



National Science Foundation • Office of Inspector General  
4201 Wilson Boulevard, Suite I-1135, Arlington, Virginia 22230

**MEMORANDUM**

**DATE:** February 10, 2016

**TO:** Dr. Michael Van Woert  
Executive Officer/Director NSB Office

**FROM:** Dr. Brett M. Baker   
Assistant Inspector General for Audit

**SUBJECT:** **NSF OIG Report No. 16-2-007**, *Audit of National Science Board's (NSB) Compliance with the Government in the Sunshine Act 2012-2015*,

Attached is the final report on the subject audit. Our audit found NSB may have inappropriately used exemption 9(B) to close Sunshine Act meetings and may have discussed deliberative items at NSB retreats without following Sunshine Act rules. In addition, in a few instances the NSB did not comply with the procedural requirements of the Sunshine Act. We have made seven recommendations to address the issues identified in this report. We have included NSF's response as an appendix to this report.

In accordance with Office of Management and Budget Circular A-50, *Audit Followup*, please provide a written corrective action plan to address the report recommendations. In addressing the report's recommendations, this corrective action plan should detail specific actions and associated milestone dates. Please provide the action plan within 60 calendar days of the date of this report.

We appreciate the courtesies and assistance provided by the NSB Office during the audit. If you have any questions, please contact me at (703) 292-7100, or email at [bmbaker@nsf.gov](mailto:bmbaker@nsf.gov).

Attachment

cc: Allison Lerner  
Karen Scott  
Dan E. Arvizu  
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**Audit of the National Science Board's  
Compliance with the Government in the  
Sunshine Act from 2012-2015**

**National Science Foundation  
Office of Inspector General**

**February 10, 2016**

**OIG 16-2-007**



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## Introduction

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In 1976, Congress passed the Government in the Sunshine Act based on the policy that “the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.”<sup>1</sup> The Act also states that its purpose is to “provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.”<sup>2</sup>

With the overall goal of transparent 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,” with the exception of meetings that qualify for ten narrow exemptions. The exemptions pertain to discussions that are likely to disclose:

- (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.<sup>3</sup>

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.

In addition, before closing all or a portion of a meeting, an agency must vote with a majority in favor of the closing, make a written copy of the vote and provide a “full written explanation of its action closing the portion [of the meeting]” available to the public. 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 must maintain a complete transcript or electronic recording of closed meetings that can be requested by the public.

The National Science Board has traditionally opened its full-Board meetings to the public. However, prior to 2003, the NSB did not provide public access to the meetings of its committees, subcommittees, taskforces, or other subdivisions.

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<sup>1</sup> Pub. L. No. 94-409, §2 (statement of purpose).

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 552b(c).

The National Science Foundation Authorization Act of 2002, which became effective in December 2002, contained administrative amendments to the National Science Foundation (NSF) Act pertaining to NSB meetings. As part of these amendments, the Congress specified that in addition to meetings of the full NSB, “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].” Consequently, in 2003, the NSB applied the Sunshine Act to its committee and other subdivision meetings for the first time. The NSB continued to apply the Sunshine Act to these meetings through the time period covered by this audit.

### **Audit Requirement**

In keeping with its interest for greater openness in NSB meetings, the Congress placed another requirement in the 2002 Authorization Act directing that the NSF Office of Inspector General (OIG) conduct audits of the NSB’s compliance with the Sunshine Act. These audits are to “examine the proposed and actual content of closed meetings and determine whether the closure of the meetings was consistent with [the Act].” In a report submitted to the Congress by February 15th of each audit period, the OIG is to transmit the audit along with “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.”

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## **Results of Audit**

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To determine the National Science Board’s (NSB) compliance with the provisions of the Sunshine Act, we audited NSB meetings that took place during the three-year period from August 1, 2012 through July 31, 2015. We reviewed a statistically valid random sample of 85 of 190 NSB meetings. Our sample of 85 meetings consisted of 41 of the 106 open meetings held during this time, and 44 of 84 closed meetings.

We found that improvements were needed with respect to NSB’s growing use of Exemption 9(B) to close meetings. Specifically, we found that the NSB may have inappropriately used Exemption 9(B) to close agenda items in 9 of 44 closed meetings in our sample. Aside from concerns about correct application of the exemption’s substantive criteria, we noted two other matters pertaining to Exemption 9(B) that raise questions about its use. First, NSB’s use of this exemption to close meetings increased significantly from 25 percent (18 of 71 agenda items) between August 1, 2011 and July 31, 2012, to 85 percent (79 of 93 agenda items) between August 1, 2014 and July 31, 2015. Next, a broad range of topics was discussed in meetings closed under 9(B), but these topics were not fully described in the public agendas. Rather, some of the “9(B) topics” were generically characterized as “Discussions on risks to NSF,” even though the discussions were more particularized and varied.

NSB staff stated that the use of exemption 9(B) increased because of the number of meetings at which NSB needed to discuss “risks” to the Foundation had increased. The Board Office further explained that, upon review, four of the “9(B)” agenda topics that we questioned

could have been discussed in open session. Finally, that office stated that in the future it will identify the discussion of each topical risk item as a separate agenda item.

With a few exceptions, we found NSB complied with the Act’s procedural requirements for the meetings in our sample. We also examined the Sunshine Act’s applicability to NSB retreats. Under NSB policy, the NSB’s annual retreats are not subject to the Act because they are supposed to only involve discussions that fall outside of the Act’s definition of a “meeting.” Our review of retreat agendas, however, raised concerns that the line between what does and does not constitute a “meeting” may have been blurred. This underscores the need for close monitoring and control of retreat discussions to ensure compliance with the Act.

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## **Improvements Needed in NSB’s Growing Use of Exemption 9(B) to Close Meetings**

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### *Exemption 9(B) Is Intended to Be Narrowly Construed*

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Exemption 9(B) rests on a determination that premature disclosure of information would be “likely to significantly frustrate implementation of a proposed agency action.”<sup>4</sup> However, as the U.S. Court of Appeals for the District of Columbia Circuit observed in *Common Cause v. Nuclear Regulatory Commission* – a landmark decision focusing on this exemption – Exemption 9(B)’s language is not self-explanatory.<sup>5</sup> For that reason, the court meticulously examined the exemption’s context and legislative underpinnings to provide an accurate picture of how it operates.

In doing so, the D.C. Circuit made clear that the exemption should not be used as a basis to protect deliberations because this would defeat the very purpose of the Sunshine Act. Relying extensively on the congressional record, the court provided this analysis:

The Government in the Sunshine Act establishes the policy that ‘the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.’<sup>6</sup>

...

Congress enacted the Sunshine Act to open the deliberations of multi-member federal agencies to public view. It believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make

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<sup>4</sup> *Id.* § 552b(c)(9)(B).

<sup>5</sup> 674 F.2d 921, 933 (1982).

<sup>6</sup> *Id.* at 928.

government more fully accountable to the people. In keeping with the premise that “government should conduct the public’s business in public,” the Act established a general presumption that agency meetings should be held in the open.<sup>7</sup>

...

The Act went farther than any previous federal legislation in requiring openness in government. In general the Sunshine Act’s exemptions parallel those in the Freedom of Information Act (FOIA), but there is an important difference. Unlike FOIA, which specifically exempts “predecisional” memoranda and other documents on the premise the government cannot “operate in a fishbowl,” the Sunshine Act was designed to open the predecisional process in multi-member agencies to the public. During the legislative process a number of federal agencies specifically objected to the Sunshine Act’s omission of an exemption for predecisional deliberations. [However,] Congress deliberately chose to forego the claimed advantages of confidential discussions among agency heads at agency meetings.<sup>8</sup>

...

Express language in the Sunshine Act demonstrates that Congress did not intend to follow the FOIA pattern for predecisional discussions at agency meetings.<sup>9</sup>

...

Congress decided not to provide any exemption for predecisional deliberations because it wished the process of decision as well as the results to be open to public view. . . . Yet the agencies may attempt to seize upon the language of Exemption 9(B) to avoid the perceived discomfort and inconvenience that are, in the words of one commentary, ‘inherent in the open meeting principle. . . .’, [A]n overly broad construction of Exemption 9(B), which applies to all agencies subject to the Act, would allow agencies to ‘circumvent the spirit of openness which underlies this legislation.’<sup>10</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 929.

<sup>9</sup> *Id.* at 930.

<sup>10</sup> *Id.* at 932-33 (citing R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act 24* (1978) and Senate Rep. No. No. 94-354 (1976)).

Against this backdrop, the D.C. Circuit Court of Appeals further recognized that Sunshine Act exemptions, in general, should be narrowly construed, but this precept “applies with particular force” to Exemption 9(B).<sup>11</sup> Exemption 9(B)’s contours are properly defined by the “narrow”<sup>12</sup> examples delineated in the legislative history.

An Exemption 9(B) claim, therefore, is properly analyzed in reference to the four concrete examples of the application of this exemption in the House and Senate Reports, [which] are (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.<sup>13</sup>

The common thread in these examples is that 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.’<sup>14</sup>

Simply stated, Exemption 9(B) is governed by a narrow framework. Neither this exemption, nor any other exemption in the Sunshine Act (unlike the FOIA), is available to protect against chilling agency deliberations. Rather, transparent deliberations are the very point of the Sunshine Act.

Based on our assessment, we found that improvements were needed with respect to the NSB’s increasing utilization of Exemption 9(B) to close meetings.

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### *NSB’s Use of Exemption 9(B) Increased Substantially During the Period Audited*

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Because, as case law recognizes, agencies may be inclined to use exemption 9B “to avoid the perceived discomfort and inconvenience” associated with open meetings, we reviewed the NSB’s use of Exemption 9(B) over the period August 1, 2011 through July 31, 2015, and found that the NSB’s use of Exemption 9(B) is extensive and has increased significantly during that time. This increase raised concerns about whether the NSB was using the exemption to close meetings that did not meet the exemption’s criteria and should have been open to the public.

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<sup>11</sup> *Id.* at 932.

<sup>12</sup> *Id.* at 933 (“We construe Exemption 9(b) to cover those situations delineated by the narrow principles which encompass all four legislative examples.”).

<sup>13</sup> *Wilkinson v. Legal Services Corp.*, 865 F. Supp. 891, 895 (D.D.C. 1994) (citing *Common Cause*, 674 F.2d at 933).

<sup>14</sup> *Id.* (Emphasis added). Elsewhere in the opinion, the court returned to the point about the exemption’s interplay with third party action by explaining that “premature disclosure could affect the decisions or actions of third parties acting in a nongovernmental capacity.” *Common Cause*, *supra*, at 936.

Time period	Total Agenda Items	# Agenda Items Using 9(B)	% of Agenda Items Using 9(B)
8/1/11 to 7/31/12 <sup>15</sup>	71	18	25%
8/1/12 to 7/31/13	64	40	63%
8/1/13 to 7/31/14	86	61	71%
8/1/14 to 7/31/15	93	79	85%

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*NSB May Have Inappropriately Used Exemption 9(B) to Close Meetings on Some Occasions*

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We found that NSB may have used exemption 9(B) inappropriately to close 11 agenda items in nine of the 44 (20 percent) meetings in our sample. NSB used exemption 9(B) to deliberate in closed session on topics such as pending legislation, NSF top management challenges, recommendations from Office of Inspector General reports, and other risks to the Foundation.

Because an agency does not maintain documentation for why they believe exemption 9(B) can be used to close a meeting topic, we requested that the NSB provide the specific basis for closing each of these 11 agenda items. NSB staff informed us that they have sometimes used exemption 9(B) when planned discussions did not clearly fall under one of the other Sunshine Act exemptions. They also explained that the exemption has been used when the NSB needed to meet to ask “probing” questions or to discuss specific risks to the Foundation. NSB staff said that they were concerned that important discussions might not occur if the NSB were required to discuss them in open session. However, the NSB staff also informed us that upon further reflection, “it would have been possible” to have discussed four of the agenda topics we questioned in open session.

NSB staff further explained that in its view the remaining seven agenda topics were properly discussed in closed session under Exemption 9(B). We determined that two of these topics, pertaining to budget formulation, were appropriate for closed discussion under Exemption 3, which the NSB had also asserted as a basis to close. Use of Exemption 9(B) for these topics is questionable.<sup>16</sup> Likewise, this exemption does not appear to support closed discussion of

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<sup>15</sup> According to general counsel certifications, in 2011 and 2012, the NSB used Exemption 9(B) to close agenda topics “having to do with proposals and awards for specific grants, contracts, or other arrangements.” However, from August 1, 2011, and July 31, 2012, the certifications did not always specify which exemption the NSB used to close specific agenda items. As a result, we determined which agenda items related to “proposals and awards for specific grants, contracts, or other arrangements,” and counted those items as closed under 9(B). After 2012 certifications specified which exemption the NSB used to close specific agenda items

<sup>16</sup> Exemption 3 covers information that is specifically exempted from disclosure by statute, in this instance 42 U.S.C. § 1863(k) (proposed budgets). We note that in *Common Cause*, the court rejected the idea discussion of budget preparation could take place in a closed setting under Exemption 9(B). *See Common Cause*, 865 F. Supp. at 935.

the remaining five agenda topics. These topics concerned congressional criticism of the merit review process, the propriety of certain research awards, the method of agency funding as well as NSF's response options to a document request from the Committee on Science, Space, and Technology of the U.S. House of Representatives.

In response to questions we raised during the audit, the Board Office explained its position concerning Exemption 9(B)'s applicability to these five congressionally-focused discussions. NSB staff noted that the Board could not have engaged in a "frank assessment" and critique if the issues had been taken up in open session, and that the subject matter implicates the interests of the government as a whole. They also reasoned that although both NSF and congressional committees are part of the government, these two entities act independently of each other and have different roles. While we understand the NSB Office's position, closed discussion of the five agenda topics, nevertheless, appears inconsistent with the narrow framework surrounding Exemption 9(B), which is illuminated by governing case law (discussed above).

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### *Broad Agenda Topics for Closed NSB Meetings Could Limit Transparency*

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We also noted that "Discussion on Risks to NSF," was the announced agenda topic in four meetings in our sample of meetings closed under Exemption 9(B) that we discussed above. The Sunshine Act envisions informing the public as to what topic will be discussed, despite the use of an exemption to close the meeting. The use of such a broad agenda topic makes it challenging for stakeholders to determine whether or not topics of interest to them would be discussed. In addition, as noted previously, the transcripts indicate that the NSB discussed a variety of topics at these closed meetings. The NSB staff informed us that in the future, it will identify topics as separate agenda items, rather than group issues under the broad topic of risk.

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### **NSB Generally Complies with Sunshine Act's Procedural Requirements**

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We found that while the NSB generally complied with the Sunshine Act's procedural requirements, it did not always post its votes to closed meetings, provide presiding officer statements for closing meetings, and announce both open and closed meetings at least seven days in advance, as required. We also identified several instances in which the NSB made additions to meeting agendas without following all of the Sunshine Act requirements for such changes as required by the Act and as recommended by the OIG's 2012 Sunshine Act review. Our specific findings are detailed below. Compliance with the Act's procedural requirements is an important tool for ensuring transparency and public access.

**Procedures Related to Meeting Announcements:** In addition to procedures unique to closed meetings, the Sunshine Act also imposes several procedural requirements that apply to all meetings, both 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. For 7 of the 85 open and closed meetings, which were all teleconferences, NSB staff posted the announcement less than one week before the meeting. The notices for five of the seven meetings were posted six days prior to the meeting.

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

**Procedures Related to Votes to Close Meetings and Explanations of Closings:** The Sunshine Act requires that the NSB make its vote to close any Sunshine Act meeting, as well as its full written explanation for closing the meeting, available publicly within one day of the vote. For 18 of 44 (41 percent) of the closed meetings in our sample, the NSB did not post the vote to close and written explanation of closing within one day of the vote. It should be noted that NSB eventually posted its vote to close and written explanation of closing for all of 44 closed Sunshine Act meetings. NSB staff stated that late posting occurred because of issues with the web servers and because votes were taken often right before holidays and weekends.

**Procedures Related to Presiding Officer Statements:** The Sunshine Act requires the agency to retain a statement from the presiding officer of the closed meeting that includes the time and place of the meeting, and the persons present. For 6 of the 44 (14 percent) closed meetings, the presiding officer statement was not retained or did not include all the required information. NSB informed us that NSB staff has met with new Executive Secretaries to discuss the requirements for the presiding officer statements.

**Procedures Related to Adding Agenda Topics:** The Sunshine Act recognizes the realities of how meetings can evolve and includes within it a process to follow to provide for meeting flexibility while also ensuring the most amount of transparency possible. For agenda changes to open meetings, the Board needs to decide whether agency business requires the proposed topic to be discussed during the meeting, without the benefit of advance notice to the public, and this decision must be recorded through a vote. Further, the change and the vote on the change must still be publicly announced as soon as possible. For agenda changes to closed meetings, the same process applies in regards to the public notice requirements. Further, there is also the added step that requires the Board to decide whether the proposed discussion “is likely” to fall under one of the Sunshine Act’s ten exemptions. We found two meetings in which the NSB added agenda items to the meetings without the required NSB votes. A February 2015 closed session and a February 2014 closed session included a discussion of a NSB member’s proposal and the Large Synoptic Survey Telescope (LSST) award, respectively, which were not published on the agenda. Adding agenda items without the required vote is a reoccurring issue identified in the two prior NSF OIG Sunshine Act reports.

In response to a recommendation in the 2009-2012 Sunshine Act review, NSB stated that it added a reminder for Executive Secretaries to read when beginning a meeting that the meeting discussion should stay on the noticed agenda topics, as the Sunshine Act requires. NSB staff told us that they emailed all current Executive Secretaries and NSB Office

Liaisons about the need to include the statement about staying on topic. NSB staff indicated that they will clarify this requirement in the Sunshine Manual.

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## **Issues Discussed At NSB Retreats Could Transform Those Events Into Meetings Covered by the Sunshine Act**

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While reviewing NSB closed transcripts during our audit, we noted discussions in some of the transcripts about retreat topics that raised concerns about Sunshine Act compliance at these events. As a result, we reviewed NSB retreat agendas to determine whether NSB was having deliberative discussions, which advance agency business in retreats that would be subject to the Sunshine Act.

As background, the Sunshine Act's procedural and substantive requirements are triggered by "meetings" of a collegial body. A "meeting" occurs when there are deliberations of a quorum that determine or result in the joint conduct or disposition of official agency business. Stated differently, assuming a quorum is present, the Sunshine Act applies if a discussion is "sufficiently focused on discrete proposals or issues as to cause or likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency."<sup>17</sup> Such a discussion does not have to result in a final decision.<sup>18</sup> Rather, "a discussion that significantly furthers the decisional process by narrowing issues, discarding alternatives, etc., should be treated as a meeting" unless it is "not of a nature to foreclose or narrow discussion at subsequent collegial gatherings."<sup>19</sup> On the other hand, as the NSB's retreat policy indicates, a discussion that is simply informational, exploratory, or preliminary falls outside of the Act.

Because there are no transcripts for NSB retreats, we reviewed NSB's detailed retreat agendas to assess whether any discussions may have crossed the line into "meetings." For the most part, the agendas reflected planned discussions that were exploratory, informational, and the like. Some topics, though, appeared to set the stage for or directly invite substantive deliberations on NSB business.

For example, the agenda for a September 2012 retreat stated that, "the NSF will need to develop a strategy to inform Congress/Administration regarding what NSF can do and cannot do with the current funding – and – develop strategies to manage community expectations. Is there a role for NSB in helping to shape and deliver this message?"

From the topic description, the NSB was deciding whether to help NSF shape a communications strategy related to budgetary constraints. Without careful attention and control, however, such a discussion could easily have centered on the merits of particular proposals, thereby shifting the conversation from a preliminary brainstorming-type focus into

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<sup>17</sup> *FCC v. ITT World Communications Inc.*, 466 U.S. 463, 471 (1984).

<sup>18</sup> See S. Rep. No. 94-354, at 18 (1975) ("[Open] meetings . . . are not intended to be merely reruns staged for the public after agency members have disclosed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results must be exposed to scrutiny."); see also R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* 2d Ed, at 14-15 [Interpretative Guide].

<sup>19</sup> Interpretative Guide at 15.

deliberations that advance agency business (a “meeting”). NSB staff was unable to provide us with transcripts which would provide us with information about how this discussion actually unfolded.

In a few instances, the retreat agenda descriptions seemed to go a step further by actually soliciting substantive deliberations. For example, one of the agenda topics at the September 2014 retreat involved reviewing a draft charge of “Program Portfolio Planning” and considering alternatives. The 2013 NSB retreat included the topic of developing a summary and action plan on NSB interactions with the Hill, and the 2014 NSB retreat included a topic of discussing short term and long term goals and strategies for mitigating future risks with regards to Congress. On their face, these discussions appear to have constituted “meetings,” which required Sunshine Act compliance.

In the future, NSB members and staff should ensure that discussions in retreats remain exploratory and informational as to not run afoul of the Sunshine Act.

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## **Conclusion and Recommendations**

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To further advance the National Science Board’s (NSB) compliance with the Sunshine Act requirements, we recommend that NSB staff strengthen its controls to ensure compliance with the Sunshine Act including:

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 its votes to close and written explanations of meeting closings in accordance with the timeframes specified in the Sunshine Act.
5. Post agenda items 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 staff agreed with several of the NSF OIG’s recommendations and have already started implementing corrective actions.

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## **Agency Response and OIG Comments**

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The NSB Office generally agreed with the findings and conclusions in the audit report, and recognized that there are opportunities to improve their compliance with the Sunshine Act. The NSB Office has already started implementing corrective actions for many of the OIG’s recommendations. However, the NSB Office disagreed with the NSF OIG on the NSB Office’s use of Exemption 9(B) to close Sunshine Act meetings. The NSB Office

stated that in its view Exemption 9(B) can be used to close Board discussions about matters where reactions by any outside party could harm governmental interests. While we agree with the NSB Office that Exemption 9(B) may be appropriate to use in certain circumstances, the congressionally-focused discussions we reviewed appeared inconsistent with the narrow framework surrounding Exemption 9(B). To increase transparency, the NSF OIG urges the NSB Office to close meetings consistent with governing case law and the Sunshine Act.

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## **Objective, Scope, and Methodology**

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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 NSB's deliberations.<sup>20</sup>

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

- 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.

Our audit covered NSB meetings held during the three-year period of August 1, 2012, through July 31, 2015. During that time period the NSB held 190 meetings--106 open and 84 closed. We selected a statistically valid random sample of 85 of the 190 meetings- 44 closed meetings and 41 open meetings and assessed compliance with the Act's requirements for each meeting. Using an 8% confidence interval, the random sample results can be projected to the universe of Sunshine Act meetings with a 95% confidence level. The random sample selected covered at least one meeting from each NSB committee, subcommittee, and task force. In addition, the sample covered both teleconferences and onsite meetings.

To determine whether the NSB complied with the procedural requirements of the Sunshine Act, we interviewed agency personnel and gathered and reviewed documentation for a random sample of 41 of 106 open meetings and 44 of 84 closed meetings. For both the open and closed meetings in our sample, we determined whether the NSB met the Sunshine Act's procedures for public notice. For each of the closed meetings in our sample, we reviewed documentation to determine whether the NSB met the applicable Sunshine Act requirements, including voting to close and maintaining a closed transcript for each meeting. We did not rely on computer processed data to complete the audit.

To determine whether NSB closure of meetings were consistent with exemptions in the Sunshine Act, we reviewed 44 closed transcripts and compared items discussed in each meeting to the Sunshine Act exemptions and case law.

Through interviewing NSB staff and reviewing documentation, we also obtained an understanding of the internal controls the NSB uses to comply with the Sunshine Act. We

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<sup>20</sup> 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).

identified internal control deficiencies and noncompliance with the Sunshine Act which we discuss in our findings. We did not identify any instances of fraud or illegal acts.

We conducted this performance audit between July 2015 and January 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our finding and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our finding and conclusions based on our audit objectives.

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## Appendix A: Agency Response

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### MEMORANDUM

DATE: February 8, 2016

TO: Brett Baker  
Assistant Inspector General for Audit

FROM: Michael Van Woert, Executive Director – NSBO  
Ann Bushmiller, Senior Legal Counsel – NSBO

RE: NSBO Response to 2015 Sunshine Act Compliance Audit

The National Science Board Office appreciates the opportunity to review and respond to the Discussion Draft of the Audit of the National Science Board’s Compliance with the Government in the Sunshine Act prepared by the Inspector General’s office.

We generally agree with the findings and conclusions in the audit report, and recognize that there are opportunities to improve the timely publishing of the various public notices required prior to meetings of the National Science Board (Board), its committees and other covered sub-entities. In particular, we will focus on processes to improve the timeliness of the public notices for teleconferences, and change notices for agenda items added on short notice. We will work with the Board members and supporting staff to minimize the likelihood that the Board will engage in discussions not noticed on the agenda, and develop options for proceeding should such a discussion start to occur.

We agree that the presiding officer statement prior to each closed session could be more clear and have recently provided all Executive Secretaries with a standardized script to be sure relevant topics are covered. Similarly, we have changed our processes to identify certain topics separately on an agenda to promote fuller public understanding of the likely discussion.

We are pleased to note that with one exception, the audit findings appear to confirm that the Board is properly assessing closeable items, and thereby promoting the values of transparency and public engagement that are important to both the Board and the Inspector General's Office. With regard to the remaining closure exemption, 5 USC 552b (c) (9) (B), we have reviewed the findings and recommendations in the draft report and agree some changes in our analysis are appropriate, and we have informed your office of them. However, we believe there are instances when it is appropriate to rely on this exemption regarding Board discussions about matters where reactions by any outside party could harm governmental interests.

We look forward to collaborating with your office in the coming year to continuing to address this issue and the other items mentioned in the report. If you have any questions concerning our responses, please contact Ann Bushmiller at 703/292-8304.