

2006 Government in the Sunshine Act

**National Science Foundation
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Introduction

Background

The National Science Board (Board) is the governing entity of the National Science Foundation (NSF), an independent Federal agency established by the National Science Foundation Act of 1950. The Board is composed of 24 part-time, Presidentially appointed members, who are selected on the basis of their eminence in research or public affairs, and the NSF Director.

The Board has the responsibility for providing national science policy advice to the President and Congress, and for acting as the governing Board of the NSF. The Board conducts its business during two-day meetings, which are generally held five to six times a year. Much of the Board's analysis and background work in preparation for Board discussion and action is done through its committees.

Currently, the Board has five standing committees: Executive, Audit and Oversight, Education and Human Resources, Programs and Plans, and Strategy and Budget. These committees, and other subcommittees and task forces, generally meet during the same two-day period as the full Board. In addition, the committees occasionally meet at other times throughout the year on an as-needed basis.

The Government in the Sunshine Act

In the early 1970s, partially in response to the Watergate scandal, Congress enacted the Government in the Sunshine Act along with other anti-secrecy legislation. Congress intended the Sunshine Act to open the government's deliberation processes to public scrutiny.

The Act 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,"¹ and covers some 50 Federal agencies, including the National Science Board. The Act requires that "every portion of every meeting of an agency shall be open to public observation"² with ten narrow exemptions for discussions of material that are likely to disclose:

¹ 5 U.S.C. § 552b(a)(1) (2005).

² *Id.* § 552b(b).

- (1) National Defense and foreign policy;
- (2) Internal personnel rules and practices;
- (3) Statutory exemptions;
- (4) Proprietary information;
- (5) Accusation of crime or formal censure;
- (6) Personal privacy;
- (7) Investigatory records;
- (8) Financial institution reports;
- (9)(A) Financial speculation and stability;
- (9)(B) Frustration of proposed agency action; and
- (10) Issuance of subpoena, participation in civil action or proceeding, or formal agency adjudications.³

While the Act does not require an agency to hold meetings, it does contain a number of procedural requirements that must be followed when an agency decides to meet for either a closed or open session. First, 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 the designated official, and whether the meeting is to be open or closed.

Additionally, to close all or a portion of a meeting, an agency must vote to do so and make publicly available a written copy of the vote and a "full written explanation of its action closing the portion [of the meeting]."⁴ Also, for a closed meeting, the agency's General Counsel must publicly certify that the meeting may be closed under one of the Act's exemptions. Finally, the agency must annually report to the Congress: any changes in the agency's policies and procedures under the Act; a tabulation of the number of meetings held, exemptions applied, and the days of public notice provided to close a meeting; a brief description of litigation or formal complaints concerning the implementation of the Act; and any changes in law that have affected the open-meeting responsibilities of the agency.

Open Meetings of the National Science Board

In accordance with the Government in the Sunshine Act, the National Science Board has traditionally opened its full-Board meetings to the public. However, prior to 2003, the Board did not provide public access to the meetings of its committees, subcommittees, taskforces, or other subdivisions.

³ *Id.* § 552b(c).

⁴ *Id.* § 552b(d)(3).

The NSF Authorization Act of 2002, which became effective in December 2002, contained administrative amendments to the National Science Foundation Act pertaining to Board meetings. As part of these amendments, the Congress specified that in addition to meetings of the full Board, “all of its subcommittees, and task forces (and any other entity consisting of members of the Board and reporting to the Board) shall be subject to [the Sunshine Act].”⁵ Consequently, during 2003, the Board opened to the public, for the first time, its committee and other subdivision meetings.

Audit Requirement

In keeping with its interest for greater openness in Board meetings, the Congress placed another requirement in the NSF Authorization Act directing that the NSF Office of Inspector General (OIG) “conduct an annual audit of the compliance by the Board with [the Sunshine Act].”⁶ The audit is “to examine the proposed and actual content of closed meetings and determine whether the closure of the meetings was consistent with [the Act].”⁷ In a report submitted to the Congress by February 15th of each year, the OIG is to make “recommendations for corrective actions that need to be taken to achieve fuller compliance with [the Sunshine Act] and recommendations on how to ensure public access to the Board’s deliberations.”⁸

This is the fourth annual audit of the Board’s Sunshine Act activities. Prior years’ audits found a clear intent on the part of the Board to provide for greater access to and increased openness in its meetings. With respect to the Board’s decision to close meetings, we found that the Board generally closed its meetings consistent with the Sunshine Act’s exemptions. However, we noted instances where the Board included agenda items in its closed meetings that should have been more properly included in open sessions. In addition, in all three years, the Board faced challenges in meeting the Act’s numerous procedural requirements. We recommended that the Board develop and implement formal policies, processes, and procedures for complying with the Act’s numerous procedural and closure requirements and to provide training to pertinent staff. The Board agreed with the audit findings of all three prior audits.

⁵ Pub. L. No. 107-368 (2002).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Objectives, Scope, and Methodology

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

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

Our audit covered Board meetings held from January through December 2006. During this timeframe, the Board conducted 85 separate meetings of which 28, or 33 percent, were closed. For the purposes of this audit, we counted each of the various committee, subcommittee, and task force meetings separately, although they typically occur during the same two-day time period. Also, we considered a committee meeting with both an open and closed portion on the same day as two separate meetings: one open and one closed. However, we considered a committee meeting that met for more than one non-consecutive time frame during a single day, and was either entirely open or entirely closed, as one meeting. For example, an open Task Force on Polar Issues meeting from 1:00pm to 3:00pm, with a closed portion from 1:30pm to 2:00pm would count as two meetings. Likewise, an open Education and Human Resources Committee meeting from 9:00am to 10:00am and again from 1:00pm to 2:00pm on the same day, with no closed session, would count as one meeting.⁹

To determine whether the Board complied with the procedural requirements of the Sunshine Act, we interviewed agency personnel and gathered and reviewed documentation for all meetings to determine whether the Board met the Act's requirements for public notice. For each of the closed meetings, we reviewed documentation to determine whether the Board met the applicable Act requirements, including the vote to close and General Counsel certification.

To determine whether the Board closed its meetings in accordance with the Act's exemptions, we reviewed a sample of 18 of the 28 closed-meeting transcripts and compared them with meeting

⁹ For purposes of our audit we counted the Plenary Closed and Plenary Closed Executive Board meetings as one meeting.

agendas, General Counsel certifications, and the Board's explanations for closing meetings.

We conducted our work during the period of September 2006 through January 2007 in accordance with generally accepted government auditing standards.

Results of Audit

During 2006, the National Science Board again demonstrated a clear intent to comply with the Sunshine Act regulations and generally closed its meetings only when warranted, consistent with the exemptions contained in the Act. However, we noted instances where the Board, and particularly the Executive Committee, continued to include open agenda items in several of its closed meetings that more properly should have been included in open sessions. The decision to include agenda items in open or closed sessions necessarily is made in advance of the actual meeting. However, because of a lack of documentation, we were unable to determine whether the Board properly applied the Sunshine Act's prospective standard of being likely to reveal information covered by one of the Act's exemptions when deciding upon closed meeting agenda items. As a result, the public may not have fully reaped the benefits of the open government promised by the Sunshine Act as it applied to several agenda items included in closed sessions. As such, we once again recommend that the Board develop, implement, and provide training on a process for documenting the reason for placing each agenda item in a closed meeting rather than an open meeting.

In meeting the procedural requirements of the Sunshine Act, the Board greatly improved its compliance due to a new process for tracking due dates implemented by the Board Office. Nevertheless, there are two areas where the Board could improve its procedural compliance with the Act. These are ensuring the Board votes on and announces all changes to publicly announced agendas and instructing court reporters to fully record all closed meetings.

Decision to Close

Presumption in Favor of Open Meetings

The overall presumption of the Sunshine Act is in favor of open meetings. This is consistent with the Act's underlying policy that "the public is entitled to the fullest practicable information regarding

the decision-making processes of the Federal Government.”¹⁰ However, the Sunshine Act recognizes that circumstances exist in which public disclosure of a particular matter may not be in the government’s best interest. As such, the Act has built-in exceptions to its open meeting requirement. Although the starting point for any meeting is always openness, an agency *may*¹¹ choose to close a meeting if the discussion “is likely” to disclose information contained in one of the Act’s ten exemptions.¹²

The language of the Sunshine Act requiring open meetings “is sweeping, unqualified, and mandatory.”¹³ Thus, the ten exemptions are to be construed narrowly¹⁴ so that the greatest amount of openness can be achieved. The Sunshine Act envisions that agencies will engage in a two-step process when deciding whether to close a meeting. The agency must first make a determination whether the expected discussion is likely to reveal information contained in one of the Act’s exemptions.¹⁵ Second, the agency must make a determination as to whether public interest requires opening of the meeting even in the face of an exemption.¹⁶

Improvements Still Needed

During 2006, the Board closed 28, or 33 percent, of its 85 total meetings for reasons involving 8 of the 10 exemptions contained in the Sunshine Act. Our review of a sample of 18 of the 28 closed meetings found several agenda item discussions that did not appear to contain information that met one of the Act’s exemptions.

¹⁰ Pub. L. No. 94-409, 90 Stat. 1241, at § 2 (1976).

¹¹ “As with FOIA, the exemptions from the Sunshine Act are permissive, not mandatory; an agency *may* close a meeting or any portion of a meeting if it is protected by one of the exemptions.” *The Government in the Sunshine Act – An Overview*, 1977 DUKE L. J. 565 (1977) (citations omitted). The one exception to this is mandatory closure under exemption three.

¹² See 5 U.S.C. § 552b(c) (2005).

¹³ *Pacific Legal Fndn v. Council on Environmental Quality*, 636 F.2d 1259, 1265 (D.C. Cir. 1980).

¹⁴ See, e.g., *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921, 928 (D.C. Cir. 1982); see also H.R. REP. No. 94-880, pt. 1, at 3 (1976) (“In case of doubt as to whether a portion of a meeting is exempt, the presumption is to be in favor of openness[,] . . . even if a matter falls within an exemption.”).

¹⁵ “Congress rejected the approach of establishing “functional categories” of agency business whose discussion could automatically be closed to the public. Instead **the Sunshine Act provides for an examination of each item of business to ascertain whether it may be closed under the terms of one of ten specific exemptions.**” *Common Cause*, 674 F.2d at 932 (emphasis added).

¹⁶ “In making this decision [to close a meeting], the agency must utilize a balancing process to determine whether ‘the public good achieved by opening the meeting out weighs the advantages to be gained by closing it.’” Susan T. Stephenson, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 173 (1976-1977) (quoting S. Rep No. 354, 94th Cong., 1st Sess. 20 (1975)).

Most of these agenda items occurred during Executive Committee meetings.

For example, the August 9 Executive Committee closed meeting included the agenda item "Future Budgets." The justification to close this agenda item was that the discussion would pertain to "future budgets not yet submitted by the President to the Congress."¹⁷ Our review of the closed meeting transcript revealed that the actual discussion was of NSF's intent to make its annual award of \$2 million to the Human Frontier Science program, as well as a non-research award to the US National Academy of Science. Both of these awards were brought as information items to the Board during the closed meeting and required no action - the agency was just informing the Board of its intent to make these awards. It appears that this discussion does not meet the "future budget" or any other Sunshine Act exemption.

In another example, the September 27 Executive Committee closed meeting included an item classified as "Specific Personnel Matters" and "Future Budgets." The justification to close this agenda item was that the discussion "would be likely to constitute a clearly unwarranted invasion of personal privacy"¹⁸ and would pertain to "future budgets not yet submitted by the President to the Congress."¹⁹ However, our review of the closed transcripts revealed that the actual discussion was to inform the Executive Committee members about the recently enacted Federal Funding Accountability and Transparency Act of 2006,²⁰ its requirements, and a request from the Office of Management and Budget for NSF to be actively involved in the government-wide implementation of this act. This discussion also appears not to meet any of the Sunshine Act exemptions.

In other instances, committees, including the Executive Committee, occasionally discussed personnel matters in closed sessions that should have been in open sessions of the Board. The justifications to close these personnel discussions were that such discussions "would be likely to constitute a clearly unwarranted invasion of

¹⁷ The NSF Act contains a specific exemption for future budgets not yet submitted to the Congress, 42 U.S.C. § 1863(k) (2005), which falls within the Sunshine Act's statutory exemption, 5 U.S.C. § 552b(c)(3).

¹⁸ See 5 U.S.C. § 552b(c)(6).

¹⁹ The NSF Act contains a specific exemption for future budgets not yet submitted to the Congress, 42 U.S.C. § 1863(k) (2005), which falls within the Sunshine Act's statutory exemption, 5 U.S.C. § 552b(c)(3).

²⁰ This act calls for a publicly accessible and searchable database for all grants, contracts, and sub-recipient awardees with data no more than 30 days old to be available by January 1, 2008.

personal privacy.”²¹ However, our review of these closed meeting transcripts did not reveal any discussions that “would be likely to constitute a clearly unwarranted invasion of personal privacy.” Rather, these discussions were of a very general nature and did not provide personal information. Most of the time, when individual names were used it was in the context of announcing individuals who had been recently appointed to particular management positions within the agency, matters, which if disclosed publicly would not have invaded personal privacy. Consequently, it does not appear that these discussions met the requirements of any Sunshine Act exemptions.

Including open agenda items in closed meetings occurred because the decision to include these items in open or closed sessions necessarily is made in advance of the actual meeting. The standard for closure in the Sunshine Act is whether an upcoming discussion “is likely” to disclose exempted information.²² This standard is to be applied prospectively. However, there is no documentation to show why certain agenda items were placed into closed session rather than open. Without such documentation, we are unable to determine whether the Board properly considered the “is likely” standard when determining what agenda items to include in closed session and how the exemptions may have applied. Consequently, we can only look at these meetings with 20-20 hindsight and make a determination whether they were properly closed based solely on the actual content of the discussions.

By including agenda items in closed sessions that should otherwise be covered in open meetings, the Board may not be providing the public with the access intended under the Sunshine Act. Absent special circumstances, the public has a right to observe the agency decision-making process first-hand. In addition, when the Board conducts apparent non-exempt discussions behind closed doors, there is a lack of transparency of Board activities.

Recommendations

In order to evidence that it is properly applying the “likely to” standard for using a Sunshine Act exemption when including an agenda item in closed session, we again recommend that the Executive Officer of the National Science Board:

- Develop and implement a formal process for determining and documenting the basis for placing each specific agenda

²¹ See 5 U.S.C. § 552b(c)(6).

²² Id. § 552b(c).

