



Louisiana's Sunshine Laws

Technological Change and New Fears Challenge Open Government

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Introduction

Sunshine laws are critical to maintaining open and accountable government. Louisiana is fortunate to have relatively strong laws supporting a citizen's right to examine public records and observe public meetings. However, these laws must respond to many, sometimes rapid, changes in society. The public records law, drafted when paper was the only medium for transmitting and storing information, leaves many questions in an electronic age unanswered. Recently, threats to security have presented a formidable challenge in balancing the public's right to access information and the right to safety. In addition, privacy issues involving public access to personal information have

increased with the ease of access and anonymity offered by the Internet. Clearly, balancing legitimate safety concerns and the right to information has become a more difficult challenge.

PAR last examined the state's sunshine laws in its 1998 report, "Sunshine Laws: Guaranteeing the Citizen's Right to Know." The report provided a brief history and summary of the state's public records and open meetings laws and presented a detailed list of recommendations designed to strengthen them. The recommendations covered a variety of issues including the need to allow for public comment at all public meet-

ings, access to computerized data, the cost of acquiring records, and a call for the Office of the Attorney General (OAG) to play an active role in education and enforcement. Although some of PAR's suggested reforms have been enacted, most still require legislative action.

This report is the first in a series re-examining the open meetings and public records laws. It updates the actions taken on PAR's earlier recommendations, reviews recommendations that remain to be enacted, and highlights new issues yet to be addressed. Subsequent reports will deal primarily with issues raised by the impact of technology.

Recent Legislative Sessions Focus On Technology and Security Changes

Since the publication of PAR's report, complex new issues have emerged as a result of evolving forms of communication and a new emphasis on security. Several bills proposed during the 2001 legislative session attempted to address technology-related issues.

One bill proposed to exempt e-mail from the public records law and another proposed the use of video conferencing to conduct interim legislative committee meetings. Neither bill was enacted but the issues are likely to be raised again in the future. A house resolu-

tion was passed requesting a study to explore publication of official notices on web sites instead of in traditional journals or newspapers.

Heightened concerns about security pose new challenges to maintaining open government.

Louisiana is one of many states following the lead of the federal government in passing anti-terrorism laws. During the 2002 special session, two bills exempting information related to security matters were proposed. The Legislature passed the Louisiana Anti-Terrorism Act (House Bill 53) after

much intense debate. One provision of the comprehensive legislation exempts “criminal intelligence information” and “vulnerability assessments” from the public records law. Senate Bill 15 proposed an exemption for vulnerability assessments prepared for water utilities. The final version of SB 15

that included safeguards not incorporated in HB 53 was deferred for further study in the interim. Questions remain as to how the new exemptions will be interpreted and if they will prevent citizens from gaining access to critical information, such as data on potential environmental hazards.

Recent Enactments of PAR Recommendations

Eight of the 31 recommendations in PAR’s earlier report were enacted in 1999 and 2001. (See Table 1.) The most significant change was an act requiring *all* public bodies to provide an opportunity for public comment. Historically, public bodies were not “required” to provide an opportunity for public comment, although many did. It was not until 1997 that school boards were required to allow the public to comment. The 2001 legislation gives public bodies the responsibility for developing their own “reasonable rules and regulations.” A future PAR report will examine the rules and practices governing public comment that have been adopted by selected public bodies at the state and local level.

The Legislature also took action to increase awareness of the sunshine laws. One act requires the OAG to educate the general public and government employees about the public records law. The statute suggests using brochures, pamphlets, videos, seminars and the Internet to provide information

about the sunshine laws. Another act requires public bodies to post the open meetings law.

The Legislature enacted three PAR recommendations regarding exemptions to the public records law. Chief among the new statutes is one consolidating all exemptions. While the public records law already included numerous exceptions, an additional 275 exemptions were scattered throughout a multitude of separate statutes. The Legislature incorporated the current exemptions into the public records law by reference and required future exemptions to appear in the public records law.

Another act requires that a custodian, who denies access to a record, must issue a written statement citing the legal basis for the denial within three days of receipt of the request. A new exemption protects attorney or expert work product done in preparation for trial. This provision acknowledges the privilege that already exists between an attorney or expert and clients in the private sector.

Another provision limits the amount of attorney fees that a citizen would have to pay if losing a suit in a public records law case. This cap serves to shield a citizen from exorbitant legal fees if a court finds the plaintiff-requester should pay the public entity’s attorney fees. The attorney fees cannot exceed the OAG’s schedule for legal services fees, which reaches a maximum of \$150 per hour.

Also, new language was added to strengthen the public records law. The new provisions emphasize the importance of the law and clarify the responsibilities of public employees. The new provisions clearly state that:

- Public employees and elected officials have a duty to provide citizens with access to public records.
- Records are presumed to be public unless specifically exempted by law.
- The burden of proving a record is not available to a citizen rests with the custodian of the records.

**Table 1
ACTION ON PREVIOUS PAR RECOMMENDATIONS**

Public Records Law and Open Meetings Law

Awareness of Sunshine Laws

PAR Recommendations

Legislative or Judicial Action

Require the Attorney General to educate public officials and the general public about the *open meetings law* and public records law.

Partial. Only applies to the public records law. Added by Acts 1999, No. 1154 (R.S. 44:31.2)

Require all public bodies to post a notice in a prominent place in their office advising the public of their rights regarding the *public records law* and open meetings law.

Partial. Only applies to the open meetings law. Added by Acts 1999, No. 467 (R.S. 42:4.1)

Add to the preamble of the public records law:

- ▶ access to public records is part of a public employee or elected official's routine duties;
- ▶ a statement that records are presumed to be public unless specifically exempted by law, and
- ▶ a statement that the burden of proof for denying access to a public record rests with the custodian and the public body.

Complete. Acts 1999, No. 1154 [R.S. 44:31(A)]

Complete. Acts 1999, No. 1154 [R.S. 44:31(B)]

Complete. Acts 1999, No. 1154 [R.S.44:31(B)2]

Recourse and Enforcement

PAR Recommendations

Legislative or Judicial Action

Establish a voluntary, non-binding mediation process in the Office of the Attorney General (OAG).

No Action

Eliminate the payment of attorney fees by unsuccessful plaintiffs unless patently frivolous.

No Action

Limit attorney fees to OAG attorney fee schedule.

Complete. Acts 1999, No. 1154 [R.S. 44:35(F)]

Public Records Law

Computerized Records

PAR Recommendations

Legislative or Judicial Action

Require custodians to provide electronically stored information to the requester in the form the requester prefers as long as the public body has the capability.

No Action

Require all public bodies to design future computer systems and records in a way (to the extent practical) that allows the easy separation of non-public information from public information.

No Action

TABLE 1 (Continued)

PAR Recommendations

Legislative or Judicial Action

Prohibit public bodies from contracting for the maintenance of a database that increases the cost of accessing records or limits access to public information.

No Action

Require that if a public body contracts with a private firm to provide previously public services, the records relating to the provision of those services remain public.

No Action

Fees Charged for Copies of Public Records

PAR Recommendations

Legislative or Judicial Action

Make fees for copies of public records statutory and consistent among state and local bodies.

▶ Charges for copies based on the actual cost of reproduction, not to exceed 25 cents per page (in contrast to the minimum now specified) for copies of public records.

No Action

▶ A requirement that custodians provide written estimates of the cost for copies of computerized records.

No Action

▶ A clear definition of “actual cost” as it relates to computer programming.

No Action

Exemptions from Public Records Law

PAR Recommendations

Legislative or Judicial Action

Place each public record exemption in both the public records law and statute relevant to the subject matter of the exemption. Future exemptions should be placed in both laws as well. Each law should include a reference to the other. Additional language identifying the area of law containing the exemption should accompany the citation.

Partial. Added by Acts 2001, No. 882 (R.S. 44:4.1) Each exemption must be in the public records law or it is not valid.

Require letters of denial of access to public records to include a citation of the specific exemption upon which the denial is based.

Complete. Acts 1999, No. 1154 [R.S.44:32(D)]

Add the 1978 amendment exempting attorney and expert work product done in preparation for trial.

Complete. Acts 2001, No. 882 (R.S. 44:4.1)

Other Recommended Changes to Public Records Law

PAR Recommendations

Legislative or Judicial Action

Require that, when a person requests a public record containing exempt information, the custodian shall provide the nonexempt portion by deleting the protected part at no additional cost to the requester.

No Legislative Action. Jurisprudence has established that a custodian is required to separate the public from the non-public information.

TABLE 1 (Continued)

PAR Recommendations

Legislative or Judicial Action

Remove the criminal penalties from the public records law except with regard to destruction of records.

No Action

Require that initial police reports be available to requesters in a reasonable and timely manner.

No Action

Include “drafts” in the definition of public records.

No Legislative Action. Jurisprudence has established that a draft is a public record.

Open Meetings Law

PAR Recommendations

Legislative or Judicial Action

Require public bodies to tape record executive sessions in case a dispute arises about whether they violated the law.

No Action

Require that after an executive session a public body reconvene in an open session and take a roll call vote (to be included in its minutes) certifying that to the best of the members’ knowledge, only matters lawfully exempted from open meetings requirements and only such matter that were identified in the public notice of the meeting (as required in certain instances) or in the motion by which the executive session was convened, were heard, discussed or considered in the closed meeting. Any member of the public body who believes there was a departure from these requirements should state so and the statement should be recorded in the minutes.

No Action

Amend the definition of a public body to include advisory committees appointed by an executive officer (mayor, governor, etc.).

No Action

Modify the exception to the open meetings law that allows public bodies to discuss “the character, professional competence, or physical or mental health of a person” in executive session:

No Action

- ▶ Require a certified statement by the public body that the person to be discussed was properly notified of the executive session and that the person chose not to require that the discussion occur in public.

No Action

- ▶ Clarify that the exception applies only to individuals, not to corporations or partnerships.

No Action

Prohibit the practice of “rolling” time for committee or other meetings of public bodies which result in a meeting beginning prior to the posted time. “Rolling” time refers to the practice of finishing one meeting and beginning another prior to the time stated in the notice.

No Action

Clarify the wording and expand the scope of a 1997 law requiring school boards to allow for public comment during their meetings.

Complete. Acts 2001, No. 285 [R.S. 42:5(D)] All public bodies are required to provide an opportunity for public comment subject to reasonable rules and regulations adopted by the body.

Continuing Problems

The sunshine laws, though strong in many ways, need to be updated and better enforced. Problems with the sunshine laws largely stem from ignorance about their requirements, a lack of commitment to rigorous enforcement, and a failure of the law to keep pace with technology. Too many citizens, in and outside of government, are unfamiliar with the state's sunshine laws. PAR receives calls daily from frustrated citizens and

journalists who have been denied access to records or meetings or have experienced situations that are not clearly addressed in the law. Violations of these laws continue to occur and show a need to institute policies that will effectively foster openness in government.

Some boards and commissions continue to violate the open meetings law by meeting in private without a valid reason. Other com-

plaints include public bodies failing to give proper notice of meetings or citizens lacking sufficient evidence to challenge an improper executive session. Contrary to the law, citizens attempting to examine public records are too often questioned as to their reasons for requesting particular records, met with delays beyond the time allowed or charged exorbitant copying charges.

The following recent examples illustrate some of these problems:

- Members of a public body met in an illegally closed meeting. The district attorney offered the members of the body who held the meeting the opportunity to attend a seminar on the sunshine laws sponsored by the district attorney's office or face prosecution. The board members chose to attend the seminar along with two hundred public employees. The comments of those participating indicated that the workshop was long overdue. *Sunshine law training should be mandated for local and state public employees who are responsible for answering sunshine law requests.*
- A public board held an unannounced dinner meeting in an expensive restaurant on the basis that it was an informal, social occasion. After the propriety of the meeting was questioned in the media, the dinner meetings were discontinued for several months. One member commented that even if notice was issued, the location could limit access to members of the public who could not afford to eat there. Months later, advance notice was issued for a dinner meeting held at a moderately priced restaurant. *Public bodies should select meeting locations that encourage the broadest possible attendance. Restaurants are not a proper venue for public meetings.*
- A records custodian asked a requester to explain why he wanted a public record. The public body denied the request on the grounds that the frequent and voluminous requests were intended to harass. The OAG disagreed and advised in an opinion that a public body could not ask the basis for the request nor deny any person access for requests within the scope of the public records law. *Although simple curiosity may motivate most custodians' questions, such inquiries can have a chilling effect on the exercise of a citizen's rights as some citizens may perceive that disclosure hinges on their response.*
- The Public Affairs Research Council, the Bureau of Governmental Research and The Public Law Center conducted a study of legal services contracting in 2001 that revealed problems with public records law compliance. The most serious documentation lapse was the failure of many local governments to use formal written contracts when retaining outside counsel. *Use of written contracts detailing the relationship between the public entity and the legal services contractor serves a number of purposes, including producing a public record that can be examined.*

Remaining PAR Recommendations

PAR continues to strongly endorse those recommendations from its 1998 report that have yet to be enacted. (See Table 1.) Although several state agencies have implemented some of the recommendations without a legislative mandate, PAR encourages the Legislature to renew consideration of each reform in order to achieve uniform rules. All of the recommendations are worthy of attention, but some will more deeply impact a citizen's awareness of the laws and help a citizen assert those rights. The key areas for improving awareness of the sunshine laws are expanding education initiatives and stronger enforcement. Other areas highlighted include issues relating to computerization, fees, meeting safeguards and exemptions.

Education and Enforcement

● *Sunshine law education should be given higher priority by the OAG.*

The OAG should expand its efforts and aggressively utilize the various media identified in the statute and provide annual training for public employees. The level of awareness about the sunshine laws in state agencies varies widely with the experience and knowledge of staff and legal counsel. A greater emphasis on training would signify a commitment to open government and prevent inadvertent violations

of the law. Training sessions allow participants the opportunity to discuss policy concerns and have questions answered quickly. Training is especially critical for newly appointed members to public bodies. Workshops educating the public should also be regularly scheduled events.

The OAG still has more work to do in satisfying the duty imposed by the Legislature in 1999. Since the education mandate was passed, the OAG has been slow to develop a program to raise awareness about the sunshine laws. Education efforts focus on answering calls from citizens or presenting sunshine law information at various professional association meetings such as the Police Jury Association and the Louisiana Municipal Association.

The first public forums to increase awareness occurred only recently. The OAG co-sponsored two seminars with a private, non-profit group, the Louisiana Coalition for Open Government (LaCOG) in fall 2001. LaCOG, formed last year, is dedicated to increasing awareness about the sunshine laws. It plans to institute a hotline service providing citizens with answers to sunshine law questions. PAR has distributed over 20,000 *Citizen's Rights Cards*, now in its sixth printing, containing a summary of the sunshine laws and a sample public records request letter

as well as fielding questions from the public. The Louisiana Legislative Auditor's office created a brochure that summarizes the sunshine laws that is also available on its website.

Sunshine Law Education In Other States

Several states have made excellent use of web sites in promoting awareness of sunshine laws. For example, Hawaii's Office of Information Practices (OIP) launched a website in 1998 and by 2001 reported receiving an average of 463 visits per day. The web site is the OIP's primary means of publishing information and in educating and informing the public and government employees. Web sites are used in several states to allow public employees and citizens to:

- ▶ Read the law or a summary of key provisions,
- ▶ Receive general guidance for common questions in a frequently asked question (FAQ) forum,
- ▶ Download and use model forms for record requests or appeal letters,
- ▶ Conduct legal research for relevant opinion letters,
- ▶ Read the current and archived issues of newsletters, and
- ▶ Link to related sites.

Some states have created sunshine law manuals to aid in training their public employees and educating the general public. Other states allow *citizens* to request attorney general opinions when their requests are denied and post the full text of the opinions on their web sites. The Louisiana OAG issues opinions for sunshine laws questions from local and state government. Opinions can be obtained from the OAG as the attorney general's web site only provides a summary.

Two current sunshine law provisions designed to increase awareness need to be amended. The attorney general should be required to provide information about the *open meetings law* in addition to the public records law and the law requiring posting of the open meetings law should be extended to include select portions of the *public records law* as well.

Mediation of Sunshine Law Complaints

● *A voluntary, non-binding mediation process should be implemented to expedite citizen's complaints when access is denied.*

Several states have taken steps to improve a citizen's ability to assert his rights under the sunshine laws. The 1998 PAR study profiled four different approaches. Some states have created new departments or independent agencies that deal with information issues and are the first stop in disputes. Hawaii created an Office of

Information Practices staffed by five attorneys and Connecticut created an independent agency administered by five part-time commissioners. Although such programs provide many services such as educating the public, training public employees, holding hearings and issuing opinions, these programs require significant funding.

Florida created a voluntary program in which the attorney general's office mediates sunshine law disputes. Non-binding mediation is clearly a good "first step" before engaging in litigation that is expensive and time-consuming; however, the right to file suit is still preserved. The Florida attorney general's office also reports data on the number and types of requests received and assists the Department of State in training public officials. PAR continues to endorse a voluntary mediation program similar to Florida's and strongly urges reconsideration of this recommendation based on the relatively modest funding required and the potential for avoiding litigation which is too costly and intimidating for most citizens.

The Louisiana OAG has objected to this recommendation in the past citing concern that it would create a conflict of interest if it were to mediate disputes with state agencies for which it serves as legal counsel. However, this argument has not prevented other states from using their attorney general's office to either issue opinions that sometimes run contrary to the wishes of the requesting

public body or to mediate disputes. The Louisiana OAG does issue legal opinions at the request of public bodies.

A mediation program can produce results more quickly than the attorney general opinion process that can take upwards of thirty days. The Florida attorney general's office reported that, of 115 cases mediated in their office for the reported year, 15 were settled in less than 24 hours. Many conflicts are resolved by a simple phone call. Although some agencies will not participate in a voluntary program, many will, and those refusing to participate may do so under media scrutiny. Of course, the mediation role could be effectively assumed by another agency. Some states have created an office in their Division of Administration that responds to sunshine law complaints while others have expanded the roles of their Office of Information Technology to mediate these issues.

Louisiana's Ethics Administration Program might also be considered for this role as it currently provides education on ethics issues to the general public and public employees through its web site and newsletter. The Division of Administrative Law housed in the Department of Civil Service might also be considered as the Division deals with citizen's appeals of agency decisions.

Any expansion of duties would require some additional funding to support those efforts.

Computerization, Fees, Meeting Safeguards and Exemption Information

● *Issues raised by computerization of records must be a priority.*

The public records law needs to accommodate changes raised by the computerization of records. Several issues remain unanswered including the assessment of costs for computer programming services, whether the custodian is required to give the requested information in a specified format, and what limitations should be placed on private firms with contracts to manage public data.

● *Fees for copies of public records should be statutory and based on the actual cost of reproduction.*

Fees charged for public records continue to be a very contentious topic as there is no consistency among public bodies. The custodians of public records may charge “reasonable” fees according to the public records law. The Division of Administration’s fee schedule directs state agencies to charge a minimum of 25 cents per page for the first copy of a public record. Without a definitive guide, citizens are left to encounter a wide range of charges that can inhibit pursuit of public information. Fees should be based on the actual cost of reproduction, *not to exceed 25 cents per page* (in contrast to the minimum now specified for state agen-

cies) and applicable to both state and local public bodies.

● *Additional safeguards should be added to the open meetings law to provide accountability for actions taken during closed sessions.*

The recording of closed or executive sessions would provide an additional safeguard. Citizens concerned about possible violations of the law could request that a judge listen to the recording of a closed meeting and determine if the law was violated. PAR also recommends that members of the public body certify that the open meetings law was obeyed or state any objections to such certification. Certification of proper conduct by the public body will heighten each member’s awareness of the law by making them confirm that actions taken during the meeting were valid.

● *The consolidated exemption statute should include more information to facilitate searches.*

Although the new consolidated statute facilitates the search for exemptions, additional language identifying the area of law containing the exemption should accompany the citations. House Legislative Services prepared a summary of each exemption referenced in the consolidated statute with a description of the subject matter. This summary should be available on the legislative website. Additionally, the validity of the exemptions should be examined to assure that all provisions continue to be neces-

sary. Public hearings before the House and Governmental Affairs Committee for all exemptions would provide a public forum for this determination.

New Challenges To Be Addressed

With increasing frequency, the complexities of rapidly changing technology and rising concerns about security pose new challenges to the state’s sunshine laws. Evolving forms of communication must be understood in the context of the sunshine laws and a citizen’s right to information must be balanced with a need to protect public safety and private information. The following issues will be addressed in future PAR reports.

New Technology and Exemptions. How should new forms of communication such as e-mail, voice mail, instant messaging through computer and pagers be treated?

Security. How should security concerns be balanced against the public’s right to information?

Surveillance. To what extent should security camera images be considered a public record and what limitations exist on the use of that information?

Archiving. How can the destruction of electronically stored records be prevented?

Public Affairs Research Council of La., Inc.

4664 Jamestown Avenue, Suite 300

P.O. Box 14776

Baton Rouge, LA 70898-4776

Phone: (225) 926-8414 • Fax: (225) 926-8417

E-mail: staff@la-par.org or jimbrandt@la-par.org

Website: www.la-par.org

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P A R

Third Party Contractors.

What policies ensure that a citizen's right of access is maintained when state agencies outsource management of their computerized data?

Judiciary. Are additional safeguards needed to restrict online access to confidential court records?

E-Government and Privacy. Are current safeguards adequate to

protect private information collected by state agencies?

Public Comment. Have public bodies developed adequate rules and regulations providing citizens the opportunity to comment at public meetings?

Video Conferencing. What are the potential advantages and disadvantages of this method of conducting meetings?

Digital Divide. How can the advantages of technology be extended to those with access to computers without diminishing access to public records of those without access to computers?

Access/Accuracy. What is the custodian's duty in assuring accuracy of public information in a high-speed digital age?

Conclusion

Though written over fifty years ago, Louisiana's public records and open meetings laws have served the state well. However, old problems and contemporary challenges call for re-examination of the sunshine laws. Since PAR's 1998 report some changes have been made to address those problems. However, violations continue to occur at both the state and local levels leaving citizens with few real options

to resolve their problems. Educating the public and public employees about sunshine laws and improving enforcement are essential for promoting compliance and avoiding inadvertent violations.

Technological change and escalating security concerns are permanent features of society. Worries about security and the failure of the sunshine laws to

keep pace with changing technology threaten to erode the right to access public information. Many fear the recent wave of anti-terrorism legislation marks a new era of closed government. Now more than ever, sunshine law education, enforcement, and thoughtful debate about proposed changes to the law, are crucial to keeping government open and responsive to the public.