PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 82
Issue 4 *Dickinson Law Review - Volume 82, 1977-1978*

6-1-1978

Where's the Sunshine? Inadequacy of Pennsylvania's Open Meeting Law

Richard E. Fehling

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation

Richard E. Fehling, *Where's the Sunshine? Inadequacy of Pennsylvania's Open Meeting Law*, 82 DICK. L. REV. 719 (1978).
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol82/iss4/5

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Where's the Sunshine? Inadequacy of Pennsylvania's Open Meeting Law

> A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. *Knowledge will forever govern ignorance*; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.[1]

I. History and Philosophy of Sunshine Laws

A. Common-Law and Statutory History of Open Meetings and the Right to Know

The above statement, which has been echoed in many comments,[2] is the best expression of the need for open government. The common-law history of this concept has been argued as a constitutionally guaranteed "right to know."[3] State legislatures have concurred with President Madison's maxim, for they have unanimously adopted legislation requiring that certain meetings be open to the public.[4] On the federal level,

---

1. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 276 (1865) (letter to W.T. Barry, August 4, 1822) (emphasis added).

2. Recchie & Chernoski, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 OHIO ST. L.J. 497 n.1 (1976); Comment, *Freedom of Information in Arizona: An Antidote for Secrecy in Government*, 1975 ARIZ. ST. L.J. 111; Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200 n.10 (1962).

3. For two excellent histories of the common-law right to open meetings, see H. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS, 180-82 (1953); Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1203-04.

4. ALA. CODE tit. 14, § 393 (1958); ALASKA STAT. § 44.62.310 (1976); ARIZ. REV. STAT. § 38-431 (1974); ARK. STAT. ANN. § 12-2801 (1968); CAL. GOV. CODE § 11120 (West Supp. 1977); COLO. REV. STAT. § 29-9-101 (1973); CONN. GEN. STAT. ANN. § 1-21 (West Supp. 1978); DEL. CODE tit. 29, § 10001 (Supp. 1977); D.C. CODE ENCYCL. § 1-1505 (West Supp. 1977-78); FLA. STAT. ANN. § 286.011 (West 1974); GA. CODE ANN. § 40-3301 (1975); HAW. REV. STAT. § 92.1 (Supp. 1975); IDAHO CODE § 67-2340 (Supp. 1977); ILL. ANN. STAT. ch. 102, § 41 (Smith-Hurd Supp. 1977); IND. CODE ANN. § 5-14-1-1 (Burns 1974); IOWA CODE ANN. § 28A.1 (West Supp. 1977-78); KAN. STAT. § 75-4317 (Supp. 1975); KY. REV. STAT. § 61.805 (1975); LA. REV. STAT. ANN. § 42:4.1 (West Supp. 1977); ME. REV. STAT. tit. 1, § 401 (1964); MD. ANN. CODE art. 41, § 14 (1971); MASS. GEN. LAWS ANN. ch. 30A, §11B (Supp. 1977-78); MICH. STAT. ANN. § 4.1800 (1969); MINN. STAT. ANN. § 471.705 (West 1977); MISS. CODE ANN. § 25-41-1 (Supp. 1976); MO. REV. STAT. § 610.010 (Supp. 1977); MONT. REV. CODE ANN. § 82-3402 (Supp. 1975); NEB. REV. STAT. § 84-1401 (1971); NEV. REV. STAT. § 241.010 (1971); N.H. REV. STAT. ANN. § 91-A:1 (Supp. 1973); N.J. STAT. ANN. § 10:4-6 (West 1976); N.M. STAT. ANN. § 5-6-23 (Supp. 1975); N.Y. PUB. OFF. LAW § 95 (McKinney Supp. 1976-77); N.C. GEN. STAT. § 143-318.1 (1974); N.D. CENT. CODE § 44-04-19 (Supp. 1977); OHIO REV. CODE ANN. § 121.22 (Baldwin 1977); OKLA. STAT. ANN. tit. 25, § 301 (West Supp. 1977-78); OR. REV. STAT. § 192.610 (1977); PA. STAT. ANN. tit. 65, § 261 (Purdon Supp. 1977-78); R.I. GEN. LAWS § 42-46-1 (1977); S.C. CODE § 1-20 (Supp. 1975); S.D. COMPILED LAWS ANN. § 1-25-1 (1974); TENN. CODE ANN. § 8-4401 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1978); UTAH CODE ANN. § 52-4-1 (Supp. 1977); VT. STAT. ANN. tit. 1, § 312 (Supp. 1976); VA. CODE § 2.1-340 (Supp. 1977); WASH. REV.

Congress has enacted both right to know[5] and open meetings[6] laws. Moreover, these statutes have consistently withstood constitutional attacks premised on their purported vagueness.[7]

Case law,[8] legislative floor debate,[9] and commentators[10] have propounded diverse justifications for open government.[11] A 1976 Pennsylvania Commonwealth Court decision espoused a number of public and official advantages found in open meeting government.[12] Sunshine laws curtail government officials' misbehavior,[13] provide for a more educated public through more accurate media reports of government activities,[14] and disclose to public scrutiny decisions that result in expenditure of public funds.[15] The government derives advantages from open meetings because public officials receive more accurate information on the issues,[16] the officials can better gauge public reaction,[17] and the open meetings foster more public faith in government.[18]

There is, however, legitimate concern that government may become too open.[19] Discussion concerning employees' reputations,[20] labor

---

CODE ANN. § 42.30.010 (1972); W. VA. CODE § 6-9A-1 (Supp. 1977); WISC. STAT. ANN. § 19.82 (West Supp. 1977-78); WYO. STAT. § 9-692.10 (Supp. 1975).

Alabama enacted the first open meeting (right to know) statute in the United States in 1915. ALA. CODE tit. 14, §§ 393-94 (1958). The popular title "Sunshine Law" originated when the Florida legislature passed its version in 1967. FLA. STAT. ANN. § 286.011 (West 1974).

5. Freedom of Information Act, 5 U.S.C.A. § 522 (West 1977).

6. Sunshine Act of 1976, 5 U.S.C.A. § 552b (West 1977).

7. Board of Pub. Instr. v. Doran, 224 So. 2d 693, 697-99 (Fla. 1969); Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 541-43, 417 P.2d 32, 36-37 (1966). *See also* Comment, *Open Meeting Laws in Michigan*, 53 J. URB. L. 532, 551-54 (1976).

8. Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 386, 368 A.2d 675, 682-83 (1977); Paterra v. Charleroi Area School Dist., 55 Wash. 115, 117 (Pa. C.P.), *denial of relief aff'd and dismissal of complaint on the merits vacated*, 22 Pa. Commw. Ct. 451, 349 A.2d 813 (1975). Although the *Paterra* court's decision was vacated by the commonwealth court, its analysis of the justifications for open government is sound.

9. 1973 PA. H.R.J. 1918 (remarks of Representative Shane); 1974 PA. SEN. J. 2096-97 (remarks of Senator Nolan); *id.* at 2098 (remarks of Senator Duffield).

10. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1201.

11. For an interesting policy argument in favor of open meetings, see Brief for Appellant at 8-11, Judge v. Pocius, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977).

12. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 432-33, 364 A.2d 536, 539 (1976) (citing Kalil, *Florida Sunshine Law*, 49 FLA. B.J. 72 (1975)).

13. *Id. See also* Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A.J. 550 (1974).

14. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 433, 364 A.2d 536, 539 (1976). *See also* Wickham, *Let the Sun Shine In! Open-Meeting Legislation can be our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 481 (1973).

15. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 433, 364 A.2d 536, 539 (1976).

16. *Id.*

17. *Id. See also* Markham, *Sunshine on the Administrative Process: Wherein Lies the Shade?*, 28 AD. L. REV. 463, 468 (1976).

18. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 433, 364 A.2d 536, 539 (1976). *See also* Wickham, *supra* note 14, at 496; Comment, *Open Meetings Laws: An Analysis and a Proposal*, 45 MISS. L.J. 1151, 1161 (1974).

19. Markham, *supra* note 17; Wickham, *supra* note 14, at 481-82; Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1202.

20. *See* notes 107-11 and accompanying text *infra*.

negotiations,[21] and economic transactions[22] should be legislatively excluded from the coverage of open meeting laws. One court has expressed concern that overly strict demands of openness would "throttle the . . . members of the board and make it virtually impossible for them [to function]."[23] Another court noted the legislative desire to restrict the application of an open government law to prevent undue interference and obstruction.[24] State Senator Coopersmith of Pennsylvania has remarked, "[Y]ou have to run orderly government and certain things cannot be done in public."[25] His colleague Senator Hill agreed and set forth three benefits found in closed meetings: "[Y]ou get a better discussion . . . , a more uninhibited flow of ideas, a more to-the-point characterization of the testimony than you would if the deliberation on the decision is open, when people speak more guardedly and less to the point sometimes."[26]

Therefore, there must be a compromise that can "devise a legal standard affording the fullest possible degree of openness while recognizing the interests promoted by governmental secrecy."[27] The need for such a balance is difficult to dispute, but perhaps even more difficult to achieve.[28] It requires a combination of the best efforts at drafting reasonable language by the legislature and a liberal interpretation by the courts to promote the public's access to information without unduly interfering with the free flow of ideas among their representatives.[29]

B. Act 175 of 1974—The Pennsylvania Sunshine Law[30]

Before Pennsylvania's enactment of the 1957 Right to Know and Open Meeting Laws,[31] "the right of a citizen to the examination and

21. *See* notes 112-14 and accompanying text *infra*.

22. *See* notes 115-16 and accompanying text *infra*.

Other areas of confidentiality are security matters, supervening laws, quasi-judicial agencies, and legislative affairs. *See* notes 117-39 and accompanying text *infra*.

23. Paterra v. Charleroi Area School Dist., 55 Wash. 115, 124 (Pa. C.P. 1975).

24. Mooney v. Board of Trustees, 448 Pa. 424, 428 n.8, 292 A.2d 395, 397 n.8 (1972).

25. 1974 PA. SEN. J. 2096.

26. *Id.* at 2099.

27. Not e, 75 HARV. L. REV. 1199, *supra* note 2, at 1203.

28. *See* Wickham, *supra* note 14, at 490; Comment, ***Public Sector Collective Bargaining and Sunshine Laws—A Needless Conflict***, 18 WM. & MARY L. REV. 159 (1976).

29. Amicus Curiae Brief for Appellant, Judge v. Pocius, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977) (submitted by Pennsylvania Attorney General).

Arguments have also been propounded against letting the cries of "timid government officials and those who prefer the backroom to a public forum" sway the courts. Markham, *supra* note 17, at 482. "If the board or agency feels aggrieved, then the remedy lies in the halls of the Legislature and not in efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exception into the law." Canney v. Board of Pub. Inst., 278 So. 2d 260, 264 (Fla. 1973). This remark of the Florida Supreme Court was adopted in Pennsylvania in *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 435, 364 A.2d 536, 540 (1976).

30. Open Meeting Law, Act of July 19, 1974, P.L. 486, No. 175 (codified at PA. STAT. ANN. tit. 65, §§ 261-269 (Purdon Supp. 1977) as amended by Act of February 4, 1976, P.L. 24, No. 11) [hereinafter cited as Pennsylvania Sunshine Law].

31. Right to Know Law, PA. STAT. ANN. tit. 65, §§ 66.1-66.4 (Purdon 1959 & Supp. 1977); Open Meetings Law, PA. STAT. ANN. tit. 65, §§ 251-254 (Purdon 1959). For an excellent development of the history and application of the Pennsylvania Right to Know Law, see Comment, ***The Pennsylvania Right to Know Statute: A Creature of the Legislature Shaped by the Judiciary***, 82 DICK. L. REV. 749 (1978).

inspection of public records was the subject of some confusion."[32] Notwithstanding specific legislation requiring that certain records and meetings be made public,[33] a citizen's right to attend governmental meetings was also uncertain.[34]

To further clarify and expand this right, the Pennsylvania legislature enacted the Pennsylvania Sunshine Law in 1974.[35] Representative James Knepper, the prime sponsor of the bill,[36] remarked on the floor of the House of Representatives, "[The 1957 General Assembly] thought the 1957 version was better than its predecessor. But times change. Government processes change. Public interest, awareness and demands for their rights have increased since 1957."[37] Comparing his bill to its predecessor, Representative Knepper proclaimed that the bill "does have more teeth and a more logical restraint on secret or closed government than does the present law."[38] Unfortunately, Representative Knepper's improvement over the 1957 law had its teeth pulled by overly strict judicial construction of its language and a judicial policy that ignores the legislative intent.[39]

II. Judicial Interpretation of Sunshine Statutes

A. Wariness and Dissatisfaction

The suggestion of a dozen amendments to existing law by various commentators[40] reflects a national dissatisfaction with current judicial implementation of the sunshine concept. One scholar warns that courts cannot too literally construe an act that deals with such a broad concept as open meetings because language cannot capture exactly what the legislature is trying to express.[41] Admonitions about the need for sound judicial

32. Wiley v. Woods, 393 Pa. 341, 349, 141 A.2d 844, 848 (1958). *See also* Mooney v. Board of Trustees, 448 Pa. 424, 429-30, n.10, 292 A.2d 395, 398 n.10 (1972).

33. *See, e.g.*, PA. STAT. ANN. tit. 24, § 276 (Purdon 1962) (recodified at PA. STAT. ANN. tit. 24, § 4-408); PA. STAT. ANN. tit. 25, § 3145 (Purdon 1963) (repealed 1947).

34. Comment, *Pennsylvania's "Sunshine Law": Problems of Construction and Enforcement*, 124 U. PA. L. REV. 536, 537 (1975).

35. *See* note 30 *supra*.

36. Pa. H. 124, Session of 1973.

37. 1973 PA. H.R.J. 2151.

38. *Id.*

39. *See* notes 226 & 230-35 and accompanying text *infra*.

40. Mathew, *Government in the Sunshine: Judicial Application and Suggestions for Reform*, 2 FLA. ST. U.L. REV. 537, 550-57 (1974); Tacha, *The Kansas Open Meeting Act: Sunshine on the Sunflower State?*, 25 KAN. L. REV. 169, 205-13 (1977); Wickham, *supra* note 14, at 499-501; Wickham, *Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus*, 42 TENN. L. REV. 557, 570-72 (1975); Note, *Public Access to Governmental Records and Meetings in Arizona*, 16 ARIZ. L. REV. 891, 917-19 (1974); Comment, 1975 ARIZ. ST. L.J. 111, *supra* note 2, at 125-33; Comment, 45 MISS. L.J. 1151, *supra* note 18, at 1185-90; Comment, *Ambiguities in Oregon's Open Meeting Legislation*, 53 ORE. L. REV. 339, 352-53 (1974); Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 560; Comment, *Open Meetings in Virginia: Fortifying the Virginia Freedom of Information Act*, 8 U. RICH. L. REV. 261, 272-75 (1974); Comment, 18 WM. & MARY L. REV. 159, *supra* note 28, at 178-80; 49 TEX. L. REV. 764, 776-80 (1971).

41. Lawrence, *Interpreting North Carolina's Open-Meetings Law*, 54 N.C. L. REV. 777, 778-79 (1976). *See also* U. Mich. News, No. 38 (Feb. 16, 1977) at 1. In this article,

discretion as an ingredient essential to satisfactory implementation of sunshine laws have also been offered.[42]

In the present and preceding legislative sessions no fewer than eighteen bills have been introduced to amend the Pennsylvania Sunshine Law.[43] Two of these bills specifically broaden terms that the courts have narrowly construed.[44] These amendments would not be necessary if the judiciary uniformly heeded the following remarks by Chief Justice Eagen of the Pennsylvania Supreme Court: "We recognize that merely to hold automatically that the legislature's intent does not encompass something not specifically included in a statute that contains specific provisions can sometimes thwart that intent."[45] In observing the legislative intent, one court has specifically refused to approve "deceitful [and] sly methods of avoiding the Sunshine act . . . ."[46]

B. Circumvention of the Pennsylvania Sunshine Law

A number of so-called "deceitful [and] sly methods" of evading the Law have already emerged. In one such maneuver an agency might conduct its discussion, deliberation, and decision-making in executive session and then emerge, take a quick formal vote on the matter, and retire for the evening.[47] This tactic has been condemned in many jurisdictions.[48] A second way for an agency to avoid the rigors of the Sunshine

---

Professor Laymon Allen notes, "For the purpose of writing laws clearly and accurately, the English language—or any other existing 'natural' language, for that matter—has distinct limitations . . . ."

42. Wickham, *supra* note 14, at 494-95.

43. Pa. S. 461 & 605, Session of 1975; Pa. S. 1548, Session of 1976; Pa. S. 44, 100, 409 & 970, Session of 1977; Pa. H. 25, 37, 124, 125, 253, 361, 409, 637, 1054, 1374, & 1509, Session of 1977.

44. Pa. H. 361 & 1374, Session of 1977.

45. Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 388-89, 368 A.2d 675, 684 (1977). *See also In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 364 A.2d 536 (1976); "*'The judiciary should not encroach upon the Legislature's right to require that the activities of the School Board be conducted in the "sunshine."* ' " *Id.* at 434, 364 A.2d at 540, *quoting* Canney v. Board of Pub. Inst., 278 So. 2d 260, 264 (Fla. 1973) (emphasis in commonwealth court opinion).

46. Paterra v. Charleroi Area School Dist., 55 Wash. 115, 120 (Pa. C.P. 1975).

47. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2055 (1974).

48. *See, e.g.*, Sacramento Newspaper Guild v. Sacramento County Bd. of Sup., 263 Cal. App. 2d 41, 50, 69 Cal. Rptr. 480, 487 (1968) (courts may push statute beyond debatable limits to block evasive techniques); Bagby v. School Dist. No. 1, 186 Colo. 428, 434, 528 P.2d 1299, 1302 (1974) (court was concerned with the middle ground between clearly formal votes and clearly informal discussions); Times Publ'g Co. v. Williams, 222 So. 2d 470, 473-74 (Fla. 1969) (how and why officials decide to act interests the public); Reeves v. Orleans Parish School Bd., 281 So. 2d 719, 720-22 (La. 1973) (court concerned with middle ground as in *Bagby*); Kramer v. Board of Adj., 80 N.J. Super. 454, 463-64, 194 A.2d 26, 30-31 (1963) (refused to allow formal vote in public of a matter fully discussed and decided in private); Peters v. Bowman Pub. School Dist. No. 1, 231 N.W.2d 817, 820 (N.D. 1975) (refused to allow "re-run" formal votes of matter discussed fully in closed session).

The Pennsylvania Commonwealth Court had previously disallowed ratification of violations involving the Open Meetings Law of 1957. The court declared that permitting such ratification "would emasculate the intent of the Act of providing for public disclosure and discourse by permitting a public body to consider and approve controversial and unpopular resolutions at secret meetings and then subsequently ratify these actions in a hastily called meeting when its conduct is questioned." Erie Munic. Airport Auth. v. Automation Devices, Inc., 15 Pa. Commw. Ct. 273, 278, 325 A.2d 501, 504 (1974).

Law is to hold a series of round-robin telephone calls[49] or short, "informal" meetings with only two or three agency members present.[50] School boards could employ a third tactic when the passage of business such as certain contracts and teacher evaluations requires no formal votes by the members.[51] Under these circumstances there is no need for a public discussion because the Sunshine Law requires no formal action when none was previously required.[52] Much of the wariness and dissatisfaction with the courts' implementation and the agencies' circumvention of the Law grows out of the requirements enumerated in the Law. Both the legislature's language and the judiciary's interpretations are important.[53]

III. Requirements of the Pennsylvania Sunshine Law

A. *Coverage—The Sunshine Law Covers All Governmental Agencies Except the Judicial Branch*

Much of the legislative debate about the Sunshine Law focused on which agencies should or should not fall within the Law's coverage.[54] Pennsylvania courts, however, have had little difficulty interpreting the legislature's definition of "agency."[55] The commonwealth court concluded, "The statute would appear to have an all-encompassing effect, excepting only actions by 'the judiciary or judicial branch.' "[56] The attorney general elaborated, "Not specifically named but included within the scope of the Act are councils, committees, sub-committees, task forces or other groups of persons to which have been delegated

---

49. Allwein v. Zoning Hearing Bd., 15 Leb. 179, 181, 68 Pa. D. & C.2d 787, 790 (C.P. 1975), *rev'd on other grounds sub nom. In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 364 A.2d 536 (1976); 1974 PA. SEN. J. 2099 (1974) (remarks of Senator Coppersmith).

50. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2055 (1974).

51. Mullen v. DuBois Area School Dist., 436 Pa. 211, 214-15, 259 A.2d 877, 879-80 (1969) (teacher evaluation); Kennedy v. Ringgold School Dist., 10 Pa. Commw. Ct. 191, 196-97, 309 A.2d 269, 272 (1973) (contract).

52. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2057 (1974).

53. Strict, overly rigid demands of exactness from a word will frustrate the legislative intent in enacting a statute. *See* note 41 and accompanying text *supra*.

54. *See* notes 106-39 and accompanying text *infra*. *See generally* Shurtz, *The University in the Sunshine: Application of the Open Meeting Laws to the University Setting*, 5 J.L. & EDUC. 453 (1976).

55. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 261 (Purdon Supp. 1977):

> "Agency" means any branch, department, board, authority or commission of the Commonwealth of Pennsylvania, any political subdivision of the Commonwealth, or any State, municipal, township or school authority, school board, school governing body, commission, the board of trustees of all State-aided colleges and universities, the board of trustees of all State-owned and State-related colleges and universities and all community colleges, or similar organization created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function: Provided, That the term "agency" shall include the General Assembly, or any State department, board, authority or commission to include the governor's cabinet when meeting on official policy making business.

But see notes 123-28 and accompanying text *infra* (quasi-judicial agencies) and notes 129-39 and accompanying text *infra* (the legislature and its committees).

56. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 432, 364 A.2d 536, 539 (1976). *See also* PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054 (1974): "The Act applies to any state or local public body performing governmental functions, the sole exception being the judicial branch of government."

administrative or executive functions."[57] The Law does *not* cover budgetary preparation meetings between the Governor, Auditor General, and State Treasurer,[58] strictly administrative decisions by a department head based on staff advice,[59] or staff conferences.[60]

In interpreting which agencies are within the purview of the Sunshine Law, the courts have followed a policy initiated by their interpretations of the Right to Know Law definition of "agency"[61]—the Law must be applied to as broad a group as possible.[62] Furthermore, the definition of "agency" in the Sunshine Law[63] is clearly much more expansive than the definitions of "board" in the Open Meeting Law[64] or of "agency" in the Right to Know Law.[65]

B. Open Meetings

The 1957 Open Meeting Law provides, "Every public meeting of a board shall be open to the public."[66] The definition of "public meeting," however, precludes a broad application of this law. The definition's language, which allows closed meetings for everything but the final votes,[67] invited the very circumvention the legislature sought to eliminate in the Sunshine Law.[68] In recent sunshine laws, two approaches have

---

57. PA. ATT'Y GEN. OP. No. 46, 4 PA.B. 2054 (1974).

58. PA. ATT'Y GEN. OP. No. 58, 5 PA. B. 47, 48 (1975). For an analogous judicial decision supporting the attorney general's opinion in this respect, see Butera v. Commonwealth, Office of the Budget, 29 Pa. Commw. Ct. 343, 347, 370 A.2d 1248, 1250 (1977) (departmental budget reports are not included within the definition of "public records" in the Right to Know Law).

59. Weder v. Pennsylvania Dept. of Educ., 27 Pa. Commw. Ct. 328, 334-35, 365 A.2d 438, 441 (1976); Commonwealth, Dept. of Env. Res. v. Steward, 24 Pa. Commw. Ct. 493, 497-98, 357 A.2d 255, 257 (1976).

60. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2055 (1974).

61. PA. STAT. ANN. tit. 65, § 66.1(1) (Purdon 1959).

62. *See* Bogert v. Allentown Housing Auth., 426 Pa. 151, 155, 231 A.2d 147, 149 (1967) (the Right to Know Law coverage extends to housing authorities); *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 432, 364 A.2d 536, 539 (1976) (Sunshine Law coverage is all-encompassing, with the exception of the judicial branch).

63. *See* note 55 *supra*.

64. PA. STAT. ANN. tit. 65, § 251(A) (Purdon Supp. 1977).

65. *See* note 61 *supra*. The importance of this extension of the Sunshine Law's coverage is discussed in notes 207-20 and accompanying text *infra*.

66. PA. STAT. ANN. tit. 65, § 252 (Purdon 1959).

67. *Id.* § 251(B): " 'Public Meeting.' That part of any meeting of a board during which it votes upon any ordinance, resolution, motion or other official action . . . ."

68. *See* notes 47-50 and accompanying text *supra*; 1973 PA. H.R.J. 1840 (remark of Representative Wise) ("[W]e are trying to prohibit that all-too-common practice of a local school board, for example, going into five hours of executive session, thoroughly discussing all the action they expect to take, and then coming in in a half hour meeting and adopting, by motion seconded and carried, item 1, a, b, c, d, e, f, g; item 2, 1, 2, 3, 4, 5, 6, 7—this sort of thing—with no discussion, no opportunity for the public to really understand what it is all about"); 1974 PA. SEN. J. 2097 (remark of Senator Duffield) ("I have found this: A meeting was supposed to start at 7:30 p.m. We sat there for a half hour, they read the minutes, they received the treasurer's report, et cetera. About 8:00 or 8:30 o'clock they decided to go into executive session, where they went and stayed until midnight, and by that time most of the weak hearted had left. I think that has been a very sore spot on the part of our legislative process, both on the local level, the State level and, possibly, the judicial level").

been used to establish which meetings should be open—the subject matter approach and the formal action approach.

1. Subject Matter or Formal Action Approach to Open Meetings.—The differences between the two approaches and the relative merits of each have been well discussed in the literature.[69] Statutes using the subject matter approach open all meetings of agencies covered by the statute unless those meetings fall within certain subject matter exceptions specifically set forth in the statute.[70] Statutes using the formal action approach, however, open all meetings in which there is formal action (however it is defined) regardless of the subject matter of the meeting.[71] Some statutes using the formal action approach, such as the Pennsylvania Law, also provide for some subject matter exceptions.[72] The defect in both the formal action and the hybrid statutes is that they do not significantly alter the prestatutory situation.[73] Because it is "much too easy to conduct mere 're-run' votes after all the vital issues have been resolved in private sessions,"[74] the courts should not use the formal approach unless it is specifically articulated in the statute.[75]

The Pennsylvania Sunshine Law emerged from the General Assembly as one of the mixed formal action/subject matter combinations about which commentators have warned.[76] Despite this improvident drafting, the intent of the prime sponsor, Representative Knepper, remained oriented toward the subject matter approach. "I consider an executive session to be a meeting in which there is unofficial discussion concerning *whatever the subject matter is, that I am not allowed to talk about*."[77] The Law, nevertheless, contains the formal action provision and the courts must deal with it as it was enacted.

2. Decision-Making Process or Formal Actions—Which Requires Openness?—On January 10, 1977, Judge Blatt spoke for a unanimous

69. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1208-10; Comment, 45 MISS. L.J. 1151 (1974), *supra* note 18, at 1172-76.

70. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1210; Comment, 45 MISS. L.J. 1151 (1974), *supra* note 18, at 1173-76.

71. Comment, 45 MISS. L.J. 1151 (1974), *supra* note 18, at 1172-73.

72. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 263 (Purdon Supp. 1977). The subject matter exceptions concern personnel and labor disputes. *See* notes 107-14 and accompanying text *infra*.

73. These statutes may open no more of the substantive debate and discussion to public scrutiny than was required at common law or under existing legislation. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1210.

74. Wickham, *supra* note 14, at 492.

75. Shurtz, *supra* note 54, at 456.

76. *See* notes 73-75 and accompanying text *supra*. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 261 (Purdon Supp. 1977) (" 'Formal action' means the taking of any vote on any resolution, rule, order, motion, regulation or ordinance or the setting of any official policy").

77. 1973 PA. H.R.J. 1841 (emphasis added). In transcribing Representative Knepper's remarks, the printer inserted the comma between "is" and "that." For consistency with Representative Knepper's other remarks, the phrase, "that I am not allowed to talk about" modifies "subject matter" and the comma should, therefore, be omitted.

commonwealth court in *Judge v. Pocius*[78] in an opinion that set Pennsylvania citizens' rights to open meetings back to 1957. The holding of the case, and the crux of the current difficulties with the Pennsylvania Sunshine Law, is that "formal action" does not encompass the acts of deliberation, discussion, and decision prior to and culminating in the affirmative formal action that renders official the final decision of public agencies.[79] Judge Blatt explained, "We believe that if the legislature had intended that the preliminary activities of deliberation, discussion, and decision which lead up to affirmative formal action be public, those acts would have been specifically included within the statutory definition of formal action . . . ."[80]

The issue can be neither the importance of nor the policy underlying the requirement that the decision-making process be open. The weight of authority, both judicial and academic, leans heavily toward more openness.[81] Moreover, the legislators themselves recognized the vital need for an open decision-making process:

> Sure the present law makes it illegal to vote on this public business in so-called executive session. But—and this is a key point—in some instances . . . everything but the final vote is being handled in a 'public not admitted' closed meeting . . . . [I]t's our job to . . . right the wrong, to open the closed door, to eliminate the secretness—that freedom and understanding might flourish.[82]

The court in *Judge* insisted on applying a strict interpretation of the statute's provisions.[83] It attempted to follow the legislative intent, as expressed by the language of the Law, but looked neither to the actual remarks of the legislators nor to the intent implied in those remarks. It implicitly and incorrectly applied the rule of construction that when a statute has explicit language expressing its purpose, a court may not engage in a further search for the legislative intent.[84]

The best interpretation of which meetings and hearings must be open is provided by the attorney general in an advisory opinion[85] in which he

78. 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977).

79. *Id.* at 144-45, 367 A.2d at 791. The complaint was made about a school board "work session" in which a number of subjects were discussed and later voted on in a regular meeting. *Id.* at 143, 367 A.2d at 790.

80. *Id.* at 145, 367 A.2d at 791. ***But see*** note 45 and accompanying text *supra*.

81. ***See, e.g.***, Board of Public Inst. v. Doran, 224 So. 2d 693, 699 (Fla. 1969) (rights of the public to have government affairs opened regardless of the good intentions of the officials); Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1210. ***See also*** notes 8-18 and accompanying text *supra*.

82. 1973 PA. H.R.J. 2151 (remarks of Representative Knepper). Representative Knepper further noted, "We have drafted this bill to eliminate as many abuses as possible of the public's right to know and understand what its elected government agencies *think, say, and, do.*" *Id.* (emphasis added); 1974 PA. SEN. J. 2098 (remark of Senator Duffield emphasizing that the public wants to know ***how*** decisions are made, and not only ***that*** they are made).

83. 28 Pa. Commw. Ct. at 144-45, 367 A.2d at 791.

84. ***See*** notes 227-29 and accompanying text *infra*. Other rules of construction subordinated by the *Judge* decision are discussed at notes 189-235 and accompanying text *infra*.

85. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054 (1974). Pennsylvania Attorney General's Opinions are binding on all department heads, boards, commissions, and officers of the

considered the statute and its history, and concluded, "The Legislature intended the full decision-making process of an agency to be revealed to public scrutiny."[86] After ascertaining the legislative intent,[87] the attorney general declared, "[T]he hearing and all deliberations leading up to a vote by the agency members are to take place in full public view . . . ."[88] The attorney general set forth his interpretation of section two of the Law as a whole: "[A]ny gathering of those members of an agency with sufficient voting power to make a determination on behalf of the entire agency—*i.e.*, a majority or quorum of the agency—constitutes a meeting or hearing."[89]

In a recent opinion that analyzes the effect of *Judge* on the application of the Sunshine Law, the attorney general has modified the previous opinion by removing the "activities of deliberation, discussion, and preliminary decision which lead up to affirmative formal actions" from the coverage of the Law.[90]

3. Executive Sessions[91] in the Pennsylvania Sunshine Law.— "There are times . . . when I think there needs to be confidentiality, and it is the intent of [the bill] . . . to permit the confidentiality of an executive session that is necessary, but not to use an executive session to abuse the public or to run and to hide."[92] With these words Representative Knepper outlined the reasons for an executive session.[93] The legislature was concerned that allowing free use of closed or executive sessions "leaves a bad taste in the public's mouth;"[94] but the lawmakers had difficulty striking a balance between permitting closed sessions and providing maximum openness.[95] The legislators' failure to draft the most

Commonwealth until another opinion is rendered. PA. STAT. ANN. tit. 71, § 192 (Purdon Supp. 1977).

86. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2054 (1974).

87. *Id.*

88. *Id.*

89. *Id.* Another good definition (that corresponds with the legislative intent) of what meetings must be open may 8e found in Paterra v. Charleroi Area School Dist., 55 Wash. 115 (Pa. C.P. 1975):

> 'Formal action is scheduled' means that if a decision is made, a policy formulated, or an expense or appointment decided upon, subject to taking effect later upon formal action, such a thing has been 'scheduled.' On the other hand, a mere listing of an item for decision or determination at a stated later date is not the 'scheduling' of formal action.

Id. at 121.

90. PA. ATT'Y GEN. OP. No. 13, 7 PA. B. 2041, 2043 (1977).

91. Executive sessions are provided in the Law to allow interruption of an open meeting for discussion of certain subject matter. As used in the text, however, executive session also refers to any regularly scheduled closed meetings.

92. 1973 PA. H.R.J. 1841 (remark of Representative Knepper). *See also id.* at 1840 (remarks of Representative Wise claiming that the proposed biil would prohibit "re-run" formal vote meetings).

93. *Id.* at 1839 ("Particularly, I would suggest that employee negotiations, real estate propositions, and so forth, certainly are items of confidentiality which should be protected"). It was only for those "rather delicate matters," *id.*, that Representative Knepper wanted the protection of executive sessions.

94. *Id.* at 1923 (remark by Representative Wise).

95. *See, e.g.*, the floor debate in the senate, 1974 PA. SEN. J. 2096-99.

effective language to achieve their goals is obvious, but their intent should not be disregarded.

The courts should hold that the use of executive sessions is only permissible under narrowly limited circumstances, because they derogate the general policy of open meetings.[96] The Pennsylvania Supreme Court has found (albeit after the *Judge v. Pocius* decision) that the Sunshine Law requires openness for the policy-making decisions of agencies in "*clear distinction*" to the confidentiality that is permitted for "decisions about the character and competence of individuals."[97] In a decision allowing an agency to engage in informal information-seeking, one Pennsylvania Common Pleas Court warned public bodies to "avoid not only evil but the seeming of evil. It is a bit much for the whole board to meet for an evening and do nothing."[98]

Rather than looking solely to rules of statutory construction, the courts should more closely scrutinize the legislative history of the Law. The true nature of the legislative intent emerges from the senate floor debates between Senators Coppersmith and Hill, who wished to change the bill to allow unrestricted use of executive sessions, and Senators Nolan and Duffield, who wanted to restrict the use of closed sessions as much as possible.[99] The evolution of the successive executive session provisions of the bill provides the best example of intent. The original version of the bill prohibited all executive sessions in violation of the rest of the bill.[100] When the bill was reported out of committee, it was amended to allow executive sessions generally, but none were permitted in which official votes would be tallied.[101] The next bill allowed executive sessions only if no formal action would be taken.[102] The fourth version provided for recess to executive session during an otherwise open meeting for the dismissal or discipline of a public, elected officer or for labor negotiations. It also provided that executive sessions were not prohibited if no formal action would be taken.[103] The final version of the Law, passed by both houses and signed by Governor Shapp,[104] removed the provision allowing executive sessions without formal action.[105] Clearly, the Pennsylvania General Assembly considered allowing executive sessions for all but formal actions, and proponents of such a provision devoted their best efforts to implementing it, but any such authorization

96. *See* News & Observer Publ'g Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 47, 223 S.E.2d 580, 586-87 (1976).
97. Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 389, 368 A.2d 675, 684 (1977).
98. Paterra v. Charleroi Area School Dist., 55 Wash. 115, 124 (Pa. C.P. 1975).
99. *See* note 95 *supra*.
100. Pa. H. 124, Printer's No. 144, Session of 1973.
101. Pa. H. 124, Printer's No. 951, Session of 1973.
102. Pa. H. 124, Printer's No. 1638, Session of 1973.
103. Pa. H. 124, Printer's No. 2428, Session of 1973.
104. Act of July 19, 1974, P.L. 486, No. 175.
105. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 263 (Purdon Supp. 1977).

was removed before final enactment. Consequently, the Pennsylvania legislature must have intended to permit executive sessions for only particular subject matter.

C. *Subject Matter Exceptions to Sunshine Laws*

There are seven general categories of subject matter exceptions to open meeting legislation. The first two, personal reputation and labor negotiations, are included in the Pennsylvania Sunshine Law.[106] The next two, economic considerations and security and defense matters, have not yet been addressed by the Pennsylvania legislature. The fifth exception for supervening state or federal laws applies to all sunshine laws. The last two subjects of exception, quasi-judicial agencies and the legislature, have been specifically *included* in the Pennsylvania Law.

1. Personal Reputations.—Section three of the Pennsylvania Sunshine Law establishes two situations in which an agency may interrupt its public meeting and enter into executive session.[107] In the first of these special sessions an agency can handle in confidence any complaints or actions against a public employee, elected officer, or other agent, unless such person requests a public hearing.[108] This exception was enacted to protect the reputation of government employees until the charges are substantiated.[109] The legislature has not decided what degree of substantiation is necessary, and no cases have decided the question, although an analogous situation in strictly investigatory proceedings provides the necessary guidance:

> After discussion of such investigatory material has been concluded and once an investigation results in formal charges being filed or a decision made not to recommend or impose sanctions against the individual who is the subject of the investigation, any subsequent meetings or hearings must be conducted publicly and may be done so without compromising the continuing confidentiality of the actual investigatory documents.[110]

Once the board or agency decides to take formal action against the employee, or decides to take no action, further discussion about the matter shall be open.[111]

---

106. *Id.* These exceptions are in the Law only to allow executive sessions that interrupt an ongoing open meeting. It is clear, however, from the legislative history that such meetings may be independently called in executive sessions. 1973 PA. H.R.J. 1842 (remark of Representative Knepper that agencies will be able to schedule executive sessions for personnel matters and labor negotiations before a meeting).

107. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 263 (Purdon Supp. 1977).

108. *Id.*

109. 1974 PA. H.R.J. 3094 (remarks of Representative Knepper).

110. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2056 (1974).

111. Other personal reputation exemptions from open meeting laws are as follows: student records and college admission information, Shurtz, *supra* note 54, at 461-62, medical histories, Lawrence, *supra* note 41, at 791-92; PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2056 (1974), licensing of professionals, *id.*, criminal accusations, Comment, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U.L. REV. 154, 186-88

2. Labor Negotiations.—A special executive session is also allowed for the purpose of *considering* what action an agency might take in labor negotiations.[112] Many sources have spoken of the need for such an exception to open meetings.[113] Representative Maloney noted that opening labor negotiations to the public may be an unfair labor practice:

> [T]he Pennsylvania Labor Relations Board has ruled . . . that labor negotiations may be conducted in private and that a school board, which insisted that the negotiation meetings be open to the public and the press, had committed an unfair labor practice . . . .
>
> . . . .
>
> I think anyone who is familiar with labor law and familiar with labor negotiations is going to find that this is going to present a serious problem to those agencies and boards.[114]

3. Economic Considerations.—Exceptions to openness for considerations of budgetary matters have not yet been included in the Pennsylvania Sunshine Law.[115] These exceptions are intended to prevent premature disclosure of prospective business or land transactions of the agencies. Legislatures fear that resulting speculation and higher prices will cost the public unnecessary money.[116]

4. Security and Defense Matters.—Security and defense are not major areas of concern for states. Some aspects of states' operations, however, require public security and should, therefore, be excepted from open meeting requirements.[117] National defense and security are legitimate concerns of the federal government and must be considered in all cases.[118]

5. Supervening Laws.—Supervening laws provide two exceptions to the Pennsylvania Sunshine Law. The first specific exclusion arises from the provision in Act 175 that any laws "which specifically provide

---

(1976) (*but see* PA. STAT. ANN. tit. 65, § 66.1(2) (Purdon Supp. 1977), providing that criminal records can be considered public records), and certain areas of statutorily confidential information, *see* notes 119-22 and accompanying text *infra*.

112. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 263 (Purdon Supp. 1977).

113. *See, e.g., In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 433, 364 A.2d 536, 539 (1976); Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1208; Comment, 18 WM. & MARY L. REV. 159 (1976), *supra* note 28. *See also* 1973 PA. H.R.J. 2150 (1973) (remarks of Representative Rappaport that there must be a way to free the agency from public posturing in labor negotiations).

114. 1973 PA. H.R.J. 1840.

The need for an exemption for labor negotiations has even been established in the Florida courts, despite their extremely broad, diligent application of the Florida sunshine law. *See* Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972), *noted in* 25 U. FLA. L. REV. 603 (1973).

115. *But see* Pa. S. 970, Session of 1977 (the bill excludes from the Sunshine Law industrial development authorities' consideration of loan applications).

116. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1209.

117. *Id.*; Recchie & Chernoski, *supra* note 2, at 511. A typical example of a state concern for security is the activity of its law enforcement agencies.

118. 5 U.S.C.A. 552b(i) (West 1977). For further discussion of the issue of security, see Markham, *supra* note 17, at 481.

for the confidentiality of information" are excluded from repeal.[119] This exclusion excepts from the Law's coverage both attorney-client relationships—decisions concerning pending litigation or other legal matters affecting the agency[120]—and investigations by established, authorized agencies.[121] The second exception concerns voluntary compliance with federal mandates of confidentiality in matters usually tied to federal funding.[122] Both of the exceptions, whether by choice of the state or by federal mandate, are based on overriding policy considerations of the need for confidentiality.

6. Quasi-Judicial Agencies.—Although most commentary has assumed a need for closed meetings in the quasi-judicial affairs of agencies,[123] Pennsylvania has not excepted such agencies from the requirements of open meetings. Despite battles in both houses of the General Assembly,[124] all amendments excepting quasi-judicial bodies and their

---

119. Open Meeting Law, Act of July 19, 1974, P.L. 486, No. 175, § 10.

120. PA. ATT'Y GEN. OP. No. 46, PA. B. 2054, 2056-57 (1974); PA. ATT'Y GEN. OP. No. 13, 7 PA.B. 2041, 2042 (1977).

The rules for attorneys' behavior and conduct are promulgated by the Pennsylvania Supreme Court and therefore have the effect of law. *See In re* Morrissey Estate, 440 Pa. 439, 443, 269 A.2d 662, 665 (1970); Dombrowski v. Philadelphia, 431 Pa. 199, 203, 245 A.2d 238, 241 (1968). Because those rules governing attorneys deal with confidentiality and § 10 of Act of July 19, 1974, P.L. 486, No. 175 repeals all laws conflicting with the Law *except* those specifically providing for confidentiality, the two cover the same subject matter and must be dealt with *in pari materia*. When there are special and general provisions in the same act, either meaning is given to both or the special provision shall prevail. 1 PA. CONS. STAT. ANN. § 1933 (Purdon Supp. 1977). Because the rules of attorneys' conduct are specific and the repealer exception is general, the rules of confidentiality governing an attorney and his client must prevail. *See* PA. ATT'Y GEN. OP. NO. 13, 7 PA.B. 2041, 2042 (1977). *See also* note 133 *infra*, in which this rule is applied in the construction of the provisions dealing with the Law's coverage of the General Assembly.

Cases from other jurisdictions supporting this interpretation are in the majority. *See, e.g.*, People *ex rel.* Hopf v. Barger, 30 Ill. App. 3d 525, 535-36, 332 N.E.2d 649, 659-60 (1975); Minneapolis Star & Tribune Co. v. Housing & Redev. Auth. of Minneapolis, 246 N.W.2d 448, 450-54, 251 N.W.2d 620, 622-26 (Minn. 1976) (the Minnesota court provides an excellent discussion of the effect of open meeting legislation on attorney-client relationships affecting agencies); Port of Seattle v. Rio, 16 Wash. App. 718, —, 559 P.2d 18, 23 (1977).

121. PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2056 (1974). Because the Pennsylvania Sunshine Law does not repeal other laws specifically providing for confidentiality, the provision of the Right to Know Law of 1957 exempting reports of investigations from the definition of records, PA. STAT. ANN. tit. 65, § 66.1(2) (Purdon Supp. 1977), therefore, places such investigations in the confidential list and exempts them from the coverage of the Sunshine Law. *See also In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 433, 364 A.2d 536, 539 (1976); Lawrence, *supra* note 41, at 805-06.

122. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1201. *See also* PA. STAT. ANN. tit. 65, § 66.1(2) (Purdon Supp. 1977):

> [T]he term 'public records' . . . shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper . . . which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds.

123. *See, e.g.*, Lawrence, *supra* note 41, at 808-10; Mathew, *supra* note 40, at 552-54; Shurtz, *supra* note 54, at 459-60.

124. 1973 PA. H.R.J. 2070-72 (remarks of Representative Englehart about his amendments exempting from the Law any agency, except the Pennsylvania Utility Commission, that is involved in a decision-making process of a judicial nature); 1974 PA. H.R.J. 3092 (Representative Knepper placed on the floor of the House an amendment removing the exemptions of Representative Englehart's previous amendment); *id.* at 3181 (Representative Englehart sought to reintroduce the exemptions).

decisions from the Sunshine Law were defeated.[125] The common pleas courts of Pennsylvania initially differed about whether the quasi-judicial nature of zoning board hearings excepted them from the Law's definition of "agency."[126] The Pennsylvania Commonwealth Court affirmed one decision and in dictum expressed support for a holding that quasi-judicial functions of agencies were not within the purview of the Law.[127] But when it directly confronted the issue, the court held that quasi-judicial tribunals are included in the Law's definition of agency.[128]

7. The State Legislature.—Generally, a legislator is immune from civil or criminal prosecution only if his activity falls "within the 'legitimate legislative sphere'; [and] if it does, the action against the legislator calling [the activity] into question . . . must be dismissed."[129] The Pennsylvania courts have allowed the legislature a large measure of responsibility for declaring what is precisely within that umbrella of immunity, especially in the cases concerning the Sunshine Law.[130] Because the General Assembly has included its own affairs—and those of its committees—within the coverage of the open meeting legislation,[131] it has been necessary for the courts to redefine "legitimate legislative action." The courts have declared that "legitimate legislative action" occurs in two ways. First, if the activity is expressly covered and the

---

1974 PA. SEN. J. 2096 (remarks of Senator Coppersmith that the decision-making meetings of judicial and quasi-judicial agencies should not be made public); *id.* at 2098-99 (Senator Coppersmith again warned that such meetings must be allowed to remain private).

125. In fact, the Pennsylvania General Assembly has recently enacted legislation that specifically places the Public Utility Commission under the coverage of the Sunshine Law. Act of October 7, 1976, P.L. 1075, No. 216, § 7 (codified at PA. STAT. ANN. tit. 66, § 457.1(b) (Purdon Supp. 1977)).

126. *Compare* Allwein v. Zoning Hearing Bd., 15 Leb. 179, 181, 68 Pa. D. & C.2d 787, 789 (C.P. 1975) *and* Patwardham v. Bedminster Twp. Zoning Hearing Bd., 29 Bucks 36, 37 (Pa. C.P. 1976) (quasi-judicial agencies are covered by the Sunshine Law) *with* Enck v. Lititz Borough, 64 Lanc. 465 (Pa. C.P. 1975), *rev'd on other grounds sub nom.* Enck v. Anderson, 25 Pa. Commw. Ct. 318, 360 A.2d 801 (1976) (quasi-judicial agencies are *not* covered by the Law).

127. Enck v. Anderson, 25 Pa. Commw. Ct. 318, 322, 360 A.2d 802, 804 (1976) (the commonwealth court decided that the lower court in *Enck v. Lititz Borough* "ably analyzed" the case in its holding that the Zoning Hearing Board is excluded from the Sunshine Law because of the exclusion of meetings of the judicial branch).

128. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 436, 364 A.2d 536, 541 (1976).

129. Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 382, 368 A.2d 675, 681 (1977). The Pennsylvania Supreme Court, in arriving at its conclusion, held that the Speech and Debate Clause of art. 1, § 6 of the United States Constitution was the model for art. 11, § 15 of the Constitution of Pennsylvania.

130. *See, e.g.*, Brutto v. Cianfrani, No. 1385 C.D. 1977 (Pa. Commw. Ct., filed July 15, 1977).

131. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 267 (Purdon Supp. 1977): "For the purposes of this act, meetings of the Legislature which are covered are as follows: all meetings of committees where bills are considered, all hearings where testimony is taken, all sessions of the House of Representatives and the Senate."

For further discussion of the General Assembly's authority to waive its constitutional immunity and protection, see Brief for Petitioner at 7-9, Brutto v. Cianfrani, No. 1385 C.D. 1977 (Pa. Commw. Ct., filed July 15, 1977).

legislator complies with the Law, the courts will not interfere.[132] Second, if the activity is not expressly covered by the Law, the courts will not interfere regardless how it is conducted.[133]

Another very important aspect of opening the legislative process to the provisions of the Sunshine Law is the effect public exposure may have on party political caucuses. Pennsylvania specifically excludes its legislative party caucuses from coverage.[134] One commentator has remarked, however, that in local government in which there may be a tribunal of supervisors, the majority party could insist on a party caucus to discuss pending business and relevant party policy and effectively circumvent the Law.[135] He therefore suggests that the General Assembly amend the Law to explicitly cover local party caucuses.[136] Because membership and activity in a political party have been associated with and protected by the constitutional right of freedom of association,[137] however, there must be a showing of compelling state interest to open the proceedings of political groups by statute.[138] The hesitation of the Pennsylvania courts to apply or extend the Sunshine Law indicates that they are unlikely to find a compelling state interest.[139]

The only meetings, therefore, that Pennsylvania citizens are prevented from witnessing are those that deal with personal reputations, labor negotiations, investigations, specifically confidential material, and certain legislative matters. The question whether the citizens may actually participate in the remaining meetings is a subject requiring further examination.

---

132. If the General Assembly does not comply with the provisions the legislators set up for themselves, the courts may intervene. Brutto v. Cianfrani, No. 1385 C.D. 1977, at 2-4 (Pa. Commw. Ct., filed July 15, 1977) (the legislators attempted to hold a meeting to consider a bill behind closed doors, and the court enjoined them from barring public access).

133. *See* Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 382, 368 A.2d 675, 680-81 (1977). The Pennsylvania Supreme Court also decided that the general provision placing the General Assembly within the purview of the Pennsylvania Sunshine Law (§ 261) and the specific provision naming portions of the General Assembly that are covered by the Law and portions that are not (§ 267) are not contradictory. The latter section serves to clarify the former and is, therefore, controlling. *Id.* at 384-88, 368 A.2d at 681-84.

See also id. at n.25, indicating that even if courts decide they have the authority to rule on the matter, if the bill that was the subject of the meeting claimed to have violated the Law is introduced on the floor of the General Assembly, there might be nothing the courts can do. *See* Mikell v. School Dist. of Phila., 359 Pa. 113, 123, 58 A.2d 339, 344 (1948) (failure of the legislature to follow a constitutional directory provision is not a justiciable question, and the act, once duly certified, cannot thereafter be attacked); Kilgore v. Magee, 85 Pa. 401, 412 (1877) (once a law is enacted, it is official and the courts cannot look behind it to see if it was passed improperly).

134. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 267 (Purdon Supp. 1977).

135. Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 545-46.

136. *Id.* Ohio's open meeting law covers *all* meetings of the majority of agency members and, therefore, includes caucuses by the majority party. OHIO REV. CODE ANN. § 121.22(B)(2) (Baldwin 1977).

137. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

138. For a discussion of the steps necessary to determine a compelling state interest and a discussion of party caucuses and open meeting legislation generally, see Recchie & Chernoski, *supra* note 2, at 506-07.

139. *But see id.* The authors express their belief that the necessary compelling state interest exists and that Ohio courts will accept it and open the majority party caucuses to the public.

D. *Public Participation in Open Meetings*

Despite Aristotle's warning that utmost participation in government by all persons is essential to liberty and equality in democracy,[140] the Sunshine Law does not provide for direct participation in our representative form of government,[141] nor was it intended to.[142] Much uneasiness had been expressed in the General Assembly about balancing the right of the public to speak out at an open meeting[143] and the need to maintain order for effective governmental action.[144] The agencies whose meetings are open under the Sunshine Law were specifically created to be able to act quickly, and constant interruptions to allow public participation would negate that purpose. The result of the legislative balancing was section six,[145] which provides that the public may speak but also that the board may establish rules to suspend public discussion when the need arises (as long as the Law itself is not otherwise violated).[146] Participation in government under the existing laws means only attendance at meetings.[147] To further secure this right to attend meetings, the Pennsylvania Sunshine Law provides detailed notice requirements with which agencies and the General Assembly must comply.[148]

E. *Presenting a Cause of Action under the Sunshine Law*

1. Original Jurisdiction Over Sunshine Law Cases.—"The

---

140. 10 THE WORKS OF ARISTOTLE 1291 (Politica) (B. Jowett, trans., 1921): "For if liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost."

141. *See* PA. ATT'Y GEN. OP. No. 46, 4 PA. B. 2054, 2057 (1974).

142. 1974 PA. H.R.J. 3282 (remark of Representative Knepper that it was never his intention that the bill require any public agency to hold a town meeting); *id.* at 3305 (remark of Representative W.D. Hutchinson that the bill is not meant to guarantee the right of the public to debate the issues with the agency member).

143. *Id.* at 3098 (remark of Representative Shane); *id.* at 3282-83 (remarks of Representative Doyle demanding that an amendment be defeated that would have seriously curtailed public involvement in the meetings).

144. *Id.* (remarks of Representative Zearfoss that the amendments to further limit the public's participation are necessary to ensure proper functioning of the agency); 1973 PA. H.R.J. 1923 & 2152 (remarks of Representatives Kistler, Caputo, and Vann who expressed concern about overly enthusiastic public participation). *See* notes 24-26 and accompanying text *supra*.

145. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 266 (Purdon Supp. 1977).

146. 1973 PA. H.R.J. 1923 (remark of Representative Knepper explaining that the bill allowed a board or agency to make rules to prevent or control disruptive public behavior at public meetings).

147. Wickham, *supra* note 14, at 489. *See also* Paterra v. Charleroi Area School Dist., 55 Wash. 115, 122 (Pa. C.P. 1975) ("there is no requirement of law that all the information the board and members get must be divulged to [citizens attending a meeting] publicly").

148. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 265 (Purdon Supp. 1977). The Pennsylvania Supreme Court has made the point that "a meeting cannot be deemed to be public merely because its doors are open to the public if the public is not properly informed of its time and place." Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 384 n.4, 368 A.2d 675, 681 n.4 (1977).

In the event of an actual emergency presenting a clear and present danger to life or property, the rules requiring notice may be suspended. The agency shall not, however, bar members of the public who are present and who seek access to the emergency meeting. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 265(e) (Purdon Supp. 1977). *See* Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 544-45.

Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies . . . ."[149] Pennsylvania courts have maintained a properly strict adherence to this requirement and have ruled that an agency is local and within the original jurisdiction of the local court of common pleas even when it was specifically created by state legislation[150] and when it functions in a number of counties.[151]

2. Standing to Bring an Action under the Sunshine Law.—Before 1957 the courts ruled that the only restriction on a person examining records that have statutorily been made public[152] was that his request be reasonable in respect to the time, place, and manner of inspection.[153] The common-law rules allowed persons with a "personal or property interest" to inspect records to which there was no statutory access.[154] The Right to Know Law was enacted and the public's boldness in seeking access to records increased.[155] The courts became more stringent in their decisions requiring reasonableness of access and began to require that petitioners specify the records they wished to see.[156]

The Pennsylvania Sunshine Law has no special requirement of standing to bring suit.[157] Although the legislature provided that "action

149. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 269 (Purdon Supp. 1977).

150. *See, e.g.*, Scott v. Shapiro, 19 Pa. Commw. Ct. 479, 483-84, 339 A.2d 597, 599 (1975) (SEPTA).

151. *See, e.g.*, Southeastern Penn. Transit Auth. v. Kohn, 18 Pa. Commw. Ct. 546, 549, 336 A.2d 904, 906 (1975) (SEPTA).

152. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 264 (Purdon Supp. 1977). Minutes of all public meetings of an agency must be taken and recorded as public records according to the provisions of the Right to Know Law.

There is some question about how these records must be made—*i.e.*, may they be taped, and if so, by whom? Two bills before the Pennsylvania House of Representatives specifically permit tape recording an open meeting. One bill, Pa. H. 125, Session of 1977, permits taping by the media and the other, Pa. H. 637, Session of 1977, permits taping by anyone.

153. *See, e.g., In re* Simon, 353 Pa. 514, 518, 46 A.2d 243, 245 (1946); Commonwealth *ex rel.* Eagen v. Dunmore Bor. School Dirs., 343 Pa. 440, 443, 23 A.2d 468, 470 (1942) (right to inspect records must be carried out so that the agency is not unduly interrupted or interfered with); Butcher v. Civil Serv. Comm'n, 163 Pa. Super. Ct. 343, 345, 61 A.2d 367, 368 (1948) (when, by statute, records are open for public inspection, there need not be any particular reason to examine them, and it may be done out of idle curiosity).

154. Wiley v. Woods, 393 Pa. 341, 348, 141 A.2d 844, 848 (1958). The "personal or property interest" mentioned is, in essence, a requirement that the complaining citizen have standing.

155. After 1957, "[a]ny citizen of the Commonwealth of Pennsylvania [had] the right to take extracts or make copies of public records . . . ." PA. STAT. ANN. tit. 65, § 66.3 (Purdon 1959). The right to examine extended only to "public records" as defined by the act. *Id.* § 66.2(b) (Purdon Supp. 1977). Persons with the "personal or property interest," however, could continue to demand common-law access to documents not within the definition. Wiley v. Woods, 393 Pa. 341, 348, 141 A.2d 844, 848 (1958).

156. Mooney v. Temple Univ. Bd. of Trustees, 448 Pa. 424, 428 n.8, 292 A.2d 395, 397 n.8 (1972). A year later the same court demanded that requests for examination of welfare recipient lists be for specifically named recipients only. McMullan v. Wohlgemuth, 453 Pa. 147, 156, 308 A.2d 888, 893 (1973), *rev'g* 3 Pa. Commw. Ct. 574, 284 A.2d 334 (1971).

157. The person bringing the action is even granted a choice of three venues. *See* Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 269 (Purdon Supp. 1977).

may be brought by any person,"[158] the commonwealth court has refused to consider one petitioner's claim of a violation of the Sunshine Law because he "has not alleged nor shown any prejudice due to the [alleged violation]."[159]

This was wise use of judicial discretion. One of the principal fears voiced by commentators was that actions might be brought claiming violation of the Sunshine Law when no violation had occurred or when damage was minor and inconsequential.[160] The claims would be brought merely because the complainant had made an unsuccessful bid for an agency contract and was seeking revenge. A requirement that the alleged violation have some specific impact on the petitioner will alleviate this fear. The danger that courts might strictly construe the Law to avoid an unjust result would be eliminated because they can dispose of such malicious actions.[161]

3. What Cause of Action Must be Alleged?—Pennsylvania courts have carefully examined the elements necessary to allege violations of the Sunshine Law:

> It is . . . the teaching of *Bogert* [*v. Allentown Housing Auth.*, 426 Pa. 151, 231 A.2d 147 (1967)] that a failure to furnish information [or grant access to a meeting] is not itself a cause of action; it is the taking of formal action at a closed meeting which is invalid, and which gives a cause of action to one, who . . . seeks to knock out decisions taken in an impermissible mode.[162]

Difficulty arises when a complaint alleges a closed meeting and an unknown effect on later formal action because the petitioner does not know what transpired. The commonwealth court held that the lack of precise allegations concerning the closed meetings was fatal to the complaint when extensive public hearings were held on the matter.[163] One court of common pleas reluctantly dismissed an action because there was no proof of formal action taken at the allegedly unlawful meeting.[164] The

158. *Id.*

159. Board of Comm'rs v. Hakim, 19 Pa. Commw. Ct. 661, 664 n.1, 339 A.2d 905, 907 n.1 (1975).

160. Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 553-59.

161. The courts, however, maintain their strict interpretation. *See* notes 212-13 and accompanying text *infra*. When the Pennsylvania Supreme Court, nevertheless, made a determined effort to ascertain the legislative intent from the Law and was certain the claim was valid, it required *no* extra-statutory standing. Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 381-82, 368 A.2d 675, 680 (1977).

162. Paterra v. Charleroi Area School Dist., 55 Wash. 115, 120 (Pa. C.P. 1975). The same court declared, "[T]he Sunshine Law seeks openness as a means to an end and not as an end in itself." *Id.* at 121.

163. Redmond v. Commonwealth, Milk Mkt'g Bd., 26 Pa. Commw. Ct. 368, 371, 363 A.2d 840, 842 (1976). *But see* Kramer v. Board of Adj., 80 N.J. Super. 454, 463-64, 194 A.2d 26, 31 (1963) (even though there had been no formal vote at the closed meeting and there was some discussion during the public meeting, the earlier full discussion invalidated the later formal vote).

164. Paterra v. Charleroi Area School Dist., 55 Wash. 115, 123-24 (Pa. C.P. 1975).

question remains, how can a person denied access to a meeting discover what occurred at that meeting?[165]

Once the courts examine the Law's requirements and their own procedural rules and determine that a violation of the Law has occurred, statutory remedies are available under the Law. The courts may invalidate actions taken illegally, fine members who intentionally violated the Law, or enjoin future violations. Each of these remedies has elicited critical commentary.

H. Remedies to Enforce the Sunshine Law

1. Criminal Sanctions—Fines and Imprisonment.—Substantial emphasis has been placed on the comparatively de minimus value of a criminal sanction for Sunshine Law violations in view of the problems created.[166] Even the legislators, in successfully amending the bill, remarked, "[W]e do not really want to send public officials to jail for violating the open-meeting [law]."[167] Perhaps because of this weak support, only one attempted criminal prosecution for violation of the Law has been reported.[168] The defendant was found not guilty because the court construed the penal provision of the statute strictly. The court's demand for a clear showing of an " 'intent and purpose of violating' the Sunshine Law,"[169] was proper judicial interpretation of the requirements for imposing criminal penalties. This result should assuage the commentators who fear the consequences of strict construction of the penal provision.[170]

The Pennsylvania Sunshine Law provides for a fine of one hundred dollars plus costs.[171] Another possible sanction with merit is removal from his position of any official guilty of intentionally obstructing public access to meetings or otherwise intentionally violating the Sunshine

---

165. This remains one of the most difficult aspects of enforcement of any open meeting legislation. It is not until someone is personally affected by a closed meeting that unlawful conduct of the meeting is questioned. Although very inefficient and time consuming, this is the only way that actions of agencies will be examined and searches made to determine what occurred at these meetings.

166. *See, e.g.*, Annot., 38 A.L.R. 3d 1070, 1091-92 (1971); Wickham, *supra* note 14, at 496; Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 553. *See also* Lawrence, *supra* note 41, at 817-18; Mathew, *supra* note 40, at 548; Shurtz, *supra* note 54, at 464; Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1211 (courts should strictly construe only criminal provisions); 49 TEX. L. REV. 764, 772-74 (1971).

167. 1973 PA. H.R.J. 1836 (remark of Representative Miller). Some concern was also expressed that political opponents would bring unwarranted charges as harrassment, but this has not occurred. *Id.* at 1837 (remarks by Representative Dorr).

168. Commonwealth v. Harkins, 58 Erie 186 (Pa. C.P. 1975).

169. *Id.* at 187.

170. Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1211; Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 549-50.

171. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 268 (Purdon Supp. 1977):
> Any member of any agency who participates in a meeting or hearing knowing that it is being held or conducted in such a way to intentionally prevent an interested party from attending or with the intent and purpose of violating this act is guilty of a summary offense and upon conviction thereof shall be sentenced to pay a fine not exceeding one hundred dollars ($100) plus costs of prosecution.

Law.[172] The uproar that this might provoke can easily be countered by noting that prosecution is difficult and that the prosecuting party must establish a truly blatant intentional exclusion of the public from meetings that the official knows should be open. If that truly blatant intent is found, the official should be dismissed.

2. Invalidation of Actions taken at Meetings Violating the Law.— Before the enactment of the Sunshine Law, courts used due process notions of notice and opportunity to be heard to invalidate the results of closed meetings.[173] Today invalidation is one of the remedies most commonly drafted by lawmakers seeking to enforce their legislation.[174] It may also be the most effective remedy. Some commentators, however, fear that the invalidation remedy "could serve to limit the scope of the Act's open meeting provisions themselves as the courts strain to find agency actions valid . . . ."[175]

One threatened outgrowth of this remedy was that when a decision was made in violation of the Sunshine Law, the courts declared,

> [The action is] void and of no effect as having been arrived at, entered and communicated to the parties in the course of some proceeding other than a public meeting. Therefore, the decision being void and of no effect, the Board must be deemed to have taken no action on the application of appellant and, therefore, under the provisions of Section 908(9) of the Municipalities Planning Code, appellant's application must be deemed to be approved.[176]

Fortunately, this result has been rejected by the commonwealth court and the agency must start to reconsider the matter in public session.[177]

---

172. *See* MINN. STAT. ANN. § 471.705 subd. 2 (West 1977). *See also* Wickham, *supra* note 14, at 498-99.

173. *See, e.g.*, Bradley v. Radnor Twp., 51 Pa. D. & C.2d 160, 165 (C.P. Del 1971) (lack of legal notice of a meeting violated due process and rendered an ordinance passed at that meeting illegal, null, and void); Chester County Bk. v. East Whiteland Twp., 10 Chest. 454, 462-63, 27 Pa. D. & C.2d 384, 396 (C.P. 1962).

174. *See* Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 262 (Purdon Supp. 1977): "No formal action shall be valid unless such formal action is taken during a public meeting." *See also* Comment, 45 MISS. L.J. 1151, *supra* note 18, at 1180-82; Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 ORE. L. REV. 519 (1976).

Although invalidation has become one of the most common remedies for enforcement, it has been continuously subjected to the courts' criticism and scrutiny because of its severity and potential abuse. *See* Wilmington Fed'n of Teachers v. Howell, 374 A.2d 832, 835-36 (Del. 1977).

One restriction that some states use to limit a remedy as potentially volatile as invalidation is to impose a statute of limitations on the time in which an action can be brought. *See, e.g.*, GA. CODE ANN. § 40-3301(a) (1975) (90 days); MASS. GEN. LAWS ANN. ch. 30A, § 11B post (Supp. 1977-78) (14 days); N.J. STAT. ANN. § 10:4-15 (West 1976) (45 days).

175. Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 559. This fear need not be realized if the Pennsylvania courts observe the evolution of judicial discretion demonstrated in New Jersey decisions on invalidation. Wickham, *supra* note 14, at 494-95. In its interpretation of *Judge v. Pocius*, however, the Pennsylvania Commonwealth Court may have already fallen into these dangers. *See* notes 78-84 and accompanying text *supra*.

176. Patwardham v. Bedminster Twp. Zoning Hearing Bd., 29 Bucks 36, 38 (Pa. C.P. 1976). The Municipalities Planning Code § 908(9) provides that failure of a local zoning board to act on an application results in the approval of that application.

177. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 437-38, 364 A.2d 536, 541-42 (1976); Enck v. Anderson, 25 Pa. Commw. Ct. 318, 321-22, 360 A.2d 802, 804 (1976).

3. Injunction and Mandamus Relief.—The third remedy to ensure proper enforcement of the Sunshine Law is the equitable relief of injunction or mandamus.[178] In the Pennsylvania Commonwealth Court case applying the injunction remedy, *Brutto v. Cianfrani*,[179] the relief prayed for and granted was to open the General Assembly's Conference Committee on the General Appropriations bill.[180] This remedy will not be granted without both a prior violation of the law and some indication that the violation will be reported.[181]

4. Other Remedies—Declaratory Judgment, Civil Damages, Attorney's Fees.—Another remedy specifically provided in the Pennsylvania Sunshine Law is declaratory judgment.[182] The invalidation remedy is applied through this device, but courts can go further and declare that a meeting or type of meeting violates the Law. The remedies used with declaratory judgment will depend on the pleadings and the court, but it is, in itself, an important means of establishing guidelines for the types of meetings that violate the Law. Violating the Sunshine Law in the face of a prior declaratory judgment that the type of meeting held is a violation could be presumptive evidence of the scienter necessary for criminal sanctions.[183]

Civil damages should be granted to any person who has been damaged by an agency action that violates the Law. Mere invalidation may not be enough to place the complainant in his previous position. Although the standing requirement may be more rigidly examined in a claim for civil damages than in actions for injunctions or invalidation, the prerequisites should be little different than those required in *Board of Commissioners of O'Hara v. Hakim*.[184]

---

178. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 269 (Purdon Supp. 1977).

179. No. 1385 C.D. 1977 (Pa. Commw. Ct., filed July 15, 1977).

180. *Id.* at 1 & 6. The petitioners also sought declaratory judgment.

No Pennsylvania cases have been reported in which the court found that the prior action violated the Law and enjoined all subsequent similar action. It is not possible, therefore, to know if the problems other jurisdictions have experienced in obtaining general injunctions will arise in Pennsylvania. It is possible, however, that this lack of cases granting general injunctions may indicate judicial opposition to them. *See also* Dobrovolny v. Reinhardt, 173 N.W.2d 837 (Iowa 1969), *noted in* 58 IOWA L. REV. 210 (1972). The Iowa Supreme Court said, "Rights already lost and wrongs already committed are not subject to injunctive relief, especially when there is no showing the wrong will be repeated." 173 N.W.2d at 841. By not allowing general injunctive relief, the Iowa court eliminated all means of enforcing the Iowa statute, which provided for no other remedies.

181. *See* Note, 75 HARV. L. REV. 1199, *supra* note 2, at 1215. Although injunctive relief is traditionally equitable, here it is legal. The requirements of irreparable damage and no other available legal remedy are not applied.

182. Pennsylvania Sunshine Law, PA. STAT. ANN. tit. 65, § 269 (Purdon Supp. 1977).

183. If the court in a case for civil damages does not find standing but finds a violation of the Law, it can so declare although denying the relief sought. If a criminal action is brought against the agency members for violating the Law at a later time, but *in the same manner*, however, the earlier declaratory judgment could be used as evidence of their scienter.

184. 19 Pa. Commw. Ct. 661, 339 A.2d 905 (1975). *See* notes 152-61 and accompanying text *supra*.

One of the most appropriate remedies is to have the agency against whom a successful claim has been brought pay the complainant's attorney's fees.[185] Although an award of fees to the opposition "is only done under the rarest of circumstances,"[186] strong policy and decisional law support the contention that this should be such a circumstance. The commonwealth court has recently ruled that when a party to litigation benefits a great number of people by the private enforcement of a statutory violation, the party is acting as a private attorney general in effectuating both the public policy and legislative intent of the statute. That party should be entitled to collect his expenses, *including attorney's fees*, from the opposing party.[187] The policy basis for this remedy is that the petitioner brought the action on behalf of all of the citizens of the jurisdiction and the award of his attorney's fees from the agency's treasury comes from the taxpayers' money. The people who benefit from the action, therefore, pay for it.[188]

The decisions of the courts to adopt these or any other remedies or interpretations of the Sunshine Law depend on the courts' construction of the statutory language. In 1972 the Pennsylvania General Assembly passed an act codifying many of the previously common-law rules of statutory construction.[189] This Statutory Construction Act and the judicial interpretation and application of it have been the basis of much of the difficulty in properly implementing the Sunshine Law.

IV. Statutory Construction Rules Applied to the Pennsylvania Sunshine Law

A. Liberal Interpretation of the Law

One commentator recently expressed concern that a criminal provision in the Sunshine Law might cause the courts to construe the entire

185. Comment, 1975 ARIZ. ST. L.J. 111, *supra* note 2, at 131.

186. Feist v. Luzerne County Bd. of Assessment Appeals, 22 Pa. Commw. Ct. 181, 194, 347 A.2d 772, 780 (1975).

187. *Id.* at 195-96, 347 A.2d at 781. The basis for the *Feist* holding was a federal district court case, La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). The federal court set forth three types of cases in which attorney's fees are allowed. The third one applies here: "3) The 'private attorney general' situation. Here the courts use their power offensively when necessary and appropriate to insure the effectuation of a strong [legislative] policy." *Id.* at 96. *See also* Mills v. Electric Auto-Lite, 396 U.S. 375, 396 (1970).

188. 396 U.S. at 396-97. *But see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), *rev'g sub nom.* Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974). The Supreme Court ruled that because of provision for attorney's fees in certain instances, Congress implied that, when there was no statutory basis for the award, the courts should not award such fees. This decision was specifically limited to federal courts. *Id.* at 269. With judicious care in establishing standards that would comport with the Supreme Court guidelines for awarding attorney's fees, *id.* at 263-64, state courts may continue to award the fees as part of their equitable powers. *See* Serrano v. Priest, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977).

189. Act of December 6, 1972, P.L. 1239, No. 290, (codified at 1 PA. CONS. STAT. ANN. §§ 1501-1504, 1701-1704, 1901-1910, 1921-1939, 1951-1957, 1961-1963, 1971-1978, 1991 (Purdon Supp. 1977)).

Law strictly and defeat its purpose.[190] The courts' subsequent holdings have discounted this concern.[191] There has been a long, undeviating line of Pennsylvania cases holding that a statute with a provision imposing penal sanctions on transgressors will be liberally construed despite the penal provision. This provision, however, will be subject to strict construction.[192] The rule was among those codified in 1972[193] and has been continually accepted by the courts.[194]

Florida's efforts toward liberal application of its sunshine law have been cited many times in the briefs of complaining parties litigating aspects of the Pennsylvania Sunshine Law.[195] Use of these cases and their arguments has been based on both the widespread notoriety of the Florida enactment and the similarity between some of its provisions and policies and those of the Pennsylvania Law.[196] Critics of the Pennsylvania Sunshine Law who try to avoid dealing with the Florida cases cite excerpts from the comments of legislators engaged in passage of the bill.[197] These excerpts have been very misleading and out of context. Representative Knepper in his remark that "this is not the Florida Sunshine Bill" was commenting about the total inclusiveness of the Florida act and the need for confidentiality in certain *specific* subject areas in which it was denied.[198] Representative Wise, another leading proponent of the bill, declared, "There is one thing this bill is not, . . . it is not the Florida 'sunshine' law . . . ."[199] Representative Wise, however, was commenting about Representative Kistler's remarks that if there were no strong sanctions to curtail unruly public participation and outbreaks, the effectiveness of the agencies would be destroyed.[200] Representative Kistler was implying that without appropriate means to shut off public participa-

190. Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 552-53.

191. *See, e.g.*, Laman v. McCord, 145 Ark. 401, 404, 432 S.W.2d 753, 755 (1968); Board of Pub. Inst. v. Doran, 224 So. 2d 693, 699 (Fla. 1969). Both cases show that when a statute contains a penal provision, the courts will construe that provision strictly, but will construe the remainder of the statute in accordance with its purpose.

192. *See* Commercial Banking Corp. v. Freeman, 353 Pa. 563, 567, 46 A.2d 233, 235 (1946); Commonwealth v. Shaleen, 215 Pa. 595, 597, 64 A. 797, 798 (1906); Commonwealth v. Yaste, 166 Pa. Super. Ct. 275, 277, 70 A.2d 685, 687 (1950).

193. 1 PA. CONS. STAT. ANN. §§ 1928(b)(1) & 1928(c) (Purdon Supp. 1977).

194. Consumers Educ. & Pro. Ass'n v. Nolan, 470 Pa. 372, 386, 368 A.2d 675, 682 (1977); Commonwealth v. Monumental Prop., Inc., 459 Pa. 450, 460-61, 329 A.2d 812, 817 (1974). *But see* Paterra v. Charleroi Area School Dist., 55 Wash. 115, 124 (Pa. C.P. 1975), in which the court stated, "Since there is a penal provision in the Sunshine Law, we must construe it strictly." This ambiguous language (to what does "it" refer?) could be interpreted as meaning the court will construe the entire statute strictly. But the approach the court takes in dealing with the case indicates a disposition toward a liberal construction of the statute, and "it" probably refers to "penal provision."

195. *See, e.g.*, Brief for Appellant & Amicus Curiae Brief for Appellant, Judge v. Pocius, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977).

196. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 432-35, 364 A.2d 536, 539-40 (1976).

197. Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 546-47 n.74.

198. 1973 PA. H.R.J. 1839. *See also* note 77 and accompanying text *supra*.

199. 1973 PA. H.R.J. 1924.

200. *Id.* at 1923.

tion, the Pennsylvania bill would resemble the Florida law.[201] In response to this attack, Representative Wise, like Representative Knepper, noted the total coverage resulting from the Florida judiciary's interpretation of its act and concluded that it was the *total coverage* of the Florida statute that was distinguishable from the Pennsylvania bill. He intended that only those meetings *naturally* resulting in a vote or policy decision be covered and not the conversations of two men riding together in a car.[202]

The Pennsylvania courts, however, have decided not only that they should not look to Florida's statute for guidance, but also that they should not consider the Florida courts' interpretations because they are not controlling or applicable in Pennsylvania.[203] This is inconsistent with the general policy that courts look to other jurisdictions, statutes, and judicial interpretations to deal with novel concepts.[204] It also conflicts with the 1976 commonwealth court decision, *In re Emmanuel Baptist Church*.[205] The court in *Emmanuel Baptist Church* referred to the Florida Sunshine Law, the Florida Courts' interpretations, Florida legal periodicals explaining the law, and other periodicals discussing the responses of their jurisdictions to open meeting legislation.[206] The court selected its holding and then sought legal support. The court, however, rejects that same legal authority when it conflicts with a holding it has chosen in a different case.

B. *The Sunshine Law is in Pari Materia with the Right to Know and Open Meetings Laws*

The Pennsylvania courts had little difficulty in deciding that the Sunshine Law is *in pari materia* with the Right to Know and Open Meetings Laws.[207] They have even recognized that the new Law "expands" upon the former laws that required "essential governmental functions to render their decisions at public meetings."[208] The courts had

---

201. *Id.*

202. *Id.* at 1924. The text reference to "*naturally* resulting in a vote or policy decision" means that Representative Wise did not intend to allow agencies to hold their decision-making sessions elsewhere and come back and quickly conduct a formal vote. The definition of "formal" action should not be accepted as definitive, but should be viewed as descriptive of the types of meetings that should be open. Those meetings at which a formal action could naturally be taken must be open.

203. Judge v. Pocius, 77 Lack. 19, 24-25 (Pa. C.P. 1976), *aff'd*, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977).

204. *See, e.g.*, Commonwealth v. Monumental Prop., Inc., 459 Pa. 450, 461-66, 329 A.2d 812, 817-20 (1974) (examines similar federal law).

205. 26 Pa. Commw. Ct. 427, 364 A.2d 536 (1976).

206. *Id.* at 432-35, 364 A.2d at 539-40.

207. The Pennsylvania Commonwealth Court explained the Sunshine Law as "the latest in a series of legislative enactments designed to provide a comprehensive format governing public access to the meetings and hearings of public agencies." Judge v. Pocius, 28 Pa. Commw. Ct. 139, 142, 367 A.2d 788, 790 (1977) (footnotes omitted). The omitted footnotes referred to the 1957 Right to Know and Open Meeting Laws.

The court in *Judge* at the trial level also admitted that the laws cover the same subject areas. 77 Lack. 19, 24 (Pa. C.P. 1976). *See* 1 PA. CONS. STAT. ANN. § 1932(a) (Purdon Supp. 1977) ("Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things").

208. *In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 432, 364 A.2d 536, 539

made a constant effort to construe the 1957 laws liberally to achieve the obvious legislative goals.[209] It is also well established in Pennsylvania that an enlarging statute amending existing law should be construed liberally to reach the apparent (or obvious) legislative objective.[210] Similarly, acts *in pari materia* should be construed together as one statute.[211] Despite this history, the Pennsylvania courts, in dealing with the Sunshine Law, have often used strict construction of a single phrase of the statute[212] and disregarded other determinations of intent, liberal construction, and precedent.[213]

Legislative regard of the relationship between the old laws and the Sunshine Law is clear from the floor debates. Representative Knepper remarked that the bill was intended to put more teeth in the old law.[214] Of even greater importance is the debate about an amendment Representative Butera sought to introduce to limit severely the bill's coverage by excluding any agency already covered by an existing law requiring openness.[215] The immediate and outraged responses of the bill's proponents are ample evidence that this was not what the legislature intended.[216] They all declared that the bill went *beyond* existing law and opened already open meetings even further. They demanded rejection of the amendment and acceptance of *full disclosure* of agency meetings. They did not wish that merely the final votes would be made available to the public in an open meeting, but wanted to open the entire meeting.[217] The amendment was handily defeated.[218]

Although it spoke only of the Florida legislature and its Sunshine Law, the Florida Supreme Court could easily have been speaking of the Commonwealth of Pennsylvania in *Times Publishing Co. v. Williams*:[219]

> Clearly the legislature must have intended to include more than the mere affirmative formal act of voting on an issue or the

(1976). This case supports the rules of construction advising the courts to take into account "[t]he former law, if any, including other statutes upon the same or similar subjects." 1 PA. CONS. STAT. ANN. § 1921(c)(5) (Purdon Supp. 1977).

209. *See. e.g.*, Shapp v. Butera, 22 Pa. Commw. Ct. 229, 238, 348 A.2d 910, 915 (1975). The commonwealth court specifically considered the statutory purpose of the law before it decided how to construe one of the terms of the statute.

210. *See* Bolton v. King, 105 Pa. 78, 83 (1884); Sheetz v. Hanbest's Ex'rs, 81 Pa. 100, 102 (1876).

211. 1 PA. CONS. STAT. ANN. § 1932(b) (Purdon Supp. 1977).

212. Judge v. Pocius, 28 Pa. Commw. Ct. 139, 142-45, 367 A.2d 788, 790-91 (1977). *But see* notes 78-80 and accompanying text *supra*.

213. *See* notes 227-35 and accompanying text *infra*. *See also* Amicus Curiae Brief for Appellant, Judge v. Pocius, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977). "By reading together the Sunshine Law, Right to Know Law and Open Meeting Law, it is apparent that the all-embracing language of the Sunshine Law was intended to fill existing gaps to public information, and should be read to achieve that purpose." *Id.* at 25.

214. *See* notes 37-38 and accompanying text *supra*.

215. 1973 PA. H.R.J. 1917.

216. *See id.* (remarks of Representative Rappaport); *id.* at 1918 (remarks of Representative Shane); *id.* (remarks of Representative Schmitt); *id.* at 1919 (remarks of Representative Ritter).

217. *See generally id.* at 1917-21.

218. *Id.* at 1921. The vote for the amendment was 66 in favor and 125 opposed.

219. 222 So. 2d 470 (Fla. 1969).

formal execution of an official document. These latter acts are indeed 'formal,' but they are matters of record and easily ascertainable (though perhaps ex post facto), notwithstanding such legislation; and indeed the public has always been aware sooner or later of how its officials voted on a matter, or of when and how a document was executed. Thus, there would be no real need for the act if this was all the framers were talking about. It is also how and why the officials *decided* to so act which interest the public.[220]

C. *Remedial Statutes must be Construed to Give Effect to their Remedies*

Both the Right to Know and the Sunshine Laws are remedial statutes. The legislature provided the public with a right and a remedy that it did not have at common law.[221] The goal of courts in construing a remedial statute should be to apply the remedy whenever possible. This was the rule as reported in Blackstone's Commentaries,[222] and it is the rule today.[223] Courts have also repeatedly held that they must interpret a statute to remedy the evils it is designed to eliminate.[224] A final rule is that when the courts deal with a law affecting public interest, " 'an interpretation is preferred which favors the public . . . . ' "[225]

The recent judicial construction of the Pennsylvania Sunshine Law in *Judge v. Pocius*[226] denies the public the remedy the legislature provided. It allows the evils of both closed-door decision-making and secret agreements to persist between agency members. Finally, *Judge* protects the private interest of school board members at the cost of the public's interest in discerning what those members regard as important criteria in their decisionmaking.

---

220. *Id.* at 473-74 (emphasis in original). *But see* Brief for Appellee, Judge v. Pocius, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977). The school board counsel correctly stated that a strict interpretation of the formal action requirement for open meetings makes the new law even more restrictive than the previous law. *Id.* at 18. Certainly this is in direct opposition to what the legislature intended. *See* notes 37-38, 68, 198-202, & 214-18 and accompanying text *supra*.

221. *See* Orlosky v. Haskell, 304 Pa. 57, 155 A. 112 (1931). "[W]hen an act is remedial it will be construed so as to give to the words used in it the largest, fullest and most extensive meaning to which they are reasonably susceptible . . . ." *Id.* at 62, 155 A. at 113.

222. 1 W. BLACKSTONE, COMMENTARIES *87.

223. *See, e.g.*, Workmen's Comp. Appeal Bd. v. Hartlieb, 465 Pa. 249, 254, 348 A.2d 746, 748-49 (1975) (act construed to favor the injured employee); Commonwealth v. Monumental Prop., Inc., 459 Pa. 450, 460, 329 A.2d 812, 817 (1974) (act construed to prevent unfair or deceptive trade practices).

224. *See In re* Wilhelm, 104 Pa. Super. Ct. 479, 482, 159 A. 49, 50 (1932). The evil in question was illegal behavior of one seeking to run for election to a public office.

The Rules of Statutory Construction declare that, in interpreting a statute, a court may ascertain the General Assembly's intentions by "[t]he occasion and necessity for the statute", 1 PA. CONS. STAT. ANN. § 1921(c)(1) (Purdon Supp. 1977), and by "[t]he mischief to be remedied." *Id.* § 1921(c)(3).

225. City of Phila. v. Southeastern Pa. Transp. Auth., 8 Pa. Commw. Ct. 280, 289-90, 303 A.2d 247, 252 (1973) (citing Philadelphia v. Philadelphia Transp. Co., 345 Pa. 244, 250, 26 A.2d 909, 912 (1942)).

See also 1 PA. CONS. STAT. ANN. § 1922(5) (Purdon Supp. 1977). There is a presumption that "the General Assembly intends to favor the public interest as against any private interest."

226. 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977).

D. *Other Applicable Rules of Construction*

"When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[227] This codified rule of statutory construction is the basis for the Pennsylvania courts' decisions restricting coverage of the Sunshine Law to meetings at which a vote is taken or policy decided.[228] If the courts had used this rule to justify strict construction of a statute that is indeed explicit, no complaint could be raised about their interpretation. But numerous complaints have arisen from *all levels* of the judicial system that the Pennsylvania Sunshine Law is *not* explicit.[229] The rule, therefore, should not be applied.

A corollary of the rule of explicit statutes is that courts may not add language that the legislature has not deemed appropriate.[230] This was explicitly part of the courts' reasoning in *Judge*, in which the court decided that it could not add language in its interpretation of the Sunshine Law. The legislature, however, did not find this rule of construction appropriate for codification in 1972. In contrast, section 1923(c) of the Rules of Statutory Construction provides, "Words and phrases which may be *necessary to the proper interpretation of a statute* and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof."[231]

The courts' definition and interpretation of specific phrases, without regard to other provisions of the Law, conflict with other rules of statutory construction. Two of these rules are similar but are separately codified: "Every statute shall be construed, if possible, to give effect to all its provisions"[232] and "the General Assembly intends the entire

---

227. 1 PA. CONS. STAT. ANN. § 1921(b) (Purdon Supp. 1977).

228. The trial court in *Judge v. Pocius* cited this provision, 77 Lack. 19, 25 (Pa. C.P. 1976), and the commonwealth court, in affirming the lower court's holding, implicitly relied on it.

229. *See, e.g., In re* Emmanuel Baptist Church, 26 Pa. Commw. Ct. 427, 431, 364 A.2d 536, 538 (1976) (the Sunshine Law is "a statute which fails to establish precise guidelines for operational compliance"); Paterra v. Charleroi Area School Dist., 55 Wash. 115, 120 (Pa. C.P. 1975) (the Law is "no model of legislative draftsmanship"); Amicus Curiae Brief for Appellant at 8, Judge v. Pocius, 28 Pa. Commw. Ct. 139, 367 A.2d 788 (1977) (the Law has been "charged as being imprecise and susceptible to a multitude of inconsistent constructions"); Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 540 (the Law is most "inartfully drawn"). Even the court in *Judge* felt the need to "interpret" the definition of "formal action." 28 Pa. Commw. Ct. at 144-45, 367 A.2d at 791.

The Law is not explicit, even after full consideration of the warning to disallow the use of extrinsic facts or construction to create any ambiguity or uncertainty. Workmen's Comp. Appeal Bd. v. Hartlieb, 465 Pa. 249, 254, 348 A.2d 746, 749 (1975).

230. *See* Daugherty v. Continental Can Co., Inc., 226 Pa. Super. Ct. 342, 348, 313 A.2d 276, 279 (1973); Schaefer v. Commonwealth, 13 Pa. Commw. Ct. 349, 354, 318 A.2d 365, 368 (1974).

231. 1 PA. CONS. STAT. ANN. § 1923(c) (Purdon Supp. 1977) (emphasis added). Any argument that additional language affects the scope and operation of a statute can be met with the observation that it only affects the scope and operation to the extent necessary to interpret the statute as it clearly should be construed—according to the legislative purpose and intent.

232. 1 PA. CONS. STAT. ANN. § 1921(a) (Purdon Supp. 1977).

statute to be effective and certain."[233] These rules should be read in conjunction with another that provides, "[T]he General Assembly does not intend a result that is absurd, impossible of execution or unreasonable."[234] They indicate that an interpretation of the Sunshine Law permitting the entire decision-making process to occur out of public sight and allowing public access to only the final vote is incorrect. The avowed purpose and design of the Law is to open more meetings than were previously open and to open wider those meetings that had already been open.[235] Clearly this purpose is absurd, unreasonable, and impossible if the courts interpret the Law as requiring even less openness than was allowed before its enactment. Such a construction should, therefore, be avoided.

V. Conclusion

Although there will be few agency or department members who will admit that they continue to conduct their business and decision-making behind closed doors, this problem persists. In the course of the passage of the Sunshine Law, Senator Coppersmith voiced the public's cynicism that secretive meetings will continue.[236] Some previously secret meetings, however, have been opened. Circumstantial evidence of possible wheeling and dealing at meetings and the participants' reluctance to have the public privy to such proceedings may be found in the sudden departure from Harrisburg of members of the Conference Committee on the General Appropriations Bill as soon as their meetings were opened to the bright light of "Sunshine."[237] It is an old and still accepted maxim of legal evidence that proof of flight is relevant to establish a wrongdoing.[238] Whatever the shortcomings of the existing law, therefore, it does open meetings, and each newly opened meeting benefits the public.

The legislative floor debates reveal the legislature's intent in enacting the Sunshine Law.[239] Unfortunately, in the process of its legislative journey, the bill was dissected, amended, and weakened.[240] The blame for the courts' difficulty, therefore, lies with the legislature. The legisla-

233. *Id.* § 1922(2).

234. *Id.* § 1922(1).

235. *See* notes 37-38 and accompanying text *supra*.

236. "[Board members] will not meet together and they will discuss this willy-nilly, and the public will, instead of being served better, get a much worse type of governmental action." 1974 PA. SEN. J. 2099.

237. Harrisburg Patriot, July 16, 1977, at 1, col. 1.

238. Commonwealth v. Liebowitz, 143 Pa. Super. Ct. 75, 83, 17 A.2d 719, 722-23 (1941). *See also Proverbs* 28:1, "The wicked flee when no man pursueth; but the righteous are bold as a lion."

239. Legislative intent in enacting a statute must be the "polestar for construction" of that statute. *In re* Neshaminy Auto Villa Ltd., 25 Pa. Commw. Ct. 129, 133, 358 A.2d 433, 435 (1976). *See also* 1 PA. CONS. STAT. ANN. §§ 1921(a) & 1921(c) (Purdon Supp. 1977) (requiring that the courts consider the legislative intent).

240. *See* 1973 PA. H.R.J. 2071 (remarks by Representative Knepper) ("I think the bill has been compromised and diluted much more than those of us who are the sponsors would like to have seen it diluted").

ture implemented two different concepts for allowing closed meetings,[241] it omitted a section on legislative purpose that would specifically require liberal constructions,[242] and it has failed to enact amendments to alleviate these problems.[243] But the Law was passed with its faults.

The blame must now be shared by any Pennsylvania court that refuses to consider the purposes, intent, and policy of the legislature. No clear reason exists for the courts' reluctance to properly enforce the Law despite its faults. Earlier comments that the principal enforcement mechanism must be public opinion aroused by the media miss the mark.[244] Without conscientious efforts by the courts to prevent blatant "re-run" meetings at which formal votes are held and to implement the full public policy inherent in any Sunshine Law, there will be no open government in Pennsylvania.

RICHARD E. FEHLING

---

241. *See* notes 69-77 and accompanying text *supra*.

242. *See generally* Comment, 45 MISS. L.J. 1151 (1974), *supra* note 18, at 1162-63.

243. *See* Pa. H. 361 & 1374, Session of 1977. The text of the two bills is nearly identical. Bill 361 is the legislative response to the current interpretation of the Sunshine Law. Representative Knepper, the prime sponsor of the Sunshine Law, is also the prime sponsor of this bill to amend the Law.

244. Comment, 124 U. PA. L. REV. 536, *supra* note 34, at 560.