Negotiated Rulemaking and the Sunshine Law: Can it help local law enforcement and the press get along?

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State open public records laws, which in conjunction with open meeting requirements are commonly called “Sunshine Laws,” demand that the records created and gathered by government agencies be available to the public for review and copying. The laws have numerous exceptions – usually to ensure that other overwhelming privacy or security concerns are not subject to public scrutiny – but they generally require that the public’s business be done in public. Agencies must make public records available in a reasonable manner at a reasonable cost.

In its watchdog role, the press often spars with the government over public records, and the Sunshine Law provides a framework for handling any disputes that arise. However, the numerous exceptions leave plenty of grey area in the law, and spotty enforcement of Sunshine Laws means that government bodies that wrongfully refuses to disclose a record go largely unpunished. Such actions are particularly common in law enforcement agencies, which often deal with high-profile investigations. The press wants access to records to accurately report on the investigations, while the law enforcement agency tries to restrict any information that it feels could jeopardize an investigation or, once an arrest is made, the prosecution of a criminal defendant. These divergent goals often lead to conflict, which manifests itself in hostile feelings by both the press and the agency when it comes to a record.

This paper examines this problem in a local context. From my personal experience in Boone County as an editor on the Cops & Courts beat at the Columbia Missourian, as well as from my research on the Missouri Sunshine Law in my master’s work, I have become interested in ways of resolving these lingering hostilities between
the press and the government. In particular, I'm interested in how alternative dispute resolution procedures could be applied to facilitate the press-government relationship, a complex relationship that needs to be neither too cozy for the press to serve its watchdog role, nor too combative to allow the press to serve in its role of giving citizens the “information they need to be free and self-governing,” in the words of Bill Kovach and Tom Rosenstiel.¹

Here, I propose to use negotiated rulemaking to create a protocol for records access to be created by local journalists and local law enforcement agencies. The proposal considers whether negotiated rulemaking is a good option, who should participate in the negotiation and how the negotiation should be conducted. I also try to look into the crystal ball throughout to consider what topics may be discussed in the negotiation and possible outcomes of the negotiation.

That said, my initial research turned out to be more guesswork than I had imagined, so I made some calls to people in local law enforcement to gauge their interest in convening for a negotiation and to feel out their ideas and concerns about how such a negotiation might proceed. These interviews – of Capt. Beverly Braun of the Boone County Sheriff’s Department, Records Custodian Janis Brown of the Columbia Police Department, and Capt. Brian Weimer of the University of Missouri-Columbia Police Department² – helped to shape the following sections.

I. Why Negotiated Rulemaking Can Help

² The interviews were conducted by telephone in May 2006. In this paper, any quotes or comments attributed to Braun, Brown or Weimer are derived from my notes from the interviews.
Interviews with the local law enforcement sources confirmed what I had already believed about the Sunshine Law: The grey areas are confusing enough, and the penalties potentially harsh enough, that law enforcement agencies worry about how to handle records requests. Each department has a different way of handling requests, which will be detailed later. And each believes the local news media is overly demanding in both the scope of requests and in the amount of time they expect records to be made available. Each cited instances of being “burned” by the press, and each had stories to tell about how bad relationships were with a particular news agency: Weimer said the MU police don’t get along well with the Columbia Daily Tribune; the Sheriff’s Department has longstanding difficulties with KOMU; the Columbia Police Department has difficulties dealing with the student reporters from the Missourian.\(^3\)

As mentioned before, such difficulties are common and are not unique to Boone County or Missouri. Dozens of audits of Sunshine Law compliance have been conducted nationwide over the last decade, and most have come to the same conclusion: public bodies, particularly those involved in law enforcement activities, are either ignorant of the law or act in defiance of it on a regular basis. In 2000, the Maryland-Delaware-D.C. Press Association sponsored an audit that sought some of the most routine records open to the public, including school violence reports and police logs, and yet found that people seeking such records “have about a one-in-four chance of immediately getting what they’re looking for. Half the time, they will get nothing.”\(^4\) In Illinois, an audit in 1999 conducted by the Associated Press Illinois Bureau found that “(n)early two-thirds of the

\(^3\) The latter is ironic, in that Capt. Tom Dresner, who is the head of the Records Unit at the police department, is a graduate of the MU School of Journalism.
time, people requesting public documents from local offices left empty-handed. More than one-quarter of the requests were never honored, even after allowing officials time to seek legal advice or compile the records.\(^5\) One county sheriff, when asked for a copy of the county’s jail log, “wadded up a copy of state law and said, ‘I don't have to tell you nothing.’”\(^6\)

Connecticut, which gives its state Freedom of Information Committee some of the broadest enforcement powers of any jurisdiction, had “abysmal” levels of compliance in audits in 1999 and 2001.\(^7\) The 1999 survey found that less than 22 percent of local government agencies complied with a simple records request on an initial attempt, while the 2001 survey showed that just one of 68 state agencies completely complied with a routine public records request.\(^8\) Florida, which has of the nation’s oldest and most widely-respected Sunshine Laws that was eventually adopted as a constitutional amendment by popular vote in 1992, has also had difficulties with compliance. A February 2004 survey conducted by 30 Florida newspapers found that 43 percent of the government agencies audited either “made unlawful demands or simply refused to turn over public records.” In some cases, the audit showed that “officials lied to, harassed and even threatened volunteers” who sought records.\(^9\)

Missouri, similarly, has had little success with compliance, according to a pair of surveys done by State Auditor Claire McCaskill. The first review, released in November

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\(^6\) Id.


1999, found that 47 percent of political subdivisions (102 of 214) failed to comply properly with a simple request to submit copies of the minutes of their last board meeting.\textsuperscript{10} The report concluded, "There is no assurance that political subdivisions would comply with the record request provisions of the Sunshine Law."\textsuperscript{11} The second review, released in April 2001, found that among state boards, agencies and commissions, 44 percent did not comply with a simple request for records under the Sunshine Law, and 54 percent of those bodies charged excessive fees for copies in violation of the law. The conclusion of the auditor's office was that "(i)nadequate Sunshine Law policies exist for more than half the state agencies, boards and commissions, which can lead to non-compliance."\textsuperscript{12}

"The government isn't feeling the heat from the Sunshine Law," McCaskill said just before the 2001 audit was released. "The sun may be shining, but it's not hot enough. Our democracy should be open to the people who run it. If records and meetings aren't open, you don't really have a democracy. That kind of control of information means the government is not accountable to the public."\textsuperscript{13}

In Boone County, home to the University of Missouri School of Journalism, the National Freedom of Information Coalition and Investigative Reporters and Editors, local government agencies have shown greater understanding of the Sunshine Law, although compliance is still somewhat lacking. A 2001 audit conducted by reporters for KOMU and the Columbia Missourian showed that nearly three quarters of the records requests

\textsuperscript{11} Id. at 1.
\textsuperscript{13} Chip Stewart, \textit{Audit Finds Obstacles to "Sunshine Law," THE COLUMBIA MISSOURIAN}, May 20, 2001, 1A.
were denied on a reporter’s first visit to an agency; after three months, nearly a quarter of the request were denied in whole or in part – even though all requests were for information that was supposed to be disclosed under the Sunshine Law. Law enforcement agencies were particularly troublesome, as the Columbia Police Department and the Boone County Sheriff’s Department tried to charge exorbitant rates for copies of incident reports, while the University of Missouri Police Department refused to let reporters view incident reports at all unless the requester went through MU’s Office of the General Counsel.¹⁴

I took part in the Missourian and KOMU audit, as one of the 27 reporters who sought records and as the lead writer and editor of the above-referenced stories that appeared in the Missourian. The immediate result of those stories was a roundtable among local government agencies that served as an information session about what the Sunshine Law requires. However, an air of hostility remains between the press and local government, specifically law enforcement agencies, regarding access to records. Brown, records custodian of the Columbia Police Department, minced no words when talking about the Sunshine Law. “We hate it,” she said.

Part of this negative atmosphere certainly comes from confusion about exactly what the law requires; the courts have not often considered the exceptions to disclosure, giving little guidance to law enforcement agencies on topics such as reports from an incident that is part of an ongoing investigation. Changes made to the Sunshine Law in 2004 – which included heightened penalties for non-compliance, increasing fines to $5,000 if a violation is made “purposely” and altered definitions and procedures regarding “incident reports” and “investigative reports” – further muddied the waters,

¹⁴ Mixed results in some offices, THE COLUMBIA MISSOURIAN, May 20, 2001, 4C.
according to the local law enforcement sources interviewed for this paper. “At first, after
the changes, people were afraid to do anything,” Braun said.

When in doubt, the Police Department and Sheriff’s Department turn to the
Attorney General for help; Braun estimated that she contacts the Attorney General so
frequently that the department could use a full-time attorney to handle records requests.
After the 2004 changes, Braun recalled that an Assistant Attorney General had an
information session with local government agencies about the Sunshine Law; however,
Braun said, that information session did not really touch on law enforcement records
much, leaving still too much area of confusion.

It is this confusion that a negotiated records protocol could address. Negotiated
rulemaking has the benefit being “enormously successful” when employed by federal
agencies “in developing agreements in highly polarized situations and has enabled the
parties to address the best, most effective, or most efficient way of solving a regulatory
controversy.”15 Of course, the present situation is not exactly a “regulatory controversy.”
Instead, it regards application and enforcement of a law that has proven to be extremely
difficult to enforce or apply in a timely manner through the courts (in the case of
Missouri), or by any other regulatory body (in the case of other states, such as Florida,
Connecticut, and New Jersey, which created administrative agencies to handle disputes).

Even though the administrative oversight of the Sunshine Law in Missouri is
limited to occasional comments or enforcement actions by the Attorney General,
negotiated rulemaking could help develop a protocol that needs less oversight, instead
drawing its power from the agreement of the parties. If consensus could be reached on a

15 Philip J. Harter, Assessing the Assessors: The Actual Performance of Negotiated Rulemaking, 9 N.Y.U.
procedure for access to records that both satisfies the local press and local law enforcement agencies, the parties could be content to let the protocol stand in place of any other kind of administrative oversight. The protocol could be tailored to address the specific needs of both the press, which faces deadlines and has a duty to report the news of high-profile events to the public, and law enforcement agencies, which are charged with protecting the public, investigating crimes and building cases for prosecutors.

Missouri does not have a state law regarding negotiated rulemaking. The federal Negotiated Rulemaking Act of 1990 lays out specific procedures for its administrative agencies to use in such circumstances. But those rules are not a perfect fit – for example, one of the hallmarks of negotiated rulemaking is the role that administrative agencies play in the process, and as previously mentioned, there is no administrative agency at work in this situation. Under the Negotiated Rulemaking Act, agencies are supposed to determine whether there is a need for a rule to get the process started, for example.\textsuperscript{16} However, the need in this situation is relatively evident, and negotiated rulemaking appears to be a very good option for the parties. Because of the number of parties and the desired outcome – a negotiated protocol that covers an ongoing relationship – ADR methods such as mediation and facilitation may not provide enough structure to get a workable rule made. It is unquestioned that the current system, which relies on the courts to provide precedent in a handful of cases touching particular situations, has provided little guidance about how Sunshine Law requests should practically be handled in this context.

\textsuperscript{16} 5 U.S.C. § 563
With some tweaks, the Negotiated Rulemaking Act can serve as a framework for the press and local law enforcement agencies to come up with a workable protocol. And the first step in this process is convening.

II. Convening – Who Should Be There?

In the Negotiated Rulemaking Act, the agency can seek a “convener” – an impartial person to assist in examining whether a negotiation should take place and to identify parties who would be “significantly affected” by the rule. In the present situation, because no administrative agency is involved, the most obvious parties – executive editors at the local newspapers, news producers at the local television and radio stations, records custodians or media contacts at local law enforcement agencies – would have to come up with a way to get the process started. Perhaps they could meet as an informal committee to discuss either hiring a convener (perhaps an experienced mediator or facilitator) or brainstorming about who could and should be involved.

Convening is an important process, and it is not one to be taken lightly by the aforementioned parties. My interviews with the law enforcement sources surprised me in this regard. When I asked them who should be present at a negotiation for a records protocol, each suggested somebody I had not considered. Braun said that the Boone County Prosecuting Attorney should be a party to any negotiation because how investigations are publicized could affect the prosecution of cases. Brown said the Missouri State Highway Patrol should be represented, and she emphasized the need for a representative from the Juvenile Office, saying that one of the most contentious areas of records access concerns juveniles (even if the press does not usually seek records in this

17 5 U.S.C. § 563(b)(1)
Weimer said prosecutors should definitely be present as well, and he said somebody from MU’s records office should attend, as well as a representative from the Office of the General Counsel, which handles any disputes over records in the university system.

The Negotiated Rulemaking Act requires that agencies limit negotiated rulemaking committees to 25 people, and that number could surprisingly be pushed once all of the above requests are taken into consideration. So far, there would be 15 people at the table: editors from two daily newspapers, producers from three local television stations, producers from two local radio stations, representatives from four law enforcement agencies, a prosecutor, an MU attorney, somebody from the MU records department, and somebody from the juvenile office. If this group served as an initial committee, it could perhaps work to hire a convener to help the rulemaking into its next phase: publishing notice of proposed negotiated rulemaking. In this phase, the committee would be seeking to find other parties who could be affected by a proposed rule. Such a notice could be published in the local newspapers, broadcast during the news on television and radio, and posted in a public place, such as the city and county Web sites and on the bulletin board at City Hall and the County Commission building.

It is not hard to foresee others – the local medical examiner, who handles autopsies that are sometimes the subject of Sunshine Law requests, for example. And although both the press and the law enforcement agencies would claim to be acting in the public interest, neither has an agenda that could be said to serve only the public interest. Thus, the committee may need to add other interested citizens or people in a
representative capacity.\textsuperscript{18} As an important and highly esteemed Reg-Neg scholar and professional says, “It is important to include all the key interests in regulatory negotiation. While one can never hope to get representatives of all the affected interests around the same table, the convener seeks representatives of the major interests and enough others to ensure that the issues will be adequately raised and resolved.”\textsuperscript{19}

Here, it is possible to get nearly all of the affected interests at the table, as long as the committee remains focused on its task of drafting a protocol. With the 15-member committee as a core, as many as 10 others could be invited, either through discussion of the committee, or at the request of a convener, or through the public notice. The parties may also wish to choose the best representative possible from their group; for example, the executive editors may decide that a particular editor in the newsroom who more commonly makes Sunshine Law requests would have the most experience and be the most affected by the outcome of the negotiation. Or representatives from the law enforcement agencies may want records custodians, rather than higher-ranking officials such as the Police Chief or the Sheriff – there to negotiate and make decisions.

Once a committee is set, it would have to come up with procedures to follow for the negotiated rulemaking.

\textsuperscript{18} Personally, I’d recommend Charles Davis, a professor in the journalism school who also serves as head of the National Freedom of Information Coalition. I can’t imagine that he would tolerate being left out of such a rulemaking session, nor would the press want to go without him, most likely. However, I can foresee the law enforcement representatives bristling at his inclusion, or seeking balance by adding a vocal privacy advocate.

III. Negotiated Rulemaking Procedures

Once the convening was done and the committee was selected, the parties would need to select a mediator – a person, usually but not necessarily impartial, who aids in conducting the negotiation. Under the Negotiated Rulemaking Act, this person is called a “facilitator,” and he or she plays an important role by chairing the meetings of the committee, assisting the negotiation, and managing the record-keeping of the group.20 The act requires that the facilitator be impartial. The records protocol committee will certainly need this kind of assistance. After years of hostility – for example, the Sheriff’s Department is still upset at KOMU for putting information on its Web site that had been handed in confidence to a family in a missing persons case, and MU police and the Tribune are still seething over requests for incident and arrest reports – the parties could use a trained mediator to help them overcome these difficulties and stay focused on the job at hand.

But somebody is going to have to pay for this person to facilitate, and that could prove to be a difficult issue. Under the Negotiated Rulemaking Act, the agency is normally on the hook for such expenses. However, with no agency in this situation, the parties will most likely have to share the expenses. If a committee member is at the table and thinks that the status quo is not a bad thing for his or her interest, it could be difficult to convince that person (or his or her organization) to chip in to pay mediator costs. Further, law enforcement agencies would have to spend taxpayer dollars on the process, which could upset members of the public who do not see the need for a records protocol. Ultimately, because the press is the group that may be most aided by a protocol – it could

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20 5 U.S.C. § 566(d)
improve the response time for requests and perhaps limit future litigation on contentious points – it may have to bear the lion’s share of the costs.

Once a facilitator is agreed upon, and payment arrangements have been made for the fee, the committee can get down to business. The facilitator can aid on the ministerial matters – scheduling, the time of mediation, ground rules for who can speak and caucusing and such. The law will take care of other things; because the Sunshine Law requires that meetings of government officials be open to the public, this meeting would certainly qualify as a public meeting. The committee, aided by the facilitator, will then need to resolve some more complex issues. It will need to decide how an agreement can be reached – by consensus or otherwise – and what the effect of an agreement would be. These will impact what the outcome of the negotiation is and whom the protocol affects, so the committee members would need to go into some detail in this area.

Under the Negotiated Rulemaking Act, the committee “shall attempt to reach a consensus,” meaning each member agrees with the final proposed protocol as a whole. The effect of this is that “each interest…has a veto over the proposal.” While consensus may be difficult to reach, considering the varied interests of the group and the complex relationships (some fraught with bad past experiences) with one another, it is essential to forging a protocol that will be given any real effect by the parties in the future. As the esteemed administrative law scholar once noted, “no rule that implements a consensus reached by the committee in which the parties agree not to challenge it has ever been the subject of a substantive judicial review.” This is important because the

21 5 U.S.C. § 566(a)
22 Knaster & Harter, supra note 19, at 85.
23 Harter, supra note 15, at 41.
protocol, if it were conducted under the framework of the Negotiated Rulemaking Act, would not be given any special deference by the courts.\textsuperscript{24}

Because the local press has been reluctant to file lawsuits regarding the Sunshine Law in the past, and because local law enforcement has similarly been reluctant to file declaratory actions to review decisions regarding openness, such challenges to the agreement may be unlikely. But coming up with an agreement by consensus should be the goal of this negotiation, and the facilitator should emphasize the importance of this throughout.

Ultimately, presuming the committee is able to come up with negotiated solutions to the various Sunshine Law issues, it will need to come up with a formal, written protocol. The facilitator can aid in the drafting of this, and the committee can review it to see if a consensus is reached. Part of this process will be determining who is bound by the agreement and who may benefit from it. For example, suppose the agreement comes up with a one-day response time for incident report requests (shorter than the three days the Sunshine Law demands, but in line with the common practice of local law enforcement agencies). Could the St. Louis Post-Dispatch demand similar treatment? Or if the committee agreed that $2.50 per incident report was a fair price to pay, even if it’s above the normal 10 cents per page suggestion of the Attorney General – could media sources not present at the negotiation have to pay the higher amount? Ideally, the parties at the negotiation could represent all of these interests, but it may not prevent all future challenges.\textsuperscript{25}

\textsuperscript{24} 5 U.S.C. § 570  
\textsuperscript{25} One would hope that such small potatoes matters as having to pay $2.50 for an incident report on deadline instead of 80 cents would not become the subject of contention. However, this kind of treatment has been one of the underlying issues creating tension between the press and law enforcement. For
IV. Conclusion

Even though the Negotiated Rulemaking Act is not applicable in this instance, it can provide guidance to a committee made up of press and law enforcement representatives to help them come to a negotiated agreement on handling the grey areas of the Sunshine Law that have long frustrated employees of both. Personally, I have seen so many of these issues arise during the routine day-to-day newsgathering that reporters do – how much to pay for copies, when you should have to make a formal request for a copy instead of a verbal request, to whom do you make the request, how quickly should you expect either your copy or a denial, etc. – that it is not hard to understand how both journalists and records custodians can become frustrated and bitter about having to deal with the nuances of the Sunshine Law. A protocol could be extremely helpful in easing the tensions inherent in this daily effort, and it could even serve to better inform and protect the public interest.

However, because rulemaking has not been attempted in this area, and because it would come at a cost that neither taxpayers nor the press may be too excited to expend, making this negotiated rulemaking a reality could be a very difficult thing. Nevertheless, the advantages of negotiated rulemaking – identifying parties and their interests, addressing concerns with the aid of a neutral facilitator, seeking consensus on issues in an environment more informal than legislation or the courts can provide – could provide great benefits to a relationship that has long been tense and is filled with daily arguments and disagreements. Courts, attorneys general, and legislators have failed to come up with

example, the Sheriff’s Department used to charge $5 per incident report, which drew complaints from the press, even though such reports were not even requested daily. After the changes to the law in 2004, the Sheriff’s Department began charging $2 per report – a more accurate reflection of the number of copies that must be made plus a small clerical fee.
a workable Sunshine Law system that is uniformly followed and can be easily enforced. Perhaps it is time the parties most affected by the daily use and application of the Sunshine Law take a hand in determining how they should interpret its provisions, creating a system of rules that is consistent and a product of their collaboration.