2d)), 50 A.L.R. Fed. 336
What are reports prepared or used by "agency responsible for the regulation or supervision of financial institutions," within Freedom of Information Act (5 U.S.C.A. § 552(b)(8)), 48 A.L.R. Fed. 814

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Footnotes

1 See Ryan v Department of Justice (1980) 199 App DC 199, 617 F2d 781.

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