# A HEALTHY TAN IS BETTER THAN SUNBURN: OHIO'S "SUNSHINE LAW" AND NONPUBLIC COLLECTIVE INQUIRY<sup>1</sup> SESSIONS

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### Introduction

Ohio's Open Meetings Act, known as the "Sunshine Law," requires "public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." "Any person may bring an action to enforce this [statutory command]," and the public body that violates the Sunshine Law may be sanctioned.

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<sup>1</sup> The "collective inquiry" stage is the initial decisionmaking phase of public bodies where public officials identify and educate themselves on potentially salient issues. David A. Barrett, Note, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 Tex. L. Rev. 1195, 1205 (1988); *see also infra* Part II.

- <sup>2</sup> Ohio Att'y Gen., An Ohio Sunshine Laws Update 1 (1991).
- <sup>3</sup> OHIO REV. CODE ANN. § 121.22(A) (LexisNexis Supp. 2005).
- <sup>4</sup> Id. § 121.22(I)(1).
- <sup>5</sup> Section 121.22(B)(1) defines "public body" as follows:
  - (a) Any board, commission, committee, council, or similar decisionmaking body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decisionmaking body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;
  - (b) Any committee or subcommittee of a body described in division (B)(1)(a) of this section;
  - (c) A court of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for the purpose of the appointment, removal, or reappointment of a member of the board of directors of such a district pursuant to section 6115.10 of the Revised Code, if applicable, or for any other matter related to such a district other than

(continued)

The overarching justification for Ohio's Sunshine Law, and all open meetings legislation, is that a democratic society functions most effectively when its citizens have access to, and are informed of, the decisionmaking processes of its representatives. Government exists to serve the masses, not the secret, individual motives and peculiar ambitions of those in power. By requiring that meetings of public bodies be open to the citizenry, the Sunshine Law ensures that the populace is able to scrutinize and police the representatives and the processes by which it is governed. Indeed, James Madison declared that these principles formed the foundations of a society based on a popular form of government: "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

litigation involving the district. As used in division (B)(1)(c) of this section, "court of jurisdiction" has the same meaning as "court" in section 6115.01 of the Revised Code.

### Id. § 121.22(B)(1)(a)-(c).

- <sup>6</sup> Sanctions include the following: (1) Any "resolution, rule, or formal action of any kind" that is not "adopted in an open meeting of the public body" is invalid. *Id.* § 121.22(H); (2) "Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." *Id.* § 121.22(I)(1); (3) "If the court . . . issues an injunction . . . , the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and . . . reasonable attorney's fees." *Id.* § 121.22(I)(2)(a); (4) "Irreparable harm and prejudice to the party that sought the injunction shall be conclusively and irrebuttably presumed upon proof of a violation or threatened violation of [the Sunshine Law]." *Id.* § 121.22(I)(3); (5) "A member of a public body who knowingly violates an injunction issued pursuant to division (I)(1) of this section may be removed from office by an action brought in the court of common pleas for that purpose by the prosecuting attorney or the attorney general." *Id.* § 121.22(I)(4).
- <sup>7</sup> See Christopher W. Deering, Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After Dunn v. Alabama State University Board of Trustees, 28 CUMB, L. REV. 361, 368–69 (1997–1998).
  - <sup>8</sup> Id. at 369.
- <sup>9</sup> *Id.* at 368–69; *see* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173, 184 (1997) (discussing how public participation in agency decisionmaking may minimize "[e]xcessive [c]oncentration[s] of [p]ower").
- <sup>10</sup> See Rossi, supra note 9, at 182. Rossi argues that public participation in agency decisions may increase "oversight and accountability." *Id*.

their own Governors, must arm themselves with the power which knowledge gives." Open meetings legislation similar to Ohio's Sunshine Law has been enacted by the federal government, all fifty states, and the District of Columbia. Such legislation has brought life into the principle that citizens in a democratic society must be granted the right to be fully informed not only of the final decisions made by public bodies but also of the *deliberative process* by which these decisions are reached—including the weighing and examining of ideas that culminate in official action. These laws, however, are heavily varied. Is

Not all commentary on the actual effects of open meetings has been positive. The public's right to witness the deliberative processes of its representatives must be balanced with the right of the public body to perform its functions effectively and efficiently.<sup>16</sup> Indeed, while open meetings legislation is primarily concerned with facilitating public scrutiny of the government's decisionmaking process,<sup>17</sup> it is not concerned with granting citizens the power to *make* the decisions themselves. The drafters of open meetings legislation recognize that in various situations, the policy

<sup>&</sup>lt;sup>11</sup> White v. Clinton County Bd. of Comm'rs, 667 N.E.2d 1223, 1226 (Ohio 1996) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 337, 337 (Saul K. Padover ed., 1953)).

<sup>&</sup>lt;sup>12</sup> 5 U.S.C. § 552b (2000).

<sup>&</sup>lt;sup>13</sup> Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1165 (1993) (citing R. James Assaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 229 (1989)).

<sup>&</sup>lt;sup>14</sup> See Deering, supra note 7, at 368–69.

<sup>&</sup>lt;sup>15</sup> Id. at 367; James C. Hearn et al., Governing in the Sunshine: Open Meetings, Open Records, and Effective Governance in Public Higher Education, Pub. Pol.'y Paper Series (Ass'n of Governing Bds. of Univs. & Colls., Washington, D.C.), April 2004, at 2, http://www.agb.org/ (follow "Search" hyperlink and search "Governing in the Sunshine"; then follow first returned hyperlink) (noting that sunshine laws not only vary across geographical and jurisdictional boundaries, but also within individual states themselves depending on the type of public body).

<sup>&</sup>lt;sup>16</sup> "[I]ndiscriminate participation in the agency decisionmaking process potentially interferes with agency agenda setting and threatens the deliberative propensity of the process." Rossi, *supra* note 9, at 218. "By facilitating strategic action by participants, such as additional delay and the obfuscation of issues, such information may work to take additional agency time and resources without necessarily improving the rationality of the final agency decision or the deliberative quality of the decisionmaking process." *Id.* at 228.

<sup>&</sup>lt;sup>17</sup> See id. at 186.

reasons for limiting public access to meetings of public bodies outweigh the policy reasons for granting the public unfettered access to such meetings. For example, those who disrupt a public meeting may waive their right to attend and may be removed from the meeting. Moreover, Ohio's statute itself carves out a number of exceptions to which the Sunshine Law does not apply, implicitly acknowledging that public policy favors excluding the public from certain types of meetings.

In addition to the difficulties posed with balancing the right of public access with the public body's right to confidentiality, Ohio's Sunshine Law also poses interpretive challenges. In particular, the scope of Ohio's Sunshine Law is difficult to demarcate because the statute itself does not define the words "discussion" or "deliberations." Under Ohio's Sunshine Law, the only meetings that must be open to the public are those where the public body (1) engages in "any prearranged *discussion* of [its] public business . . . by a majority of its members", <sup>20</sup> (2) "*deliberat[es]* upon official [public] business"; <sup>21</sup> or (3) "take[s] official action." Because the words "deliberations" and "discussion" are not defined in the statute, there is little statutory guidance as to which decisionmaking processes constitute "deliberations" or "discussion" such that the Sunshine Law is triggered and the public must be granted access to witness the processes.

<sup>&</sup>lt;sup>18</sup> Staff Report, Sunshine Laws Get Once Over, Bucyrus Telegraph-Forum, Apr. 29, 2004, at A1, available at 2004 WLNR 1616350.

<sup>&</sup>lt;sup>19</sup> The excepted meetings include the following: grand juries; "audit conference[s] conducted by the auditor of state or independent certified public accountants with officials of the public office that is the subject of the audit"; the adult parole authority conducting a hearing "for the sole purpose of interviewing inmates to determine parole or pardon"; "organized crime investigations"; "[m]eetings of a child fatality review board"; meetings of the state medical board, the board of nursing, the board of pharmacy, or the state chiropractic board "when determining whether to suspend a license without a prior hearing"; and meetings of the "executive committee of the emergency response commission when determining whether to issue an enforcement order or request that a civil action, civil penalty action, or criminal action be brought." Ohio Rev. Code Ann. § 121.22(D) (LexisNexis Supp. 2005). The statute also permits the public body to close a meeting during consideration of the following confidential information: marketing plans; specific business strategy; production techniques and trade secrets; financial projections; and "[p]ersonal financial statements of the applicant or members of the applicant's immediate family, including, but not limited to, tax records or other similar information not open to public inspection." Id. § 121.22(E).

<sup>&</sup>lt;sup>20</sup> Id. § 121.22(B)(2) (emphasis added).

<sup>&</sup>lt;sup>21</sup> *Id.* § 121.22(A) (emphasis added).

<sup>&</sup>lt;sup>22</sup> *Id*.

This lack of clarity in the meaning of "deliberations" and "discussion" is fertile ground for legal argument, as these words serve to delineate the boundaries between permissible and impermissible conduct of public bodies, and define the proper role of public bodies with respect to the citizenry which they serve. At what point on the continuum of a public body's decisionmaking process does the public body's actions shift into the realm of deliberations or discussion? For example, when a public body merely collects or gathers information to assist it in making decisions, is briefed by a university president or chairperson of the board on issues relating to its delegated duties, or engages in question-and-answer sessions with speakers who present information to the public body, must these sessions be open to the public because they can be characterized as deliberations or discussion of the public body?<sup>23</sup> Do "deliberations" and "discussion" require something more—additional mental processes where issues are weighed and examined or where public body members exchange views with one another—before the threshold of permissible nonpublic conduct is crossed and the public body is then said to have engaged in impermissible nonpublic deliberations or discussion? informational, briefing, question-and-answer, and other informal factgathering sessions (hereinafter, "collective inquiry",24 sessions) do not fall within the command of the Sunshine Law such that the public can lawfully be excluded, what are the parameters within which a public body must conduct itself? Perhaps even more importantly, how can the public body assure the public that the sessions have not slipped into the realm of impermissible deliberative conduct if the public is not granted access to the sessions to police them?

This Article will critically analyze these primary questions: (1) Which actions by public officials constitute deliberations or discussion thus requiring that the public be granted access because the Sunshine Law has

<sup>&</sup>lt;sup>23</sup> For example, when a university president convenes the board of trustees and merely announces what issues will be voted on at the public meeting, does such a meeting constitute deliberations or discussion that trigger the Sunshine Law if board members do not weigh and examine the pros and cons for and against any issues? When a school board wants to convene simply to gather information and increase its knowledge about architectural designs for school buildings, but does not wish to select any particular design or exchange views with one another regarding preferences for any particular design, must the school board permit public access to such a meeting because it is engaging in deliberations or discussion and hence activates the Sunshine Law? See Part II, *infra*, for a discussion of the decisionmaking stages of public bodies.

<sup>&</sup>lt;sup>24</sup> See Barrett, supra note 1, at 1205.

been triggered?; (2) As a matter of public policy, should Ohio's Sunshine Law be interpreted narrowly so that collective inquiry activities are deemed to fall just short of deliberations or discussion, or broadly, which pulls collective inquiry sessions within the ambit of deliberations or discussion, so that the Sunshine Law is activated and the public must have access?

Part I of this Article explores the meaning behind the labels "collective inquiry," "deliberations," "discussion," and "official action" by describing their roles in the decisionmaking process. It then places these terms in a real-life context by examining a recent controversy involving The Ohio State University Board of Trustees. Next, the narrow definitions of deliberations and discussion supplied by Ohio's appellate courts are discussed and contrasted with the trend toward a broader construction of the Sunshine Law as evidenced by its legislative history and by Ohio Supreme Court decisions.

Part II ventures into a fact-intensive analysis of Ohio appellate court decisions seeking to interpret the boundaries of "deliberations" and "discussion" by applying them to specific controversies. Probing the holdings of the aforementioned court cases, Part II also distills from the cases a list of guidelines to which public body members should adhere in order to insulate themselves from Sunshine Law violations during collective inquiry sessions that exclude the public.

Part III sets forth additional authorities and arguments to bolster the position that private collective inquiry sessions should be legal as a matter of public policy. Specifically, these sessions may strike a much needed balance between the rights of the public to oversee its representatives in action and the rights of the public body to competently and efficiently perform its designated duties. The public benefits from granting some breathing space to its representatives, although the breathing space need not be unbridled.

## I. "SHEDDING LIGHT" ON COLLECTIVE INQUIRY, DELIBERATIONS/DISCUSSION, AND OFFICIAL ACTION

Whether or not a public body must conform to the mandates of the Sunshine Law depends on the label that is applied to the conduct of the public body. If the conduct is labeled as a collective inquiry, the public body may lawfully exclude the public because the Sunshine Law does not pertain to that conduct. If a majority of the public body engages in activities that are labeled deliberations, discussion, or official action,

however, the public must be granted access.<sup>25</sup> This Part elucidates the labels "collective inquiry," "deliberations," "discussion," and "official action" in three ways. Subpart A describes their roles in the decisionmaking process of public bodies. Subpart B places these labels in real-life context by describing a recent Sunshine Law controversy at The Ohio State University involving a fact-fight for the label: when a university president "briefs" the board of trustees does that conduct constitute "collective inquiry" and permit the public body to lawfully exclude the public, or does a briefing session involve "deliberations" or "discussion" such that the public must be granted access? Subpart C then sets forth the definitions of "deliberations" and "discussion" that have been supplied by Ohio's appellate courts to help delineate the boundaries that separate collective inquiry from deliberations and discussion.

# A. The Stages of Decisionmaking: Collective Inquiry, Deliberations/Discussion, and Official Action

Commentators have characterized the decisionmaking processes of public bodies as a three-stage continuum: collective inquiry, <sup>26</sup> deliberations/discussion, and decision. <sup>27</sup> The first stage, collective inquiry, is entered when a potentially salient issue is called to the agency's attention. <sup>28</sup> The agency and its staff seek to clarify and define the particular issue; expand their knowledge about the issue, its scope, and its ramifications; and identify potential solutions without weighing, examining, comparing, or contrasting them. <sup>29</sup> Collective inquiry is an essential precursor to the later deliberative and decisionmaking stages because efficient decisions rest on an agency's ability to augment its universe of knowledge about a particular issue. <sup>30</sup> Toward that end, the collective inquiry stage usually includes activities such as gathering information; conducting research; listening to experts, presentations, and testimony; creating study committees; briefing staff members; and

<sup>&</sup>lt;sup>25</sup> § 121.22(A), (B)(2).

<sup>&</sup>lt;sup>26</sup> Some commentators label the collective inquiry stage as the "pre-deliberation" stage. *See, e.g.*, Stephen Schaeffer, Comment, *Sunshine in Cyberspace?: Electronic Deliberation and the Reach of Open Meeting Laws*, 48 St. Louis U. L.J. 755, 782 (2004).

<sup>&</sup>lt;sup>27</sup> Barrett, *supra* note 1, at 1205.

<sup>&</sup>lt;sup>28</sup> *Id*.

<sup>&</sup>lt;sup>29</sup> See id.

<sup>&</sup>lt;sup>30</sup> See id. "[C]ollective inquiry comprises all actions and discussions that expand the foundation of knowledge upon which members later reach a decision." *Id*.

brainstorming.<sup>31</sup> These activities are designed to equip the public body with the informational tools necessary to effectively deliberate and reach quality decisions.<sup>32</sup>

The expansive, information-gathering collective inquiry stage then shifts into the narrower, decision-oriented deliberations/discussion stage.<sup>33</sup> Because the relevant information has been gathered and the issues have been clarified during the collective inquiry stage, board members are now able to engage in higher mental functions; this involves weighing and examining views, evaluating alternatives, and making assessments to help them arrive at decisions.<sup>34</sup> The deliberations/discussion stage culminates in the official action, or decisionmaking stage, where the public body arrives at a final determination or resolution of the issue.<sup>35</sup>

Legal authority and commentary indicate widespread agreement that the deliberations/discussion and decisionmaking stages must be open to the public. However, there is disagreement primarily centering on whether the collective inquiry stage too must be open to the public.<sup>36</sup> This theoretical difference was largely responsible for a recent controversy at The Ohio State University.<sup>37</sup> A broad reading of the Sunshine Law would pull factgathering and other collective inquiry activities within the domain of the

<sup>&</sup>lt;sup>31</sup> *Id*.

<sup>32</sup> See id.

<sup>&</sup>lt;sup>33</sup> *Id*.

<sup>&</sup>lt;sup>34</sup> See id. at 1205–06.

<sup>35</sup> See id. at 1206.

<sup>&</sup>lt;sup>36</sup> *Id.* Unlike Ohio's Sunshine Law, various state sunshine laws unambiguously include collective inquiry sessions within the ambit of their sunshine laws through the use of varying forms of statutory language: "receive information," IND. CODE ANN. § 5-14-1.5-2(d)(1) (West 2002); "informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting," Ky. Rev. Stat. Ann. § 61.805(1) (West 2002); "presented," Ga. Code Ann. § 50-14-1(a)(2) (2002). On the other hand, several states specifically exclude collective inquiry sessions from their sunshine laws. In Pennsylvania, meetings include "[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action" where deliberation is limited to "[t]he discussion of agency business *held for the purpose of making a decision.*" 65 Pa. Cons. Stat. Ann. § 703 (West 2005) (emphasis added). See also Michigan's Sunshine Law: "This act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid this act." MICH. COMP. LAWS Ann. § 15.263(3)(10) (West 2004).

<sup>&</sup>lt;sup>37</sup> See infra Part I.B.

Sunshine Law and require public access to the sessions; a narrow reading of the Sunshine Law would exclude the sessions from its mandates.

B. The Fight for the Label: The Ohio State University and "Briefing" Sessions

In assessing whether the Sunshine Law is applicable, the label that is applied to the conduct of public officials is determinative. Whether such conduct is best characterized as "collective inquiry," "deliberations," or "discussion" often involves a fact-fight. This struggle was evidenced on July 9, 2004, when The Ohio State University Board of Trustees, without notifying the media, met in a morning session that was closed to the public.<sup>38</sup> Later that afternoon, the board convened in a public meeting and, without discussion, voted unanimously to extend university health insurance benefits to same-sex and other domestic partners who were employed by or attended Ohio State.<sup>39</sup> The nonpublic session that preceded the public meeting was criticized in the media by Sunshine Law "experts" who concluded that the session violated the Sunshine Law because the public was excluded. 40 One commentator characterized the session as "a sad spectacle of a great university being reduced to . . . secretive maneuvering.",41

In its defense, Ohio State asserted that the nonpublic session did not violate Ohio's Sunshine Law because the session was not a meeting where discussion, deliberations, or official action took place. In fact, the university contended that no substantive discussion of the health insurance benefits issue even occurred at the nonpublic session. The university also asserted that it was not required to invite the public to the nonpublic session because it was a mere "briefing session" where the president simply apprised the board about university issues and where board members asked questions of university administrators and listened to them speak. One source described Ohio State's position as "blather and bull,"

 $<sup>^{38}</sup>$  Kathy Lynn Gray, Secret OSU Board Meetings Questioned, Columbus Dispatch, July 10, 2004, at A3.

<sup>&</sup>lt;sup>39</sup> Bill Bush, *OSU Says Meetings OK; Others not so Sure*, COLUMBUS DISPATCH, July 13, 2004, at A1.

<sup>&</sup>lt;sup>40</sup> *Id*.

<sup>&</sup>lt;sup>41</sup> Jeni Horn, Op-Ed., *OSU Trustees Skirted Public Discussion on Same-Sex Issue*, COLUMBUS DISPATCH, July 15, 2004, at A13.

<sup>&</sup>lt;sup>42</sup> See Gray, supra note 38.

<sup>&</sup>lt;sup>43</sup> Bill Bush, *Petro Says Meetings Can't Be in Secret*, COLUMBUS DISPATCH, July 15, 2004, at A1.

<sup>&</sup>lt;sup>44</sup> Gray, supra note 38.

alleging that because board members asked questions of the president at the nonpublic session, that the session was a "discussion" that triggered the Sunshine Law.<sup>45</sup>

In the midst of this controversy, Ohio Attorney General Jim Petro delivered a warning to Ohio State and all Ohio universities and trustees, urging them to curtail the practice of conducting secret deliberations or one-on-one discussions between officials, if their boards were engaging in such practices. Petro did not, however, allege that Ohio State had actually violated the Sunshine Law. Before receiving Petro's warning, Ohio State, "in the spirit of openness," decided to stop holding private briefing sessions.

C. Eclipsing the Sunshine: The Narrow Definitions of "Deliberations" and "Discussion" Supplied by Ohio's Appellate Courts

Whether the briefing sessions at The Ohio State University can be classified as collective inquiry, or more appropriately as deliberations or discussion, depends on the precise definitions of these labels. definitions are also important because they, along with the cases and controversies that interpret them, delineate the boundaries of permissible and impermissible conduct, which places public officials on notice as to which conduct activates the Sunshine Law. How broadly or narrowly "deliberations" and "discussion" are defined is significant; if defined broadly enough, "deliberations" and "discussion" could possibly swallow activities, such as briefing sessions, that might appear to be collective inquiry activities. If that were the case, The Ohio State University might then have violated the Sunshine Law by excluding the public from a briefing session that the court would label "deliberations" or a "discussion." On the other hand, if "deliberations" and "discussion" are defined narrowly, activities that might appear to be discussion or deliberations would nevertheless be labeled collective inquiry, thereby escaping the commands of the Sunshine Law.

Ohio's appellate courts seem to have counterbalanced the broad interpretations of Ohio's Sunshine Law suggested by the language of the statute, its legislative history, and Ohio Supreme Court interpretations with

<sup>45</sup> Bush, supra note 39.

<sup>46</sup> Bush, supra note 43.

<sup>&</sup>lt;sup>47</sup> See id.

<sup>&</sup>lt;sup>48</sup> *Id*.

a narrower construction of the statute.<sup>49</sup> For example, one court held that initially the burden of proof is upon the complainant who alleges a Sunshine Law violation.<sup>50</sup> Moreover, the courts have determined that the absence of discussion on a particular issue at a public meeting does not necessarily lead to a proper inference that the board had already discussed the issue privately.<sup>51</sup> Applying this to the controversial facts involving The Ohio State University, the appellate courts might conclude that just because the board of trustees emerged from a private briefing session and later that day voted on the health benefits issue in a public meeting without discussion, it does not mean that the issue was impermissibly discussed in the private session. Rather, the burden would fall on the complainant to supply proof that the issue was impermissibly discussed in the private briefing session.

Perhaps most pertinent to the legal question at hand are the narrow definitions of "deliberations" and "discussion" that have been supplied by Ohio's appellate courts. In essence, the appellate courts have required something beyond collective inquiry activities before the conduct can be characterized as involving deliberations or discussion.<sup>52</sup>

### 1. Meaning of "Deliberations"

a. First Definition of "Deliberations"

"Deliberations" involve more than information-gathering, investigation, or fact-finding . . . . [Deliberation is defined]

<sup>&</sup>lt;sup>49</sup> For a discussion of the statutory language, the evolution of the statute, and its interpretations by the Ohio Supreme Court, see *infra* Part II.

<sup>&</sup>lt;sup>50</sup> "The statute is worded that 'upon proof of a violation,' not 'if the board proves compliance.' Therefore, the burden of proof, at the very least, initially is upon [complainants]." DeVere v. Miami Univ. Bd. of Trs., No. CA85-05-065, 1986 Ohio App. LEXIS 7171, at \*15 n.5 (Ohio Ct. App. June 10, 1986) (per curiam).

<sup>&</sup>lt;sup>51</sup> Id. at \*11, \*14 n.3.

<sup>&</sup>lt;sup>52</sup> See, e.g., Vos v. Vill. of Washingtonville, 7th Dist. No. 03-CO-20, 2004-Ohio-1388, ¶ 26; Mansfield City Council v. Richland County Council AFL-CIO, No. 03 CA 55, 2003 Ohio App. LEXIS 6654, at \*10 (Ohio Ct. App. Dec. 24, 2003); Steingass Mech. Contracting, Inc. v. Warrensville Heights Bd. of Educ., 151 Ohio App. 3d 321, 2003-Ohio-28, 784 N.E.2d 118, ¶¶ 50−52; Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees, 667 N.E.2d 458, 464 (Ohio Ct. App. 1995); Holeski v. Lawrence, 621 N.E.2d 802, 805 (Ohio Ct. App. 1993); Theile v. Harris, No. C-860103, 1986 Ohio App. LEXIS 7096, at \*15 (Ohio Ct. App. June 11, 1986); *Devere*, 1986 Ohio App. LEXIS 7171, at \*10−11.

"as the act of weighing and examining the reasons for and against a choice or measure" or "a discussion and consideration by a number of persons for the reasons for and against a measure." Question-and-answer sessions between board members and other persons who are not public officials<sup>53</sup> do not constitute "deliberations" unless a

53 Whether one qualifies as a "public official" under Ohio's Sunshine Law is another complex issue in and of itself. Based upon this first definition of "deliberation," The Ohio State University most likely did not violate the Sunshine Law when its president merely briefed the board of trustees in a private session, provided that board members did not exchange views with other board members concerning public business. However, the issue is somewhat complicated by the fact that it was the university president who briefed the board of trustees. Ohio's appellate courts have emphasized that "the Sunshine Law is not intended to prevent a majority of a board from being in the same room and answering questions or making statements to *other persons who are not public officials.*" *Holeski*, 621 N.E.2d at 806. Is a university president a public official? *DeVere* appeared to answer this question for at least one Ohio appellate jurisdiction, though implicitly, when it concluded that no Sunshine Law violation occurred when the president of Miami University conducted a similar briefing session with the board of trustees. *DeVere*, 1986 Ohio App. LEXIS 7171, at \*8, \*13.

Although not binding authority in Ohio, a Michigan attorney general opinion provided an interesting twist to Michigan's narrow Sunshine Law and the meaning of "public official" when it characterized a university president as a public official. *See* 1979–1980 Mich. Op. Att'y Gen. 5433 (1979). The Michigan Sunshine Law states, "This act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid this act." MICH. COMP. LAWS ANN. § 15.263(3)(10) (West 2004). In construing the meaning of "conference not designed to avoid this act," the Michigan attorney general concluded.

A public body may . . . attend a conference or informational gathering designed to focus upon issues of general concern and intended primarily to provide training and/or background information, provided that a public body may not, without complying with the Open Meetings Act, engage in discussions or deliberations during such a meeting or otherwise enter into the process of addressing or resolving issues of public policy.

1981-1982 Mich. Op. Att'y Gen. 6074 (1982).

Based on this language alone, it would seem that when a university president simply briefs a board of trustees, such a session would be immunized from the commands of Michigan's Sunshine Law and could be closed to the public. However, in a prior opinion, the Michigan attorney general declared that this "conference" exemption from the Michigan Sunshine Law was inapplicable to "department heads" or "administrators" conducting (continued)

majority of the board members also entertain a discussion of public business with one another.<sup>54</sup>

b. Second Definition of "Deliberations"

At least one Ohio appellate court has restricted the meaning of "deliberations" even further:

We believe that for purposes of Ohio's Sunshine Law, a public body deliberates upon official business after it has obtained the relevant and salient facts necessary to reach a correct, proper, prudent, and responsible decision. We hold that after a public body has obtained the facts, it deliberates by thoroughly discussing all of the factors involved, carefully weighing the positive factors against the negative factors, cautiously considering the ramifications of its proposed action, and gradually arriving

closed presentational sessions with their public bodies. 1979–1980 Mich. Op. Att'y Gen. 5433 (1979). Specifically, the Michigan attorney general determined that department heads or administrators of a college may not meet with the college board of trustees in a closed session. *Id.* The attorney general explained the rationale for this interpretation:

These presentations of administrators are part of the deliberative process through which decisions on public policy are reached. To label such a gathering of public officials to discuss public business as a "conference," would defeat the intent of the legislature to encourage openness in government . . . . [W]hen gatherings are designed to receive input from officers or employees of the public body, the Open Meetings Act . . . requires that the gathering be held at a public meeting.

Id.

This reasoning harmonized with the attorney general's conclusion that "the purpose and function of [a] workshop . . . or other informational gathering is to consider issues broader than those affecting the particular public body only." 1979–1980 Mich. Op. Att'y Gen. 6074 (1982). Therefore, even though Michigan contains an explicit "conference" exemption to its Sunshine Law, this exemption has been construed quite narrowly by Michigan's attorney general to exclude presentations by administrators or department heads—such as a university president—to the board of trustees. 1979–1980 Mich. Op. Att'y Gen. 5433 (1979). In Ohio, however, no similar opinion has yet been rendered by the Ohio Supreme Court, by any of Ohio's appellate courts, or by the Ohio attorney general. It will be interesting to witness the evolution of the law as it pertains to the definition of "public official."

<sup>&</sup>lt;sup>54</sup> Springfield Local, 667 N.E.2d at 464.

at a proper decision which reflects this legislative process. 55

### 2. Meaning of "Discussion"

Ohio appellate courts have defined "discussion" as "an 'exchange of words, comments, or ideas by the board." 56

3. Rationale for Narrow Constructions of "Deliberations" and "Discussion"

Thus far, Ohio's appellate courts have not ventured into exhaustive public policy or theoretical discussions as to why narrow constructions of "deliberations" and "discussion" are preferable to broader interpretations. Why should public bodies be given such leeway or breathing space before the activities of those bodies can be said to constitute deliberations or discussion that trigger the Sunshine Law? A more detailed analysis of this question and further support for a narrow construction of "deliberations" and "discussion" is forthcoming in Part III, but generally, Ohio's appellate courts have recognized the necessity of permitting public bodies to perform their delegated duties unhampered. Toward that end, one court stated that "Ohio's courts have recognized that information-gathering and fact-finding are *essential functions* of any board, and that the gathering of facts and information for ministerial purposes does not constitute a violation of the [Ohio] Sunshine Law." 57

D. The Sun Rises: The Broader Interpretations of Ohio's Sunshine Law Suggested by Its Legislative History and the Ohio Supreme Court

Although Ohio's appellate courts have construed the Sunshine Law narrowly with respect to collective inquiry activities, a narrow construction of the statute is not necessarily suggested by the legislative history of the statute or by Ohio Supreme Court decisions.

1. The Statutory Language of Ohio's Sunshine Law

The pertinent statutory language of Ohio's Sunshine Law is set forth in Ohio Revised Code § 121.22. Section (A) states, "This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings

<sup>&</sup>lt;sup>55</sup> Theile, 1986 Ohio App. LEXIS 7096, at \*15.

<sup>&</sup>lt;sup>56</sup> Mansfield City Council, 2003 Ohio App. LEXIS 6654 at \*10 (quoting Holeski, 621 N.E.2d at 806); Springfield Local, 667 N.E.2d at 464 (quoting Holeski, 621 N.E.2d at 806).

<sup>&</sup>lt;sup>57</sup> Holeski, 621 N.E.2d at 805 (emphasis added).

unless the subject matter is specifically excepted by law."<sup>58</sup> The only word in section (A) that is statutorily defined is "meeting," which means "any prearranged discussion of the public business of the public body by a majority of its members."<sup>59</sup>

Reading these sections together, meetings that must be open to the public include those where a public body (1) takes "official action";<sup>60</sup> (2) engages in any "prearranged discussion of [its] public business by a majority of its members";<sup>61</sup> or (3) "deliberat[es] upon official business."<sup>62</sup> The first of these—"official action"—has generated little interpretive conflict since it is relatively unambiguous. Prior to 1975, this type of action was the only class of conduct that triggered the open meetings requirement.<sup>63</sup> In Beacon Journal Publishing Co. v. City of Akron, the Ohio Supreme Court held that the Sunshine Law, as it then existed, permitted a public body to deliberate upon official business in a private session as long as the resolution, rule, regulation, or formal action was adopted in an open, public session.<sup>64</sup> The current Sunshine Law overrules this interpretation, in favor of greater openness, by bringing "deliberations"

"All meetings of any board or commission of any state agency or authority are declared to be public meetings open to the public at all times. No resolution, rule, regulation or formal action of any kind shall be adopted at any executive session of any such board, commission, agency or authority."

Beacon Journal Publ'g Co. v. City of Akron, 209 N.E.2d 399, 400 (Ohio 1965) (per curiam) (quoting Ohio Rev. Code Ann. § 121.22 (Baldwin Cumulative Issue 1954) (current version at Ohio Rev. Code Ann. § 121.22 (LexisNexis Supp. 2005))).

<sup>&</sup>lt;sup>58</sup> OHIO REV. CODE ANN. § 121.22(A) (LexisNexis Supp. 2005).

<sup>&</sup>lt;sup>59</sup> *Id.* § 121.22(B)(2).

<sup>&</sup>lt;sup>60</sup> *Id.* § 121.22(A) (emphasis added).

<sup>&</sup>lt;sup>61</sup> *Id.* § 122.22(B)(2). The Sunshine Law is inapplicable to meetings of public bodies where less than a majority of its members are present. *See id.* For example, if a board of trustees is composed of five members, the Sunshine Law is not violated where two of those members meet and discuss or deliberate. However, recognizing the potential for abuse, the Ohio Supreme Court has refused to permit public bodies to dodge the open meeting requirement by holding a series of back-to-back meetings where less than a majority of the public body is present. *See* State *ex rel.* Cincinnati Post v. City of Cincinnati, 668 N.E.2d 903, 905–06 (Ohio 1996).

<sup>&</sup>lt;sup>62</sup> § 121.22(A) (emphasis added).

<sup>&</sup>lt;sup>63</sup> The pre-1975 Sunshine Law provided:

<sup>&</sup>lt;sup>64</sup> See Beacon Journal, 209 N.E.2d at 404–05.

within the umbrella of the statute. <sup>65</sup> Under the current version of Ohio's Sunshine Law, the public must not only have access to the final products of a public body's decisionmaking process—those rules, regulations, or resolutions that are ultimately adopted—but also to the deliberative process itself from which such rules, regulations, or resolutions coalesce. <sup>66</sup> As the Ohio Supreme Court stated,

The 1975 amendment to R.C. 121.22 was intended to expand public access to the operation of state and local governmental entities. The major thrust of this amendment was to require that not only formal actions of public bodies, but also the deliberations preceding those actions, take place in sessions open to the public.<sup>67</sup>

Thus, based on this addition of "deliberations" to the statute, it is not necessary for a public body to reach a decision, pass a resolution, or take formal action on any measure in order to violate Ohio's Sunshine Law. This interpretation harmonizes with the purpose of the Sunshine Law—that the public has the right to know not only which decisions are made by their representatives, but also *how* those decisions are reached. 69

The second and third categories of meetings that must be open to the public—those involving deliberations or discussion—have engendered much more interpretive conflict because their meanings are ambiguous and the statute itself does not define them. It would appear on first impression that "deliberations" and "discussion" should be broadly construed, thereby pulling informational, briefing, question-and-answer, and other sessions of a collective inquiry nature within the ambit of the Sunshine Law. This assumption rests on both the language and the legislative history of the statute. First, § 121.22 commands that it "shall be liberally construed." Thus, the law favors a strong presumption of openness. Second, the 1975 addition of "deliberations" to the statute suggests a legislative trend toward greater public access; the Sunshine Law was no longer activated solely by

<sup>65 § 121.22(</sup>A).

<sup>66</sup> Id.

<sup>&</sup>lt;sup>67</sup> Matheny v. Frontier Local Bd. of Educ., 405 N.E.2d 1041, 1044 (Ohio 1980) (per curiam), *superceded by statute on other grounds*, 1988 Ohio Laws 3356, *as recognized in* Gerner v. Salem City Sch. Dist. Bd. of Educ., 630 N.E.2d 732, 735 (Ohio 1994).

<sup>&</sup>lt;sup>68</sup> See State ex rel. Delph v. Barr, 541 N.E.2d 59, 63 (Ohio 1989).

<sup>&</sup>lt;sup>69</sup> See State ex rel. Cincinnati Post v. City of Cincinnati, 668 N.E.2d 903, 906 (Ohio 1996).

<sup>&</sup>lt;sup>70</sup> § 121.22(A).

official action.<sup>71</sup> In essence, the legislative history of the statute evidences an increasingly broader scope.<sup>72</sup>

### 2. The Ohio Supreme Court

The Ohio Supreme Court has neither defined the words "deliberations" or "discussion," nor determined whether collective inquiry activities may be labeled as "deliberations" or "discussion." Accordingly, no definitive answer or authoritative guidance to this legal conundrum currently exists.

In what could be relevant decisions, however, the Ohio Supreme Court appears to have construed the statute broadly. The Ohio Supreme Court has refused to allow public bodies to circumvent the statute where, for example, a city council called back-to-back closed meetings with less than a majority of council members present at each meeting in a purported attempt to render the statute inapplicable. In *Cincinnati Post*, the Ohio Supreme Court liberally construed the Sunshine Law and held that the back-to-back meetings were really one meeting where a majority of the council members were present, thus bringing the meetings within the scope of the Sunshine Law. As previously mentioned, the Ohio Supreme Court has ruled that it is not necessary for a public body to actually reach a decision on any measure in order to violate the Sunshine Law. For example, the Ohio Supreme Court reversed in part an appellate court's decision that the circumstances under which a police chief was appointed

<sup>&</sup>lt;sup>71</sup> See Matheny, 405 N.E.2d at 1044.

<sup>&</sup>lt;sup>72</sup> But the legislature's adoption of the relatively narrow words "deliberations" and "discussion," rather than broader terms such as "assembly," "gathering," or "conference," may indicate a legislative intent to narrow the statute's reach. For example, see the United States Supreme Court's interpretation of the federal Sunshine Law in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 470 n.7 (1984), in Part III.D, *infra*, holding that Congress's adoption of the word "deliberations" rather than broader terms was an attempt to narrow the scope of the federal Sunshine Law so as to permit nonpublic informal background discussions.

<sup>73</sup> See Cincinnati Post, 668 N.E.2d at 906.

<sup>&</sup>lt;sup>74</sup> *Id.* at 906–07. In *Cincinnati Post*, the city manager had called three sets of back-to-back meetings with less than a majority of city council members present in order to consider whether the City of Cincinnati should build a new stadium for the Cincinnati Bengals, thereby preventing the team from relocating to Baltimore. *Id.* at 904. "In depositions the city manager testified that 'the reason for having fewer than a majority of members of council at a meeting is so that we wouldn't violate Ohio['s] Open Meetings Law."" *Id.* 

<sup>&</sup>lt;sup>75</sup> *Id.* at 906–07.

<sup>&</sup>lt;sup>76</sup> See State ex rel. Delph v. Barr, 541 N.E.2d 59, 63 (Ohio 1989).

did not violate the Sunshine Law.<sup>77</sup> The appellate court had determined that no Sunshine Law violation occurred because public officials had not "conclusively" decided to appoint the police chief at an informal, private meeting attended by members of a civil service commission.<sup>78</sup> The Ohio Supreme Court reversed, stating that "R.C. 121.22(H) . . . invalidates any formal action that results from deliberations conducted in private. The commission's formal action resulted from deliberations taken at a private, informal meeting."<sup>9</sup> The Ohio Supreme Court has also determined that a public body may not successfully defend itself against a Sunshine Law violation by claiming that it did not initiate the meeting.<sup>80</sup> Finally, and perhaps most relevant to the legal question at hand, the Ohio Supreme Court held that the Sunshine Law was violated where officials of local governments met in a closed "'workshop' or 'retreat' . . . to discuss their respective communities' . . . concerns and plans for future development"<sup>81</sup> because the meetings constituted discussions of public business.<sup>82</sup>

The statutory language, the legislative history, and the tenor of judicial gloss provided by the Ohio Supreme Court appear to suggest that Ohio's Sunshine Law is quite broad. Liberal interpretations of the statute, consistent with the statutory command that the Sunshine Law "shall be liberally construed," might ensuare collective inquiry activities within the ambit of the Sunshine Law since those sessions might arguably be characterized as discussion, deliberations, or as furtive attempts to dodge or circumvent the commands of the statute. The Ohio Supreme Court has not determined whether conduct that appears to be best classified as collective inquiry should nonetheless be deemed to involve deliberations or discussion. Therefore, a legal uncertainty remains, and Ohio's appellate courts have attempted to supply an answer. The answer supplied by Ohio's appellate courts appears to have halted the inertial trend toward an all-encompassing construction of the Sunshine Law. Ohio's appellate

<sup>&</sup>lt;sup>77</sup> Id.

<sup>&</sup>lt;sup>78</sup> *Id*.

<sup>&</sup>lt;sup>79</sup> *Id*.

<sup>&</sup>lt;sup>80</sup> See State ex rel. Fairfield Leader v. Ricketts, 564 N.E.2d 486, 491 (Ohio 1990) (per curiam); see also State ex rel. Schuette v. Liberty Twp. Bd. of Trs., 5th Dist. No. 03-CAH-11064, 2004-Ohio-4431, 2004 Ohio App. LEXIS 4015, ¶ 35 (citing Fairfield Leader, 564 N.E.2d at 491).

<sup>81</sup> Fairfield Leader, 564 N.E.2d at 488.

<sup>82</sup> See id. at 490-91.

<sup>83</sup> OHIO REV. CODE ANN. § 121.22(A) (LexisNexis Supp. 2005).

<sup>&</sup>lt;sup>84</sup> See supra Part I.C.

courts, in effect, have provided overwhelming support for the notion that collective inquiry activities of public bodies, without more, are not deliberations or discussion and hence, need not conform to the requirements of Ohio's Sunshine Law. 85

# II. SORTING THE LIGHT THROUGH A PRISM: OHIO APPELLATE COURT DECISIONS AND GUIDELINES FOR PUBLIC OFFICIALS

Whether conduct can be labeled collective inquiry, deliberations, or discussion depends on how Ohio's appellate courts have applied definitions of these terms to specific cases. Only by disentangling the fact-specific holdings of these cases can the limits of these terms be ascertained to guide public officials in their efforts to conform to the Sunshine Law.

### A. A Recent Ohio Appellate Court Decision

The most recent Ohio appellate court decision addressing whether collective inquiry sessions fall within the scope of the Sunshine Law was rendered on August 19, 2004. In *Schuette*, a complaint was filed against the Liberty Township Board of Trustees after it convened a quorum-sized meeting to consider the potential merger of Liberty Township with the City of Powell. An exclusive group of township residents and business interests were invited to attend this meeting, while the general public and press were excluded. After a resident asked to attend the meeting but was refused admittance, a complaint was filed against the board of trustees alleging that it had violated the Sunshine Law by conducting "secret deliberations."

The trial court granted the board of trustees' motion to dismiss for failure to state a claim upon which relief may be granted, 90 holding that a public body can lawfully meet in private for "information-gathering" purposes. 91 The Ohio Fifth District Court of Appeals, however, reversed

<sup>&</sup>lt;sup>85</sup> See Part I.C, *supra*, discussing the narrow definitions of "deliberations" and "discussion" supplied by Ohio's appellate courts. See also Part II, *infra*, discussing how Ohio's appellate courts have applied these definitions to specific cases.

<sup>&</sup>lt;sup>86</sup> State *ex rel*. Schuette v. Liberty Twp. Bd. of Trs., 5th Dist. No. 03-CAH-11064, 2004-Ohio-4431, 2004 Ohio App. LEXIS 4015.

<sup>&</sup>lt;sup>87</sup> *Id*. ¶¶ 5–6.

<sup>&</sup>lt;sup>88</sup> *Id*. ¶¶ 6–7.

<sup>&</sup>lt;sup>89</sup> *Id*. ¶¶ 6–7, 11.

<sup>&</sup>lt;sup>90</sup> *Id*. ¶ 1.

<sup>&</sup>lt;sup>91</sup> Randy Ludlow, *Ex-Trustee Hopes Suit Sheds Light on Sunshine Law*, COLUMBUS DISPATCH, Apr. 6, 2004, at B1.

and remanded.<sup>92</sup> It determined that the inquiry into whether a Sunshine Law violation had occurred is fact-specific and must be based on evidence regarding the events that transpired at the closed-session meetings. 93 Here, because the trial court was limited to the complaint itself and lacked "evidence of what actually occurred at the contested meeting or meetings,"94 the appellate court determined that the trial court improperly dismissed the case.<sup>95</sup> In particular, the appellate court held that the plaintiff properly alleged in his complaint that "discussions and deliberations will result in formal action" and that "construing the allegations and all reasonable inferences thereof, in favor of appellant, . . . a reasonable inference could be drawn that the trustees may [have] discuss[ed] and/or deliberate[d]" in violation of the Sunshine Law. 97 In remanding the case, the appellate court interestingly noted, "[T]his does not mean appellant will succeed in prosecuting his claim, but only that the trial court should permit the matter to go forward."98

In *Schuette*, the appellate court's refusal to permit the trial court to dispose of the case illustrates the fact-intensive nature of a Sunshine Law inquiry. Because collective inquiry and deliberations/discussion activities overlap, it is difficult to label conduct as one or the other without first scrutinizing the factual evidence itself. In order to properly distinguish collective inquiry activities from deliberations/discussion, it is necessary to examine the slate of factual scenarios and holdings of Ohio appellate court decisions.

## B. "Deliberations" and "Discussion" Applied

Because it is apparent that collective inquiry may not fall within the sphere of "deliberations" or "discussion," it is necessary to determine where the courts have drawn the line between collective inquiry activities and activities involving deliberations or discussion. Assuming that most members of public bodies do not wish to violate the law or breach the confidence of the public, it is important to critically analyze how Ohio's appellate courts have applied the definitions of "deliberations" and

<sup>&</sup>lt;sup>92</sup> Schuette, 2004-Ohio-4431, 2004 Ohio App. LEXIS 4015, ¶ 42.

<sup>&</sup>lt;sup>93</sup> See id. ¶ 37.

<sup>&</sup>lt;sup>94</sup> Id.

<sup>&</sup>lt;sup>95</sup> *Id*. ¶ 40.

<sup>&</sup>lt;sup>96</sup> *Id*. ¶ 39.

<sup>&</sup>lt;sup>97</sup> *Id*. ¶ 40.

<sup>&</sup>lt;sup>98</sup> Id.

"discussion" to actual cases in order to distill clear guidelines that will help insure that board members are conducting themselves in a manner that constitutes private collective inquiry rather than in a manner that involves deliberations or discussion. The following cases help to delineate the boundaries between permissible and impermissible conduct at nonpublic gatherings.

1. Case 1: No Sunshine Law Violation where University Board of Trustees Met in an Informational Session because No Discussion or Deliberations Occurred

Perhaps most factually similar to the controversy surrounding The Ohio State University 100 is a case involving the Miami University Board of Trustees, Devere v. Miami University Board of Trustees. 101 Like Ohio State, the Miami University Board of Trustees met in two sessions—a closed session followed by a public meeting. 102 The DeVere court held that the nonpublic session did not violate the Sunshine Law where the university president informed the board of trustees that the proposed demolition of a building was on the public meeting agenda; that he expected the demolition to cost \$300,000, not \$250,000 as originally estimated; that the project would be funded by the university rather than the state; and that he would be speaking and voting against the resolution at the open meeting. 103 The court held that this presentation of information did not constitute a "discussion" or "deliberations" for four reasons: (1) the board members did not exchange "words, comments, or ideas"; 104 (2) the university president "did not relay any new information to the board," as "[a]ll . . . matters relating to the cost and source of funds had been revealed at a prior public meeting"; 105 (3) when the president expressed his opinion on the matter, he was promptly instructed by the chairman of the board that such comments were inappropriate in a closed meeting and should be reserved for the public meeting; 106 and (4) "no evidence [suggested] that the source of funds was mentioned" and no proof existed that the

<sup>&</sup>lt;sup>99</sup> See supra Part I.C.

<sup>100</sup> See supra Part I.B.

<sup>&</sup>lt;sup>101</sup> No. CA85-05-065, 1986 Ohio App. LEXIS 7171 (Ohio Ct. App. June 10, 1986) (per curiam).

<sup>&</sup>lt;sup>102</sup> *Id.* at \*3.

<sup>&</sup>lt;sup>103</sup> *Id.* at \*8–9.

<sup>&</sup>lt;sup>104</sup> *Id*. at \*10.

<sup>&</sup>lt;sup>105</sup> Id.

<sup>&</sup>lt;sup>106</sup> Id. at \*8, \*11.

informational meeting resulted in the adoption of the resolution to destroy the building, but rather the resolution was the culmination of several discussions over many years.<sup>107</sup>

2. Case 2: No Sunshine Law Violation where Public Body Met in Fact-Finding and Investigatory Meeting and where General "Discussion" Did not Relate to a Specific Resolution

In *Thiele v. Harris*, <sup>108</sup> the appellant alleged that the passage of a resolution to dissolve the township police department by the township board of trustees violated the Sunshine Law because the passage of the resolution was "based upon deliberations and discussion conducted in several prior non-public meetings . . . , [which] resulted in the crystallization of [the board's] secret decision to [a] point just short of ceremonial acceptance."

The *Theile* court determined otherwise: it held that the first meeting did not constitute deliberations when the trustees met with the prosecuting attorney to consider the method of dealing with current crime in the event that the police department was dissolved. The court characterized this meeting as one of investigation and fact-finding rather than deliberations. As to the second meeting, the court determined that it did not constitute "deliberations" where trustees had a general discussion of budgetary problems unrelated to the specific resolution of dissolving the police department. The court added:

Public officials must be permitted to express, exchange and test ideas when confronted with a difficult decision. Although private deliberations about public business are prohibited, freedom of discussion and the exchange of ideas, in general terms, is essential to a better understanding of a problem. During the fact finding stage of any problem, informal discussion assists public officials in ascertaining the causes and effects of that problem. 113

<sup>&</sup>lt;sup>107</sup> *Id*. at \*11–12.

<sup>&</sup>lt;sup>108</sup> No. C-860103, 1986 Ohio App. LEXIS (Ohio Ct. App. June 11, 1986) (per curiam).

<sup>&</sup>lt;sup>109</sup> Id. at \*2-3 (internal quotation marks omitted) (first and third alterations in original).

<sup>&</sup>lt;sup>110</sup> *Id*. at \*16.

<sup>&</sup>lt;sup>111</sup> *Id*.

<sup>&</sup>lt;sup>112</sup> *Id*. at \*17.

<sup>&</sup>lt;sup>113</sup> *Id*.

3. Case 3: Nonpublic Fact Gathering and Question-and-Answer Session Is Permissible; Nonpublic Discussion of Specific Aspects of a Proposal by Board Members Between Themselves Is Impermissible

A public school board met with a busing contractor in nonpublic sessions to help the board decide whether to privatize busing for the school district.<sup>114</sup> The court determined that no violation of the Sunshine Law occurred where the school board gathered facts about the possibility of privatizing the busing, heard from the potential private contractor, and engaged in a question-and-answer session between the private contractor and board members without evidence of debate or discussion between the board members themselves.<sup>115</sup> The court stated,

The testimony of all witnesses who were deposed requires the conclusion that the initial meeting that was held... was informational only. At this early stage of the board's exposure to and involvement in the idea of privatization, the board was entitled to gather facts from available sources, including a private business entity, without public scrutiny. 116

With respect to a separate nonpublic session, however, the court concluded that a violation of the Sunshine Law did occur where board members discussed specific aspects of the proposal for private busing—including bus ownership, safety, inspection records, and financing—with one another.<sup>117</sup>

In order to invalidate any one decision of a public body, there must be proof of causation—that is, in addition to the deliberation itself, those deliberations must actually influence the decision.<sup>118</sup>

Public access to, and debate of, the subject of deliberations may militate against . . . the causal connection. Where the subject matter of deliberations is an issue of public concern and debate, the mere fact that the subject is raised at an executive session is insufficient to prove that the

<sup>&</sup>lt;sup>114</sup> Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees, 667 N.E.2d 458, 461–62 (Ohio Ct. App. 1995).

<sup>&</sup>lt;sup>115</sup> *Id*. at 464.

<sup>&</sup>lt;sup>116</sup> *Id*.

<sup>&</sup>lt;sup>117</sup> Id. at 465.

<sup>&</sup>lt;sup>118</sup> *Id*.

action was "deliberated to the extent that it was the cause of the public resolution." <sup>119</sup>

4. Case 4: No Sunshine Law Violation where Decisions/Conclusions Were Characterized as Ministerial or Fact-Gathering Activities

A township board formed a committee to determine the feasibility of employing a township administrator. A committee member submitted a report on the issue that he advertised to be the conclusions of the committee; the conclusions were actually plagiarized by the committee member from an earlier report on the same issue. In a nonpublic meeting, township board members and the press examined the report, determined that it was plagiarized, and later made comments to the press about the plagiarism, which appeared in local newspapers. A complaint was filed alleging that the nonpublic meeting violated the Sunshine Law because public business was discussed. The court determined that the nonpublic meeting did not violate the Sunshine Law because the originality and authenticity of the report, rather than the substance of the report, was the issue being investigated. The court characterized the nonpublic meeting as a ministerial, fact-gathering activity and further clarified the meaning of "discussion":

[T]he law is . . . clear that the Sunshine Law is not intended to prevent a majority of a board from being in the same room and answering questions or making statements to other persons who are not public officials, even if those statements relate to the public business. The Sunshine Law is instead intended to prohibit the majority of a board from meeting and discussing public business with one another . . . . "[D]iscussion" of the public business means the exchange of words, comments or ideas by the board. 125

<sup>&</sup>lt;sup>119</sup> *Id.* (quoting Greene County Guidance Ctr., Inc. v. Greene-Clinton Cmty. Mental Health Bd., 482 N.E.2d. 982, 986 (Ohio Ct. App. 1984)).

<sup>&</sup>lt;sup>120</sup> Holeski v. Lawrence, 621 N.E.2d 802, 804 (Ohio Ct. App. 1993).

<sup>&</sup>lt;sup>121</sup> *Id*.

<sup>&</sup>lt;sup>122</sup> *Id*.

<sup>&</sup>lt;sup>123</sup> Id.

<sup>&</sup>lt;sup>124</sup> *Id.* at 805–06. "[I]t is clear that the trustees met in a ministerial, fact-gathering capacity, which, as previously stated, does not necessitate that appellees conduct an 'open meeting' pursuant to R.C. 121.22(H)." *Id.* at 806.

<sup>&</sup>lt;sup>125</sup> *Id.* at 806.

5. Case 5: No Violation of Sunshine Law where Members of a Public Body Were Passive Observers

Courts have held that the term "meeting" does not encompass situations where members of a public body act as passive observers. No Sunshine Law violation occurred, for example, where a public school board met in a closed session and listened to its attorney give hypothetical and general legal advice unrelated to specific actions. 127

6. Case 6: Sunshine Law Violated where Public Officials Deliberated in a Closed Meeting although No Actual Decision Was Reached

Township trustees met in closed sessions to consider proposals that would amend the recommendations of the zoning commission regarding the township's zoning plan. The appellants argued that, assuming the trustees did meet together at the same time and place without inviting the public,

[t]here was no decision made by those Trustees other than to indicate to the Zoning Inspector that the Zoning Commission could make additions to its recommendations. [Further], the fact that [one Trustee] alone indicated that the prohibition against landfills should be added does not project into a private session in which the Board of Trustees made a collective decision to prohibit landfills. 129

The court rejected the appellants' arguments, reinforcing the point that Ohio's Sunshine Law not only prohibits public bodies from making decisions in closed meetings but also applies to deliberations as well. Accordingly, the court upheld the trial court's determination that the Sunshine Law had been violated because nonpublic deliberations had occurred. 131

<sup>&</sup>lt;sup>126</sup> Steingass Mech. Contracting, Inc. v. Warrensville Heights Bd. of Educ., 151 Ohio App. 3d 321, 2003-Ohio-28, 621 N.E.2d 802,  $\P$  47–50.

<sup>&</sup>lt;sup>127</sup> *Id.* ¶¶ 51–52.

<sup>&</sup>lt;sup>128</sup> Danis Montco Landfill Co. v. Jefferson Twp. Zoning Comm'n, 620 N.E.2d 140, 143 (Ohio Ct. App. 1993).

<sup>&</sup>lt;sup>129</sup> *Id.* (internal quotation marks omitted) (second alteration in original).

<sup>&</sup>lt;sup>130</sup> Id. at 143-44.

<sup>131</sup> Id. at 144.

C. The Light in Full Spectrum: Guidelines for Board Members at Nonpublic Informational, Briefing, and Question-and-Answer Sessions where a Majority of Board Members Are Present

The Ohio Supreme Court cases and Ohio appellate court cases previously discussed provide guidance to public officials on how to conduct themselves so that their actions will be labeled as collective inquiries rather than deliberations or discussions. The following suggestions are purposely conservative in order to provide maximum insulation from a Sunshine Law violation:

#### 1. Actions that May Be Permissible

- Sitting passively and listening to a speech, briefing, or presentation given by non-public officials
- Asking questions of non-public officials (but avoiding exchanges with other board members on matters that relate to official business)
- Making statements to non-public officials
- Acquiring information to assist with decisionmaking
- Investigating and fact-finding to assist with decisionmaking
- Promptly censoring other board members if the Sunshine Law is being, or is about to be, violated

### 2. Actions that May Be Impermissible

- Passing rules, resolutions, or taking formal action
- Announcing opinions relating to official business
- Weighing, examining, or deliberating the reasons for or against a choice or measure with other board members
- Discussing and considering measures or proposals with other board members
- Exchanging words, comments, or ideas that relate to official business with other board members

# III. A HEALTHY TAN IS BETTER THAN SUNBURN: POLICY REASONS FOR PERMITTING PUBLIC BODIES TO EXCLUDE THE PUBLIC FROM COLLECTIVE INOUIRY SESSIONS

The preceding conclusion—that collective inquiry sessions that are closed to the public may be legal under Ohio's Sunshine Law—was primarily an analysis of current Ohio law. It was not an attempt to examine *why* such sessions should be legal. This Part sets forth the public

policy arguments for broadly or narrowly interpreting Ohio's Sunshine Law and concludes that the narrow construction is superior.

A. Arguments for the Broad Interpretation: Requiring Public Access to Collective Inquiry Sessions

Proponents of the broad interpretation of the Sunshine Law argue that the public should be granted unfettered access not only to sessions where public bodies make decisions and deliberate or discuss issues, but also to sessions where public bodies merely acquire information and facts in order to educate themselves about the issues. Advocates of this view make several arguments to support their position. First, they argue that open meetings are constitutionally grounded in the First and Ninth Amendments. 133 Second, they rely on the justifications supporting open meetings legislation in general—that the public should have the right to know exactly and completely what its representatives are doing. 134 Underlying this belief is the argument that the quality of representation is directly proportional to the amount of information that is made available to the public because the public can more effectively scrutinize its representatives; an ignorant public, in contrast, may result in a corrupt government. 135 In addition, public officials who are acting in their representative capacities exist solely to serve the people, and the people should therefore have the power to witness firsthand the actions of their representatives. 136 As James Wilson remarked at the Constitutional Convention, "The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings." Access to collective inquiry sessions would therefore keep the public informed at all stages of the decisionmaking

<sup>&</sup>lt;sup>132</sup> See, e.g., Deering, supra note 7, at 368–70.

<sup>&</sup>lt;sup>133</sup> See id. at 371–72 (arguing that not only do the First Amendment freedoms of speech and press prevent the government from interfering with the "communication of the facts and views of governmental affairs," but also that even if no such affirmative right exists, the public still has the right by default, via the Ninth Amendment, which reserves unenumerated rights to the people). But see Barrett, supra note 1, at 1197 ("Neither the Constitution nor the common law . . . grants the public a right of access to the deliberative processes of government." (footnotes omitted)).

<sup>134</sup> Deering, supra note 7, at 368.

<sup>&</sup>lt;sup>135</sup> See Assaf, supra note 13, at 256.

<sup>&</sup>lt;sup>136</sup> See id. at 251 ("[T]he ultimate power rests in the people.").

<sup>&</sup>lt;sup>137</sup> *Id.* (quoting The Records of the Federal Convention of 1787, (Max Farrand ed., rev. ed. 1937), *reprinted in* 2 The Founders' Constitution 290–91 (Philip B. Kurland & Ralph Lerner eds., 1987)).

process, not just those stages where decisions are deliberated or discussed and decisions are reached. Logically, this could lead to a better informed electorate<sup>138</sup> and increase public involvement in the decisionmaking process from its very inception to its culmination.<sup>139</sup> This participation is important because it affirms the public's sense of belonging in a political community.<sup>140</sup>

Requiring public access at collective inquiry sessions could encourage public officials to better prepare for and attend the sessions in order to create a favorable image in the eyes of the public. This better preparation might increase the quality and efficiency of meetings, and may also boost public confidence in the government. Proponents of the broad view argue that by granting the public access at all stages of the decisionmaking process, including the collective inquiry stage, the government is forced to sensitize itself to the wishes and needs of the public at large rather than submitting blindly to the demands of special interest groups. Openness, in fact, may expose public officials to widely diverse viewpoints at the outset of the decisionmaking process. This may be particularly important at the collective inquiry stage where special interest groups could potentially subvert the rest of the decisionmaking process by carving the path of inquiry in directions that are favorable to themselves rather than to the public at large.

Finally, one argument in favor of the broad view that has not been considered in the literature is the following concern: Permitting public

<sup>&</sup>lt;sup>138</sup> See Rossi, supra note 9, at 185–86 (identifying the argument that the private market fails to provide the public with adequate amounts of information and that when the public has more information, it can better understand and support proposals, become aware of others' views, and work toward consensus and understanding).

<sup>&</sup>lt;sup>139</sup> See Michael A. Lawrence, Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission, 45 CATH. U. L. REV. 1, 9 (1995); see also Rossi, supra note 9, at 188 (identifying the argument that public participation may breed citizenship).

<sup>&</sup>lt;sup>140</sup> *See* Rossi, *supra* note 9, at 188 (citing Judith N. Shklar, American Citizenship: The Quest for Inclusion 25–26 (1991)).

<sup>&</sup>lt;sup>141</sup> See Lawrence, supra note 139, at 9–10.

<sup>&</sup>lt;sup>142</sup> See id. at 10 & n.46.

<sup>&</sup>lt;sup>143</sup> See id. at 10.

<sup>&</sup>lt;sup>144</sup> See Rossi, supra note 9, at 186 (arguing that public participation encourages public officials to "really listen" to what participants believe and to broaden the range of issues that are before the public body).

<sup>&</sup>lt;sup>145</sup> See Barrett, supra note 1, at 1208 ("Public scrutiny . . . might reveal improper influences and considerations that sometimes enter into the collective inquiry process.").

bodies to close collective inquiry sessions to the public may facilitate the ability of public bodies to disguise deliberations/discussion and decisionmaking sessions under the façade of collective inquiry for the sole purpose of excluding the public. 146 Because the public would not be present to witness the events that transpire at these "sham" meetings, it may be difficult to produce the necessary evidence to prove that the public body had actually deliberated or discussed official business. Even if the public body lacked the unscrupulous intent at the outset to engage in deliberations and discussions under the guise of collective inquiry and honestly sought to engage in collective inquiry without intending to deliberate or discuss, the public body could nevertheless accidentally lapse into deliberations and discussion without realizing it. This argument is strengthened by the intuitive realization that it may be natural during the decisionmaking process to simultaneously collect information and discuss and deliberate upon it. To allow public officials to gather information but not to discuss or deliberate on it with their colleagues may be asking them to perform a feat of mental gymnastics. This would require board members to have thorough knowledge of the legal intricacies of permissible and impermissible Sunshine Law conduct and to actively monitor their conduct in order to avoid crossing the threshold from the collective inquiry stage into the deliberations/discussion stage. To evade these problems, proponents of the broad view argue that open government at all stages performs a necessary "check and balance" on government abuse of power, 147 whether the abuse is intentional or not. This check and balance also breeds greater trust in the government. 48 As the United States Supreme Court stated, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."149

<sup>&</sup>lt;sup>146</sup> For a discussion of additional ways in which public officials can hide their deliberations from the public (or make them known to the public), including e-mail, electronic bulletin boards, and instant messaging, see generally Schaeffer, *supra* note 26.

<sup>&</sup>lt;sup>147</sup> See Assaf, supra note 13, at 250–51.

<sup>&</sup>lt;sup>148</sup> See id. at 254.

<sup>&</sup>lt;sup>149</sup> Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (plurality opinion).

B. Arguments for the Narrow Interpretation: Permitting Public Bodies to Exclude the Public from Collective Inquiry Sessions

Despite the arguments in favor of a broad interpretation of the Sunshine Law and the natural appeal that "open government" has on the American psyche, <sup>150</sup> the actual effects of the Sunshine Law on the functioning of public bodies have not been completely positive. <sup>151</sup> Because of this reality, numerous statutes, courts, agencies, institutions, and commentators favor a narrow interpretation of the Sunshine Law, which gives public bodies some breathing space by granting them the option of excluding the public from the collective inquiry stage. <sup>152</sup>

A narrow interpretation of the Sunshine Law rests on the belief that public access during the collective inquiry stage "chills" the meaningful fact-gathering ambience of public bodies, thus reducing their ability to effectively gather information, clarify important issues, and competently perform their delegated duties. For example, following the enactment of the federal Sunshine Law, questionnaires were sent to officials of the major federal regulatory agencies. All but one respondent reported that the presence of the press and the public at meetings of these agencies negatively impacted the "free exchange of ideas and opinions" among public officials. Perhaps contributing most to this disdain that public officials have toward the press, is the widespread belief, even by the public at large, that the media regularly distorts the truth. The inaccurate reporting of information was all too apparent during the controversy involving Ohio State when *The Columbus Dispatch* attacked the university for holding "secret" meetings<sup>157</sup> without ever reporting that several Ohio

<sup>&</sup>lt;sup>150</sup> See Steve Henley & Jo Haynes Suhr, The Role of Court Administration in the Management, Independence and Accountability of the Courts, Fla. B. J., Mar. 2004, at 26, 26.

<sup>&</sup>lt;sup>151</sup> See David M. Welborn et al., *Implementation and Effects of the Federal Government in the Sunshine Act*, in Administrative Conference of the United States, Recommendations and Reports 199, 248 (1984).

<sup>&</sup>lt;sup>152</sup> See Barrett, supra note 1, at 1208–13.

<sup>&</sup>lt;sup>153</sup> See id. at 1209; see also Welborn et al., supra note 151, at 248.

<sup>&</sup>lt;sup>154</sup> See Thomas H. Tucker, "Sunshine"—The Dubious New God, 32 ADMIN. L. REV. 537, 551 tbl. 1 (1980).

<sup>&</sup>lt;sup>155</sup> Lawrence, *supra* note 139, at 11 & n.51.

<sup>&</sup>lt;sup>156</sup> See Deering, supra note 7, at 374.

<sup>&</sup>lt;sup>157</sup> See Gray, supra note 38.

appellate courts have upheld the legality of excluding the public and the press from collective inquiry activities. 158

In addition, the Welborn Report, a study of the federal Sunshine Law, concluded that the Sunshine Law increased inhibitions and reduced collegiality among agency officials. The Report's authors noted that government "officials in positions of responsibility, generally do not wish to appear unknowledgeable, uncertain, or unprincipled" in front of a public audience. It is the collective inquiry stage of decisionmaking—the stage where public officials may be most ignorant or appear to be most unprincipled because they are merely identifying issues and have not yet acquired the relevant information—in which public officials may feel most vulnerable. Public officials, particularly new ones, must be able to ask questions in private, when the public and media are not "staring them down," "without fear of . . . embarrassment or of being labeled uninformed." Without this ability, decisionmakers may simply refuse to ask important questions, gather information, or later contradict positions that were publicly taken.

Decisionmakers may refuse to even broach sensitive issues if they must publicly raise such topics. <sup>163</sup> If this position appears to underestimate the fortitude of public officials, consider again the Ohio State example: the chairwoman of the board described the purpose of the private briefing session that preceded the public meeting as "an opportunity for [the university president] 'to develop her thinking, raise questions that she can do *in comfort, without being judged.*'"<sup>164</sup> It is open to speculation whether the controversial issue of benefits for same-sex or domestic partners would even have been *raised* if public officials were forced to raise it, at least initially, in a public meeting rather than within the safer confines of exploratory collective inquiry sessions closed to the public. This concern is strengthened by the fact that public officials may also fear that the public

<sup>&</sup>lt;sup>158</sup> See discussion supra Part II. The Ohio Tenth District Court of Appeals, which has jurisdiction over The Ohio State University, see Ohio Rev. Code Ann. § 2501.01(J) (LexisNexis Supp. 2005), has not yet ruled on whether deliberations and discussions encompass collective inquiry activities.

<sup>&</sup>lt;sup>159</sup> Welborn et al., *supra* note 151, at 248.

<sup>160</sup> Id

<sup>&</sup>lt;sup>161</sup> See Hearn et al., supra note 15, at 8.

<sup>&</sup>lt;sup>162</sup> See Schaeffer, supra note 26, at 759.

<sup>&</sup>lt;sup>163</sup> See Barrett, supra note 1, at 1210.

<sup>&</sup>lt;sup>164</sup> Bush, *supra* note 39 (emphasis added) (quoting Tami Longaberger, The Ohio State University Board of Trustees Chairwoman).

and the press will confuse the mere *mentioning* of an issue with advocacy of that issue. 165

As an additional illustration of how sensitive information may be adversely impacted by complete openness, consider a public university's search for a president. A university may find it impossible to attract ideal presidential candidates when the media and Sunshine Laws demand disclosure of the candidates' identities. Other issues involving race, ethnicity, diversity in student populations, or faculty diversity are also particularly sensitive matters and are uncomfortable for board members to discuss in public. He end result of opening the doors of collective inquiry to the public may actually result in a disservice to the public as genuineness is discarded in favor of simple avoidance, obstructions in the decisionmaking process, or even political grandstanding by public officials, which is designed to benefit the images of the public officials themselves rather than the public at large.

Proponents of the narrow interpretation of the Sunshine Law also point to an additional finding of the Welborn Report—that the Sunshine Law has resulted in a structural transformation from the "meeting" as the unit of decisionmaking to the unit of the "individual." Instead of convening in public meeting form as the primary vehicle for decisionmaking, board members have adjusted to openness requirements by segmenting their discussions into one-on-one formats with other board members and staff members in their offices in order to avoid the public eye and the reach of

<sup>&</sup>lt;sup>165</sup> Margaret S. DeWind, Note, *The Wisconsin Supreme Court Lets the Sun Shine In:* State v. Showers *and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 830.

<sup>&</sup>lt;sup>166</sup> See Hearn et al., supra note 15, at 2.

<sup>&</sup>lt;sup>167</sup> *Id.* at 11; see also Susan Hayes Droegemueller, Note, *In the Shade of the Ivy: No Sheltering Arbor in Minnesota for University Presidential Candidates in Star Tribune Co. v. University of Minnesota Board of Regents, 27 Hamline L. Rev. 312, 354 (2004) (supporting the court's decision to require presidential searches to be conducted in open meetings, but acknowledging that competing concerns for closing presidential searches to the public are "equally valid").* 

<sup>&</sup>lt;sup>168</sup> Hearn et al., *supra* note 15, at 8.

<sup>&</sup>lt;sup>169</sup> See Lawrence, supra note 139, at 12 ("[A] matter's most important issues may not be discussed at all during these open meetings.").

<sup>&</sup>lt;sup>170</sup> See Rossi, *supra* note 9, at 228 (arguing that indiscriminate mass participation in the agency decisionmaking process may result in strategic action by participants designed to delay and confuse issues, thereby requiring greater time and resources without improving the final decision or the deliberative process).

<sup>&</sup>lt;sup>171</sup> Barrett, *supra* note 1, at 1212.

<sup>&</sup>lt;sup>172</sup> Welborn et al., *supra* note 151, at 236.

the Sunshine Law.<sup>173</sup> By the time the public meeting occurs, individual members routinely have *already* made their decisions and do not engage in deliberations or discussions at all in front of the public.<sup>174</sup> To illustrate this fact, consider again the Sunshine Law controversy at The Ohio State University. One trustee, speaking anonymously, stated that "decisions never reach the board table unless a unanimous vote is guaranteed."<sup>175</sup> The chairwoman of the board echoed this sentiment, stating that all board votes have been unanimous since she joined about eight years ago and that board members simply meet in private one-on-one sessions to discuss issues.<sup>176</sup> Paralleling this trend in segmentation is the rise in notation voting, where members vote individually and separately rather than voting at a meeting.<sup>177</sup>

Openness and its resulting shift away from the meeting format as the primary vehicle for board decisionmaking has negative consequences, particularly at the collective inquiry stage. First, it is burdensome on public bodies to merely gather information or conduct research, especially during times of emergency, when public bodies must conform their collective inquiry sessions to the strict notice requirements of the Sunshine Law.<sup>178</sup> It is much easier to engage in information-gathering and

Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours' [sic] advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a

(continued)

<sup>&</sup>lt;sup>173</sup> Id. at 237–38.

<sup>174</sup> Id. at 236.

<sup>&</sup>lt;sup>175</sup> Bush, supra note 39.

<sup>&</sup>lt;sup>176</sup> Id

<sup>&</sup>lt;sup>177</sup> Welborn et al., supra note 151, at 236–37; see also Bush, supra note 39.

<sup>&</sup>lt;sup>178</sup> Under Ohio's Sunshine Law,

exploration when meeting as a collective body than to force board members to gather information individually or independently. This is particularly true when the entire group would benefit from listening to a briefing or presentation of information—it would be cumbersome and inefficient to arrange several presentations when it could more easily be accomplished in one setting.

Second, preventing public bodies from meeting collectively in nonpublic sessions to initially explore important issues may result in the dilution of issue identification. As one university president stated, "It's impossible to have a frank discussion in a board meeting. All frank discussions go to sub-quorum gatherings of regents, so there's not a possibility of actually all of them airing the same argument at the same time in any setting." 179

Third, the inability of board members to meet in a group format results in a sacrifice of the collective creativity of the group. As one board member of a public university stated,

There are times when you'd love to be able to have a meeting so you could get a free-thinking conversation going and get the best thoughts of your board members and maybe of some of your leadership that's in the room with you. [But] everyone is choosing their words [when the public has access]. 180

Finally, because discussions occur in one-on-one formats, typically between individual board members and the chairperson of the board, the power of the board chairperson has been dramatically elevated. The concerns and views of the board collectively may be concentrated in the chairperson of the board, who is then equipped to manipulate other board members or greatly influence the decisionmaking process of the board.

Backers of the narrow view argue that the broad view is infeasible because it would require *all* communications relating to the business of the public body to occur in open meetings when a quorum of the public body

mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.

OHIO REV. CODE ANN. § 121.22(F) (LexisNexis Supp. 2005); see also Barrett, supra note 1, at 1212; Tucker, supra note 154, at 548; Welborn et al., supra note 151, at 232.

<sup>181</sup> *Id*. at 9.

<sup>&</sup>lt;sup>179</sup> Hearn et al., *supra* note 15, at 8.

<sup>&</sup>lt;sup>180</sup> Id.

<sup>&</sup>lt;sup>182</sup> See id.

is present.<sup>183</sup> This may be unworkable in practice because board members may live or work near one another and may have personal relationships with each other.<sup>184</sup> It would place board members in difficult hush-hush positions, which could result in the avoidance of all exchanges between officials that relate in any way to their public organizations because they fear violating the Sunshine Law.<sup>185</sup> The result of this all-encompassing power of the Sunshine Law is the disruption of routine organizational functioning.<sup>186</sup>

It is expensive and time-consuming for public bodies to adhere to the notice and minutes requirements of the Sunshine Law. The costs of Sunshine Law compliance are substantial, and proponents of the narrow interpretation argue that it is absurd to subject public bodies to these requirements when they are tentatively exploring issues. When balancing the hardship and obstruction to the public body, advocates of the narrow view believe that such requirements should be tempered during the pre-deliberative stage of inquiry.

In summation, while a broad interpretation of the Sunshine Law might shed more light on government affairs by requiring collective inquiry sessions to be open to the public, it also may ironically succeed in eclipsing some of this light by either stifling the decisionmaking process or pushing it to the back doors of civic administration. The end result is the same: a disservice to the public whom the public body is charged with serving.

# C. The Superiority of the Narrower Interpretation: Too Much Sunshine Causes Sunburn

In selecting between the broad and narrow views of the Sunshine Law, it is important to acknowledge that very few, if any, commentators are anti-Sunshine Law.<sup>191</sup> A survey of data and interviews in six states concluded that most board members respect the purposes of open meetings legislation and that the risk of noncompliance with Sunshine Laws outweighs any

<sup>&</sup>lt;sup>183</sup> Barrett, supra note 1, at 1212.

<sup>&</sup>lt;sup>184</sup> *Id*.

<sup>&</sup>lt;sup>185</sup> *Id*.

<sup>&</sup>lt;sup>186</sup> *Id.* at 1213.

<sup>&</sup>lt;sup>187</sup> See Hearn et al., supra note 15, at 5.

<sup>188</sup> *Id* 

<sup>&</sup>lt;sup>189</sup> See Lawrence, supra note 139, at 10 & n.49.

<sup>&</sup>lt;sup>190</sup> See Barrett, supra note 1, at 1212–13.

<sup>&</sup>lt;sup>191</sup> See id. at 1206.

gains. <sup>192</sup> Most commentators support requiring public access at the deliberations/discussion and decision stages. <sup>193</sup> It is simply the first stage of the decisionmaking process—the collective inquiry stage—that has caused the dispute. <sup>194</sup>

Permitting public bodies to exclude the public during that initial information-gathering stage seems to strike a much needed balance between the public's right to openness and the right of the public body to effectively perform its functions. Too much sunshine in the form of unbridled access at this early stage appears to stifle other crucial policy considerations, such as the quality of the decisionmaking process. Giving public bodies the option to exclude the public from the information-gathering stage provides some much needed breathing space to public officials, with the public as the ultimate beneficiary.

The weaknesses in the broad interpretation are all too apparent. First, opening the doors of collective inquiry to the public does not guarantee that the public will remain informed at all stages of the decisionmaking process or witness firsthand the actions of the government. The realities of board decisionmaking suggest the opposite: greater openness is counterbalanced by the retreat of public officials both physically and mentally—public officials wish to avoid the public spotlight when clarifying issues and educating themselves about issues, at least initially. Indeed, an inverse relationship appears to exist between restrictions on permitting public officials to meet privately and "the sum total of open government." When public officials are forced to immediately perform in front of the press and the public while ignorant or when gathering information on particularly sensitive issues, the free flow of information and genuineness necessary for quality decisionmaking is diverted into a vacuum of avoidance, and retreat into private non-quorum sessions, <sup>198</sup>

<sup>&</sup>lt;sup>192</sup> See Hearn et al., supra note 15, at 4, 6.

<sup>&</sup>lt;sup>193</sup> Barrett, supra note 1, at 1206.

<sup>&</sup>lt;sup>194</sup> Id.

<sup>&</sup>lt;sup>195</sup> See id. at 1214.

<sup>&</sup>lt;sup>196</sup> See id.

<sup>&</sup>lt;sup>197</sup> R.J. Shortridge, Note, *The Incidental Matters Rule and Judicially Created Exceptions to the Nebraska Public Meetings Law: A Call to the Legislature in Meyer v.* Board of Regents, *510 N.W.2d 450 (Neb. App. 1993)*, 73 Neb. L. Rev. 456, 478 (1994).

<sup>&</sup>lt;sup>198</sup> Hearn et al., *supra* note 15, at 8. *But see* DeWind, *supra* note 165, at 856 (concluding that the Wisconsin Supreme Court interpreted the state's open meetings law to require certain non-quorum sized meetings to be held in public).

"sugar-coated" rhetoric, or "fluff." This maneuvering decreases the quantity and quality of information that is available to the public during all stages of the decisionmaking process, thereby thwarting the primary goal of the Sunshine Law: a better informed public. A senior campus official in Texas, a state which has ruled that private "board briefings" violate the Texas Sunshine Law, echoed this sentiment: "I think the public really knows less about [the] factors [that go into] decision making . . . because [board members are] already going to have thought about it for the most part and have made a decision usually upfront" before the board can be briefed with important background information. 200

Second, because the quality of information obtained during the collective inquiry stage is adversely affected when the public is given access, a chain reaction is triggered, which adversely impacts the deliberations/discussion and decision stages. Because the information obtained during an open collective inquiry stage is of lesser quality and quantity, the board's ability to weigh and examine ideas during the deliberations/discussion and decision stages is not as robust and thorough as it could be. The end result is obvious: decisions are made based on incomplete information and a lack of creative ideas.

It is important to emphasize here that even when the public is excluded from the collective inquiry stage, it still has access to the deliberations/discussion and decisionmaking stages. Because closed collective inquiry sessions result in higher quality information, healthier discussions would result during the deliberations/discussion and decision stages. As a result, the citizenry might be better informed (assuming that the board deliberates/discusses at all), thereby satisfying one of the primary goals of the Sunshine Law. Moreover, the public would still be able to scrutinize firsthand the actual decisionmaking of its representatives during the deliberations/discussion and decision stages, another important goal of the Sunshine Law. It is less important that the public be permitted to scrutinize the events that transpire at collective inquiry sessions because

<sup>&</sup>lt;sup>199</sup> Hearn et al., *supra* note 15, at 8.

<sup>&</sup>lt;sup>200</sup> *Id*. at 9

<sup>&</sup>lt;sup>201</sup> See Rossi, supra note 9, at 179 (arguing that when decisionmakers and participants are met with conflicting demands, "increased participation comes only at the cost of diminished deliberation").

<sup>&</sup>lt;sup>202</sup> See Barrett, supra note 1, at 1214 (discussing how an "open collective inquiry stage has . . . harmful implications for the deliberative stage").

<sup>&</sup>lt;sup>203</sup> *Id*.

<sup>&</sup>lt;sup>204</sup> Id.

the information available during those stages is merely exploratory and in an infantile, undeveloped form. It is logical, especially when balancing the harm to the public body, to permit the public to view this amorphous and splintered body of knowledge only when it coalesces and crystallizes into coherent and meaningful form during the deliberations/discussion and decision stages. During those stages the public can not only make better sense of the information because it has become more cogent, but also hold its representatives accountable because they have begun to solidify their positions and opinions. Prior to the deliberations/discussion and decision stages, the positions of public officials may fluctuate or may be unknown.

While opponents of this particular view might submit that it is more important for the public to be granted access when the information is incomplete and issues are vague so that the public may influence the public body at the outset, it is crucial to point out that open meetings legislation is primarily concerned with facilitating public scrutiny of the government's decisionmaking process; it is not concerned with granting citizens the power to actually *make* the decisions themselves.<sup>207</sup> Public bodies represent the people; they are not directly controlled by them. If the public is dissatisfied with the positions taken by its representatives during the deliberations/discussion and decision stages, it can either pressure its representatives during or after those stages or petition for the removal of those representatives from their board positions after the expiration of their terms. Applied to The Ohio State University controversy, if the public at large is so dissatisfied with the decision to extend health benefits to samesex or domestic partners, it can simply wage a campaign to repeal the decision. The public is not deprived of any meaningful opportunity to scrutinize or react to decisions of its representatives just because it is excluded from the initial decisionmaking stage of its representatives; rather, alternate routes are available for the public to police the government's actions.

In addition, opening the collective inquiry stage may result in better preparation and attendance of public officials at information-gathering sessions, but that preparation would be meaningless because public

<sup>&</sup>lt;sup>205</sup> *Id.* at 1215.

<sup>&</sup>lt;sup>206</sup> See id. at 1215–16.

<sup>&</sup>lt;sup>207</sup> See Rossi, *supra* note 9, at 175–76 (questioning why commentators elevate public participation during agency decisionmaking to "sacred status" when the public is limited to the role of observer during other activities of life, such as when viewing theatrical performances).

officials would simply hold fewer quorum-sized meetings in order to escape the public eye. 208 Preparation means very little when public officials are afraid to convene in quorum-sized meetings. One cannot prepare for a meeting that is not called. It is illogical to require public officials to overly prepare themselves for collective inquiry sessions because the underlying rationale for holding a collective inquiry session is that the public body is somewhat unprepared, uneducated, or needs clarification on a particular issue in the first place. Thorough preparation is more important during the deliberations/discussion stage because it is at that stage when public officials can effectively organize the information acquired during the collective inquiry stage in order to weigh and examine particular issues. Thus, it is better to hold officials accountable for their preparation during the deliberations/discussion stage, not during the collective inquiry stage when they are merely gathering information and clarifying issues.

Although advocates of the broad interpretation argue that opening collective inquiry would prevent special interest groups from overly influencing the government and sensitize public bodies to the will of the public at large, there is no reason why this goal cannot be achieved during the deliberations/discussion and decision stages. Special interest groups, particularly those with sufficient resources, may be able to influence public officials regardless of whether or not meetings are open to the public. In any case, the public still has the capacity to effectively scrutinize and police these influences during the deliberations/discussion stage because these stages are merely carryovers and reflections of the information that is obtained during the collective inquiry stage. Influences should therefore be apparent during the deliberations/discussion stage.

Perhaps more importantly, not all special interests are detrimental to a democratic society. With its representative form of government, the Founding Fathers of America attempted to protect the minority from the majority.<sup>211</sup> Public bodies are manifestations of this principle. Minorities

(continued)

<sup>&</sup>lt;sup>208</sup> See Barrett, supra note 1, at 1214. "Openness would cripple quorum-sized collective inquiries because the learning and brainstorming process would shift from collegial processes toward less effective, segmented, individualized processes." *Id.* 

<sup>&</sup>lt;sup>209</sup> Id. at 1215–16.

 $<sup>^{210}</sup>$  Id. at 1214 ("[A]gency members rehash their collective inquiry at the deliberative stage . . . .").

The Framers, by their protests against the "excesses of democracy," were merely making clear their sound reasons for preferring a Republic as the proper *form* of government. They well knew, in light of history,

are shielded from the potential tyranny of the majority because the public at large does not directly decide issues; rather, its representatives do. 212 Various groups in American society that have been marginalized, special interest or not, benefit when public representatives are able to grapple with sensitive issues free from the scrutiny of the majority, at least during the initial stages of decisionmaking. Public representatives provide a "buffer" zone to shield minorities and marginalized groups from majoritarian despotism. When this argument is applied to Ohio State, it becomes apparent how a marginalized group was able to benefit from private inquiry free from public scrutiny. When the public is able to invade the free flow of information at the inception of decisionmaking, minorities and marginalized groups are most likely to be harmed because the government may cave to the pressures of the majority.

Finally, it is possible to insure (1) that closed collective inquiry sessions are not used by public bodies as "sham" meetings to cloak their deliberations and discussions and (2) that board members do not accidentally lapse into deliberations and discussions at such meetings. Public officials must be educated on the purposes of the Sunshine Law so they understand its scope and importance as well as the severe consequences for violating the law, including their own potential removal from office. Public officials should also be given clear guidelines, such as those identified in Part II, to assist them in conforming to the law during the collective inquiry stage. Conforming to these guidelines does not

that nothing but a Republic can provide the best safeguards—in truth in the long run the only effective safeguards . . .—for the people's liberties which are inescapably victimized by Democracy's *form* and system of unlimited Government-over-Man featuring The Majority Omnipotent. . . . [The purpose of a Republic is] to protect the Individual's God-given, unalienable rights and therefore for the protection of the rights of The Minority, of all minorities, and the liberties of people in general.

An Important Distinction: Democracy Versus Republic, http://www.lexrex.com/enlightened/AmericanIdeal/aspects/demrep.html (last visited Oct. 5, 2005).

<sup>&</sup>lt;sup>212</sup> See id.

<sup>&</sup>lt;sup>213</sup> With respect to Ohio's public records law, a counterpart to Ohio's Sunshine Law, a recently introduced bill in the Ohio House of Representatives "would require government officials to take classes on Ohio's public records laws, mandate all agencies to have a written policy for public records and would sanction them with a \$250-per-day penalty for noncompliance." Editorial, *Sunnier Days*, The Post Online (Athens, Ohio), Feb. 1, 2005, http://www.thepost.ohiou.edu/show\_news.php?article=E1&date=020105.

require board members to perform unrealistic feats of mental gymnastics; rather, the guidelines are clear and it can be assumed that board members are, on average, relatively sophisticated in comparison to the general population. If a public official accidentally lapses into impermissible deliberations during a private collective inquiry session, she can be instructed by her colleagues to stop that conduct. In short, it is not too much to expect board members to be able to monitor themselves during private collective inquiry sessions.

It is quite naïve to assume that all public officials and governmental bodies are magnanimous and free from corruption. According to the old adage, "Power corrupts and absolute power corrupts absolutely." It was, after all, the Founding Fathers' mistrust of those in power that formed the bedrock for the structure of American government.<sup>214</sup> Therefore, it is necessary to be able to police public officials when the public is not present to perform this function. This can be accomplished in two ways. First, if it is suspected that officials have engaged in impermissible deliberations during collective inquiry sessions, the public can initiate adversarial proceedings to discover evidence of wrongdoing at these meetings. Advocates of open collective inquiry sessions might argue that this evidence is difficult or even impossible to collect because the public body can easily conceal evidence of wrongdoing since the public is not present to witness the wrongdoing as it actually occurs. However, this argument is unpersuasive because courts would rarely find Sunshine Law violations. Because courts have been able to deduce that Sunshine Law violations have occurred, sufficient evidence must have been available to assist the courts in making these determinations even when the public was absent from the meetings.

Second, public bodies could be required to tape record or videotape nonpublic collective inquiry sessions.<sup>215</sup> If it is suspected that the public body engaged in impermissible conduct, the videotape could be viewed in camera by a judge. Only if a Sunshine Law violation is found by the judge would the public have access to the tape recording or videotape. This suggestion achieves several goals: First, it encourages public officials not to deliberate or discuss when the public is not present because public

<sup>&</sup>lt;sup>214</sup> See Lorne Gunther, Columnist, Edmonton Journal, Speech to the Third Annual Conceived in Liberty Celebration: The Intellectual Foundations of the American Revolution (July 4, 2002), http://www.fathersforlife.org/articles/gunter/liberty.htm.

<sup>&</sup>lt;sup>215</sup> However, electronic recording may also be overly burdensome for various public bodies during the collective inquiry stage and public officials may be reluctant to consent to such a procedure.

officials know that their words and actions are being electronically recorded; second, it preserves the evidence necessary to prove that officials actually deliberated or discussed; third, it allows officials to be genuine and frank because although the conduct of officials is being recorded, the public would *only* have access to this evidence if a judge determined that a Sunshine Law violation had actually occurred; fourth, electronic recording provides comfort to public officials who follow the law because evidence of their lawful conduct is preserved; finally, electronic recording provides reassurance to the public and the press that its representatives are lawfully conducting themselves and not engaging in secret deliberations and discussions. This final benefit should not be underestimated because it is public pressure, not the law, that may undermine the attempt of public bodies to hold private collective inquiry sessions. To illustrate this conclusion, again consider Ohio State: although private briefing sessions may be legal under Ohio law. 216 it was the press, not the law, that ultimately caused Ohio State to abandon holding such sessions. This suggests a great need for public bodies to wage preemptive public relations campaigns designed to convince the public and the media that their decisionmaking procedures are proper. Even if private collective inquiry sessions are legal, public bodies will not benefit from them in any way if they are forced to abandon them because of public and media pressure. This pressure is overwhelming: the media tends to mistrust public bodies, particularly public universities and colleges, who are seen as being "prone to secretiveness, cumbersome procedures, and poor information flows."<sup>217</sup> Videotaping or tape recording private collective inquiry sessions may be the "great equalizer" necessary to mitigate public fears while insuring that public bodies are complying with the Sunshine Law. <sup>218</sup>

D. Persuasive Authority for the Narrow Interpretation: The Federal Sunshine Law and Its Interpretation by the United States Supreme Court

The policy reasons for a narrow interpretation of the Sunshine Law not only appear to be supported by Ohio's appellate courts, <sup>219</sup> but they also

<sup>&</sup>lt;sup>216</sup> See supra Part II.

<sup>&</sup>lt;sup>217</sup> Hearn et al., *supra* note 15, at 6.

<sup>&</sup>lt;sup>218</sup> One commentator has suggested that the minutes of all meetings that are not subject to open meetings requirements should be recorded and made available to the public. DeWind, *supra* note 165, at 833–34. Electronic recording safeguarded from the public by in camera review may avoid the problems associated with this suggestion.

<sup>&</sup>lt;sup>219</sup> See supra Part II.

appear to be supported by the federal Sunshine Law<sup>220</sup> and its narrow interpretation by the United States Supreme Court itself.<sup>221</sup> Like Ohio's Sunshine Law, the federal statute applies to "deliberations" of public bodies, but unlike Ohio's Sunshine Law, the federal law explicitly narrows the meaning of deliberations.<sup>222</sup> The federal statute states that "the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." The language of this statute qualifies and limits the meaning of "deliberations" to include only those that "determine or result in the joint conduct or disposition of official agency business." The only limit on deliberations explicitly stated in the Ohio statute, however, is that the deliberations must be deliberations "upon official business."

In FCC v. ITT World Communications, Inc.,<sup>225</sup> the U.S. Supreme Court interpreted the language "where such deliberations determine or result in the joint conduct or disposition of official agency business."<sup>226</sup> It held that nonpublic "Consultative Process" sessions between a committee of the Federal Communications Commission and its European counterparts, where the purpose of these conferences was to exchange information aimed at facilitating the joint planning of telecommunications facilities,<sup>227</sup> did not violate the federal Sunshine Law because the sessions were not "meetings."<sup>228</sup> The Court stated, "[I]nformal background discussions [that] clarify issues and expose varying views are a necessary part of an agency's work. The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit."<sup>229</sup> The Court also noted that the U.S. Senate specifically intended to exclude informal discussions from the statute's reach by adopting the word "deliberations" instead of previously

<sup>&</sup>lt;sup>220</sup> 5 U.S.C. § 552b (2000).

<sup>&</sup>lt;sup>221</sup> FCC v. ITT World Comme'ns, Inc., 466 U.S. 463, 472–73 (1984).

 $<sup>^{222}</sup>$  Compare Ohio Rev. Code Ann. § 121.22(A) (LexisNexis Supp. 2005), with 5 U.S.C. § 552b(a)(2).

<sup>&</sup>lt;sup>223</sup> 5 U.S.C. § 552b(a)(2) (emphasis added).

<sup>&</sup>lt;sup>224</sup> § 121.22(A).

<sup>&</sup>lt;sup>225</sup> 466 U.S. 463 (1984).

<sup>&</sup>lt;sup>226</sup> Id. at 473.

<sup>&</sup>lt;sup>227</sup> Id. at 465.

<sup>&</sup>lt;sup>228</sup> *Id.* at 473.

<sup>&</sup>lt;sup>229</sup> Id. at 469–70 (citation omitted).

proposed terms such as "assembly or simultaneous communication" or "gathering." Earlier versions of the Act applied to any agency discussions that merely "concern[ed] the joint conduct or disposition of agency business," whereas the Act "now applies only to deliberations that 'determine or result in the conduct of official agency business." In interpreting this revision, the Court stated, "The intent of the revision clearly was to permit preliminary discussion among agency members." The same reasoning may also be applied to Ohio's Sunshine Law: it may be quite telling that the Ohio legislature adopted the word "deliberations" rather than broader language. This suggests, perhaps, the intent to narrow the scope of Ohio's Sunshine Law so as to exclude collective inquiry activities.

When the U.S. Supreme Court applied its interpretation of the federal statute to the dispute before it, it concluded that the FCC committee did not engage in "deliberations [that] determine[d] or result[ed] in the joint conduct or disposition of official agency business" because "[s]uch discussions must be 'sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency" in order to constitute deliberations. In ITT World, no deliberations occurred because the committee did not consider or act on any matters within its "formally delegated authority."

#### **CONCLUSION**

Ohio's Sunshine Law creates a certain tension between the people's right to witness the decisionmaking activities of its public representatives and the ability of those representatives to perform their delegated duties competently and unobstructed. To illustrate the magnitude of this tension, the application of public meetings laws, as they apply to public universities, has been litigated in approximately half of the U.S. states.<sup>236</sup> The friction is particularly prominent during the beginning stage of the

<sup>&</sup>lt;sup>230</sup> Id. at 470 n.7.

<sup>&</sup>lt;sup>231</sup> *Id.* (quoting H.R. 11656, 94th Cong., § 552b(a)(2) (1976)).

<sup>&</sup>lt;sup>232</sup> *Id.* (quoting 5 U.S.C. § 552b(a)(2)) (emphasis omitted).

<sup>&</sup>lt;sup>233</sup> *Id*.

<sup>&</sup>lt;sup>234</sup> *Id.* at 471 (first alteration in original) (quoting Richard K. Berg & Stephen H. Klitzman, Admin. Conference of the U.S., An Interpretive Guide to the Government in the Sunshine Act 9 (1978)).

<sup>&</sup>lt;sup>235</sup> *Id.* at 472–73.

<sup>&</sup>lt;sup>236</sup> Jon Dilts, *Open Meetings in Higher Education*, COMM. & L., June 1987, at 35.

decisionmaking process, the collective inquiry stage, when decisionmakers are first beginning to gather information and clarify issues that are important to the duties of the public body. At this stage the presence of the public and the press can severely hamper the ability of the public body to begin to constructively address sensitive and important issues. When the public is permitted access to this beginning stage of decisionmaking, decisions that are ultimately made may be less informed or less genuine, and issues may be avoided altogether because they are too controversial. It is at this collective inquiry stage when the public's wielding of Sunshine Law power to scrutinize the decisionmaking of its representatives should be balanced with the public body's own right to freely acquire the information and background knowledge needed for competent decisionmaking. Such balancing logically requires that the omniscience of the public during the deliberations/discussion and decisionmaking stages be offset by conceding some breathing space to public officials during the collective inquiry stage, thereby permitting public officials to perform their duties free from the lens of the public and the press.<sup>237</sup>

Many states, as well as the federal government, recognize this human dimension of decisionmaking and the need of public bodies to perform their functions unobstructed when they statutorily circumscribed the scope of their Sunshine Laws to exclude the collective inquiry stage. Ohio's Sunshine Law is much more ambiguous because it does not explicitly preclude the collective inquiry stage from its ambit. Judicial interpretations of Ohio's Sunshine Law, in the form of appellate court decisions, however, support a narrow interpretation of Ohio's Sunshine Law that permits public bodies to exclude the public from collective inquiry sessions. This narrow interpretation of Ohio's Sunshine Law is also supported by the adoption of the narrower term "deliberations" in the statutory language, the weight of public policy, the United States Supreme Court's explanation of the purpose and scope of the federal Sunshine Law, and the refusal of the judiciary to articulate a constitutional right of public access.

<sup>&</sup>lt;sup>237</sup> One commentator implicitly recognized this need for balance: "To achieve absolute, unrestricted, open government is to give up too much. Privacy, national security, and government effectiveness and efficiency are just some of the costs. On the other hand, a certain level of openness is a necessary and positive attribute of the democratic system." Jennifer A. Bensch, *Government in the Sunshine Act: Seventeen Years Later: Has Government Let the Sun Shine In?*, 61 GEO. WASH. L. REV. 1475, 1513 (1993).

<sup>&</sup>lt;sup>238</sup> See supra Part I.C.

<sup>&</sup>lt;sup>239</sup> See Assaf, supra note 13, at 268.

From Ohio's appellate court rulings, several guidelines can be distilled to help public officials conduct themselves lawfully during collective inquiry sessions from which the public is excluded. <sup>240</sup> Public officials should monitor themselves to avoid breaching the Sunshine Law. provide assurance to the public that these guidelines are being followed, and to help acquire the public's acceptance of private collective inquiry sessions, board members should be educated on the spirit, purposes, and requirements of the Sunshine Law, and may need to make concessions in the form of electronic recording of private collective inquiry sessions. If it is suspected that a Sunshine Law violation has occurred at a closed collective inquiry session, the electronic recording should be reviewed in camera by a judge and should only be released to the public if a Sunshine Law violation is found. Electronic monitoring may preserve the evidence necessary to prove a Sunshine Law violation, safeguard the right of the public to insure that the public body is not impermissibly discussing or deliberating, and preserve the ability of public officials to explore issues and gather information unencumbered by the press and the public during the collective inquiry stage.

While it is undisputed that the public should have the right to witness the deliberations, discussions, and final decisions of public bodies, this omnipotent power to know must be moderated during the collective inquiry stage. As one president of a major university system stated,

"These advocates of complete openness say subjecting our institutions to complete openness is beneficial, . . . but in fact it compromises the public good because many other noble goals of equal value are compromised or sacrificed, such as lowering the quality of board discussion and debate, lessening the quality of institutional leadership, reducing the number of public servants who will serve on boards." <sup>241</sup>

While sunshine is beneficial, too much of it can be detrimental. Too much sunshine causes sunburn and an ultimate cancer that hampers the ability of public bodies to serve the public good.

<sup>&</sup>lt;sup>240</sup> See supra Part II.C.

<sup>&</sup>lt;sup>241</sup> Hearn et al., *supra* note 15, at 6.