

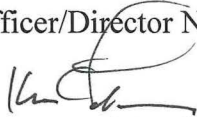


National Science Foundation • 4201 Wilson Boulevard • Arlington, Virginia 22230

Office of the Inspector General

MEMORANDUM

DATE: February 14, 2013
TO: Michael Van Woert
Executive Officer/Director NSB Office

FROM: Ken Chason 
Assistant IG for Legal, Legislative & External Affairs

SUBJECT: Sunshine Act Compliance Inspection

In 1976 Congress passed the Government in the Sunshine Act to better inform the public “regarding the decision-making processes of the Federal Government.”¹ The Act focuses on transparency while maintaining an environment within which the government can effectively carry out its responsibilities. It applies to agencies “headed by a collegial body composed of two or more individual members . . . and any subdivision thereof authorized to act on behalf of the agency,” and covers some 50 Federal agencies, including the National Science Board.

With the overall goal of opening up deliberations, the Act contains a number of substantive and procedural requirements that must be followed. In general, it requires that “every portion of every meeting of an agency shall be open to public observation”² with the exception of meetings that qualify for ten narrow exemptions.

Procedurally, at least one week prior to each meeting, the agency must make a public announcement regarding the time, place, and subject matter of the meeting, the name and phone number of a designated contact official, and whether the meeting is to be open or closed.³

In addition, before closing all or a portion of a meeting, an agency must vote with a majority in favor and make a written copy of the vote and a “full written explanation of its action closing the portion [of the meeting]” available to the public.⁴ Also, for a closed meeting, the agency’s General Counsel, or chief legal officer, must publicly certify that the meeting may be closed under one or more of the Sunshine Act’s exemptions and, with limited exceptions, the agency

¹ Richard K. Berg, Stephen H. Littman, Gary J. Idles, An Interpretive Guide to the Government in the Sunshine Act, xxxi, (2d ed. ABA Publishing (2005); *citing* Pub. L. No. 94-409, §2.

² 5 U.S.C. § 552b (b).

³ *Id.* § 552b (e).

⁴ *Id.* § 552b(d)(3).

must maintain a complete transcript or electronic recording of closed meetings that can be requested by the public.

Audit/ Inspection Requirement

The National Science Foundation Act requires the Office of Inspector General (OIG) to conduct a triennial audit of the National Science Board's compliance with the Sunshine Act and to make any recommendations to ensure public access to the Board's deliberations.⁵ We conducted this year's assessment of the Board's compliance with the Sunshine Act as an inspection in accordance with the Quality Standards for Inspection and Evaluation developed by the Council of Inspectors General on Integrity and Efficiency.

Inspections adhere to professional standards for matters such as quality control, sufficient evidence, and independence while providing a flexible, timely, and effective mechanism for oversight and review. The streamlined approach afforded by an inspection was particularly appropriate for this review in light of the most recent Sunshine Act audits, which have shown the Board making steady progress in ensuring compliance with the Act's requirements.

Our inspection covered Board meetings held during the three-year period of August 7, 2009, through July 31, 2012. We selected a random sample of 81 meetings—38 closed meetings and 43 open meetings and assessed compliance with the Act's requirements for each meeting.⁶

In keeping with the statutory requirement, the objectives of our inspection were to:

- Determine whether the Board's closures of meetings were consistent with the exemptions in the Government in the Sunshine Act, and
- Determine whether the Board and its subdivisions complied with the procedural requirements of the Government in the Sunshine Act.

We found that NSF staff complied with the vast majority of the requirements for all of these meetings. While we found minor exceptions to the Act's requirements for both closed and open meetings, we did not identify any such exceptions that had a significant impact on the public's ability to follow NSB operations. It is noteworthy that we did not find any instances in which the Board improperly closed a meeting. Detailed results of our findings are set forth below.

Closure of National Science Board Meetings Generally Consistent with Sunshine Act

The Sunshine Act requires that to close all or a portion of a meeting, there must be a vote to do so, a written copy of the vote, and a full explanation of the action to close. Additionally, the General Counsel must publicly certify that the meeting may be closed under one of the Act's exemptions and the Board must maintain a transcript or recording of the closed meetings.

We found that the Board complied with all of the requirements to close a meeting in 36 of the 38 meetings we examined. We found two NSB meetings -- May 10-11, 2011, and February 2-3, 2012, that lacked public notice for closure and the General Counsel's certification for their

⁵ 42 U.S.C. § 1862n-5(a)(3),(4). While these audits were initially required to be conducted annually, the National Science Foundation Authorization Act of 2007 changed the audit requirement to at least tri-annually. *See* Pub. L. No. 110-69 (2007).

⁶ We counted subcommittee meetings, task force meetings, and teleconferences as separate meetings.

closed committee meetings. The May NSB meeting involved closed sessions of the Audit and Oversight Committee, the Strategy and Budget Committee, and the Plenary Executive Committee. Board staff informed us that the required documents were partially prepared, but there was no signed copy in the files. In addition, these documents were not publicly available as required. We were informed that the departure of a key staff member during this timeframe may have contributed to the lack of notice.

The February 2012 NSB meeting involved closed portions of the Joint Committee on Strategy and Budget/Committee on Programs and Plans, and the Committee on Strategy and Budget meetings, as well as a closed Plenary Executive Committee meeting. Board staff gave us a copy of the signed certification from the files; however, the certification was not available publicly as required.

The Act also requires that notice of a meeting cancellation must be given to the public as soon as possible after making the decision to cancel.⁷ We found one closed meeting, a Committee on Strategy and Budget session on May 2, 2012, that was cancelled on the day of the meeting without advance notice, and we did not find that public notice of this cancellation was given after the meeting as required.

We also noted that during a closed session of the Committee on Strategy and Budget on December 10, 2009, a topic was introduced which was neither on the published agenda, nor covered by any of the ten exemptions pertaining to closed meetings. In addition, this topic did not qualify for any of the ten exemptions for closing a meeting. While the Act indicates that changes to agenda topics may be made under certain circumstances, including when no earlier announcement of the change was possible, we did not find any documentation pertaining to the change.

We recognize the difficulty in halting productive discussion because a new topic is not on the agenda and note this exception as a reminder of this requirement in the Act. By this example, we illustrate the need to be mindful of discussing matters in closed meetings that are more appropriate for open session. It is noteworthy that in several instances, such as for the July 28, 2011 Committee on Programs and Plans closed session, the Board's Executive Secretary's opening statement reiterated the Sunshine Act requirements and reminded Board members to restrict their discussion to topics listed on the agenda. To ensure that conversations stay on topic, we suggest this as a best practice for all closed sessions.

National Science Board Generally Complies with Sunshine Act's Procedural Requirements

In addition to procedures unique to closed meetings, the Sunshine Act also imposes several procedural requirements that apply to all meetings—open and closed. At least one week prior to each meeting, the agency must make a public announcement regarding the time, place, and subject matter of the meeting, as well as the name and phone number of a designated contact official, and whether the meeting is to be open or closed. We found that the Board complied with the public announcement requirement for 41 of the 43 open meetings in our sample, and for 33 of the 38 closed meetings we reviewed. The two open sessions and three of the closed sessions that did not comply with the public notice requirement were part of the February 2-3,

⁷ 5 U.S.C. § 552b (e)(2).

2012, Board meeting. The notice for these meetings was publicly posted one day in advance. The other two closed sessions were part of the November 4, 2009, and June 17, 2011, meetings. The notice for the November meeting was publicly posted two days in advance, and the notice for the June meeting was posted three days in advance. Of the five closed meetings that did not meet the requirement, two were teleconferences. One of the teleconferences was an Executive Committee meeting and the other was the Committee on Strategy and Budget. The other three meetings were Audit and Oversight, and Committee on Programs and Plans meetings.

We recognize that teleconferences present scheduling and notification challenges; however, the Act requires the Board to give the same advance notice for meetings held by teleconference as it does for others to help ensure openness and public access to its deliberations.

NSB Takes Strong Actions to Address Previous Audit Recommendations

We found that the National Science Board continues to advance transparency and openness in its proceedings, public notification of meetings, decisions to close meetings, and other important areas. The Board has addressed all four recommendations from the OIG's 2009 audit of Sunshine Act compliance: 1) ensure closed meetings are recorded or transcribed; 2) evaluate ways to improve the process for setting agenda items; 3) consider updating policies and develop checklists to assist staff in complying with the Act's requirements; and 4) ensure that relevant staff receives periodic training on the Act's requirements. The Board's actions to address these recommendations included upgrading audio recording equipment for closed meetings, holding public meetings to discuss agenda items, developing checklists for staff to help ensure compliance with the Act, and holding periodic Sunshine Act training sessions.

In addition to these actions, in 2012 the Board held three webcasts of open sessions of in-person meetings. The webcasts enabled interested persons from throughout the county to observe the meetings and to see the presentation materials on the screen in the Board room. The public meeting notices for the three meetings to date that have used this feature included a link to the webcast. The Board plans to continue webcasts of open meeting sessions and has a year-long contract for this service.

Finally, in addition to staff training provided in response to the OIG's recommendations, on May 8, 2013, prior to the May 9-10 Board meeting, the Board Counsel has scheduled training on Sunshine Act requirements during orientation for the new Board members. These actions, combined with those taken in direct response to our 2009 recommendations, should help the Board ensure that it accomplishes the Act's goal of openness and transparency.

Other Matters

We identified two meeting notices that had separate agenda links that directed the public to the meeting notice, rather than to a separate agenda. Care should be taken to ensure that links actually take readers to the promised document.

Conclusion and recommendations

The minor exceptions to Sunshine Act requirements we identified reflect the Board's continued commitment and attention to openness, transparency, and public access to the Board's proceedings. The Board's decision to webcast open meetings will further advance these goals.

We encourage the Board to maintain its emphasis on complying with the Sunshine Act and to keep the OIG informed of any additional efforts, such as the inclusion of training on Sunshine Act requirements in orientation for new Board members. We also suggest that the Board be open to and continue to identify new ways to increase transparency, such as webcasts of open meetings. In light of the Board's substantial compliance with the Act, we are not making any other recommendations.

MEMORANDUM

DATE: February 13, 2013

TO: Ken Chason
Assistant IG for Legal, Legislative & External Affairs

FROM: Michael Van Woert

RE: NSBO Response to 2013 Sunshine Act Compliance Inspection

The National Science Board Office has had an opportunity to review the draft of the Sunshine Act compliance inspection report prepared by the Inspector General's office. We share the IG's recognition of the importance of the Sunshine Act's goals of openness, transparency and access, and we are pleased that the NSBO's efforts of the preceding three years have been able to demonstrate that.

In response to the comments and recommendations made in the report, the NSBO staff notes that we are taking the following steps to improve our processes further:

- We will revise the talking points used by Executive Secretaries when beginning a closed meeting to add a reminder that the meeting discussion should stay on the noticed agenda topics in compliance with the Sunshine Act. We are developing an options checklist for NSBO staff and Executive Secretaries to use if members of the Board, or one of its subsidiary entities, wish to add a topic during a meeting.
- Counsel has met with the IT staff regarding certain non-working links on the NSB meetings page and other procedural matters that should improve our compliance and record-keeping.
- We will reinforce the guidelines regarding the need to post public notices of meeting changes, including cancellations. In the instance noted, the closed session of the Subcommittee on Facilities meeting on May 2, 2012, was cancelled at the end

of the open session and just before the closed session would have started, because all business was accomplished in the open session and there was nothing left to discuss. No matter how quickly given, notice would have been simply a record-keeping matter in that case.

- We are scheduling an orientation session for incoming Board members before the February and May 2013 meetings. Counsel will outline the Sunshine Act and cover the requirements relevant to Board member actions.

In other matters, the compliance inspection report refers to an annual report that agencies submitted to Congress on Sunshine Act matters. The requirement to file such a report has lapsed and therefore the NSBO no longer prepares it.¹

Finally, it does not appear that the Sunshine Act will continue to apply directly to the National Science Board as a result of Pub. L. 112-166. This law removed the requirement of Senate confirmation for NSB members. As a result, in the next few years the NSB will no longer come within the definition of a covered agency in 5 U.S.C. § 552b (a)(1), namely an agency headed by a collegial body where a majority of the members are Presidentially appointed with Senate confirmation. However, the NSB and the NSBO intend to continue to comply with the requirements of the Sunshine Act pursuant to provisions in the National Science Foundation Act, 42 USC § 1862n-5 (a)(2).

¹ See the note "Termination of Reporting Requirements" following 5 USC §552b, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/html/USCODE-2011-title5-partI-chap5-subchapII-sec552b.htm>.

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