

**Audit of NSB Compliance with the Government
in the Sunshine Act**

**National Science Foundation
Office of Inspector General**

**February 13, 2004
OIG 04-2-002**



Introduction

Background

The National Science Board (NSB or Board) is the governing board 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, and the NSF Director, who are selected on the basis of their eminence in research or public affairs.

The Board has responsibility for providing national science policy advice to the President and to the 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 background work of the Board 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) National Defense and foreign policy;
- (2) Internal personnel rules and practices;

¹ 5 U.S.C. §552b(a)(1).

² *Id.* at §552b(b).

- (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 date, time, and place of the meeting 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; 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.

The NSF Authorization Act of 2002, which became effective in December 2002, contained administrative amendments to

³ 5 U.S.C. §552b(c).

⁴ *Id.* at §552b(d)(3).

the National Science Foundation Act pertaining to NSB 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 in seeing greater openness in NSB 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

⁵ Pub. L. No. 107-368 (2002).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Objectives, Scope, and Methodology

In keeping with the audit requirements contained in the NSF Authorization Act of 2002, 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 NSB and its subdivisions are in compliance with the procedural requirements of the Government in the Sunshine Act.

The NSB Office identified 6 meetings of the Board (February, March, May, August, October, and November 2003) plus 11 telephone meetings of NSB Committees for a total of 17 meetings. However, for the purposes of this audit, these meetings were sub-divided into the various committee, subcommittee, and task force meetings that, together with the full Board meetings, yield a total count of 100 separate meetings of which 30 were closed. For the purposes of this count, 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 1:30 to 2:00 counted 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, counted as one meeting.

To determine whether the Board closed its meetings in accordance with the Sunshine Act exemptions, we reviewed transcripts and electronic recordings of closed meetings and compared them with meeting agendas. We also compared actual meeting discussions with the General Counsel certifications and the Board's explanations for closing meetings.

To determine whether the Board complied with the procedural requirements of the Act, we met with agency personnel to determine its applicable policies, procedures,

and practices. We gathered and reviewed documentation for all meetings to determine whether the Board met the Act's requirements for public notice. For each of the 30 closed meetings, we reviewed documentation to determine whether the Board met the applicable Act requirements, including the vote to close and General Counsel certification. Finally, we reviewed the Board's most recent annual report to the Congress, submitted in 2003 for calendar year 2002, to determine whether it complied with the Sunshine Act's reporting requirements.

We conducted our work between October 2003 and January 2004 in accordance with generally accepted government auditing standards.

Results of Audit

Overall, we 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 decisions to close meetings, we found that the Board properly closed its meetings consistent with the exemptions contained in the Sunshine Act.

However, we also found that during 2003, the Board experienced some challenges in meeting all of the many procedural requirements of the Sunshine Act. With the opening to the public of the meetings of the Board's committees, subcommittees, and task forces, the complexity of complying timely with the Act's procedural requirements increased. Accordingly, the NSB needs to have in place formal policies and procedures that define the various participants' roles and responsibilities for complying with the Act's numerous procedural requirements. Such policies and procedures would help ensure that staff involved clearly understand what is required and when, and would assign clear accountability for accomplishing the tasks timely. We recommend that the Board develop, implement, and provide training on such policies and procedures to ensure greater consistency and accountability in complying with the Sunshine Act's requirements in the future.

We also noted opportunities for increased open meeting discussions by enhancing the Board's access to information on anticipated agenda items prior to meetings. Such information could allow for more informed NSB decisions of when to close a meeting and hopefully maximize the number of open meetings.

Decisions to Close

Meeting Closure is Largely Consistent with Sunshine Act Exemptions

With one exception during 2003, the Board properly closed its meetings consistent with the exemptions contained in the Sunshine Act. 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."⁹ By conducting most of its meetings in the public forum, the Board helped keep the public more informed about how government operates while still protecting individuals' privacy. The Sunshine Act has built-in exceptions to its open meeting requirement. The starting point for any meeting is always openness; however, an agency may choose to close a meeting if the discussion is likely to disclose information contained in one of the Act's ten exemptions.

During 2003, the NSB and its various subdivisions held a total of 30 of its 100 total meetings that were closed for reasons involving 8 of the 10 exemptions. Discussions in closed meetings involved the following topics:

- future budgets,
- awards and agreements,
- specific personnel matters, and
- OIG briefings on active investigations.

Discussions held during these closed sessions did follow the planned agendas for the meetings and did pertain to topics that the Board had decided were covered by one or more of the Act's exemptions. Only one closed meeting agenda item, concerning a budget request for a fiscal year that had already been submitted by the President to the Congress, was clearly not covered by an exemption.¹⁰ The remaining

⁹ Pub. L. No. 94-409, 90 Stat. 1241, at §2 (1976).

¹⁰ In May 2003, an unusual situation occurred where the Board was discussing the NSB FY2004 budget request, which unlike the NSF FY2004 request, had not yet been submitted to the President or the Congress. The NSF Act provides that portions of meetings in which the Board considers proposed budgets for a particular fiscal year may be closed until the President's budget for that fiscal year has been submitted to the Congress. 42 U.S.C. §1863(k). Because the President's budget for FY2004 budget was submitted to the Congress in February 2003, the May discussion did not meet this criterion for closure. In FY 2005, the NSB budget was submitted to the Congress along with the full NSF budget as part of the President's FY 2005 budget.

agenda items and discussions did properly meet at least one of the Act's exemptions to the open meeting requirement.

Procedural Compliance

More Consistent Compliance with Procedural Requirements is Needed

The Sunshine Act is replete with detailed procedural requirements that must be followed for both open and closed meetings. The Board has shown a clear intent to comply with these requirements and has followed these requirements in the past for meetings of the full Board. However, with the increased opening to the public of the Board's committees, subcommittees, and task forces, the complexity of complying timely with the Act's procedural requirements increased. Consequently, the Board experienced some challenges and difficulties during 2003 in ensuring that all of its committees, subcommittees, and other subdivisions also followed all of the Act's many requirements.

For example, while in 2003 the Board fully complied with requirements to conduct a vote to close and have the General Counsel certify for all of its closed meetings, it was not always timely in providing public notice of its meetings. The Act requires that public notice must be made one week in advance. Public notices for only 54 of the 100 meetings were done timely enough to provide the required full week's notice, although 27 of the untimely public notices missed the statutory requirement by only one day.

The Board also needs to improve the timeliness of providing the public information regarding its votes and reasons for closing meetings. The Sunshine Act requires that the Board make available to the public, within one day, a written copy of its votes to close any of its meetings, along with an explanation for why it made its decision. While the Board did make public its votes to close 25 of the 30 closed meetings, it took anywhere from 8 to 92 days in all but 3 instances to make this public. Also, its public disclosure of its decisions did not always include a timely explanation of its decision to close the meetings.

The Sunshine Act requires the Board to maintain a complete transcript or electronic recording of all closed meetings. During 2003, the Board met this requirement for 25 of its 30 closed meetings. For the remaining 5 meetings, the Board experienced technical difficulties with making electronic recordings. Some recordings were difficult to understand and at least one did not include the entire discussion. The Board, however, has recognized the need to ensure that

quality recordings are made of its closed meetings and is modifying its practices with respect to these recordings. To the extent possible, the Board now holds all closed meetings in the main boardroom, which has a quality sound recording system and individual microphones for each speaker. In addition, the Board office is assigning an individual to ensure that the recording equipment is properly activated prior to each meeting.

Finally, the Board is required to submit an annual report to the Congress on certain aspects of its open meeting activities, including a tabulation of the number of meetings, the number of days of public notice given for each, and the exemptions applied to closed meetings. In its report on its 2002 meetings, submitted to the Congress in February 2003, the Board met all of the statutory requirements except for including a tabulation of the number of days of public notice given for each meeting.

The purpose of the Sunshine Act is to open the government's deliberation processes to public scrutiny and the underlying premise of the Act is that public observation will provide for greater accountability on the part of public officers and increase the public's confidence in and understanding of the governmental decision making process. By providing more timely information regarding upcoming meetings and votes and reasons for closing meetings, the Board can better fulfill the Act's objective of an open government.

**Formalized Procedures
Can Help Ensure
Compliance**

Better procedural guidance would help the NSB address these procedural gaps in compliance. Currently, the Board's only formal policy governs attendance at its meetings and does not address procedural compliance with the Sunshine Act.

While compliance with the Act can certainly occur without a formal policy – as it did in prior years – the increase in number of meetings subject to the Act has made compliance more challenging, suggesting the need for formalization to ensure requirements are clearly understood and fully assigned. During 2002, only meetings of the full Board were subject to the requirements of the Sunshine Act. Thus, only 12 meetings – six open and six closed – were involved. Comparatively, in 2003, meetings subject to the Act included not only the full-Board meetings, but also committee and

other subdivision meetings both outside of and within the regular two-day sessions, so that 100 meetings – 70 open and 30 closed – were now involved.

This increased workload brings with it more chance for noncompliance. Without a formal policy explicitly stating and assigning compliance-related responsibilities, requirements may be overlooked or not performed timely, if at all. Without documented procedures, no one may be aware of the actions necessary for compliance when key employees are absent.

Responsibilities for NSB compliance with the Act are spread over numerous individuals, further warranting the widespread need for formal clarification of duties in writing. For example, according to guidance issued by NSF's General Counsel, the Executive Secretaries of each of the Board's subdivisions are responsible for recordings or transcripts of closed meetings. However, we found in practice, this responsibility often fell to an audiovisual technician who on a few occasions, forgot to initiate the recordings when meetings closed.

While not required by the Act itself, we suggest that the Board consider consolidating strict compliance activities under one individual within the Board office. By appointing a Sunshine Act "compliance officer," there would be the dual effect of both providing accountability over this important function and also raising the level of importance and awareness of Sunshine Act compliance.

Recommendations

In light of the need for formal policies and procedures, we recommend that the Executive Officer of the National Science Board:

- Develop formal policies and procedures to address compliance with the procedural requirements of the Sunshine Act. The guidance should clearly spell out all of the procedural requirements for both open and closed meetings, and should define the various roles and responsibilities involved in Sunshine Act compliance. Additionally, it should detail the necessary time frames within which activities must occur. The guidance should specifically address those requirements for which the Board has had difficulty meeting over the past year such as timely public notice and timely production of the Board

vote to close and its explanation. It may be appropriate to include in such guidance a sample calendar for the events that must both precede and follow a meeting, and a method such as a detailed checklist for ensuring those dates are met.

- Provide training to all affected staff members, both within the Board office and NSF, on the new policies and procedures and Sunshine Act compliance in general. Such training will ensure that individuals who are responsible for and support compliance activities understand both the nature of those activities as well as their importance to Board accountability and openness.

Other Matters for Consideration

Sometimes it is necessary for the Board to hold discussions of open material along with closed material, in order to provide the proper context. It would be extremely difficult for the Board to try to segregate such discussion items into separate open and closed portions.

While it may not always be possible to know in advance whether a particular subject will arise during a discussion, making increased information available to the Board office prior to a meeting can assist in making a better determination of which agenda items should be in open or closed meetings. Currently, the Board votes to close portions of its regular two-day sessions well in advance, e.g. during its prior two-day session. This vote is based upon the Board's experience with the types of discussions that typically arise during its meetings and may not be made with reference to any specific agenda items. Shortly after the vote, the Board's Executive Officer meets with the Executive Secretaries of the Board's various subdivisions to discuss upcoming agenda items and whether discussions may meet one of the Sunshine Act exemptions and thus be held during a closed session. During the time prior to the next meeting, the Executive Secretaries keep in contact with the Executive Officer and their respective committee chairs to further refine agenda items. Roughly two weeks prior to the next meeting, the Executive Secretaries and Executive Officer meet again to finalize agenda items and whether certain discussions should be held during open or closed meetings.

This process is dependent upon receipt of timely and quality information from NSF on issues being brought to the Board for consideration. Without such information, the Executive Secretaries and Executive Officer may not be able to properly assist the Board in making the best decisions on how to segregate discussions and may conservatively opt for closing the meeting.

For example, with respect to proposed awards and agreements, NSF staff present recommendations to the Board. The more information NSF can provide sooner to the Executive Officer, the better he can parcel discussions into open and closed sessions. In fact, this occurred on at least two occasions when the Executive Officer had access to NSF presentations prior to Board meetings and ultimately

modified which portions of proposed discussions were assigned to closed or open sessions.

Consequently, the Board and its Executive Officer may wish to consider methods for gaining earlier access to information that NSF plans to present to the Board for discussion so as to better inform the Board's decision on how to segregate its discussions in to open and closed meetings.

Agency Response

The National Science Board reviewed a draft of this report and responded that it is “committed to fully complying with the Government in the Sunshine Act.” The NSB agrees with our report’s findings, recommendations, and suggestions and is already taking steps to address them. In addition, based on comments provided by the NSB Executive Officer, we have included some clarification in the final report.

We have attached the NSB's response to this report in its entirety as an appendix.

National Science Board

February 12, 2004

Dr. Christina Boesz
Inspector General
National Science Foundation

Dear Dr. Boesz:

Thank you for providing me with a copy of the official draft report for the Office of Inspector General audit of the National Science Board's compliance with the Government in the Sunshine Act. The Board is committed to fully complying with the Government in the Sunshine Act. This first annual OIG audit of the compliance by the Board with the Sunshine Act is a welcomed opportunity to verify Board compliance and receive OIG suggestions on how the Board's Office (NSBO) may enhance its ability to ensure public access to the Board's deliberations.

The Board fully expected and is pleased with the two principal findings:

- A clear intent exists on the part of the Board to provide for greater access to and increased openness in its meetings, and
- The Board properly closed its meetings consistent with the exemptions contained in the Sunshine Act.

We also agree with the two additional findings:

- The Board experienced some challenges in meeting all of the many procedural requirements of the Sunshine Act, due to the opening to the public of the meetings of the Board's committees, subcommittees, and task forces, and the associated increased complexity of complying in a timely manner with the Act's procedural requirements, and
- Opportunities for increasing open meeting discussions would occur by enhancing the Board's access to information on anticipated agenda items as they are being developed and discussed within the National Science Foundation prior to Board meetings.

The OIG audit report also offered three recommendations and suggestions for how the Board's Executive Officer, Dr. Michael Crosby, may be able to enhance the ability of the NSBO to ensure public access to the Board's deliberations:

- Develop formal policies and procedures to address compliance with the procedural requirements of the Sunshine Act,
- Provide training to all affected staff members, both within the NSBO and NSF, on the new policies and procedures and Sunshine Act compliance in general, and
- Consolidate strict compliance activities under one individual within the NSBO.

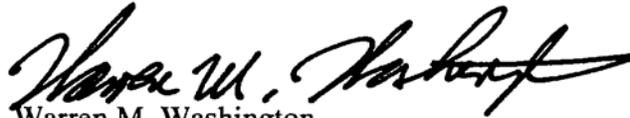
National Science Foundation

Not only are we in agreement with these recommendations and suggestions, but Dr. Crosby had already begun to take such steps prior to the completion of the OIG audit. Your inclusion of these points in your audit report provides us with further validation that our Board Office is pro-actively identifying, developing and implementing new procedures to meet the challenges noted in your audit findings. Dr. Crosby will be discussing with you some specific ideas for moving forward with these actions.

With respect to your finding of a significant value to enhancing the Board's access to information on anticipated agenda items as they are being developed and discussed within NSF, I will be discussing with the NSF Director the possibility for our Executive Officer to be included as an observer in Director's Review Board meetings and other NSF Executive Management meetings.

In closing, I would like to say that the Board views this report as very positive and supportive of our efforts to conduct our business in as open and transparent manner as possible in accordance with the spirit and guidelines of the Sunshine Act. Your efforts to assist us in this regard are greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Warren M. Washington", written in a cursive style.

Warren M. Washington
Chairman

Cc: M. Crosby
D. Cureton
K. Scott
K. Stagliano