Governor's Office of Planning and Research

Hearing of June 22, 2015

Statement of Michael Asimow

Thanks for the opportunity to furnish written testimony on the Bagley Keene and Brown Acts. I'm sorry that I cannot attend the session on June 22.

As background, I am a long-term visiting professor at Stanford Law School and a professor emeritus at UCLA Law School. My academic specialization is California and federal administrative law and I have written numerous books and articles on this subject.

1. Sunshine laws stifle deliberation and do not enhance transparency. The reason to create a multi-member agency is to achieve collegial deliberation and compromise between the different points of view held by the members. Typically statutes creating multi-member agencies require partisan balance to take advantage of differing points of view. The idea is that collective deliberation contributes to wiser public policy than would be achieved by an agency headed by one person.

This purpose is almost completely stifled by sunshine acts. In most cases, the public meetings required by the law are a sham. They are completely scripted. The members of the agency never want to say anything with the public and the media present that could be used against them. The staff never wants to say anything that could embarrass the members. As a result, the members do not and cannot deliberate and the public learns nothing about the thought processes of the members. Thus sunshine acts are a nearly complete failure in enhancing transparency.

For some of the research on this issue, see James Cawley, "Sunshine Law Overexposure and the Demise of Independent Agency Collegiality," 1 Widener J. Pub. L. 43 (1992), an 80-page discussion featuring numerous examples of state and federal agencies unable to deliberate because of sunshine laws. Chai Feldblum, a commissioner of the federal Equal Employment Opportunity Commission, said in a recent talk that EEOC commissioners never deliberate in public but make all decisions through seriatim communications between two commissioners followed by notational voting (these workarounds are discussed below). Feldblum finds the situation totally frustrating but has been unable to do anything about it.

2. Appropriate situations for confidentiality. We should know by now that there are appropriate situations in which confidentiality is protected to enhance deliberation.

a. The attorney client privilege provides that confidential communications between attorneys and clients cannot be disclosed in court or in any other way. That certainly interferes with the pursuit of truth. Wouldn't it be great if the jury could find out everything the client told the lawyer? But they can't. The privilege is justified

because it encourages candid conversations between lawyers and clients. If the client knew that the attorney could be forced to disclose the contents of the communication, the client would never level with the attorney and attorneys would discourage clients from doing so.

b. The Freedom of Information Act (or FOIA) provides that all documents possessed by the government can be disclosed on request by anyone who asks for them. But there is a critical exception (statutory at the federal level, created by case law in Calif.)—the deliberative process exception. Pre-decisional conversations between government officials, such as a cabinet officer and the officer's advisory staff, are protected from public disclosure. Why is that? Because we know that the adviser will never give candid advice if that advice has to be disclosed go the public. The adviser will always worry about collateral damage, to the advisee or to him or herself, if the candid advice becomes public. So written advice would be bland generalities; the real advice would be given orally. In order to assure that our decision-makers can get candid written advice from their staff, such advice is privileged from disclosure under FOIA. But there is no deliberative process exception in sunshine laws.

c. As another example, consider the state and federal Supreme Courts which conduct their deliberations in closed meetings. It is easy to see that the work of the justices in determining their position on controversial issue would suffer badly if the deliberations had to be conducted in public meetings. Honest and blunt communications would never occur.

These examples illustrate the obvious—confidential deliberations will not occur if they are subject to public scrutiny. But sunshine laws ignore this basic insight about collective deliberation.

3. Federal workarounds. At the federal level, as explained by EEOC Commissioner Feldblum, agencies use various sub-optimal strategies to get around the Sunshine Act and carry on some form of deliberation.

a. Delegation to staff. Agencies frequently arrange for meetings between staff members for each of the commissioners. Each staff member, knowing his or her boss' preferences, negotiate with the other staff until a common position is worked out. Then that position is put to a vote in a public meeting without any further discussion. But this is far inferior to having the matter actually discussed by the members who can critique the views of their colleagues and negotiate compromises in ways that staff members can't.

b. Seriatim meetings. Another common approach is seriatim communications. For example, the chair might exchange emails with each other member separately. Assuming a quorum of 5, a 2-person email (or phone call or meeting) wouldn't violate the federal Sunshine Act. Through these communications, the chair eventually achieves a consensus which can be put to a vote. But this is vastly inferior to having a discussion between all of the members.

c. Notational voting. Commissioners can vote without a meeting through an electronic system (or presumably by a paper ballot),

d. At the federal level, a Supreme Court case allows for a Sunshine Act exception for background discussions. The members can get together in private for a general background discussion or to gather information from persons outside the agency. *FCC v ITT World Communications*, 466 US 463 (1984).

4. California bans workarounds. California bans these workarounds. Under Gov't C. §11122.5, a "meeting" is a congregation of a majority of members at same time and place to "hear, discuss, or deliberate" on any item within the subject matter of the agency. Thus the *ITT World Communications* loophole is closed.

Even more importantly, §11122.5(b) and a corresponding provision in the Brown Act state: "a majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body."

Thus all the workarounds used by federal agencies are closed off in California. There can be no seriatim meetings, phone calls or e-mails; no delegation to staff to meet and achieve consensus; no brainstorming sessions; no notational voting. Federal agencies find suboptimal ways to deliberate privately; California agencies have no way to do so. The consequences of this are extremely negative. Agency heads just can't deliberate or even manage their agencies.

5. Conclusion. I recognize that there is no chance that the Bagley Keene and Brown Acts will be repealed. This is politically unthinkable. However, I urge the Governor to press for legislation that would repeal §11122.5(b) and would permit brainstorming sessions. Thus California would at least permit state and local agencies to use these suboptimal but necessary strategies for deliberation. California agencies have vital responsibilities. We should let their members deliberate rather than tie them in knots.

Thanks for the opportunity to make my views known.

Michael Asimow