

March 2015

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William R. Sherman

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### Recommended Citation

William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. Rev. 413 (2015).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2015/iss2/6>

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## The Deliberation Paradox and Administrative Law

*William R. Sherman\**

### ABSTRACT

*Deliberation is a linchpin of administrative decision making, and is a key basis for judicial deference to the agency's interpretation of law. But deliberation has a dual valence in other areas of administrative law: it triggers the right to access agency information in public meeting laws, but bars access in public records laws. This is the first Article to identify and explain what I call the "Deliberation Paradox" in administrative law. This longstanding but unexplored dichotomy has roots in common law history, separation of powers, the purposes of public access statutes, and assumptions about how the government works. But the development of deference doctrines since Chevron sets deliberation at cross-purposes, confusing agencies about what is publicly accessible and denying the public information about vast swaths of government decisionmaking. This Article contends that the Deliberation Paradox should be recognized and discarded in favor of an approach that grants deference only to deliberation that is publicly disclosed, with significant implications for judicial deference to agency interpretations of law and for inter-agency collaboration.*

### INTRODUCTION

Administrative law places great importance on deliberation in agency decision making. An agency's careful consideration of evidence, argument, perspectives, and options can earn it deference from a reviewing court, and a growing list of statutes and orders require an agency to weigh certain questions or factors prior to action. That decision-making process, however, will be either open or closed to the public, depending on a paradox in open government laws:

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\*Adjunct Professor, Seattle University School of Law. I am grateful for advice from Professors Deborah Ahrens, Kent Barnett, Liz Ford, Charlotte Garden, Matt Hall, Jack Kirkwood, Margaret Kwoka, Ben Means, Richard Peltz-Steele, Anna Roberts, David Skover, and Tara Urs. I greatly appreciated the comments from discussants at the Lewis & Clark Law School Junior Faculty Works-in-Progress Workshop, especially Eric Biber, Mike Blumm, William Funk, Robert Glicksman, and Sandi Zellmer. Seattle University School of Law students Chris Bhang and Dru Swaim provided helpful suggestions. Thanks most of all to Holly Barker.

Deliberation among officials triggers mandatory public access to certain agency *meetings*, but exempts public access to agency *records*. What accounts for deliberation's powerful, but contradictory, impact on administrative law?

This is the first article to identify and explain what I call the "Deliberation Paradox"<sup>1</sup> in administrative law. State open record laws and the federal Freedom of Information Act (FOIA) grant broad access to documents produced, retained, or otherwise used by the government. But those laws recognize an exemption for records that reflect the government's deliberative process, such as internal memoranda, the recommendations of subordinates, or preliminary drafts. In other words, records are exempt from disclosure if they reflect the government's process of making up its mind. Records of deliberations, in short, may be kept secret.<sup>2</sup>

Open meeting laws, on the other hand, establish a right of public, in-person access to certain government decision-making processes as they happen. They apply to meetings of multi-member bodies such as federal or state commissions or boards, city councils, and the like—entities that often exercise the same range of executive, legislative, and adjudicative powers as the agencies covered by open records laws. Open meeting laws like the Government in the Sunshine Act and its state counterparts, however, make a critical distinction between some meetings and others. Those that merely involve distribution of information don't need to be public. But those that involve a deliberative exchange of opinions, positions, recommendations, or analyses must remain open. Meetings with deliberation, in short, may *not* be kept secret.<sup>3</sup>

At the same time, judicial review of agency action accords great weight to deliberation, granting deference to agency interpretation of laws under *Chevron U.S.A., Inc. v. NRDC*,<sup>4</sup> *Skidmore v. Swift & Co.*,<sup>5</sup> and routine review under the Administrative Procedure Act (APA).<sup>6</sup> Deliberation, then, is a linchpin of administrative law, but in

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1. I define the term "paradox" as "one (as a person, situation, or action) having seemingly contradictory qualities or phases." Paradox, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/paradox> (accessed February 13, 2014).

2. See *infra* section I.B.

3. See *infra* section I.C.

4. 467 U.S. 837 (1984).

5. 323 U.S. 134 (1944).

6. 5 U.S.C. §§ 500–596 (2011); see *infra* section I.A.

a paradoxical way: agency deliberation is the ideal of administrative decision making, but it triggers the right to access in public meeting laws and bars access in public records laws. The Deliberation Paradox goes largely unobserved in judicial and scholarly analyses,<sup>7</sup> but government agencies struggle with it on a daily basis as they seek to establish policy while simultaneously trying to determine what records and meetings must be public.

In contemporary governance, the two types of deliberation set administrative law at cross-purposes, confusing agencies about what is accessible and denying the public information about vast swaths of government decision making. Furthermore, statutory and judge-made deliberation requirements in administrative law have complicated public access to deliberative records.

This Article illuminates an obscure aspect of administrative law: the peculiar status of deliberation as a shibboleth of deference. It begins, in Part I, with a more complete explanation of the role of deliberation in open records and open meeting law and administrative law as a whole. Part II documents the development of the divergent applications of deliberation in open government law. Part III continues this inquiry, turning to the purposes of open government laws and accompanying assumptions about how the government works. Together, Parts II and III explain how the Deliberation Paradox came to exist in its current form. Part IV observes that the Deliberation Paradox no longer makes sense in the administrative state because judicial deference to deliberation, directed deliberation, and consultative deliberation require public scrutiny to retain democratic legitimacy. Part V concludes that the Deliberation Paradox should be discarded in favor of an approach that would condition judicial deference to an agency on the disclosure of the agency's deliberation, narrowing the gap between access to meetings and to records, and leaving a more coherent understanding of deliberation's significance for deference doctrines. This Article aims to establish the Deliberation Paradox as significant to administrative law; to explain it; to define terminology for its explication; and to identify its implications and possible remedies.

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7. As discussed in section III.C.2, the Paradox is noted by commentators only in the context of critiques of open meeting laws, and not recognized as a fundamental conflict in open government and administrative law.

I. DELIBERATION IN ADMINISTRATIVE LAW AND OPEN  
GOVERNMENT

Judicial inquiry into agency deliberation is nagged by a Heisenbergian question: How can one assess the quality of an agency's deliberation without affecting that deliberation?<sup>8</sup> The refinement of requirements for the deliberative process is inextricably bound up with the question of public access to administrative government. From the outset, drafters of the APA considered public scrutiny of the government's decision-making process to be an important part of legitimacy and democratic accountability (and perhaps quality, as well).<sup>9</sup> But scrutiny of agency deliberation has troubled courts as they attempt to identify procedures for internal adjudicatory appeals<sup>10</sup> or otherwise assess agency decisions.<sup>11</sup> At the same time, public access to and participation in agency deliberations are seen as a civic good that should be encouraged<sup>12</sup> (although, according to some, only in moderation).<sup>13</sup> Deliberation, however scrutinized, remains the gold standard for agency decision making.

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8. Please forgive the physics analogy. The Heisenberg Uncertainty Principle observes that it is possible to ascertain the location of an electron, or its speed and direction, but not both simultaneously. Werner Heisenberg, *THE PHYSICAL PRINCIPLES OF THE QUANTUM THEORY* 13 (1949). In application, this means that it is impossible to fully observe an electron without altering what one observes. The principle has since been loosely extended to describe any situation in which the observer alters what is being observed.

9. Administrative Procedure Act, 5 U.S.C. § 3(c) (1946) ("Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.").

10. *See, e.g.*, *United States v. Morgan*, 313 U.S. 409 (1941) ("Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected.").

11. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 45 (D.C. Cir. 1986) (noting that "examining the deliberative proceedings of the agency . . . must be the rare exception").

12. *See, e.g.*, CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 243 (1993) ("Public deliberation may reveal the truth or falsity of factual claims about the state of the world or about the likely effects of policy proposals."); Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *WAKE FOREST L. REV.* 463, 465 (2013).

13. *See, e.g.*, Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *NW. U. L. REV.* 173, 207-211 (1997) ("Regardless of the decisional model, participation lends legitimacy to agency decisions . . . Encouraging deliberation, then, becomes a matter of managing participation to ensure that the process remains sufficiently deliberative.").

But it is more than that: it is also the key to both daylighting and shielding government action from public view.

#### *A. Deliberation and Deference*

The idealized government decision follows a process of deliberation—thorough, well-balanced deliberation taking into account law, facts, values, disparate opinions, predictions of future events, and context.<sup>14</sup> Administrative agencies are created and authorized to make decisions with the understanding—really, the requirement—that the agency consider its actions carefully. Administrative law is in large part the refinement and application of this rule to disparate decisions and circumstances.<sup>15</sup> Seen this way, the validity of an agency’s action is usually more closely linked to the way it deliberates prior to action than the substance of the action itself.<sup>16</sup>

The development of judicial deference doctrine has further extended the role of deliberation. In *Chevron U.S.A., Inc. v. NRDC*, the Supreme Court held that a court must defer to an agency’s interpretation of law when that law is ambiguous and the agency’s

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14. See, e.g., *id.* at 205 (noting that deliberative democracy is largely undefined, but relies on civic virtue; participants must not only respect public viewpoints, they must engage them). Rossi comments that “[a] deliberative democratic process strives to operate in an engaged mode, somewhere between mere respect and confrontation.” *Id.* For a fascinating discussion of various theoretical and psychological conceptions of deliberation, see Andre Baechtiger, Address at the annual meeting of the American Political Science Association: On Perfecting the Deliberative Process: Agonistic Inquiry as a Key Deliberative Technique, (July 19, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1642280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642280).

15. See Shapiro, Fisher & Wagner, *supra* note 12, at 465. Most significantly, the focus on the rational-instrumental paradigm deflects attention from the “deliberative-constitutive” paradigm, which originated in the Progressive Era—a paradigm that relied on expertise, deliberation, and reason giving to establish legitimacy of public administration. See also William R. Sherman, *A Pragmatic Republic, If You Can Keep It*, 112 MICH. L. REV. 905 (2014) (discussing the internal standards developed by early administrative agencies in the United States). Shapiro, Fisher and Wagner explain that the deliberative model of agency decision making was key to the legitimacy of the administrative state. In this way, agencies and commissions were vehicles for “defining issues, sifting evidence, posing problems and enlightening the public mind.” Shapiro, Fisher & Wagner, *supra* note 12, at 473 (quoting Justice Frankfurter).

16. See MICHAEL ASIMOW & RONALD LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 11 (3d ed. 2011) (“Civic republicans believe that . . . the role of administrative law should be to facilitate the deliberative process, minimize political influences over the administrative process, and assure that agency decisions are well explained and rational . . . . Under the civic republican model, the rulemaking process promotes deliberation because the notice and comment system invites all citizens to participate and articulate their own values.”).

interpretation is based on a permissible construction of the statute.<sup>17</sup> In forgoing the judicial authority to interpret the law, *Chevron* and related cases<sup>18</sup> place great importance on the reasonableness of the agency decision-making *process*. Specifically, an agency earns judicial deference if it properly deliberated in the course of its decision. In fact, courts will grant deference on a scale that slides with deliberation, and remand agency decisions that are unaccompanied by a proper explanation.<sup>19</sup>

Thus, deliberation is critical at two stages of judicial review of agency action: first, in application of basic agency decision making procedure standards; and second, in application of deference doctrines under *Chevron*.

The Administrative Procedure Act was an effort to standardize (and mandate) the steps of adjudication and rulemaking.<sup>20</sup> It reflects a central role for deliberation. Adjudication under APA section 554 requires the agency to consider facts and arguments; section 557 requires statements of reasons or basis for decisions.<sup>21</sup> Rulemaking under APA section 553 requires the agency to “consider” submitted “written data, views, or arguments.”<sup>22</sup> Upon publication of a rule, APA section 553(c) requires the agency to issue a “concise general statement of . . . basis and

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17. 467 U.S. 837 (1984).

18. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *United States v. Mead Corp.*, 533 U.S. 218 (2001). For an extensive, and useful, discussion of *Skidmore*, *Chevron*, and congressional treatment of deference doctrines, see Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1 (2015).

19. *See Chevron*, 467 U.S. at 844. *See also* Evan Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1292 (2008); Mark Seidenfeld, *A Syncopated Chevron*, 73 TEX. L. REV. 83 (1994). There is a distinction, to be sure, between the process of deliberation and the giving of a reason that accompanies a decision. The requirement for reason-giving implicitly requires deliberation, but there is no requirement that the reason given actually disclose the entire deliberative process. *See, e.g.*, David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 2317 (2010) (arguing that various standards for judicial review of agency action collapse into a reasonableness test).

20. *See generally* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). It is a mistake to consider the APA the starting point for administrative law, but so far as transsubstantive statutes and the application of due process to administrative deliberation, it is a significant milestone. *See Sherman, supra* note 15, at 905–906 (discussing the multitude of alleged birthdates of administrative law).

21. 5 U.S.C. §§ 554, 557.

22. *See also* Model State Admin. Procedures Act (MSAPA) § 12 (1961); Administrative Procedure Act 5 U.S.C. § 555(e) (1964).

purpose.”<sup>23</sup> Both on their own terms and as applied by the courts, these mandates require direct engagement with facts, opinions, and arguments by agency decisionmakers.<sup>24</sup> The federal APA and state APAs could have established procedural steps that did not require any specific agency deliberation, but they did not. Instead, they included the quite reasonable expectation that the agency would take the procedure seriously, and carefully consider its action.

But deliberation plays an even more significant role in judicial review of agency action. Under the APA, a court can set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>25</sup> Although “arbitrary and capricious” means many things, at its core it means “unaccompanied by a reasoned decision-making process.”<sup>26</sup> Arbitrary and capricious review authorizes courts to take a “hard look” at agency decision making—but the Supreme Court has emphasized that it is aimed at the decision-making process, not the merits of the decision itself. Thus, “hard look” review as a procedural check (not a substantive limit) on agency reasoning starts with the mandate that an agency follow a reasoned decision-making process, demonstrating that there was some process of deliberation that preceded agency action.<sup>27</sup>

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23. See also MSAPA § 3–110(a) (1981) (calling for “a concise explanatory statement containing . . . [the agency’s] reasons for adopting the rule”).

24. See, e.g., *Morgan v. United States*, 298 U.S. 468 (1936) (requiring that an agency’s internal appeal process not detach the hearing from the deciding official); *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (holding that “major issues of policy” must be addressed in a rule’s explanatory statement). See also Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 118 (2007).

25. 5 U.S.C. § 706 (2014). See also Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 491–92 (1997) (“Courts require that agencies offer detailed explanations for their actions. The agency’s explanation must address all factors relevant to the agency’s decision. A court may reverse a decision if the agency fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose.”).

26. For an extended discussion of this argument, see Seidenfeld, *supra* note 25 at 491–524 (“Essentially, under the hard look test, the reviewing court scrutinizes the agency’s reasoning to make certain that the agency carefully deliberated about the issues raised by its decision.”). See also Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974) (cited in Seidenfeld, *supra* note 25).

27. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (holding that “hard look” review goes to inspection of process, not substantive conclusions); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (holding, inter alia, that arbitrary



Deliberation takes on an especially pivotal role in the application of judicial deference to agency interpretations of law, most prominently in the *Chevron* doctrine. A minor industry of scholarship followed in *Chevron*'s wake to identify the justification for judicial deference (which, after all, seemed a situational abdication of the courts' duty to say "what the law is").<sup>28</sup> That justification has been located in technical expertise, programmatic expertise, institutional competence, congressional delegation, and process theory. But every such justification has at its heart the requirement that the agency carefully deliberate before announcing its interpretation.<sup>29</sup> Courts consistently treat a deliberative decision-making process as cause for deference, and the absence of a deliberative decision as a reason to deny deference. Thus, *Chevron* deference is denied certain types of agency interpretations, such as positions taken by agencies in litigation, because they are not "the result of the agency's deliberative processes."<sup>30</sup> Although *Chevron* was quickly recognized as a watershed decision in administrative law, the reliance on deliberation did not originate with *Chevron*; in fact, the case can be seen as a continuation of a long line of cases in which the courts deferred to agency interpretations of law that were developed with sufficient deliberative processes.<sup>31</sup>

Proto-*Chevron* deference doctrine consistently placed deliberation front-and-center in the model of agency process. Under the arbitrary and capricious standard, a government decision must be upheld "if it is the result of a deliberate, principled reasoning process

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and capricious review required the agency to consider relevant factors). *See also* Zaring, *supra* note 19.

28. *Marbury v. Madison*, 5 U.S. 137, 137 (1803).

29. This Article's assessment of deliberation as a key to deference should be understood as distinct from, but not necessarily in conflict with, understandings of *Chevron* and *Skidmore* that focus on congressional delegation or agency expertise. Those understandings approach deference as a question of design, rather than decision-making process. *See, e.g.*, Barnett, *supra* note 18.

30. *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997); *see also* *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012) (refusing to give deference to agency amicus brief position due to lack of process) *aff'd on other grounds*, 134 S. Ct. 870 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 1877, 2165–68 (2012) (refusing to give deference to agency position in amicus brief).

31. *See, e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962); *Sec. Indus. Assoc. v. Bd. of Governors of the Fed. Reserve Sys.*, 468 U.S. 207, 217 (1984) (according deference to agency interpretation of law where the agency conducted proper analysis); *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 495 & n.4, 496 (1985) (granting weight based on thoroughness of consideration).

and if it is supported by substantial evidence.”<sup>32</sup> But the significance of deliberation for judicial review of agency decisions goes far beyond the minimal requirement to avoid arbitrary and capricious decisions or processes. The level of agency deliberation determines what level of deference a reviewing court will give a decision. Deliberation is not mere shorthand for care, nor a universal positive descriptor given to good decisions. Rather, it refers to the reasoned consideration of factors and use of reasoned explanations for final decisions. As the Ninth Circuit put it,

Ad hoc agency action such as here is also entitled to some deference, but not all deference is created equal. How much deference an agency decision is due depends in part on such factors as how much deliberation went into reaching it and whether the decision fits with a policy the agency has consistently followed.<sup>33</sup>

Perhaps most clearly, *United States v. Mead Corp.* states that the deference given to an agency decision is directly related to the level and quality of an agency’s deliberative process.<sup>34</sup> Under *Mead*, Congress must have “delegated authority to the agency generally to make rules carrying the force of law,” and the agency interpretation claiming deference must have been promulgated in the exercise of that authority.<sup>35</sup> If the agency’s decision is a result of a sufficiently formal and deliberative process to warrant deference, it will receive a high degree of deference.<sup>36</sup>

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32. *Balmert v. Reliance Standard Life Ins. Co.*, 601 F.3d 497, 501 (6th Cir.2010) (quoting *Baker v. United Mine Workers of Am. Health & Returned Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991)) (internal quotation marks omitted); *see also* *N.Y. State Bar Ass’n v. FTC*, 276 F.Supp.2d 110 (D.D.C. 2003) (holding that interpretation was not the product of notice and comment rulemaking, did not appear to have been made with any degree of deliberation, and was supported only by *post hoc* rationalization, hence was arbitrary and capricious) *aff’d*, *Am. Bar Ass’n v. F.T.C.*, 430 F.3d 457, (D.C. Cir. 2005).

33. *A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998); *see also* *Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir.1994), *aff’d sub nom.* *Bhd. of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152 (1996); *Barnett v. Weinberger*, 818 F.2d 953 (D.C. Cir. 1987).

34. *United States v. Mead Corp.*, 533 U.S. 218, 226–31 (2001).

35. *Id.* at 226–27.

36. *Id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).

Enforcement decisions, as well, receive deference on a scale that slides with deliberation.<sup>37</sup> The same is true of decisions related to interpretive rules or internal agency guidance: documents that are not adopted under a sufficiently deliberative process will get less deference than those that are.<sup>38</sup> Courts apply this yardstick across the board; an extensive deliberative process, including gathering input and considering it, places a decision “comfortably within the category of agency decision making procedures that support *Chevron* deference.”<sup>39</sup>

Other developments in administrative law, however, demonstrate that deliberation must consist of more than mere reasoned decision making. A proliferation of transsubstantive administrative statutes, from the National Environmental Policy Act to the Paperwork Reduction Act, rely on the notion that a sound decision must consider certain factors and articulate reasoning related to them. The complication comes not merely from the requirement of additional deliberation, but rather from the requirement of a certain *type* of deliberation, in which decision makers consider many specific factors and views, and must explain how they affected, or did not affect, the final outcome.<sup>40</sup> Through statute, regulation, and executive order, agencies are now required to include in their deliberations any environmental consequences, costs and benefits, regulatory burden, and other aspects of decisions.<sup>41</sup> An agency’s compliance with

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37. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995) (explaining that the Office of the Comptroller of the Currency “is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws.” (quoting *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 403–404 (1987))).

38. *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 115 (3d Cir. 2003) (“We also decline to defer to the explanation of the agency’s position in its Compliance Manual. As an internal document, it is automatically at the lower end of the *Skidmore* scale of deference. An internal agency manual is not subject to the kind of deliberateness or thoroughness that gives rise to significant deference.”).

39. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011).

40. *See, e.g.*, Michael Blumm & Stephen Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENV’T L. REV. 277 (1990) (describing NEPA as process-driven).

41. *See* Unfunded Mandates Reform Act, 2 U.S.C. chs. 17A, 25; Regulatory Flexibility Act, 5 U.S.C. §§ 601–603; National Technology Transfer and Advancement Act, 15 U.S.C. § 272; National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C); Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520; Exec. Order No. 12,291, 3 C.F.R. 127 § 3 (1981), Exec. Order No. 12,866, 3 C.F.R. 638 §§ 2–4 (1993), Exec. Order No. 12,866.

requirements for what I call “directed deliberation”<sup>42</sup> can only be fully assessed with inquiry into the agency’s decision-making process.

But as central as deliberation is to administrative law, our system assigns two incompatible roles to public scrutiny of (or participation in) that deliberation: if the deliberation is on paper, it is secret; if the deliberation is in the context of a certain type of meeting, it must be public. Despite the ubiquity of deliberation requirements in modern administrative law, neither courts nor commentators have previously identified the paradox in laws preserving access to government: deliberation is the touchstone for guaranteeing public access to *meetings* of government officials, but it carves a vast exemption to public access to *records* of those same officials or their agencies. The Deliberation Paradox touches on every area of administrative decision making.

### *B. Deliberation and Public Records*

Much of what we know about our administrative state is the result of open records laws. A records request is the first, and often best, tool of the reporter, litigant, businessman, citizen, or scholar. Writing a newspaper article about teachers with criminal history? A records request to the school district is the first step.<sup>43</sup> Suing a doctor for malpractice? Ask the state for prior licensure complaints.<sup>44</sup> Looking to contract with the government? Get copies of similar proposals and contracts.<sup>45</sup> Want to learn how safely the Navy stores explosives near your seaside village? FOIA is your best bet.<sup>46</sup> Curious about how the government allows citizen participation? For reliable empirical data, start with each agency’s public records contact.<sup>47</sup>

Each of these requests, and others like them, will net the requester a substantial amount of valuable information. But the requester may be denied any documents showing the government’s

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42. “Directed deliberation” and its implications for the Deliberation Paradox are discussed more fully in section IV.B, *infra*.

43. *See, e.g.*, *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wash. 2d 199 (2008).

44. *See, e.g.*, *Calloway v. Ohio State Med. Bd.*, 990 N.E.2d 673 (Ohio Ct. App. 2013).

45. *See, e.g.*, *Mead Data Cent. Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242 (D.C. Cir. 1977).

46. *See, e.g.*, *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259 (2011).

47. David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes*, 57 U. KAN. L. REV. 1, 13 & n.61 (2008).

deliberative process—the internal or interagency emails, memoranda, reports, comments, recommendations, or notes used as people in the government came to a decision. None of the following must be produced: the prosecutor’s memo weighing whether to charge the teacher with a crime; the medical licensing board’s emails considering various penalties for the doctor; the government procurement agency’s analysis of low-bid contract proposals; the Navy’s preliminary memo supporting one plan and not another for ordnance storage; two subcabinet assistant secretaries’ notes from their meeting about how to react to a directive from the White House. Those documents reflect the government’s deliberative process, and for that reason they can remain secret under FOIA and every state open record law.

The specific language, structure, and coverage of the federal and state laws shed some light on the particular deliberations to be shielded from public view and why.

### *1. The federal Freedom of Information Act*

The federal Freedom of Information Act (universally known as FOIA) grew from minor provisions in the original Administrative Procedure Act that gave interested parties access to a limited universe of documents related to APA-governed decisions.<sup>48</sup> From such humble beginnings, in 1966 Congress enacted FOIA, and substantially strengthened it in 1974. It was a cornerstone of the “sunshine laws” movement that began in the 1950s and flourished in the post-Watergate era, opening government records to public access on the theory that sunlight is the best disinfectant<sup>49</sup>—that is, public scrutiny exposes, and therefore hampers or remedies, corruption.

The key provisions of FOIA work like this: section 552(a)(3) requires an agency to furnish any reasonably described record

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48. Administrative Procedure Act of 1946 § 3(c).

49. The phrase is attributed to Justice Louis Brandeis. *See* LOUIS BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT (1914) (“Sunlight is said to be the best of disinfectants.”). *But see* Jon Stewart, THE DAILY SHOW, June 25, 2009, *available at* <http://www.thedailyshow.com/watch/thu-june-25-2009/cheney-predacted> (“It’s a beautiful metaphor, although I do have to caution . . . sunlight is actually a terrible, terrible disinfectant. If you do . . . have a cut or an open wound of any kind, I cannot stress this enough, do not clean it out with sunlight.”).

requested by any person for any reason.<sup>50</sup> Section 552(b) lays out a number of exemptions to the basic rule; pertinent to this Article, subsection 5 exempts “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>51</sup> Although the language itself is fairly opaque, Exemption 5 is interpreted to establish what is known as the “deliberative process” exemption,<sup>52</sup> which aims to “prevent injury to the quality of agency decisions.”<sup>53</sup>

But the purposes of the exemption appear to be broader than mere prevention of injury. Courts have identified at least three goals behind the exception: First, to encourage frank discussions of policy among agency staff and officials; second, to protect against disclosure of policy proposals and ideas before they are actually adopted; and third, to avoid the confusion that might result from the misperception that certain reasons and rationales resulted in agency action.<sup>54</sup> Courts treat the exemption as a two-part inquiry: First, are the documents inter- or intra-party memorandums or letters? And second, would disclosure of them cause “injury to the quality of agency decisions”?<sup>55</sup> Neither of these questions is as simple as it might seem.

The phrase “inter-agency or intra-agency memorandums or letters” has never been taken literally. Rather, the exemption includes any record that is treated as though it was part of the government’s internal decision-making process. Consequently, when private contractors are retained to provide advice in the same way that an

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50. 5 U.S.C. § 552(a)(3)(A).

51. 5 U.S.C. § 552(b)(5) (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110175, 121 Stat. 2524

52. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); *see also* U. S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 359 (2006).

53. *Sears*, 421 U.S. at 151.

54. *See, e.g.*, *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772–73 (D.C. Cir. 1978); *Kidd v. Dep’t of Justice*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would “inhibit drafters from freely exchanging ideas, language choices, and comments in drafting documents”) (internal quotation marks and citation omitted); *Heggstad v. Dep’t of Justice*, 182 F. Supp. 2d 1, 12 (D.D.C. 2000) (protecting memoranda containing recommendations based on perjured testimony, finding that they “have no probative value to the public since they are based on misrepresentations”); *Am. Fed’n of Gov’t Emps. v. Dep’t of Health and Human Services*, 63 F.Supp.2d 104, 108 (D. Mass. 1999) (holding that release of predecisional documents “could cause harm by providing the public with erroneous information”).

55. *Sears*, 421 U.S. at 151.

agency employee would be used, or when non-governmental experts are consulted for advice (as distinct from other input), their communications will be considered inter- or intra-agency.<sup>56</sup>

But the second question—whether disclosure would cause injury to the decision-making process—is more interesting. As applied by the courts, this portion of the deliberative process exemption seeks to protect nothing less than the “decision making processes of government agencies.”<sup>57</sup> In turn, this exemption applies to those communications in which “agencies [may] freely . . . explore alternative avenues of action and . . . engage in internal debates without fear of public scrutiny.”<sup>58</sup> To remain exempt under this section, the communication must be deliberative (i.e., “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters”).<sup>59</sup>

The communication of recommendations or opinions is at the center of FOIA’s concept of “deliberation.” Under Exemption 5, a document is deliberative when it “makes recommendations or expresses opinions on legal or policy matters”<sup>60</sup> or when it “reflect[s] the personal opinions of the writer rather than the policy of the agency.”<sup>61</sup> In addition, the idea of deliberation includes the act of weighing arguments in the development of a decision. In one important opinion, the court looked closely at “whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency” and “whether the document is deliberative in nature,

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56. The distinction can be blurry, particularly when an outside party is in the process of negotiating to become a contractor or consultant. During the negotiating process, FOIA treats the outside party as nongovernmental—and thus unprotected by the deliberative process exemption. For example, when the Air Force negotiated with West Publishing Co. for legal research software, Lexis’s parent company wanted to see the documents. The court distinguished between documents reflecting the Air Force’s internal evaluation of the negotiations, which were exempt, and a document summarizing the offers and counter-offers exchanged during the negotiations, which were not. *See Mead Data Cent. Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 257–58 (D.C. Cir. 1977) (evaluating whether documents relating to the negotiation of an Air Force licensing agreement were exempt).

57. *Sears*, 421 U.S. at 150 (quoting *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (CA6 1972) (internal quotation marks omitted)).

58. *Missouri ex rel. Shorr v. U.S. Army Corps of Eng’rs*, 147 F.3d 708, 710 (8th Cir. 1998).

59. *Jordan v. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

60. *Vaughn*, 523 F.2d at 1144.

61. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

weighing the pros and cons of agency adoption of one viewpoint or another.”<sup>62</sup> This concept is often summarized as documents that reflect the “give-and-take” of the decision-making process.<sup>63</sup>

The nuance and complexity of FOIA Exemption 5 are sufficiently deep to warrant book chapters and many journal articles.<sup>64</sup> But at its core, this deliberative process exemption protects the secrecy of a vast scope of records, so long as they were antecedent to a final decision and were part of the process of an agency’s internal decision making. And unlike many state deliberative process exemptions, FOIA’s exemption continues to apply even after the agency has made a final decision.<sup>65</sup>

## *2. Public records laws in the states*

The public record statutes of the states—and every state has one—are largely patterned after FOIA.<sup>66</sup> These laws have, from the start, exempted records reflecting the government’s deliberative process.<sup>67</sup> Yet in practice, courts have strained the deliberative process exemption to cover virtually anything used by or submitted to the government; it is not limited to “intra-agency documents prepared by a government agency,” but includes all “‘recommendations’ made as part of the deliberative process,”

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62. *Id.*

63. *Marzen v. U.S. Dep’t of Health & Human Servs.*, 632 F.Supp. 785, 814 (N.D. Ill. 1986).

64. FOIA Exemption 5 contains twenty-five words; the DOJ manual on Exemption 5 is sixty pages long with 307 footnotes. 5 U.S.C. § 552(b)(5); Department of Justice Guide to the Freedom of Information Act 357-416 (2006).

65. *See, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F.Supp.2d 100, 112–13 (D.D.C. 2005) (“Contrary to plaintiff’s assertion that materials lose their Exemption 5 protection once a decision is taken, it is the document’s role in the agency’s decision-making process that controls.”); *Judicial Watch of Fla., Inc. v. Dep’t of Justice*, 102 F.Supp.2d 6, 16 (D.D.C. 2000) (rejecting as “unpersuasive” the assertion that deliberative process privilege is inapplicable after deliberations have ended and relevant decision has been made); *May v. Dep’t of the Air Force*, 777 F.2d 1012, 1014–15 (5th Cir. 1985); *Cuccaro v. Sec’y of Labor*, 770 F.2d 355, 357–59 (3d Cir. 1985).

66. *See* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002). Although some commentators refer to state FOIAs or “little FOIAs,” this Article will reserve the term FOIA for the federal Freedom of Information Act and will refer to state laws as state open records laws or by specific name, such as the Georgia Public Records Act, Ga. Code Ann. § 15-18.

67. *See, e.g., CAL. GOV’T CODE* § 6254(a); *FLA. STAT.* §§ 119.01-119.15; *5 ILL. COMP. STAT.* 140/7(1)(f); *WASH. REV. CODE* 42.56.280.



apparently regardless of source.<sup>68</sup> For example, one state court of appeals held that a document was exempt from disclosure even though an outside party submitted the document to the government and had an adversarial negotiating relationship with the government. The court reasoned that the document was reflective of the government's deliberative process because it was considered by the government in its policymaking process, constituting a "note[]" or "recommendation[]," even though it was the note or recommendation of an outside adversarial party.<sup>69</sup>

At the state level, then, it appears that courts are tempted to interpret the deliberative process exemption to create non-statutory exemptions where candid deliberation is desirable within the realm of agency discretion. For example, in the case discussed above, it seems likely that the court wished to create, *sub rosa*, an exemption for documents used during a collective bargaining process.

Interestingly, some jurisdictions appear to contemplate an end to either the deliberative process or the usefulness of (or justification for) secrecy; these states put a timer on the deliberative process exemption. When the government makes a final decision, the deliberative materials leading up to the decision are no longer protected from disclosure. Deliberative materials are exempt only until the policies or recommendations contained in such records are implemented.<sup>70</sup>

Thus, although there are some differences at the margins, generally state open records laws exempt predecisional internal or inter-agency communications that reflect an agency's deliberative process.

### *B. Deliberation and Public Meetings*

If public records are the first critical avenue of public access to administrative government, agency meetings are a close second. This is especially true at the state and local level, where city councils with plenary power and multiple boards and commissions exert substantial executive and legislative power. Open meeting laws bear some superficial similarity to open record laws; they state that all

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68. *See, e.g.*, *ACLU v. City of Seattle*, 89 P.3d 295, 297–300 (Wash. 2004) (holding that materials submitted by an outside party to the agency, but used by the agency, reflected the agency's deliberative process). The author represented the ACLU of Washington at a later phase of this case.

69. *Id.* at 551.

70. *See, e.g.*, *Dawson v. Daly*, 845 P.2d 995, 1002 (Wash. 1993).

meetings of certain governmental bodies must be open, subject to certain exceptions. But the parallels end there. Open meeting laws cover gatherings of boards, commissions, councils, and agencies led by multiple members—they do not apply to just any meeting of government employees. The laws reflect a procedural difference as well, because a meeting can only be open if it is accessible to the public in real time, not in recorded form after the fact. In addition, although a formerly private document can be later disclosed, a closed meeting cannot be retroactively opened to the public.<sup>71</sup> And, importantly, agency meetings *need only be public if they include deliberation*.

### *1. The Government in the Sunshine Act*

The most prominent federal open meeting law is the Government in the Sunshine Act of 1976.<sup>72</sup> The Sunshine Act requires that meetings of federal agencies be open, with some exceptions. On the surface, the requirement applies to every agency. However, the definitions of “agency” and “meeting” are sufficiently narrow so that the Act does not apply to a large array of situations in which the public may seek access. “Agency” is defined as an entity “headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate [or a] subdivision thereof authorized to act on behalf of the agency.”<sup>73</sup> So entities like the Federal Trade Commission or the Federal Communications Commission are covered, but only at the very top level—the presidential appointees themselves. This can lead to some confusing results; for example, it means that the Atomic Safety Licensing Board is not an “agency” for the purposes of the Sunshine Act because its members are appointed by the Nuclear Regulatory Commission, not the President.<sup>74</sup> Altogether, about fifty federal agencies are subject to the Act.

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71. This description may oversimplify the matter somewhat because meetings held in executive session might later be found subject to open meeting requirements, and then the minutes or recordings would be disclosed. But the meeting itself cannot be retrospectively opened in any real sense.

72. 5 U.S.C. § 552b

73. 5 U.S.C. § 552b(a)(1).

74. RICHARD PELTZ-STEELE, *THE LAW OF ACCESS TO GOVERNMENT* 160 (2012) (citing *Hunt v. NRC*, 611 F.2d 332 (10th Cir. 1979)).

The Sunshine Act defines a “meeting” as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . .”<sup>75</sup> That definition limits the applicability of the statute, as not all gatherings are worthy of the name “meeting.” Only deliberations that result in action are meetings; deliberations “upon matters not within a subdivision’s formally delegated authority,” “a series of joint planning conferences . . . where the sessions are not convened by the agency and subject to the agency’s unilateral control,” and “a conversation between a member of an agency and members of the regulated industry” are not covered.<sup>76</sup>

The identification of deliberation as the trigger for the Sunshine Act is not an accident; rather, the act of deliberating is precisely what separates a conversation that may be secret from a conversation that must be public. The D.C. Circuit observed:

Congress enacted the Sunshine Act to open the deliberations of multi-member federal agencies to public view. It believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people.<sup>77</sup>

The object of public view is the deliberations themselves—the “serious exchange of views”<sup>78</sup> rather than a mere briefing or background discussion.<sup>79</sup>

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75. 5 U.S.C. § 552b(a)(2). For a helpful discussion of deliberation occurring in the information-gathering stage of agency decision making, see David A. Barrett, Comment, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195, 1201-02 (1988). See also Susan T. Stephenson, Note, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 154 n.3 (1976).

76. See PELTZ-STEELE, *supra* note 74, at 160 (citing cases and examples). See also RICHARD K. BERG, STEPHEN H. KLITZMAN, & GARY J. EDLES, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 14-16 (2d ed. 2005) (parsing the precise nature of conversations that trigger the definition of “meeting” for GSA purposes).

77. *Common Cause v. NRC*, 674 F.2d 921, 928 (D.C. Cir. 1982).

78. BERG ET AL., *supra* note 75, at 9-10 (“[T]he meeting must consist of ‘deliberations [which] determine or result in the joint conduct or disposition of official agency business’ . . . . Thus, at a minimum, ‘meeting’ includes any gathering of the requisite number of members where a serious exchange of views achieves a consensus on a matter of official agency business.”).

### 3. State open meeting law

All fifty states have statutes requiring that most state or local agency meetings be held in public.<sup>80</sup> State open meeting laws typically cover any state, county, or municipal government-convened multi-member body with decision-making or advisory authority.<sup>81</sup> Because state and local governments tend to distribute executive, rulemaking, and adjudicative powers among many such bodies, state open meeting laws have substantial reach. Beyond the typical city council meeting, these statutes also apply to state utility and railroad commissions, governing boards of state universities or colleges, gambling commissions, and labor relations boards.<sup>82</sup> Thus, open meeting laws apply to many of the core administrative and legislative agencies at the state and local level.

The structure of these laws is relatively straightforward: Meetings of covered entities must (1) be open to the public, (2) publish an agenda, and (3) keep minutes. Exceptions exist for personnel decisions, quasi-judicial hearings, attorney-client communications, and certain other purposes. But, unlike open records laws, no exception exists that permits deliberation in secret. In fact, deliberation is the shibboleth that identifies which meetings must be open.<sup>83</sup>

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79. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 471–74 (1984) (holding that a “meeting” occurs when the agency deliberates on matters within its formal delegated authority, but not when the agency receives a briefing or background materials). One commentator, however, has argued that the Sunshine Act interprets “deliberations” as primarily a narrowing function, in which the range of possible policy choices is winnowed prior to a decision stage of discussions. Barrett, *supra* note 75, at 1205–06.

80. See Teresa Dale Pupillo, Comment, *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).

81. See, e.g., FLA. STAT. § 286.011; FLA. CONST. ART. I, § 24(b); WASH. REV. CODE 42.30.020.

82. ANN TAYLOR SCHWING, *OPEN MEETING LAWS* 78-82 (3d ed. 2011).

83. A state law definition of deliberation “typically includes the discussions of the decision makers, the verbalization of their thought processes and the collective acquisition of reports or statements of fact or opinion.” *Id.* at 440–41. See, e.g., MASS. GEN. LAWS ANN. Ch. 30A §18 (defining deliberation as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction”); TEX GOV’T CODE ANN §551.001(2) (defining deliberation as “a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.”).

Washington State's Open Public Meetings Act is typical.<sup>84</sup> This law states that “[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting.”<sup>85</sup> As with many administrative statutes, the key details appear in the definitions; but in this case, the less-than-helpful definition of “meeting” is “meetings at which action is taken.”<sup>86</sup> And the definition of “action” is “the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.”<sup>87</sup> Lest there be any doubt that deliberation is the key, the law states that “[i]t is the intent of this law that [a public agency's] actions be taken openly and that their deliberations be conducted openly.”<sup>88</sup>

Deliberation involving a give-and-take discussion is sometimes best defined in contrast to a passive factual briefing. Some states require so-called “fact-finding” sessions to be open.<sup>89</sup> In practical effect, informational briefings are likely to feature questions and

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84. Others are similar. *See, e.g.*, CAL. GOV'T CODE § 54952.2(a) and (b) (defining “meeting” as “any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate” and directing that “any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members . . . to develop a collective concurrence as to action to be taken on an item by the members . . . is prohibited”); IDAHO CODE § 67-2341(6) (defining “meeting” as “the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter”); IOWA CODE ANN. § 21.2(2) (“‘Meeting’ means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body’s policy-making duties.”); KAN. STAT. ANN. § 75 4317a (“[M]eeting’ means any gathering, assembly, telephone call or any other means of interactive communication by a majority of a quorum of the membership of a body or agency . . . for the purpose of discussing the business or affairs of the body or agency.”); TENN. CODE ANN. § 8-44-102(b)(2) (defining “meeting” as “the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision”).

85. WASH. REV. CODE § 42.30.030 (1971).

86. *Id.* at § 42.30.020(3).

87. *Id.* (emphasis added).

88. WASH. REV. CODE § 42.030.010 (1971). This statute was cited in *Miller v. City of Tacoma*, 979 P.2d 429, 433, 439 (Wash. 1999) (“The people insist on remaining informed so that they may retain control over the instruments they have created. . . . The overall intent of the Open Public Meetings Act is that governmental bodies take actions openly and conduct deliberations openly.”).

89. *See, e.g.*, Georgia Open Meetings Act, GA. CODE ANN. § 50-14-1(a)(2) (1981) (stating that both “fact-finding” and purely deliberative sessions must comply with the Act).

exchanges that can become deliberative, and thus informational briefings are likely to be open anyway.<sup>90</sup>

That contrast between meetings with and without deliberation is most stark when applied to virtual, or serial, meetings, in which individuals are not physically gathered, but communicate in a series of smaller groups, either in person or by message. A series of sub-quorum meetings can add up to a virtual meeting that triggers open meeting law requirements.<sup>91</sup> But even then, the applicability of open meeting law depends on whether the communications constitute “deliberation.” For example, an exchange of emails among school district board members was considered a meeting because the substance of the communications involved deliberation—“the active exchange of information and opinions” on a matter of public business, not “the mere passive receipt of information.”<sup>92</sup>

The significance of the “active exchange” portion of the court’s analysis is brought into sharper relief by the Virginia Supreme Court’s take on a similar situation. The Virginia court determined that an exchange of emails, even if they constituted an active exchange, were insufficiently close in time to suggest real-time deliberation.<sup>93</sup> This principle is not specific to Virginia. Generally speaking, a mere exchange isn’t sufficient; the exchange must occur

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90. *See, e.g.*, *Johnson v. Nebraska Env'tl. Control Council*, 509 N.W.2d 21 (Neb. Ct. App. 1993) (holding that Nebraska open meeting law applied because factual briefings involve listening to facts, arguments, and statements, and therefore constitute a crucial part of a governmental body’s decision making).

91. *See, e.g.*, *Roberts v. City of Palmdale*, 853 P.2d 496, 503 (Cal. 1993) (“[A] concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.”); *Mankato Free Press Co. v. City of N. Mankato*, 563 N.W.2d 291, 295 (Minn. Ct. App. 1997) (“Arguably the effect of the one-on-one interviews is at odds with the purpose of the Open Meeting Law.”); *State ex rel. Mathews v. Shelby Cnty. Bd. of Comm’rs*, 1990 WL 29276, \*12–13 (Tenn. Ct. App. 1990) (“The purpose of this [law] is to prevent public officials from deciding or deliberating public business in chance meetings, informal assemblages or by electronic communication.”); *Eugster v. City of Spokane*, 39 P.3d 380, 385 (Wash. 2002) (“[T]he [law] does not require the contemporaneous physical presence of the Council members in order to constitute a meeting.”).

92. *Wood v. Battle Ground Sch. Dist.*, 27 P.3d 1208, 1218 (Wash. Ct. App. 2001).

93. *See Beck v. Shelton*, 593 S.E.2d 195, 198–200 (Va. 2004). For an excellent analysis of this case, see John F. O’Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 722–23 (2004).

in such a way that suggests deliberation in real time—what Illinois law refers to as “contemporaneous interactive communication.”<sup>94</sup>

Thus, to an even greater degree than the federal Sunshine Act, state open meeting laws identify a particular kind of activity—deliberation—as the trigger requiring public access.<sup>95</sup>

### 3. *Common concepts in open meeting laws*

Despite their differences—in particular the vast gap between state open meeting laws that apply to a multitude of governing bodies and the narrower federal ones—these statutes display a set of core concepts that reinforce the central role for deliberation. First, these laws all require certain meetings to be held in full public view and in real time. They do not recognize as sufficient *ex post* access through recordings or minutes; accordingly, they operate on a concept of access that recognizes only in-person, face-to-face attendance. In addition, these laws require advance notice of meetings, permitting the public to submit materials, comments, or opinions to either the entity or its members in advance of the meeting. Further, they mandate that decisions be made on the record, in public. Finally, and most pertinent to this inquiry, they write deliberation into the very definition of meeting and consequently into the requirements for public access.

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94. 5 ILL. COMP. STAT. 120/1.02 (2006); *see also* CONN. GEN. STAT. § 1-200(2) (2013) (defining meeting as any gathering at which members “discuss or act”); FLA. STAT. § 286.011(1) (2012) (interpreted to include a body’s entire decision-making process as a meeting); Roberts, 853 P.2d at 503 (holding that California’s Brown Act applies to collective action, not the passive receipt of e-mail by members absent a concerted plan to engage in collective deliberation); Times Publ’g Co. v. Williams, 222 So.2d 470, 473 (Fla. Dist. Ct. App. 1969) (“Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us.”).

95. *See*, Stockton Newspapers v. Redevelopment Agency, 214 Cal. Rptr. 561, 564 (Ct. App. 1985) (citing Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors, 69 Cal. Rptr. 480, 485–86 (Ct. App. 1968)) (applying open meeting law to deliberation because it “connotes not only collective discussion but also the ‘collective acquisition and exchange of facts preliminary to the ultimate decision’”); Wood v. Marston, 442 So.2d 934, 940 (Fla. 1983) (using the term “discussion stages”) (quoting Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974)).

*C. The Deliberation Paradox and Administrative Confusion*

In its simplest form, the Deliberation Paradox is plain: deliberation may be kept private in records, but must be open in meetings. Thus, the paradox might be explained by different conceptions of what it means for an agency to *deliberate*. Alternatively, the paradox could arise because the word (or concept) of deliberation means different things in the context of records and meetings. Is the Deliberation Paradox a real conceptual quandary, or a mere linguistic tic?

*1. The paradox in real life*

The actual practice of government agencies suggests that the paradox is a real conundrum, confusing officials about what may be kept secret and what must be made public.

Consider the example of a commission that holds a public meeting, but then goes into closed session to get legal advice. When it emerges, it takes a vote with no further discussion or public comment. A reporter or other interested party might be suspicious that something more than mere receipt of legal advice took place in closed session, and request a copy of minutes from the closed session. If the minutes do exist, and if they show that the commission deliberated during the closed session, the minutes might still be exempt from disclosure because they comprise a record that reflects the agency's deliberative process.<sup>96</sup>

Consider as well a situation where each member of a five-person administrative board develops a memorandum summarizing his or her opinion and analysis of a pending issue. They circulate the memoranda, which inform each other of the likely vote on the issue, as well as the reasons supporting it. None of them mentions the memoranda at the open meeting at which they vote on the pending issue. Are the memoranda accessible as public records? Probably not,

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96. *See, e.g.*, PELTZ-STEELE, *supra* note 74, at 373 (comparing Multimedia Publ'g of N.C., Inc., v. Henderson Cnty., 550 S.E.2d 846 (N.C. Ct. App. 2001), with Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 637 A.2d 1261 (N.J. 1994)) (A board of commissioners held a public meeting, then went into closed session. Peltz-Steele explores the question of whether the minutes or recordings of the executive session are accessible as records.).



unless they are specifically cited by the board members as used in conjunction with the vote, in which case they are accessible.<sup>97</sup>

One step further: nearly every jurisdiction recognizes the applicability of open meeting laws to “serial meetings,” in which a less-than-quorum number of officials communicate in a series, which eventually adds up to a quorum.<sup>98</sup> Serial meetings can take place in person or by telephone, but can also take place by record—including email, instant message, or civic social network (such as Twitter or Facebook).<sup>99</sup> Government officials’ deliberation via an exchange of records would be exempt from disclosure under open record law right up until the point that they can be considered deliberation as applied by open meeting law (*i.e.*, usually with a quorum and evidence that the deliberation is going on in real time). In other words, the exact same exchange taking place over the course of three days might be exempt, but taking place over the course of an afternoon might trigger access requirements under open meeting law.<sup>100</sup>

As these examples suggest, considerable confusion can arise, in both the agencies and the courts,<sup>101</sup> especially with regard to electronic records or civic social media. Concurrently, a thriving consulting and training industry has arisen to manage electronic records and provide advice to governments struggling with the

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97. *See, e.g.*, 5 ILL. COMP. STAT. 140/7(1)(f) (2014) (“[A] specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.”).

98. *See Beck*, 593 S.E.2d at 198–200 (holding that series of emails can constitute a serial meeting); *Wood v. Battle Ground Sch. Dist.*, 27 P.3d 1208 (Wash. Ct. App. 2001) (same).

99. *See* Bill Sherman, *Your Mayor, Your “Friend”?: Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 110–113 (2011) (discussing various scenarios in which social media use can inadvertently facilitate open meeting law violations).

100. *See Stockton Newspapers*, 214 Cal. Rptr. at 564; *Wood*, 442 So.2d at 940 (Fla. 1983).

101. *See, e.g.*, Duane W. Gang, *San Bernardino County Officials Defend Edited Credit-Card Records*, THE PRESS-ENTERPRISE (Nov. 15, 2007 7:26 AM), <http://www.boards2go.com/boards/board.cgi?action=read&id=1195158653&user=sbcs&page=6> (noting that county attorneys redacted names from expense reports, claiming deliberative process – the notion that protecting the anonymity of his meeting attendees protects his deliberation); *see also* Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 512 n.391 (1997). Compare *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101 (D.C. Cir. 1976) (using exemption 5 to justify closing an advisory committee meeting) and *Washington Research Project, Inc., v. Dep’t of Health, Educ., and Welfare*, 504 F.2d 238 (upholding nondisclosure of certain advisory committee documents based on exemption 5) with *Wolfe v. Weinberger*, 403 F.Supp. 238, 241–43 (D.D.C. 1975) (holding exemption 5 inapplicable to internal deliberations of advisory committee) and *Nader v. Dunlop*, 370 F. Supp. 177, 177 (D.D.C. 1973) (holding that exemption 5 does not apply so as to permit exclusion of public).

complexity of the law. The stakes are high; a violation of open record law can be compensated by a penalty, plus attorney fees,<sup>102</sup> and government action taken at an illegal meeting is subject to reversal.<sup>103</sup>

Thus, government agencies have a single concept of deliberation, but struggle with its implications.

### *2. The paradox and the single meaning of “deliberation”*

The conclusion that agencies believe that deliberation describes the same conduct in meetings and records is reinforced by the conception of deliberation underlying both records and meetings. Both types of laws aim at the same thing: an exchange of ideas, proposals, and recommendations that, while presented as part of a serious discussion, are not yet complete. This is the process of coming to a decision, when various facts and options are weighed. Just as deliberative materials are labeled as such under open records and open meetings laws, non-deliberative materials are subject to the paradox as well. For example, the deliberative process exemption to FOIA and state open record laws does not apply to purely factual material; facts, even when submitted to support a recommendation or draft, are disclosable under open record laws because they do not reflect thoughts.<sup>104</sup> Conversely, a purely factual briefing of a body otherwise covered by an open meeting statute need not be public, because no deliberation occurs.<sup>105</sup> Consequently, the Deliberation Paradox cannot be explained by divergent definitions of the word *deliberation*, or by divergent definitions of non-deliberative content.

### *3. The paradox as a binary choice*

Furthermore, the Deliberation Paradox cannot be explained as the result of a single balancing test in which public access and candor

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102. See Brian M. Rosenthal, *Shoreline Public-Records Case Ends after 7 Years*, SEATTLE TIMES, (June 28, 2013, 9:19 PM), [http://seattletimes.com/html/localnews/2021291545\\_metadaxml.html](http://seattletimes.com/html/localnews/2021291545_metadaxml.html) (recounting public records case with \$538,555 verdict, more than 80 percent of which was an award of attorney fees).

103. See *In re Lakewood City Council Members*, 30 P.3d 474 (Wash. 2001) (affirming dismissal of recall petition done secretly); *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998) (affirming criminal conviction for open meeting violation).

104. See, e.g., *Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1975) (holding that raw data was not exempted because they were not “a part of the decisional process”).

105. *Equitable Shipyards, Inc. v. State of Wash.*, 611 P.2d 396 (1980) (holding that review of materials is not “action” for the purposes of the Open Public Meetings Act).

are weighed in context, with access winning out in meetings but candor prevailing in records. The deliberation trigger in public meetings is at the very core of open meeting laws; it is not the product of a multifactor test.

The argument goes like this: administrative law is always balancing the competing values of access, which informs the public, and secrecy, which permits government actors to speak or write with candor. That balance, the argument goes, does not hinge on deliberation, but happens to tilt toward withholding documents in the records context.<sup>106</sup> If this contention is accurate, then there is no deliberation paradox; deliberation would be a matter in both meetings and records, but merely one consideration among many.

This argument carries the seeds of its own unpersuasiveness, however. If open records laws just happen to balance deliberation toward secrecy, it is because the statutes identify deliberation as a statutory exemption to the general rule of open access. The exemption is not an afterthought, but rather a foundational characteristic of both federal and state open records laws.

Deliberation though, is not just one factor to be considered in a balancing test for either records or meetings; rather, it is the determinative factor.<sup>107</sup> If deliberation were merely one factor among many, we would expect to see a range of cases in which records contain some deliberation, but not enough to be exempt from disclosure, or in which some meetings contain deliberation, but not of the type of degree to support public access, given the context. However, such is not the case. The Deliberation Paradox sets up a binary system: If records reflect an agency's deliberative process, that alone moves them from accessible to exempt. If a qualified government body is deliberating, that alone means that it must do so

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106. I am grateful for an email exchange with Richard Peltz-Steele in which he distilled the essence of this argument.

107. As discussed *supra* in section I.C., "deliberation" determines whether a "meeting" has occurred, or whether "action" has taken place. But it is not an accident of language; the purpose of these laws, as described in both definitions and statements of purpose, often mentions the word or describes the concept of "deliberations." *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-431 (1962); 5 ILL. COMP. STAT. ANN. 120/1 (1957) ("[I]t is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly."); IND. CODE ANN. § 5-14-1.5-1; MD. CODE ANN. STATE GOV'T §10-501(b) (West 1991) ("The ability of the public . . . to attend . . . meetings of public bodies and to witness the phases of the deliberation . . . ensures the accountability of government to the citizens of the State."); WYO. STAT. ANN. § 16-4-401 (1957) ("Certain deliberations and actions shall be taken openly as provided in this act.").

in public (unless some other exemption applies, such as deliberations in a quasi-judicial capacity).

But if the Deliberation Paradox cannot be explained away as a semantic difference or a malleable balancing test, where did it come from? Some answers arise from the history and purposes of open records and open meeting laws.

## II. WHY DELIBERATION DIVERGED

The Deliberation Paradox exists, in part, due to the different origins of open government doctrine. Open meeting and open records laws were never part of a single access-to-government doctrine; rather, they developed in entirely separate areas of the law, and their operation today reflects their origins. Open records law may be best understood as a narrow, statutory waiver of sovereign immunity, still subject to a limited executive privilege due to separation of powers. Open meeting law, by contrast, is a statutory manifestation of the common law right of access to the government. An examination of those origins helps explain the peculiar role of deliberation and helps identify a possible resolution for the paradox.

### *A. Open Records Law: From Subpoena Power to Generalized Access by Statute*

The common law provided only a very limited right of access to government records. In the eighteenth and early nineteenth centuries, British courts identified a judicial power to compel production of government records that were deemed necessary for certain litigation. In order to gain access, the courts required the litigant to prove his personal connection to the documents and their necessity to pursue or defend a court case. The courts would deny requests if they perceived the litigant to be motivated by malice or concluded that the documents' production might harm the dignity of a government official or agency. A generalized interest in the documents or their contents would not suffice.<sup>108</sup> Thus, the early common law right of access to documents was in most respects an acknowledgment that the government had a duty to respond to a subpoena duces tecum.

This approach was followed in American courts as well, with some expansion of the right to include requesters who had an

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108. See PELTZ-STEELE, *supra* note 74, at 125.

identifiable interest in records, but not an ongoing court case. With the advent of muckraking journalism and frustration with government corruption in the Gilded Age, courts began to relax these requirements. But broad access-upon-request laws were rare. The right remained largely in the hands of the judiciary,<sup>109</sup> and even government responses to subpoenas were unreliable.<sup>110</sup> Any such common-law right has been entirely supplanted by FOIA and state open records laws.

Concepts of open government law have been vulnerable, though, to two sovereignty-based critiques: First, sovereign immunity had permitted the government to resist demands for records. The adoption of public records statutes, which explicitly or impliedly waived immunity, rendered this critique obsolete. Second, the separation of powers doctrine allowed the executive branch to claim that public records law impermissibly intrudes upon the core executive function. Although separation of powers-based arguments have not toppled FOIA and its state counterparts entirely, they do live on in the form of claims of executive privilege and its specific application, the deliberative process exemption.<sup>111</sup>

With this evolution in mind, one source of the Deliberation Paradox appears clear: open records law is always battling sovereignty or separation-of-powers norms that tend to value confidentiality.

### *B. Open Meeting Law: From Access to Courts to Government in the Sunshine*

Like open record law, access to meetings arose in the context of the courtroom. At a time when British courts were not only adjudicative bodies but also more general governing entities, the common law developed a right to access that served democratic and legitimizing functions: the public could participate in a “moot” and

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109. For example, a citizen could examine public records only if the records were “required by law to be maintained” by the government, and only if the citizen could show a “legitimate interest,” which often equated with a litigation interest. See Michael C. McClintock, et al., *Washington’s New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 GONZ. L. REV. 13, 25, 45–46 (1975). Only a handful of states recognized a common law right to public documents. See SCHWING, *supra* note 82, at 2 & n.8.

110. See, e.g., Daniel C. Taylor, *Taking Touhy Too Far: Why It Is Improper for Federal Agencies to Unilaterally Convert Subpoenas into FOIA Requests*, 99 GEO. L.J. 1227, 1234–1237 (2011).

111. See, e.g., *Marriott Int’l Resorts, L.P., v. United States*, 437 F.3d 1302, 1304–05 (Fed. Cir. 2006) (noting that deliberative process privilege is one of many privileges that generally fall under the rubric of “executive privilege”).

courtroom proceedings were open for the world to see. In the words of the Supreme Court in *Richmond Newspapers, Inc. v. Virginia* (the American case establishing the right of public access to the courts):

In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment.<sup>112</sup>

Later, the duty of all freemen to participate was relaxed, but criminal trials generally remained public. Historical sources indicate that public attendance was thought essential to the quality of the justice rendered; thus, public access was for the benefit of justice itself, rather than merely for those seeking access.<sup>113</sup>

All indications are that this tradition continued in the colonies, and remained after they became the United States.<sup>114</sup> The charters of some of the colonies emphasized open criminal trials as well, and the rhetoric of the Revolutionary period suggested some pride in this fact. As the Court in *Richmond Newspapers* explained:

Looking back, we see that when the ancient “town meeting” form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a “right of visitation” which enabled them to satisfy themselves that justice was in fact being done.<sup>115</sup>

It took time, however, for the right of access to court proceedings to evolve into a more generalized right to attend meetings of agencies. English common law did not recognize a right to attend meetings of public entities; rather, legislative debate could

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112. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980) (citations omitted).

113. *Id.* at 566 (citing EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 73–74 (6th ed. 1967) (“[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.”); *see also* *Offutt v. United States*, 348 U.S. 11, 14 (1954) (noting that justice must “satisfy the appearance of justice”).

114. *See id.* at 567 (citing ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 129 (1930), and Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 367, 405 (1907)).

115. *Richmond Newspapers*, 448 U.S. at 572.

occur in secret, and publication of legislative proceedings could be outlawed.<sup>116</sup> Secret deliberations were permissible in the early United States as well. The first Constitutional Convention conducted its deliberations in private, as did the first Congress (even as it was considering the Bill of Rights). The Constitution is silent about the accessibility of meetings in either Congress or the Executive Branch, and after adoption of the Constitution, the Senate held all sessions in private until 1794.<sup>117</sup>

At the state and local level, where small government bodies such as councils, commissions, boards, or non-judicial courts met and exercised power, the antecedents of *Richmond Newspapers* suggested a common law access to certain meetings. State laws grew from statutes ordering access to particular government bodies (like an 1868 Kansas law dealing with school boards<sup>118</sup>) and more general judicial decrees mandating open meetings.<sup>119</sup> Thus, it makes sense that state open meeting laws largely pre-dated federal statutes like the Sunshine Act and the Federal Advisory Committee Act of 1972 (FACA). But after Alabama adopted the first comprehensive open meeting law in 1915, states began to follow suit. In 1976, New York made it unanimous.<sup>120</sup>

At the outset, the state laws emphasized open deliberations. For example, one of the most influential open meeting statutes, California's Brown Act, states in its introduction:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist

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116. SCHWING, *supra* note 82, at 1.

117. PELTZ-STEELE, *supra* note 74, at 4 (citing Potter Stewart, "Or of the Press," 50 HASTINGS L.J. 705 (1999)).

118. KAN. CODE 19-218.

119. See SCHWING, *supra* note 82, at 3 & n.17.

120. Timothy P. Whelan, *New York's Open Meetings Law: Revision of the Political Caucus Exemption and Its Implications for Local Government*, 60 BROOK. L. REV. 1483, 1483 & n.3 (1995) ("When New York enacted the OML in 1976, it became the last state to codify this commitment to open government.").

on remaining informed so that they may retain control over the instruments they have created.<sup>121</sup>

In keeping with this history—and in contrast with state public records statutes—open meeting laws were framed with an eye toward public participation in governance.<sup>122</sup> Thus, open meeting laws have at their core the value of public access to government bodies as they make decisions—that is, as they deliberate.

Against this historical backdrop, federal open meeting laws were late arrivals. The Federal Advisory Committee Act of 1972 (FACA) and the Government in the Sunshine Act of 1976 were prompted by the rising concern about backroom deals and secret negotiations, culminating in the Watergate scandal.<sup>123</sup> As the D.C. Circuit put it,

A decade ago revelations of secret abuse of official power shocked this nation and seared in our minds a lesson vital to the health of a democratic polity: government should conduct the public's business in public. In the Sunshine Act Congress moved to ensure that those in government do not forget that they are above all accountable to the people of this nation.<sup>124</sup>

Like the state laws that preceded and followed, the adoption of the Sunshine Act and FACA focused not on mere information distribution, but on the deliberations that characterized a substantial

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121. CAL. GOV'T CODE § 54950. The Act goes on to define “meeting” as “any congregation of a majority of the members of a legislative body at the same time and location . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.” § 54952.2(a). *See also* MONT. CONST., art. II § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

122. *See, e.g.*, Okla. Ass'n of Mun. Attorneys v. State, 577 P.2d 1310, 1313–14 (Okla.1978) (“If an informed citizenry is to meaningfully participate in government or at least understand why government acts affecting their daily lives are taken, the process of decision making as well as the end results must be conducted in full view of the governed.”). *See also* FLA. CONST. art. 1, § 24(b) (“All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.”).

123. *See* Stephenson, *supra* note 75, Note, *Government in the Sunshine Act*, 26 AM. U. L. REV. 154 (1976).

124. *Phila. Newspapers, Inc. v. Nuclear Regulatory Comm'n*, 727 F.2d 1195, 1203 (D.C. Cir. 1984).



meeting.<sup>125</sup> Their content reflects their history; government actions with the stamp of approval of the public should be observable by the public, despite the costs, red tape, and side effects, which could be substantial.

### III. THE PURPOSES OF OPEN GOVERNMENT LAW

The Deliberation Paradox might be described as a conflict between two different approaches to deliberation. For records, “deliberation” is a content descriptor that identifies an essential feature of “good” decision making (meaning both objectively better policy and a process that works smoothly and results in the desired form of product). In that context, it is also an internal process that needs space, time, and privacy to function. In meetings, “deliberation” is the critical work that must be done; it is where the actual action happens, where minds are changed and differences settled. The legitimacy of the multi-member body is supported by the public’s ability to witness the deliberative process.

This approach begs the question whether the purposes of open government law shed any light on whether the Deliberation Paradox is unavoidable, or whether it is reconcilable. In other words, are the purposes of those laws—the goods they seek to promote, the ills they seek to diminish, and the methods they use—tied to their treatment of deliberation?

#### *A. Open Government as a Model of Democratic Participation*

As a general matter, open government laws seek to enable an informed citizenry. The necessity of public access to information about the government in order to make informed voting choices is nearly a cliché. As James Madison wrote, “A popular Government, without popular information, or the means of acquiring it, is but a

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125. See H.R. REP. NO. 92-1017, at 9 (1972) (stating that the House version of the FACA bill imposes a “requirement of openness,” which is “designed to assure public access to deliberations of advisory committees”); S. REP. NO. 92-1098, at 14 (1972) (describing Section 10 of the Senate bill as “establish[ing] the standard of openness in advisory committee deliberations, and provid[ing] an opportunity for interested parties to present their views and be informed with respect to the subject matter taken up by such committees”); 118 CONG. REC. 23, 30274 (1972) (statement of Sen. Percy) (“The second major element of the bill is its provisions for opening up advisory committees to public scrutiny.”). See also Henry H. Perritt, Jr., & James A. Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 737 (1975).

Prologue to a Farce or a Tragedy; or, perhaps both.”<sup>126</sup> But, as with many clichés, it grew from a simple truth: there is great value to informing the public about the government. And, to the extent that public participation in government is desired, open meetings and records are a must.<sup>127</sup>

The ideal of democratic deliberation is probably best typified by Jürgen Habermas’s conception of “the public sphere,” where people collectively may form public opinion in an environment without the interference of the government or the economy.<sup>128</sup> But in practical terms, open government laws are necessary to provide the sort of information that makes the formation of valid opinions possible. And beyond those lofty aims, open government can serve more limited goals. Public access can help reduce (or dilute or compete with) the

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126. James Madison, *Letter to W.T. Barry*, August 4, 1822 (in WRITINGS 9:103–9). There appears to be a requirement that this quote from Madison appear in every publication dealing with open government law. *See, e.g.*, Glenn Dickinson, *The Supreme Court’s Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 194 n.23 (1990); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895 (2006); Sean Hill, *Sunshine in Indian Country: A Pro-FOIA View of Klamath Water Users*, 32 AM. INDIAN L. REV. 463, 471 (2008); John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157 (1985); W. Alan Kailer, Note, *The Release of Private Information Under Open Records Laws*, 55 TEX. L. REV. 911, 913 n.17 (1977); Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 n.1 (1974).

127. Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 399 (2009) (“[T]he free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable.”); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 100 (2011) (“Open government and equal access to decision making processes are cornerstones that ensure an accountable and democratically legitimate Fourth Branch.”).

128. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1989) (1962). Deliberative democracy is a burgeoning topic in political theory, and more recently in law and democracy. *See, e.g.*, 12 ELECTION L. J. 1 et seq. (2013) (issue dedicated to articles about deliberative democracy and election law). Deliberative democracy can be distinguished from administrative deliberation in that it focuses on deliberation among citizens rather than within agencies. *See, e.g.*, Stephen Tierney, *Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox*, 12 ELECTION L. J. 508 (2013). They do share, however, a focus on “communicative action” as an interaction in which the participants are only oriented toward reaching understanding, and are only motivated by the “force of the better argument.” Jürgen Habermas, *Discourse Ethics, Notes on a Program of Philosophical Justification*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 89 (Christian Lenhardt & Shierry W. Nicholsen trans. 1990).

influence of special interests.<sup>129</sup> The awareness of public scrutiny can prompt government officials to improve their performance, better justify their actions, and ensure the appearance of fairness.<sup>130</sup>

Lawmakers recognize, however, that open government comes at a cost. Actually, three costs: First, the actual monetary cost incurred by staff who must respond to records requests and public meeting requirements. Second, the loss of efficiency and speed that accompanies additional requirements, procedures, and red tape.<sup>131</sup> And third, the secondary effects on agency activity: diminished collegiality at agencies, reduced flow of opinions and proposals, diverted attention and concern for records produced.<sup>132</sup> Thus, lawmakers attempt to balance transparency and public participation with efficiency and celerity, and deliberation suffers.<sup>133</sup>

### *B. Purposes of Open Records Laws*

#### *1. The virtue of public access to records*

Open record laws are the archetypal access-to-government laws. They allow the public to peer behind closed doors to see evidence of the behavior of government officials. They allow one to perceive mistruths, acquire objective information, and root out waste, fraud, and abuse. They can answer the question “what did the government know, and when did it know it?”

The specific means by which the public becomes informed, however, are worth a closer look. Most people will go their entire lives without filing a public records request. But open records laws

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129. See Rossi, *supra* note 13, at 202 (“[P]luralism in administrative decisionmaking runs the risk of powerful factions securing deals in legislation or regulations at the expense of smaller, more isolated (and perhaps more vulnerable) groups.”).

130. This finding should not surprise; the awareness that one is being watched has a strong impact on behavior. See, e.g., HENRY A. LANDSBERGER, HAWTHORNE REVISITED (1958) (discussing the famous Hawthorne experiments of lighting and other worker conditions in factories); Valerie A. Curtis, Lisa O. Danquah, & Robert V. Aunger, *Planned, Motivated, and Habitual Hygiene Behaviour: An Eleven Country Review*, 24(4) HEALTH EDUC. RES. 655 (2009) (finding that people were more likely to wash their hands after using the bathroom if they were being observed).

131. See, e.g., Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79 (2012).

132. See discussion *infra* section III.B.2.

133. See Cary Coglianese, Heather Kilmartin, & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927–28 (2009).

do enable an informed citizenry because they allow citizen proxies, such as reporters, candidates for office, or litigants, to find and distribute information that may have community-wide value. The public, therefore, benefits as a whole from the incentives that such laws provide these individual intermediaries (i.e., allowing the reporter to draw more readers, the candidate to advance her campaign, the litigant to gain an advantage in his lawsuit). In that way, open record laws offer the opportunity to hold public officials accountable for statements, actions, and results.

By providing for citizen suits, penalties, and attorney fees, they also seek to prevent public officials from keeping secrets without good reason. The opportunity to keep secrets without sanction opens the door to moral hazard, and experience has shown that when permitted to keep secrets, the government probably will, whether for a legitimate reason or an improper one.<sup>134</sup>

In some ways, public records laws aim to address the fear that government (or government officials) will try to avoid responsibility or fault for mistakes; that is, that secret government records allows officials to better hide corruption. To the extent that government decisions might be made in a way, and by people, obscured from public view, we expect open records law to be useful in identifying and preventing that behavior.

## *2. The vice of access and the purpose of the deliberative process exemption*

Granting all the virtues of public access to records, it still makes intuitive sense that the government cannot accomplish certain functions in full public view. The deliberative process exemption is based on the notion that one of those functions is the deceptively complex process of making a decision. The deliberative process exemption seeks to carve out a space in which an agency can weigh options, seek advice, and, when a decision has been made, speak with a coherent voice.

Federal and state caselaw identifies three goals for administrative governance that justify the deliberative process exemption: (1) to encourage open, frank discussions among staff, and between staff

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134. One particularly pernicious example is the efforts to shield from scrutiny a record of maintenance trouble on the B-29 bomber, improperly hidden under the “state secrets” exemption to FOIA. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1 (1953); *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005); BARRY SIEGEL, *CLAIM OF PRIVILEGE* (2008) (all discussed in PELTZ-STEELE, *supra* note 74, at 237).

and their superiors; (2) to avoid early disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of arguments, reasons and rationales that were not in fact the final basis for an agency's action.<sup>135</sup> In other words, "the purpose of the deliberative privilege is to afford government officials not only the freedom to 'debate alternative approaches in private,' but also the 'freedom to' deliberate."<sup>136</sup>

Courts applying this exemption tend to take it as a given that secrecy will help the deliberative process. In California, "[t]he purpose of the exemption is to provide a measure of agency privacy for written discourse concerning matters pending administrative action."<sup>137</sup> Thus, the reasoning goes, better decisions will be made, and will be made at lower cost and with less hassle.

### *C. Purposes of Open Meeting Laws*

#### *1. The virtue of access to government deliberation in real time*

Open meeting laws target a different type of access to government, and therefore are constructed differently than open record laws. For example, whereas an open record law grants access to records that already exist, an open meeting law cannot open a meeting that already occurred. Rather, the law operates as a set of requirements for meetings, and then offers an *ex post* remedy for violation (penalties, attorney fees, rescission of government action at

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135. See, e.g., *Kidd v. Dep't of Justice*, 362 F.Supp.2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would "inhibit drafters from freely exchanging ideas, language choices, and comments in drafting documents") (internal quotation marks omitted); *Heggstad v. Dep't of Justice*, 182 F.Supp.2d 1, 12 (D.D.C. 2000) (protecting memoranda containing recommendations based on perjured testimony, finding that they "have no probative value to the public since they are based on misrepresentations"); *Am. Fed'n of Gov't Empls. v. Dep't of Health & Human Servs.*, 63 F.Supp.2d 104, 108 (D. Mass. 1999) (holding that release of predecisional documents "could cause harm by providing the public with erroneous information"); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978).

136. *Judicial Watch of Fla., Inc. v. Dep't of Justice*, 102 F.Supp.2d 6, 14 (D.D.C. 2000). For a discussion of the impact of public participation in regulatory deliberation, see Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-Gov't 41, 58 (2006).

137. *Citizens for a Better Env't v. Dep't of Food & Agric.*, 217 Cal. Rptr. 504, 509 (1985).

the improper meeting, and possibly personal liability).<sup>138</sup> The remedies, though, are insufficient to fully correct a violation. Once a meeting has occurred in violation of the law, the participants cannot in any real way rewind their decision-making process to the moment before the noncompliant discussion occurred; one cannot un-ring the bell.

So if open meeting laws serve a primarily deterrent function, what model of public access to meetings do they aim to implement? One influential treatise notes that “[t]he overriding public policy is that government is the public’s business and should be conducted in public so that the basis and rationale for governmental decisions as well as the decisions themselves are easily accessible to the people.”<sup>139</sup> But the specific requirements of open meeting laws demonstrate that very particular policy judgments underlie this broad policy.

First, open meeting laws put great value on direct public viewing of government process. Access to minutes or to a recording of the meeting is not sufficient. Neither is access through an intermediary, like a reporter. This aspect of meeting law appears aimed at ensuring a government official’s personal accountability to the public; the ability to individually witness an official’s actions is paramount.

Second, open meeting laws prioritize public access to deliberation itself *in real time*. Thus, public access is not merely informational; it must also be either participatory or otherwise encompass the possibility that a public presence may have an effect on the deliberation itself.

This interpretation of the real time aspect of open meeting laws finds support in the *Richmond Newspapers* cases, which reasoned that public access to courtrooms has a salutary effect on the conduct of the people involved in a court case.<sup>140</sup> The importance of public access to real-time deliberations in public meetings suggests that public scrutiny adds value to the deliberation itself, and that the value is something that would be absent were the deliberations only

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138. In extreme cases, there can be criminal liability for open meeting violations. *See, e.g.,* Tovar v. State, 978 S.W.2d 584 (Tex. Crim. App. 1998) (affirming a criminal conviction for open meeting violation).

139. SCHWING, *supra* note 82, at 22–23. By implication, this justification suggests that later-available public records cannot fully convey the content of a multi-party decision-making process.

140. Discussed *supra* note 106 et seq.

available after the fact (say, by audio or video recording, or by transcript).<sup>141</sup>

Third, some open meeting laws require that the government offer the public some opportunity to comment. The opportunity to comment, not only after the fact but in real time, suggests the possible impact of the comments on subsequent agency action. Also at work is a concept of fairness, in the sense that the public, especially people who deem themselves affected by the government action, should be able to speak or watch while power is being exercised.

In this way, open meeting law emphasizes the integrity of the decision-making *process*. Open meeting law proceeds on the assumption that the decision-making process can only be fair if it considers everything, and everyone, brought to it. Thus, its structure and supporting reasoning reflects the same values as deference-to-deliberation doctrines such as *Chevron*, and arbitrary and capricious standards of review as well.

*2. The vice of formality: The persistent call for a deliberative process exemption to open meeting laws*

Commentators have railed against open meeting laws for their chilling effect on intra-agency discussions. Richard J. Pierce, author of the definitive *Administrative Law Treatise*, makes the case:

[The Government in the Sunshine Act] renders collegiality impossible in a collegial body that heads an agency. . . . Because of GSA, meetings among members of multi-member agencies are infrequent; such agencies often make important decisions through notational voting with no prior deliberation; and communications at open meetings are grossly distorted by the presence of the public. Commissioners are reluctant to express their true views for fear that they will expose their ignorance or uncertainty with respect to issues of fact, policy, and laws. They attempt to disguise their uncertainties with stilted and contrived discussions that greatly impede the kind of frank exchange of views that is essential to high-quality decisionmaking by a collegial body . . . . It is highly unlikely, for instance, that the Supreme Court would have issued its

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141. Interestingly, the argument that people act differently when they know they are being observed is made in both the open records and the open meetings context. In meetings, the argument is that scrutiny prompts better behavior; in records, that it renders people uncandid, and therefore results in inferior decision making. *See also* sources cited *supra* note 128.

unanimous, bold decision in *Brown v. Board of Education* . . . if the Justices had been required to conduct the decade-long debate that preceded *Brown* only in public meetings. . . . It is tempting to indulge the cynical assumption that Congress enacted GSA for the purpose of crippling multimember agencies. Whatever may have been Congress's intent, GSA certainly has that effect.<sup>142</sup>

Other scholars have brought a related critique to other types of public participation in agency action: “[M]ass participation, while sometimes beneficial to agency legitimacy, may in certain circumstances impair deliberation, which many contemporary administrative theorists perceive as an equally important function of administrative law . . . . [A]s has often been observed in the context of open meeting laws, it may impair collegiality and chill deliberation in multimember agencies.”<sup>143</sup> The Administrative Conference of the United States has repeatedly attacked open meetings for the same reasons.<sup>144</sup> One attempt to strike a middle ground proposes that agencies subject to open meeting laws be permitted to have pre-decisional discussions in private, but still be required to hold votes and present statements of reasons in public.<sup>145</sup>

None of these proposed amendments have been pursued in any jurisdiction. This is not merely because is it politically unpalatable to oppose openness in government,<sup>146</sup> but because these proposals fail to take into account the central role that deliberation plays in the purpose and structure of open meetings. After all, deliberation is a definitional part of meetings themselves.<sup>147</sup> To create a deliberative process exemption for open meetings would be tantamount to repeal. Hence the paradox.

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142. RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 392 (5th ed. 2010).

143. Rossi, *supra* note 13, at 178, 180. Rossi concludes that, “[t]o the extent that deliberative democratic ideals are important to agency decision-making, mass participation may make their pursuit impractical.” *Id.* at 180.

144. *See, e.g.*, ACUS Recommendation 84-3 (1984); Special Committee, Administrative Conference of the United States, *Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 421-22 (1997) (listing ways in which open-meeting requirements can inhibit communications at affected meetings); Rossi, *supra* note 13, at 233 (“The Sunshine Act inadvertently transforms multiheaded agencies into entities which tend to function as if headed by a number of individual, independently-acting members.”).

145. *See* Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11 (2004).

146. Rossi, *supra* note 13.

147. This topic is discussed at length in Section I.C, *supra*.



*D. The Deliberation Paradox Should be Revisited in Light of  
Developments in Open Government Law*

The different purposes and operation of open record and open meeting laws suggest a set of common principles that may shed light on the dual valence of deliberation. To a certain extent, open government law is a tangle of contradictions, expectations, and aspirations for our government. Ideally, we want government officials to speak with as much candor as possible, *and* we want to see it, *and* we want the fact that we can see it not to affect the extent to which they speak with candor.<sup>148</sup> Thus, our policy reflects the hope (or naïve assumption) that deliberative bodies are not distracted or hindered by public access, or if they are, it is worth it. By this reasoning, public scrutiny or presence is just something that comports with democratic values: it's public government, public tax dollars, public power delegated to the government, so the public should be able to access the government. Any limit to public access must be accompanied by a justification.

At the same time, open government law as a whole recognizes the value of candor, and in particular reflects a judgment that decisionmakers who are accountable for agency decisions should be able to receive frank advice from subordinates. Similarly, the laws acknowledge the necessity of public participation and public scrutiny at the point that a public official exerts power.

But both types of laws, then, seek to hold an agency to public scrutiny when it acts *as an agency*. Thus, open government laws uniformly value accountability, but accountability operates differently when applied to an agency led by a single executive or to a government unit that acts under the direction of a council, board, or commission.

An individual agency chief is accountable for his or her decisions; open record law does not seek to hold that person accountable for things considered but not done. We expect an agency chief might aim to make a decision after hearing all sides, and allowing subordinates to make risky or potentially embarrassing arguments; perhaps it is appropriate to withhold those arguments because only the agency chief is individually responsible for the agency's final

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148. At a recent lecture on Open Government Law, I polled the audience on whether Julian Assange, of Wikileaks, was a hero or a villain. A large plurality raised their hands when I offered the option of "creepy guy, but I'm kind of glad he did what he did."

decision. In fact, one of the most valued traits of a public official is the ability to weigh options, and to hear even unorthodox or outlandish arguments, but settle on one option that he or she can stand behind publicly. Part of that process envisions the exchange of memoranda among subordinates who are not individually accountable for the agency's final decision.

A collegial body, on the other hand—one subject to an open meetings act—can only exercise government authority collectively. No individual member of a body subject to an open meetings law can take government action without convening the body and deliberating in some way, however briefly. Accordingly, the collegial body governance ideal is more closely tied to interactions among members of the body, as well as the significance of public access, and the potential for that access to affect the meeting participants' vote or decision. Thus, open government law holds agency officials subject to open meeting laws only when they exercise collective authority, and particularly when they interact with each other in a way that can affect the final decision or action of the collectively led agency.

Thus, open government law does not require scrutiny of deliberation until an official's decision-making process begins to affect other members of a deliberative body. Typically, the deliberative process of an agency with a unitary chief will allow internal deliberation to remain private.<sup>149</sup> The exercise of influence, including the transmission of arguments, opinions, and efforts at persuasion or deal-making makes the interaction between principals a use of government power that renders it open to scrutiny in real time under open meeting law.<sup>150</sup>

This view of agency accountability makes sense, but it is destabilized by the development of interagency consultation and joint policy development. Officials consult across multiple agencies

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149. As I argue *infra*, this typical model of agency decision making begins to break down in a modern context, where agencies act in concert, but not as a collective agency. I argue below in Section IV.C that documents reflecting deliberation *among agencies* should not be protected under the deliberative process privilege.

150. It would be shortsighted, however, to portray public access to records as an obstacle to high-quality deliberation. In fact, named authorship of disclosed predecisional records may have a positive impact on the excellence of the final product. Seen this way, the iterative and discursive nature of a written deliberative process can improve both quality and legitimacy, but only if it can be seen by the public. This argument is laid out well in Shapiro, *supra* note 12, at 498.

(and are often required to do so).<sup>151</sup> Decisions, then, are based not only on recommendations of subordinates, but recommendations of peer agencies, or of officials with special responsibility for a particular policy area. For example, a deliberative process about a highway project may take into account recommendations from the U.S. Fish and Wildlife Service, or a lean management consultant,<sup>152</sup> or a labor negotiator.<sup>153</sup> This is especially true in an era of cooperative federalism, where federal agencies work with (or over) state agencies in the implementation of federal statutes. Where uncooperative federalism arises—that is, there is competition or resistance between the two levels—the communication between the two is certainly deliberative (in that it consists of notes, recommendations, etc.) but occurs between two different officials who are accountable to different audiences (e.g., one national, one state).<sup>154</sup>

If the purposes of open government law find shared principles in accountability for the exercise of power, then two significant implications arise. First, the deliberative process exemption to public records law should no longer apply to inter-agency memoranda, because exercise of power among distinct and individually accountable government entities should be public. And, second, the deference

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151. For example, the Endangered Species Act requires covered agencies to consult with the Secretary of the Interior. § 7(a)(1), 16 U.S.C.A. § 1536(e)(3). The National Environmental Policy Act regulations require coordination with other agencies. 40 CFR § 1501.6. Other federal statutes that allow implementation by state agencies require coordination among related agencies. See Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013); Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886 (2012).

State agencies face similar consultation requirements. For example, Washington State's marijuana legalization statute requires the state Liquor Control Board to consult with the state Department of Agriculture in "establishing classes of marijuana, useable marijuana, and marijuana-infused products . . ." RCW 69.50.345(8).

152. See, e.g., David Krings, Dave Levine, & Trent Wall, *The Use of "Lean" in Local Government*, ICMA PUBLIC MANAGEMENT (PM) MAGAZINE, 88:8 (Sept. 2006); U.S. ENVIRONMENTAL PROTECTION AGENCY, LEAN IN GOVERNMENT STARTER KIT: HOW TO IMPLEMENT SUCCESSFUL LEAN INITIATIVES AT ENVIRONMENTAL AGENCIES, VERSION 2.0, at 5 (2009).

153. See *ACLU v. City of Seattle*, 89 P.3d 295, 297 (Wash. Ct. App. 2004) (in which the city argued that communications between the city and a union during arms-length negotiations were documents reflecting the city's internal deliberative process).

154. See, e.g., ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 352 (2011) (in assessing state-federal policy negotiations, arguing that "[a]ccountability review should ensure that the process by which a bargain was reached was sufficiently transparent").

enjoyed (and earned) by an agency's deliberation should be closely linked to the public's ability to observe that deliberation.<sup>155</sup>

#### IV. THE DELIBERATION PARADOX AND DEFERENCE IN THE ADMINISTRATIVE STATE

If the Deliberation Paradox poses doctrinal problems for government agencies, its practical effects display a deeper disconnect with deliberation-based rationales for deference to agency interpretations of law.

##### *A. The Deliberation Paradox Confuses Agencies about their Obligations under Open Government Law*

The deliberation-based contradiction between open records and open meeting laws has posed a significant problem for government agencies attempting to comply with the law. This is particularly true where records and meetings begin to merge. For example, an email is a record, and thus is exempt from disclosure under open records law if it reflects the agency's deliberative process. But the same email, sent among a quorum of a covered government body, can violate open meeting law if the email chain is the functional equivalent to a meeting. Another example: a purely factual briefing of council members is not a meeting, and therefore can be closed to the public. But if, instead of a briefing, the identical factual content was distributed on paper, the record could not be kept secret because it contains only raw data, not deliberation.

Recently, agencies have struggled with applying this contradiction to the activity of government officials on social media. Because public officials can read and respond to each other's tweets, blog posts, and Facebook updates in real time, they may engage in communication that cannot be neatly categorized as either meeting or record.

Consider this hypothetical. City Councilmember Jones posts his opposition to the mayor's public safety policy on Facebook. Among two dozen reader comments are the following: Councilmember Nguyen clicks the "like" button on the post—signaling to all readers that he agrees with Councilmember Jones; Councilmember Diaz

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155. *See, e.g.*, Seidenfeld, *supra* note 25, at 501–502 (discussing the conflict between easing “hard look” review and demanding agency deliberation, because an agency is more careful and fair when aware of possible judicial scrutiny).

comments on the post that she thinks the mayor's policy does not go far enough; Councilmember Rogers writes that he disagrees with Councilmember Jones but is open to persuasion; and Councilmember O'Connor links to Councilmember Jones's post on her own Facebook page and comments that the entire question is moot because the public safety budget is strapped.

Is this an exchange of deliberative documents, or a city council meeting in violation of the law? The moment that the number of participants reaches a quorum, it is probably both.<sup>156</sup>

Government agencies have adapted by both over- and under-designating deliberations in meetings in an attempt to preserve public access to decision making, but to also permit regular government activities to occur without triggering open meeting requirements. By some accounts, in-person deliberation at open meetings has become rarer; a hearing, board, or commission meeting may be only a formality after smaller pre-meetings have taken place and the outline or direction of discussion has been chosen.<sup>157</sup> That is not to say that real time deliberation does not happen, but it does raise the question whether it should continue to be treated differently than pre-meeting deliberation on paper, or in a public records setting. Courts faced with attempting to reconcile the differences have a difficult task.<sup>158</sup> In some cases, such as the social media context discussed above, the distinction between meetings and records can break down entirely.<sup>159</sup>

Individual officials have adapted, as well. The deliberation trigger for open meetings has not been successful in daylighting government officials' thought processes; it has merely ensured that officials meet in sequence to avoid public meeting requirements, or rely on staff-level discussions to vet any policy disagreements or compromises before they are aired publicly. It also pushes any deliberative discussion onto paper, where it is more likely to be exempt from disclosure.

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156. In the majority of states, that is; some states use a number other than the quorum to determine the existence of a meeting. See SCHWING, *supra* note 82, at 465 et seq. For a further exploration of open government law and online civic social networks, see Sherman, *supra* note 99, at 110 (discussing, inter alia, the above example).

157. See Pierce, *supra* note 142, at 392.

158. See, e.g., Cape Coral Med. Ctr., Inc. v. News-Press Publ'g Co., 390 So.2d 1216, 1218 n.5 (Fla. Dist. Ct. App. 1980) ("As the policy behind chapter 119 [the public records act] and the policy behind section 286.011 [open meeting law] are similar, we believe that they should be read in parimateria."); News & Observer Publ'g Co. v. Poole, 412 S.E.2d 7, 14 (1992).

159. See Sherman, *supra* note 99.

Governments have adapted to use the inaccessibility of records, as well. For, although public employees are often told to expect less privacy (“don’t write it down unless you want it on the front page of the paper”),<sup>160</sup> governments routinely over-designate deliberative-process documents, demonstrating that the privilege exists not only to protect deliberations, but to allow more secrecy as a general matter.<sup>161</sup>

It seems that governmental secrecy is hydraulic; like water, it will flow wherever it is least restricted.<sup>162</sup>

*B. Subterranean Deliberation and Directed Deliberation Require a New Model of Public Access*

Even considering the adaptive habits of government agencies, deliberative processes have changed enormously since the spread of open government laws. The deliberative rulemaking process has moved far beyond the notice-comment-response pattern standardized by the Administrative Procedure Act. The government’s deliberation starts long before the publication of a Notice of Proposed Rulemaking, and proceeds inside an agency, outside an agency, and among agencies.<sup>163</sup>

Furthermore, the increasing complexity of administrative decisions renders public comment inadequate to address serious questions or disagreements. A public comment period is more likely to be a staged opportunity to demonstrate political organization or muscle, rather than to gather testimony to be used to help craft policy.<sup>164</sup>

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160. See, e.g., Foster Pepper Mun. Grp., *Web 2.0: Staying Out of the Headlines*, LOC. OPEN GOV’T BLOG (July 28, 2009), <http://www.localopengovernment.com/2009/07/articles/web-20/web-20-staying-out-of-the-headlines/> (blog post of law firm advising local governments on open government law).

161. Courts often permit expansive use of the deliberative process exemption, allowing it to be used to shield purely factual material. See, e.g., *Dudman Commc’ns Corp. v. U.S. Dep’t of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *Mead Data Cent. Inc. v. Dep’t of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977); *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

162. The metaphor is borrowed from Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

163. See, e.g., Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) (noting that advocates have started to lobby and litigate agencies long before the formal decision-making process begins).

164. *Id.* (citing Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–13 (2011) (describing the “opportunity for imbalanced interest group input into rulemakings . . . during the formative development of a proposed rule”) and Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Votes Get Heard?*,

The changes in agency deliberation are not limited to voluntary adjustments in agency and stakeholder behavior. Federal and state administrative law no longer leaves an agency to its own judgment about the factors to consider, how to consider them, or the manner in which supporting data is gathered and incorporated into the process of deliberation. Legislative- and executive-led reforms have imposed requirements for very specific types of deliberation—what I call “directed deliberation.” The National Environmental Policy Act (NEPA) of 1969<sup>165</sup> requires the government to consider “environmental amenities and values.” The Regulatory Flexibility Act<sup>166</sup> requires the consideration of “reporting, recordkeeping and other compliance requirements.” The Paperwork Reduction Act<sup>167</sup> adds awareness of “the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.” The Unfunded Mandates Reform Act<sup>168</sup> ensures that an agency consider “the expenditure [of funds] by State, local, and tribal governments . . . .” The National Technology Transfer and Advancement Act<sup>169</sup> requires agencies to “consult with voluntary, private sector, consensus standards bodies,” and “when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, [to] participate with such bodies in the development of technical standards.” Executive Orders such as E.O. 12866<sup>170</sup> require covered agencies to consider a substantial number of other issues as well, such as costs and benefit and conflicts among statutes and rules. An agency ignores directed deliberation at its peril, particularly where the mandate is enforceable by citizen-suit, or where

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8 J. PUB. ADMIN. RES. & THEORY 245, 252–53 (1998) (finding that “business commenters” dominate the rulemaking process at the EPA and the National Highway Traffic Safety Administration, submitting between 66.7 and 100 percent of the comments).

165. 42 U.S.C. § 4332(C).

166. 5 U.S.C. §§ 601–603.

167. 44 U.S.C. §§ 3501–3520.

168. 2 U.S.C. chs. 17A, 25.

169. 15 U.S.C. § 272.

170. 3 C.F.R. 638 §§ 2–4 (1993).

compliance is centrally monitored, such as by OIRA's administration of E.O. 12866 at the federal level.<sup>171</sup>

The proliferation of directed deliberation demonstrates that the politically accountable branches of the government do not trust agencies to deliberate properly without intensive supervision. The interaction of these deliberation requirements and open record laws has not assisted their consistent application. For example, the Eighth Circuit held that an intra-agency memorandum commenting on a draft environmental impact statement could be secret, even though its production might be essential to assessing the agency's compliance with NEPA. The court stated that "[a]lthough [the National Environmental Policy Act] contemplates public participation . . . NEPA's statutory language specifically indicates that disclosure to the public is to be in accord with FOIA, which includes Exemption 5."<sup>172</sup>

This clash suggests that the deliberative process exemption is outmoded in light of directed deliberation and inter-agency consultation. Where the politically accountable branches have imposed directed deliberation, the requirements are bound to be less effective if draft documents and internal memoranda documenting the agency's efforts to comply with those requirements are off-limits. Deliberative documents include reliable evidence about whether the government has sufficiently followed the law. To allow the government to withhold deliberative materials is to omit from the public dialogue facts about the agency's decision-making process, even where certain types of deliberation are required by law.

### *C. Consultative Deliberation Across Separate Agencies Demands Public Scrutiny*

Relatedly, government agencies find themselves consulting with other agencies, or cooperating on rulemakings or other types of

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171. Some directed deliberation is spottily enforced, especially in state governments. *See, e.g.*, WASH. STATE AUDITOR, REGULATORY REFORM: COMMUNICATING REGULATORY INFORMATION AND STREAMLINING BUSINESS RULES, REP. NO. 1008276 (Sept. 6, 2012), available at <http://www.sao.wa.gov/auditreports/auditreportfiles/ar1008276.pdf>.

172. *Missouri v. U.S. Army Corps of Eng'rs*, 147 F.3d 708, 710–11 (8th Cir. 1998). *See also* *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1120–21 (9th Cir. 1988) (protecting draft forest plans and preliminary draft environmental impact statements); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (protecting preliminary scientific data generated in connection with study of chemical).



administrative action. Sometimes this is required by statute<sup>173</sup> or by executive order;<sup>174</sup> in other circumstances, an agency may, on its own initiative, seek external government expertise.<sup>175</sup> Thus, the conventional model of deliberation—involving a single agency poring over candid opinions from subordinates and mulling options outside of the glare of public scrutiny—no longer dominates in a world where many policies require cross-agency coordination at high levels.<sup>176</sup> In the current environment, it is more difficult to distinguish the exchange of recommendations and opinions and expert advice among agencies from the same sort of exchange on a government council, board or commission whose interactions trigger open meeting requirements. When the Department of the Interior informs the Department of Transportation that a highway project may endanger the environment, the exchange gains nothing, and loses much, from concealment from public view.

In a time of legislative gridlock, administrative agencies often seek to solve problems that arise either between or across agencies' designated subject areas. Regulators who work in those areas—an example might be in regulation of genetically modified organisms across the Department of Agriculture, the Food and Drug Administration, and other agencies—deal with jurisdictional uncertainty between agencies (or between federal, state, and local governments).<sup>177</sup> To the extent that those officials can be held accountable, the process of interagency negotiation must be transparent.

The issue of cross-agency consultation has implications for other areas of law as well, but those implications can only be recognized if that consultation is open to public view, and not hidden behind FOIA's deliberative process exemption. For example, the Supreme

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173. See, e.g., The Endangered Species Act of 1973, 16 U.S.C.A. § 1536 (1973). (requiring consultation with the Secretary of the Interior, and by implication with the Fish and Wildlife Service).

174. Exec. Order No. 12866 is one prominent example.

175. See also Marisam, *The Interagency Marketplace*, *supra* note 151; Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417 (2012) (noting that deference doctrines depend on a match of agency subject matter and statutory topic).

176. The same is true of agency interaction with the public during rulemakings. See Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 436–37 (2011) (observing that rulemaking agencies must demonstrate “regulatory rationality,” regardless of other circumstances).

177. See RYAN, *supra* note 152, at 266–67, 352 (discussing “accountability review” of cross-agency and state-federal negotiation).

Court majority in *Oregon v. Gonzales* rejected the attorney general's attempt to exert authority over assisted suicide. But the Court's analysis might look different if the attorney general's decision had emerged from a "consultative, formal process in which the views of the secretary of the Department of Health and Human Services were solicited and given determinative weight."<sup>178</sup> And that process could only be analyzed if it were disclosed.

*D. Deference Doctrines and the Breakdown of the Deliberation Paradox*

The development of directed deliberation and consultative deliberation increases the stakes for judicial deference to agency action because the agency's obligations multiply and the agency's ability to make law expands. But those are not the only developments.

First, directed deliberation makes it harder for an agency to act, or act nimbly. The ossifying effects of these super-APA requirements on rulemakings have been well documented.<sup>179</sup> They render it very difficult to make, amend, or repeal a rule. They create a strong bias in favor of the status quo. They make it more likely that an agency will pursue its goals by other methods, thus frustrating the goals of directed deliberation in the first place. But they also have an important effect on deliberation. By requiring an agency to conduct a number of types of pre-decisional analyses, these requirements encourage the agency to develop a record containing pro forma consideration of required criteria and outsourced responses to comments or decisional documents. In other words, the record of the agency's decision may include less information about the agency's real decision-making process, and more documentation of the directed deliberation in order to forestall judicial or other external scrutiny.<sup>180</sup> Thus, the deliberative record is not especially likely to contain candid recommendations and opinions of

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178. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2035 (2008).

179. See generally Seidenfeld, *supra* note 25.

180. The rise of pre-decisional requirements has been followed by the development of an industry for the outsourcing of directed deliberation. See, e.g., ICF CONSULTING, THE REG MAP, available at <http://www.reginfo.gov/public/reginfo/Regmap/index.jsp> (promoting the company as "[e]xpert[] in drafting rulemaking documents and preparing supporting analyses"). Full disclosure: although I was employed by ICF Incorporated between 1990 and 1992, I did not develop or use the Reg Map. It is handy, though.

subordinates so much as draft documents prepared as a bulwark against litigation or administrative challenge to the agency's decision.

Further, the proliferation of directed deliberation undercuts the notion that, in order to deliberate properly, an agency requires secrecy. By adding required topics of deliberation, the legislature and executive have prioritized certain subjects for deliberation, and reduced the likelihood that communications on those high-priority topics can be kept secret. Thus, although confidential deliberation is appealing, the growth of directed deliberation indicates a diminishing level of trust in the agency's non-supervised (i.e., secret) deliberations.

In addition, the expansion of collaborative or cooperative deliberation among agencies suggests that interagency deliberation resembles the interactions in open meetings, and therefore should be accessible, even if it is in the form of records. When agencies convey their considered opinions to another agency in a process that is intended (by either agency) to affect the decision, it is an exercise of power between two agencies, not a candid consideration of options by subordinates. Thus, the purpose of the deliberative process exemption to public records statutes is not served.

#### V. BEYOND THE DELIBERATION PARADOX

Uncertain in theory and frustrating in practice, the Deliberation Paradox is unsupportable, particularly due to the way it twists deference doctrines in administrative law. Does the paradox make sense as either policy or through theory? Not anymore. The harder question is whether there is any other way.

##### *A. Step Zero: The Deliberation Paradox Should Be Recognized and Discarded*

There is another way, but first the Deliberation Paradox must be seen for what it is and discarded: an anachronism no longer supported by either theory or practice. But for that to happen, it needs to be recognized in the first place.

For the most part, the dual valence of deliberation in administrative law (and particularly open government law) has been either ignored or papered over with a general observation about the common purpose of open government laws (an observation demonstrated to be untrue in Part I.C, *supra*). To the extent that the paradox has been noticed, it has only been observed as a flaw in open

meeting laws, and the subject of reform proposals narrowly aimed at porting a deliberative process exemption from open record law to open meeting law.<sup>181</sup> As discussed above in sections I.C and II.C, these critiques evince a failure to recognize the depth of the paradox.

Were courts and commentators to squarely face the conflict in deliberation, it may force both those seeking access and the government (generally opposing access) to better explain the true value of deliberation, whether secret, in records, or public, in meetings. Because deliberation is not defined by statute, but left to the litigants and the courts, the recognition of the paradox may provide the parties an array of demonstrative arguments and examples demonstrating what, precisely, deliberation is and why it has significance.

For example, an agency seeking to withhold documents under the deliberative process privilege should be held to account for the exact role those documents had in the agency's deliberations. Were the documents considered? By whom? Did they contain recommendations of individuals within the government, or from outside advisors (whose participation in the process may even implicate open meeting laws)? What role did they have in the decision-making process? Would disclosure of the documents harm future decisions? In light of deference doctrines, is there something about the document that strengthens the agency's claim to legitimacy?<sup>182</sup>

As another example, a citizen wanting access to "two by two" pre-meeting briefings of school board members<sup>183</sup> should be able to explain why sub-quorum briefings, when held in series, is the functional equivalent of deliberation. The citizen may contend that

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181. See discussion accompanying *supra* note 135.

182. See, e.g., Margaret Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 219–20 (2013) (noting that courts tend to defer to an agency's interpretation of the level of confidentiality necessary to protect its deliberative process).

183. As mentioned *supra*, "two by two" meetings are a series of meetings of a sub-quorum number of officials of a body covered by an open meeting statute. "Two by two" meetings are a common method by which government bodies avoid risking an open meeting law violation. See, e.g., Denise Civiletti, *So Much for Open Meetings*, RIVERHEAD LOCAL (Nov. 19, 2012), <http://www.riverheadlocal.com/civiletti/so-much-for-open-meetings>; Donal Brown, *Crescent City: Town government bodies may be stretching open meeting laws*, FIRST AMENDMENT COALITION (Feb. 3, 2010), <https://firstamendmentcoalition.org/2010/02/crescent-city-town-government-meetings-may-stretch-open-meeting-laws/>.

the same briefing contents might be found “deliberative” (and thus inaccessible) if contained in mere records.

Thus, even the recognition that deliberation’s face appears on both sides of the open government coin may have a salutary effect on litigants’ and courts’ treatment of these issues.

*B. Step One: Reconciliation Begins with Records*

For the most part, the sort of deliberation envisioned by deference doctrine takes place in records, or in meetings that would not be governed by the Sunshine Act, FACA, or state open meetings laws. A committee of non-presidential appointed staff, or one-on-one city council meetings, or an exchange of memos or emails over the course of days—the everyday stuff of an agency’s deliberations—is unlikely to be daylighted by open meetings laws. Thus, if such deliberation is to be disclosed, it might only be done through public records laws.

Consequently, the material most necessary to demonstrate the extent of an agency’s deliberative process (and therefore most helpful in earning it judicial deference) is the least likely to be open to public view. Although the agency can waive any deliberative process exemptions and disclose voluntarily, that has not been agency practice.<sup>184</sup>

Much has been made of the counter-majoritarian nature of deliberative democracy,<sup>185</sup> and the same observation applies to administrative deliberation. The argument goes like this: Any decision that is affected by anything other than majority will is, in some way, contrary to it. Thus, to the extent that an agency considers minority views or applies a decision factor or structure that incorporates a principle that hinders or dilutes the majority position, it harms it.

In this way, the concealment of deliberation also seeks to permit counter-majoritarian policy development, and protect it from disclosure or public scrutiny. The requirement for deliberation, judicial deference to it, and open government law’s exemption for deliberative records are three layers of insulation of agency action from majoritarian or democratic influence. They share an overall

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184. See generally Kwoka, *supra* note 182.

185. See, e.g., James A. Gardner, *The Incompatible Treatment of Majorities in Election Law and Deliberative Democracy*, 12 ELECTION L. J. 468, 474 (2013).

suspicion of public scrutiny, transparency, and political accountability of agencies.

This suspicion is reflected elsewhere in administrative law, particularly in the disfavored place that political policy preferences occupy in judicial review of agency action. If we do not expect agency decisions to reflect public policy preferences—or, rather, those of elected officials—then we accept a disconnect between them.

*C. Step Two: Tie Deference to Disclosure of Deliberation*

Deliberation is a powerful concept in administrative law because it describes an agency's best effort to make a decision on the pure merits of a question. By implication (or necessity) this concept excludes or rejects arbitrary decision making, biased decision making, and any process that aims to accomplish something other than an objective solution to the problem at hand (e.g., political favor allocation, punishment, or market distortion). Thus, it makes sense that a court would defer to an agency's decision if it followed a sufficiently deliberative process. This is especially the case because reviewing courts are encouraged to focus on an agency's process, rather than a policy's substance. A court wanting to question the substance of a policy could, instead, fault the agency's process leading up to the adoption of the policy.

Such is the outcome of the long battle over the meaning of “hard look” review, which can be resolved as an inquiry into an agency's process, rather than an investigation of the merits of the agency's policy.<sup>186</sup> Even *Chevron* step two, which on the surface requires examination of the outcome of a policy determination, is often presented as an inquiry into process (whether the policy was the result of a reasoned decision-making process).<sup>187</sup> When process is king, deliberative processes are the coin of the realm.

The deference doctrines, however, were developing at the same time that FOIA's deliberative process exemption was being interpreted. The courts, however, are rarely asked to reconcile these two ways of looking at agency decision making (the two ways being deference and secrecy in records).

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186. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–54 (1983) (applying a careful examination of the agency's failure to use a process that fully considered various options).

187. *See* Seidenfeld, *supra* note 25.

In order to reconcile the value of deliberation with the virtues of disclosure, I propose that courts grant an agency deference only for deliberative processes that are publicly disclosed. In other words, if an agency wishes to occupy the judicial ground to say what the law is, it must earn it not only by deliberating, but by deliberating in public view.

My proposal would not require a reconsideration of FOIA or state public records laws, or a reassessment of *Chevron*, *Skidmore*, or *Auer*. It could be accomplished through judicial or agency interpretation of existing case and statutory law. When applying *Chevron* step two, in which a reviewing court examines the agency's reasoned decision-making process, the court should only defer to deliberation that has been disclosed. To be sure, agencies already disclose substantial material in certain decision-making contexts. An agency must publish a Concise Explanatory Statement upon rulemaking; must, in some circumstances, provide a statement of reasons for disregarding comments; must publish an Environmental Impact Statement or the like. Disclosure of deliberation, however, is distinct from these reason-giving exercises. First, disclosure of deliberation documents what happened, as distinct from providing a justification for the end product. Following that, deliberative documentation cannot be outsourced (or can only be outsourced to the extent that the overall decision, itself, was outsourced). None of these existing disclosure requirements include a mandate that the agency produce records that reflect its deliberative process.

The timing of the disclosure, however, is critical. Rather than disclosing deliberation in the throes of APA litigation, a court should defer only if the deliberation were disclosed, substantially, in the Concise Explanatory Statement that accompanies a rulemaking,<sup>188</sup> and treated subsequently requested documents as if they were referenced by decision, and disclosed pre-litigation.

Although this solution would not require a radical reinterpretation of *Chevron*, the APA, or FOIA, it would have major implications for their future development.

First, this solution would reinvigorate the "reasoned process" interpretation of *Chevron* step two, further incentivizing deliberation. In so doing, it may have implications for certain readings of deference doctrine, such as the agency expertise or

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188. Or, for exempt rulemakings or adjudications, at the time of their publication.

“institution matching”<sup>189</sup> models, because it offers deference based on process, rather than history, or credentials, or even congressional grant of general subject matter authority.

Second, this solution is much better suited to the increasingly complex world of inter-agency problem-solving and cross-government consultation. Where an “institution matching” model looks to expertise, and a congressional grant model looks to subject matter authority, open deliberation would favor transparency and consideration of various viewpoints, and a reason-giving requirement for agency action.

Third, and most importantly, this solution would give agencies a strong incentive to make internal and inter-agency deliberative records public. No disclosure, no deference.

#### *D. Step Three: Disclose Interagency Consultation*

The development of collaborative and cooperative deliberation suggests that inter-agency communications should not come within the deliberative process exemptions of open record laws. When an agency’s expertise is sought, when it uses its internal deliberative process, and then transmits its opinion, recommendation, or analysis to a peer agency, the communication bears a strong resemblance to communications among members of a body covered by open meetings laws. Consequently, where possible, courts and agencies should daylight interagency consultative records.<sup>190</sup>

Relatedly, this proposal might further exclude from the deliberative process exemption any documents submitted to the government by an outside party, unless the outside party was acting as the government’s agent. As noted above, some states have so expansively interpreted the deliberative process privilege that it now encompasses documents sent to the government from an outside party during an arms-length adversarial process.<sup>191</sup>

Furthermore, courts should interpret the deliberative process exemption to open record laws so as not to apply to deliberative documents after the related decision has been made by the

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189. *See, e.g.*, Huq, *supra* note 175.

190. This recommendation would require changes to FOIA, which creates the threshold question whether a record is an inter- or intra-agency memorandum.

191. *See* ACLU v. City of Seattle, discussed in text accompanying note 68.



government.<sup>192</sup> Thus, the temporal gap between meetings (which must be open in real time) and records (which, under FOIA and some state laws can be secret in perpetuity) may be narrowed. State courts that end the exemption after a decision reason that the exemption is justified by the need for secrecy during the decision-making process, but discount the possible chilling effect of ending the exemption after the decision-making process is complete.<sup>193</sup> Although FOIA and some states have not adopted this revision, states that do disclose deliberative documents after a decision do not appear to have suffered a breakdown in deliberation.<sup>194</sup>

## VI. CONCLUSION

The Deliberation Paradox describes a conundrum in administrative law, a problem that centers on our desire for democratically unaccountable decision makers to act with care and consideration, but our need to inquire to ensure that this is done. Administrative law wishes to both trust that agencies deliberate and to verify that they do.

In turn, the central role in deference doctrines for agency deliberation reflects a gap between administrative law and the Deliberation Paradox. This Article's proposal—to squarely recognize the paradox, defer only to disclosed deliberation, and daylight interagency consultation—aims to resolve this disconnect.

Although this prescription would not work a revolution in open government or administrative law, it would have a significant impact on internal agency decisions about disclosure. This solution joins a number of other agency critiques that propose to link, or condition, judicial acceptance of agency behavior with transparency.<sup>195</sup> In so doing, this proposal seeks to strengthen the democratic legitimacy of administrative decision making through disclosure and public scrutiny.

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192. This change is already present in many state public records laws, but not in FOIA.

193. This does not resolve all questions, of course; many courts struggle with when, exactly, a decision-making process is complete, particularly in the criminal investigative and no-decision contexts. *See, e.g.*, *Newman v. King Cnty.*, 947 P.2d 712 (Wash. 1997).

194. *See, e.g.*, *ACLU v. Seattle*, 89 P.3d 295, 297–300 (Wash. 2004) (records later disclosed were not claimed to have harmed future deliberations).

195. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

This Article shows that such a proposal is entirely within the purpose and history of open government and administrative law. Banishing the Deliberation Paradox would not contribute to Madison's Farce or Tragedy, but rather would bring a consistent approach to the complex drama of deliberation and transparency.

