# Sunshine May Cloud Good Decision Making

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Foremost among a number of legislative reforms imposed upon state utility and regulatory commissions in recent years have been sunshine laws.

The intent of sunshine laws is laudable and the idea simple: the public's business ought to be conducted in the open for the public to observe. Decision making should be transparent, with a clearly articulated rationale available for all who seek it.

Not only the decision, but its evolution and the decision makers' thought processes, should be fully revealed. Few backroom deals can withstand such scrutiny.

Should the level of accountability vary for an appointed or elected public official? In theory, no, but that only addresses questions about the appearance of accountability and openness. Does such a requirement improve the quality of decision making; or, more importantly, does it improve the quality of decisions? There is a strong case that it does not.

## Sunshine or Clouds?

Regulatory bodies are made up of several members.[1] Decisions are made on a collaborative and deliberative basis, with different views reflected in the final outcome. That is hardly surprising, since so many of the issues are legislative in nature and require expertise in a variety of disciplines.

On the surface, it would appear that utility regulatory bodies provide an ideal setting for applying sunshine laws. Three critical factors, however, belie this assumption: the willingness and ability of commissioners to fully explore issues in public, the effectiveness of communication among the commissioners and staff, and the value of commission meetings to the public.

Public policy makers must be held accountable for their decisions. Such accountability includes the ability and willingness of officials to articulate the reasoning that provides the intellectual basis for a decision. While such a responsibility may help assure accountability and enrich public debate, it does not guarantee these qualities and does not necessarily enhance the reasoning behind decisions or communication among colleagues, staff, or the public. Indeed, it can well harm them.

There are excellent reasons why some subjects are best explored in private, not public. For example, personnel, security

matters, and pending litigation to which the commission is, or is likely to become, a party are often statutorily excluded from sunshine laws. Exceptions generally take place when privacy is an issue or the public interest is better served by private discussion. Thus, subject matter rather than the dynamics of decision making has driven judgments of what must be discussed in public and what may occur in closed meetings.

Public discussion of pending matters before a commission, in theory, provides a public benefit because officials are held more accountable, citizens have the opportunity to be better informed, there is greater assurance of honesty and integrity, and affected parties can better understand decisions that affect them.

As is the case with many theories of public policy, the reality often turns out to be different. Indeed, many of the theoretical benefits of sunshine laws are never fully realized. The law can only require that commissions deliberate publicly, but the law cannot and does not try to compel outspokenness. Many regulators prefer to refrain from public discussion and, instead, conduct their inquiries and discussions with staff and colleagues in private where there is not a quorum that triggers the sunshine law.

The effect is to reduce many public meetings to ministerial functions, where decisions are formally ratified but not fully explored or formulated. Such a process virtually guarantees that the public does not gain the full benefit of a collegial system because the commission, as a whole, may never have discussed the matter before it.

## Reasons for Reticence

There are several legitimate reasons why a regulator, or an entire commission, is unwilling to publicly discuss a pending case in public sessions. First, there is concern over the external impacts of the discussion. Preliminary statements by commissioners about a pending rate case, for example, could affect the sale of a company's securities in ways that turn out to be unwarranted by the final result. While securities markets frequently respond to signals that turn out to be false, no regulator is anxious to take responsibility for causing such an occurrence.

Concern is not limited to financial markets. Consumers can also pick up false signals. Several years ago, a second- or third-hand account of a discussion at the Ohio commission about low-income payment plans led a group of low-income customers in Cleveland to withhold utility bill payments in the false, though honest, belief that their action was protected by an order of the commission—an "action" that, at the time, was only a discussion.

There are numerous incidents of utility managers taking steps they believed their commission authorized, or at least desired, when in fact all that had occurred was a casual comment by a commissioner. Even for regulators who enjoy the give and take of public debate, there are good reasons to be cautious, prudent, and often silent in public sessions, lest the public draw unwarranted conclusions.

The second reason for a lack of public discussion relates to the internal dynamics of a collegial body. There is considerable give and take among members of a regulatory body. Decisions, particularly in major cases, often are the result of negotiations among commissioners and staff. Indeed, most major orders are crafted through compromise. In legislative bodies, legislators often stake out strong positions and then yield on some points to reach consensus. In the judicialized world in which regulators find themselves, such public give and take is difficult.

Legislators operate within a framework of broad discretion limited only by their imagination and the Constitution. Regulators, like judges, operate within a statutory framework in which they are expected to produce legally "correct" decisions. While that statutory framework often leaves a great deal of discretion, the fact that each decision is subject to judicial review may inhibit the shifting of position—given that one's own argument can be used later, upon appellate review, to try to reverse a consensus decision. Moreover, a regulator, like any legislator who backs off an initial position, often is left having to explain the "flip flop."

Not surprisingly, there also is a reluctance to pursue subjects or ask questions that may put a colleague or staff member in an awkward situation or may reveal the questioner's lack of familiarity with a subject. Similarly, pursuing an argument to great lengths in public discussion can result in public posturing that can be harmful in the long run.

While one may be willing to pursue such discussion in private, it is an altogether different matter to do so in public. Commissioners who may disagree today may need each other tomorrow to form a working majority on an issue. In short, one avoids publicly embarrassing or pushing a colleague too hard in order not to burn bridges that may have to be crossed later. The greater a colleague's sensitivity, the greater the caution.

If maintaining civility is important to colleagues, it is even more important to staff who generally see themselves working "for" rather than "with" commissioners. Many, although fortunately not all, staff members find it difficult to differ with their "bosses" in private, much less public. When strong differences exist, they are discussed in private, where the majority of commissioners (or at least a quorum) will be unable to benefit from the full scope of the discussion. Public discussions that put a premium on collegiality often turn out to be highly sanitized versions of what a private discussion might have yielded. The discussion's benefit to the public or even the commission is reduced substantially.

The third category, largely the flip side of the second, is a reluctance to expose oneself to criticism or put oneself in a defensive posture by offering new or non-traditional views. There is a compelling argument that sunshine laws breed an inherent conservatism into decisions—not political conservatism, but a resistance to change of any kind.

This conservatism is reinforced by the fact that commission discussion almost always occurs after a case record is complete, which limits the discussion to what the case record contains. While a commissioner, in theory, can discuss cases before the case record is complete, there is no enthusiasm for doing so for fear of displaying bias or premature judgment on an issue. Thus, the futility of raising a novel approach to an issue constitutes another reason for a commissioner not to raise new perspectives in public sessions.

The fourth, and final, category of reasons for sanitized public discussions is judicial review. A commission, like a court whose decisions are subject to appellate review, prefers to speak in careful and deliberate written opinions rather than the more spontaneous give and take of commission sunshine sessions. While some regulatory bodies make official records of commission meetings and some do not, all are cautioned by their legal staffs to be guarded in their remarks lest they provide ammunition to appellants of regulatory decisions. Regulatory bodies, ironically, are given all the accoutrements of an adjudicative body without the benefit of meeting in private that is routinely accorded multi-judge panels in the judicial system.

## Practice Belies Theory

Despite the theory behind sunshine laws, the dynamics of human interaction, coupled with the institutional setting of regulatory bodies, can deprive the public of the benefits of public debate and discussions by regulators. Sunshine laws, in fact, can effectively preclude full, frank discussions.

Moreover, media coverage of regulatory bodies is spotty at best. The media cannot be expected to consistently follow and cover such arcane and complex matters as utility regulations. Thus, the only sector of the public that really benefits from sunshine meetings are those most interested in the decisions, not the public at large. Ironically, these often are the same interests who acquire and hold monopoly franchises to provide essential services and who strategize in private how to persuade regulators to make decisions favorable to them, not to the public interest. The benefits rarely inure to the public, and those who stand to gain the most are not the ones the public wants to bestow a special benefit.

There is another perspective from which to evaluate the im-

pact of sunshine laws—namely their impact on the dynamics of decision making in a regulatory body. While sunshine laws may impair communications among regulators, they also may diminish the role of the people the public wants to hold accountable. When commissioners cannot effectively communicate among themselves, it is difficult for a commissioner to take the initiative.[2] Thus, the staff or staff director (or the chairman of the commission in some states) assumes a role in influencing decisions the statutes do not delegate to him or her.

In short, sunshine laws create a vacuum for multi-member bodies, and power tends to concentrate either in individuals or a group of people where communication is not impaired. They are better positioned not only to advance or stifle initiative, but to become the conduit of communication for commissioners who cannot fully discuss matters with each other.

The result is that the bureaucracy, not the elected or appointed officials who can be held accountable, takes on a life of its own. Similarly, a commission chair, where he or she is so inclined, can become autocratic because of the commissioners' inability to collectively voice their opinions, other than in the public view.

Commissioners can be, and often are, precluded from staff meetings or discussions because their presence triggers the need for a public meeting. Such dynamics do not enhance accountability, improve collegiality, encourage a variety of perspectives, or assure better decisions.

Sunshine laws are well motivated and, in theory, could enhance government accountability and responsiveness. They do not, however, contribute to better or more thoughtful decisions by regulatory bodies.

The question may come down to whether the public prefers an open process or good decisions, because the result is often a commission that not only does not meet in private, but one which substantively may hardly meet at all.

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NOTES

1. A commission generally has three, five, or seven members.
2. The impairment is not simply in verbal communication. Public records or freedom of information statutes impose similar difficulties for written communications.