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# Shades of gray hurt state Sunshine Law

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There's a danger in the wording of part of Missouri's Sunshine Law. It opens the door to abuse and places a blanket of secrecy over discussions that can — and should — be held in public.

The issue centers on lawyers.

Unlike some states, Missouri gives public bodies great leeway to close meetings when lawyers want to discuss matters with their government clients.

The Sunshine Law's wording is so broad it allows officials to retreat behind closed doors for all "confidential or privileged communications between a public governmental body or its representatives and its attorneys."

It also allows officials to keep from the public discussion of "legal actions, causes of action or litigation involving a public governmental body."

So, for example, when a

lawyer concludes his or her comments will amount to "privileged communication," the lawyer is then obligated to make those comments privately. Unless the public body frees the lawyer from that obligation, by waiving its legal privilege, all the discussions remain secret.

The issue surfaced most recently with Springfield City Council, as City Attorney Dan Wichmer met with council members and city staff over the deal that had called for John Q. Hammons to build a hotel next to the Springfield Expo Center. Council cited the litigation/advice exception in holding that closed meeting, presumably to address delays in the building of the hotel and legal strategy and options for moving forward.

To their credit, council and city staff within a short time

## OUR VOICE

This editorial is the view of the News-Leader Editorial Board.

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### Legally secret

It's not uncommon to see the Sunshine Law clause regarding litigation/legal advice invoked in the Ozarks to give officials the power to close meetings. Some numbers from January 2009 to date:

- Greene County Commission, seven times
- City Utilities, 11 times.
- Springfield City Council, 30 times.
- Springfield school board, 22 times

- Source: agency spokespersons, city clerk

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## Our Voice/Decide in favor of openness, not secrecy

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released documents connected to the discussion and explained more about negotiations with Hammons. The hotelier also released a statement about plans to back away from the deal.

The documents revealed that the closed-door discussions held important and potentially far-reaching implications and impact — all of which could have stayed secret had city officials stuck to the letter of the law instead of seeing the need to be forthcoming.

As you can see from the box on the previous page, public bodies in our area frequently cite the litigation/advice exemption to open meetings. We realize that is their right and we're certainly not saying that the numbers indicate wrongdoing, or violations of the Sunshine Law.

We are, however, raising a red flag about the potential for undue secrecy, for such discussions to veer away from specific, strategic legal issues and into public policy — all falling under "privileged communications" because a lawyer is present.

We encourage public officials to stick to very specific and limited discussion in these sessions and — when appropriate — to free lawyers from the confidentiality to make issues clearer to the taxpaying public.

As is the case with other aspects of the Sunshine Law, officials should start their decision-making about what should or should-

n't be public with the presumption of openness, not furtiveness.

Other states limit more strictly closed discussion of legal matters.

Some require that an imminent and identifiable complaint exists before secrecy is permitted. Others use phrases to limit closed discussion specifically to "legal strategy." West Virginia goes this far: "Nothing in this article permits a public agency to close a meeting that otherwise would be

open, merely because an agency attorney is a participant."

The Rhode Island Attorney General has interpreted that state's litigation exemption "to include instances in which a lawsuit has not yet been filed, but not instances in which a public body is discussing the legality of a policy."

Some Missouri lawmakers have tried to change the controversial wording on this specific part of the Sunshine Law, to make it more clear that these kinds of sessions should be limited in scope. The change did not pass.

"The problem with this section of the law comes up repeatedly," said Jean Maneke, a lawyer for the Missouri Press Association, which continually works to try to improve our Sunshine Law.

Until it's fixed, we need our elected and appointed officials to err on the side of explaining potential legal tangles rather than allowing them to quietly simmer and impact our lives, our leaders' decisions — and our money.