

Government in the Sunshine Act Audit, 2012-2015

Sunshine Act Notices

- March 11, 2016 - Committee on Strategy and Budget, Subcommittee on Facilities (SCF) Teleconference (CLOSED) - Sunshine Act Meeting Notice
- March 11, 2016 - Committee on Strategy and Budget, Subcommittee on Facilities (SCF) Teleconference (CLOSED) - Basis for Closing the Meeting and Counsel Certification
- March 11, 2016 - Committee on Strategy and Budget, Subcommittee on Facilities (SCF) Teleconference - Sunshine Act Meeting Notice
- March 1, 2016 - National Science Board Teleconference (CLOSED) - Sunshine Act Meeting Notice
- March 1, 2016 - National Science Board Teleconference (CLOSED) - Basis for Closing the Meeting and Counsel Certification
- February 17, 2016 - ad hoc Task Force on NEON Performance and Plans Teleconference - Sunshine Act Meeting Notice
- February 17, 2016 - ad hoc Task Force on NEON Performance and Plans Teleconference - Basis for Closing the Meeting and Counsel Certification
- February 17, 2016 - Committee on Education and Human Resources (CEH) Teleconference - Sunshine Act Meeting Notice
- February 2, 2016 - February 3, 2016 - National Science Board Meeting - Sunshine Act Meeting Notice
- February 2, 2016 - February 3, 2016 - National Science Board Meeting - Updated Sunshine Act Meeting Notice
- February 2, 2016 - February 3, 2016 - National Science Board Meeting - 2nd Updated Sunshine Act Meeting Notice
- February 2, 2016 - February 3, 2016 - National Science Board Meeting - Basis for Closing the Meeting and Counsel Certification
- February 2, 2016 - February 3, 2016 - National Science Board Meeting - Updated Basis for Closing the Meeting and Counsel Certification
- January 28, 2016 - ad hoc Task Force on NEON Performance and Plans Teleconference (CLOSED) - Sunshine Act Meeting Notice
- January 28, 2016 - ad hoc Task Force on NEON Performance and Plans Teleconference (CLOSED) - Basis for Closing the Meeting and Counsel Certification
- January 8, 2016 - Executive Committee Teleconference - Sunshine Act Meeting Notice
- January 6, 2016 - Committee on Science and Engineering Indicators (SEI) Teleconference - Sunshine Act Meeting Notice

Public Access to National Science Board Meeting Transcripts

REVISITING THE
STEM WORKFORCE
A Comparison to Science and Engineering Indicators 2014



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Meetings



May 5, 2016 - May 6, 2016

National Science Board Meeting

NSB Meeting



August 9, 2016 - August 10, 2016

National Science Board Meeting

NSB Meeting



November 8, 2016 - November 9, 2016

National Science Board Meeting

NSB Meeting

Purpose of the Sunshine Act

- ▶ Congress passed the Government in the Sunshine Act (The Act) based on the policy that “the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.”
- ▶ The Act requires that “every portion of every meeting of an agency shall be open to public observation,” with the exception of meetings that qualify for ten narrow exemptions.
- ▶ Congress decided not to provide *any* exemption for predecisional deliberations because it wished the process of decision-making as well as the results of those decisions to be open to public view.
- ▶ Per case law, agencies should not use exemptions to close meetings to avoid the perceived discomfort and inconvenience inherent in the open meeting principle and circumvent the spirit of openness which underlies this legislation.

When is NSB Having A Sunshine Act Meeting?

- ▶ Deliberations of a quorum that determine or result in the joint conduct or disposition of official agency business.
- ▶ The discussion does not have to result in a final decision to be considered a meeting.
- ▶ The NSF Authorization Act of 2002 specified that in addition to full NSB meetings, “all of its committees, 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].”
- ▶ *A discussion that is simply informational, exploratory, or preliminary falls outside of the Act.*

Procedural Requirements of the Act

- ▶ At least one week prior to each meeting, the NSB must make a public announcement of the upcoming meeting.
- ▶ Within one day of the vote to close a meeting, NSB must make its vote to close the meeting, available publicly. For a closed meeting, the General Counsel must publicly certify that the meeting may be closed under one of ten exemptions to the Act, and with limited exceptions the agency must retain a complete transcript or recording of closed meetings which can be requested by the public.
- ▶ NSB has to retain a statement from the presiding officer of the closed meeting.
- ▶ NSB must vote to change agenda items.

Sunshine Act Audit Requirement

- ▶ Formerly, the 2002 NSF Authorization Act directed the NSF OIG to conduct an audit of the NSB's compliance with the Sunshine Act *every year* and for the NSF OIG to:
 - ▶ Examine the proposed and actual content of closed meetings and determine whether the closure of the meetings was consistent with the Act.
 - ▶ Submit results of the audit to Congress by February 15th each year.
- ▶ Due to the NSB's improved compliance with the Sunshine Act, the 2007 America COMPETES Act changed the audit requirement to every *three years*.

Objectives and Scope of the Audit

Objectives:

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

Scope:

- ▶ Our audit covered a random sample of 85 NSB meetings held during the three-year period of August 1, 2012, through July 31, 2015.

Overall Results of Audit- Closure Compliance

NSB may have inappropriately used Exemption 9(B) to close 11 agenda items.

- ▶ NSB Office agreed upon further reflection that it would have been possible to have discussed four of the agenda topics we questioned in open session including improving oversight of NSF large facilities, NSB's role in managing risks to the NSF, and certain topics related to legislative affairs.
- ▶ Two of the agenda topics while not appropriately closed under exemption 9(B) were appropriately closed under NSF's budget exemption.
- ▶ NSB Office disagreed that the remaining five congressionally focused discussions were inappropriately closed under exemption 9(B).

Exemption 9(B)

- ▶ Exemption 9(B) rests on a determination that premature disclosure of information would be “likely to significantly frustrate implementation of a proposed agency action.”
- ▶ According to case law, exemption 9(B) is used if disclosure of the agency’s proposals or bargaining position “could affect private decisions by parties other than those who manage the federal government,” and the “private responses of such persons might damage the regulatory or financial interests of the government as a whole”.
- ▶ Examples in the House and Senate Reports, (1) an agency considering an embargo on foreign shipments of certain goods; (2) an agency discussing whether to approve a proposed merger; (3) an agency proposing its strategy for an upcoming collective bargaining with its employees; and (4) an agency contemplating a purchase of real property.

Overall Results of Audit- Closure Compliance

- ▶ A broad range of topics was discussed under the agenda item “Discussion on Risks to NSF”, but these topics were not fully described in the public agendas.
 - ▶ Examples of items discussed under the topic of “Discussion on Risks to NSF” included NSF OIG management challenges, Congressional focused discussions, and results of NSF OIG audits.
- ▶ Our review of retreat agendas raised concerns that the line between what does and does not constitute a “meeting” may have been blurred. Examples of concerns included:
 - ▶ 2013 NSB retreat included the topic of developing a summary and action plan on NSB interactions with the Hill.
 - ▶ 2014 retreat involved reviewing a draft charge of “Program Portfolio Planning” and considering alternatives.
 - ▶ 2014 NSB retreat included a topic of discussing short term and long term goals and strategies for mitigating future risks with regards to Congress.

Overall Results of Audit- Procedural Compliance

- ▶ For 7 of the 85 (8 percent) of the open and closed meetings, which were all teleconferences, NSB staff posted the announcement less than one week before the meeting.
- ▶ For 18 of 44 (41 percent) of the closed meetings in our sample, the NSB staff did not post the vote to close and written explanation of closing within one day of the vote.
- ▶ For 6 of the 44 (14 percent) of the closed meetings, the presiding officer statement was not retained or did not include all the required information.
- ▶ We found two meetings in which the NSB added agenda items to the meetings without the required NSB votes.

NSF OIG Recommendations

1. Take steps to ensure use of exemption 9(B) is consistent with the Sunshine Act and the Common Cause case, such as contemporaneously documenting the basis for the NSB's use of the exemption 9B or developing a checklist for use of the exemption.
2. Monitor agenda topics discussed at NSB retreats to ensure they do not evolve into Sunshine Act meetings.
3. Provide transparent, specific agenda items to the public.
4. Post votes to close and written explanations of meeting closings in accordance with the timeframes specified in the Sunshine Act.
5. Post agenda items (public announcement) in accordance with the timeframes specified in the Sunshine Act.
6. Maintain presiding officer statements for closed meetings.
7. Follow Sunshine Act procedures for making changes to and adding agenda items.

NSB's Corrective Action Plan

- ▶ The NSB Office and NSF OIG have reached agreement (resolution) on the NSB's corrective actions to address the audit recommendations. The NSB Office's corrective actions include the following:
 - ▶ Use of 9(B) is to be supported by a contemporaneous memo to the file identifying the actions that the Board is concerned an outside party might take if that party were aware of the Board deliberations;
 - ▶ Updates to the Sunshine Act Guide and Standard Operating Procedures;
 - ▶ Development of scripts for the presiding officer statement;
 - ▶ Development of a chart for executive secretaries to use if a new topic is introduced at a meeting; and
 - ▶ Monitoring of NSB retreats by the Executive Officer and Counsel.

Interested in reading the full report?

- ▶ Here's a link:
- ▶ http://www.nsf.gov/oig/_pdf/16-2-007_Sunshine_Act_Final_Report_Redacted.pdf

Questions?

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