

Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2015–2018

NATIONAL SCIENCE FOUNDATION
OFFICE OF INSPECTOR GENERAL

March 8, 2019
OIG 19-2-004





AT A GLANCE

Audit of the National Science Board's Compliance with the Government in the Sunshine Act 2015–2018

Report No. OIG 19-2-004
March 8, 2019

WHY WE DID THIS AUDIT

The *America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act of 2007* requires us to conduct a triennial audit of the National Science Board's (NSB) compliance with the *Government in the Sunshine Act (Act)*. Our audit covered NSB meetings from August 1, 2015, to February 28, 2018.

WHAT WE FOUND

The NSB's closures of meetings were generally consistent with the exemptions in the Sunshine Act, and the NSB generally complied with the Act's procedural requirements. The NSB and National Science Board Office (NSBO) improved compliance with the closure and procedural requirements in the Sunshine Act since our last audit in 2016. For example, the NSBO improved the timeliness of its posting of NSB's votes to close meetings and public meeting agendas on its website, and the NSB refrained from discussing non-exempt congressional matters in closed sessions and increased the transparency of its agenda topics.

Compliance with the Sunshine Act is essential to ensure the public has the opportunity to fully understand the NSB's decision-making process. The NSB could further open its deliberations or increase transparency by clarifying retreat agendas, holding more discussions in open meetings, and providing more context for "Director's Remarks" on NSB plenary or plenary executive meeting agendas. Additionally, the NSB could further increase procedural compliance by ensuring contractors fully transcribe closed meetings, executive secretaries include all required elements in their presiding officer statements, and the NSB votes to change agenda topics as required by the Act.

WHAT WE RECOMMEND

We recommended the NSBO develop additional controls to further enhance compliance with the Act.

AGENCY RESPONSE

The NSB and NSBO generally concurred with the findings and recommendations in the audit report and will develop an action plan to address the recommendations. The NSBO's response is included in its entirety in Appendix A.

FOR FURTHER INFORMATION, CONTACT US AT 703.292.7100 OR OIG@NSF.GOV.



NATIONAL SCIENCE FOUNDATION OFFICE OF INSPECTOR GENERAL

MEMORANDUM

DATE: March 8, 2019

TO: John Veysey
Executive Officer
National Science Board

FROM: Mark Bell [REDACTED]
Assistant Inspector General
Office of Audits

SUBJECT: Final Report No. 19-2-004, *Audit of the National Science Board's Compliance with the Government in the Sunshine Act 2015–2018*

Attached is the final report the subject audit. We have included the National Science Board Office's (NSBO) response to the draft report as an appendix.

This report contains seven recommendations aimed at improving the NSB's and NSBO's compliance with the Act. NSBO generally concurred with the findings and recommendations and will develop an action plan to address the recommendations. In accordance with the 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 NSB and NSBO staff provided during the audit. If you have any questions, please contact Elizabeth Goebels, Director, Performance Audits, at 703.292.7100.

cc: Allison Lerner Karen Scott Ellen Ochoa
Lisa Vonder Haar Ann Bushmiller Ken Chason
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ABBREVIATIONS

America COMPETES Act	<i>America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act</i>
NSB	National Science Board
NSBO	National Science Board Office
Sunshine Act	<i>Government in the Sunshine Act</i>



Background

In 1976, Congress passed the *Government in the Sunshine Act* (Sunshine Act or Act) based on the policy that “the public is entitled to the fullest practicable information regarding decision-making processes of the Federal Government.”¹ According to the Act, 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.” Compliance with the Sunshine Act is essential to ensure the public has the opportunity to fully understand an agency’s decision-making process.

The Act contains a number of substantive and procedural requirements to help ensure transparent deliberations. In general, “every portion of every meeting of an agency must be open to public observation,” unless it qualifies for one or more exemptions (see box at right). In addition, before closing all or a portion of a meeting, a covered 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 official 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 the closed meetings that the public can request.

At least a 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.

The *National Science Foundation Authorization Act of 2002* (Pub. L. No. 107-368) specified that in addition to meetings of the full National Science Board (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.

Sunshine Act Exemptions

The *Sunshine Act* allows agencies to close discussions that are likely to:

- (1) Disclose matters authorized to be kept secret in the interests of national defense or foreign policy;
- (2) Relate solely to internal personnel rules and practices;
- (3) Disclose matters exempt from disclosure by statute;
- (4) Disclose trade secrets and privileged information;
- (5) Involve criminal accusation or formal censure;
- (6) Disclose personal, private information;
- (7) Disclose investigatory records;
- (8) Disclose financial institution information;
- (9) Disclose information that could lead to financial speculation or endanger financial stability, or frustrate implementation of proposed agency action; or
- (10) Concern the agency’s issuance of subpoena, participation in civil action or proceeding, or formal agency adjudications.

¹ Pub. L. No. 94-409



The National Science Board Office (NSBO) advises and assists the NSB and helps ensure compliance with the Sunshine Act.

Audit Requirement

The *America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act* (America COMPETES Act) of 2007 requires us to conduct a triennial audit of the NSB's compliance with the Sunshine Act and to make any recommendations to ensure public access to the NSB's deliberations.² The objectives of our audit were to:

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

Our audit covered NSB meetings held during the 3-year period of August 1, 2015, through February 28, 2018. During that time period, the NSB held 202 meetings — 117 open and 85 closed. We selected a statistically valid random sample of 88 of the 202 meetings — 38 closed meetings and 50 open meetings — and assessed compliance with the Sunshine Act's requirements for each meeting.

Results of Audit

The NSB's closures of meetings were generally consistent with the exemptions in the Sunshine Act, and the NSB generally complied with the Act's procedural requirements. The NSB and NSBO improved compliance with the closure and procedural requirements in the Sunshine Act since our last audit.³ For example, the NSBO improved the timeliness of its posting of NSB's votes to close meetings and public meeting agendas on its website, and NSB refrained from discussing non-exempt congressional matters in closed sessions and increased the transparency of its agenda topics.

The NSB could further open its deliberations or increase transparency by clarifying retreat agendas, holding more discussions in open meetings, and providing more context for "Director's Remarks" on NSB plenary or plenary executive meeting agendas. Additionally, NSB could further increase procedural compliance by ensuring contractors fully transcribe closed meetings, executive secretaries include all required elements in their presiding officer statements, and the NSB votes to change agenda topics as required by the Act.

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

³ NSF OIG Report No. 16-2-007, *Audit of National Science Board's (NSB) Compliance with the Government in the Sunshine Act 2012-2015*



NSB Improved Its Compliance with the Sunshine Act

The NSB improved its compliance with the Sunshine Act as illustrated by Figure 1, which compares the results of our last Sunshine Act audit to this year’s audit. Our prior Sunshine Act audit, which covered meetings held from August 2012 to July 2015, reported that the NSB inappropriately closed 11 agenda items in 9 of the 44 (20 percent) meetings in our sample. In the past, the NSB closed discussions on congressional matters that did not meet one of the Sunshine Act’s exceptions to close the discussion. During this audit period, which covered meetings held from August 2015 to February 2018, the NSB generally closed meetings consistent with the exemptions cited in the Sunshine Act. After we issued our audit report in February 2016, we did not identify any instances in which the NSB discussed non-exempt congressional matters in closed session.

Figure 1. Comparison of Previous Sunshine Act Audit Results with Current Results



Source: NSF OIG-generated depiction of improved compliance

*One instance occurred in our sample but was prior to issuance of the last Sunshine Act audit report, which brought this issue to the NSB’s attention.



NSB Made Improvements in Closure Compliance, but Could Further Enhance Transparency

Although the NSB has improved its compliance with Sunshine Act meeting closure requirements, it could further open its deliberations or increase transparency by clarifying retreat agendas, holding more discussions in open session by splitting up agenda topics, and providing more context for “Director’s Remarks” on NSB Plenary or Plenary Executive meeting agendas.

NSB Included Items on Retreat Agendas That Appear Deliberative

In our previous audit, we raised concerns that the NSB appeared to have blurred the line between what does and does not constitute a “meeting” under the Sunshine Act during NSB retreats. The Sunshine Act ensures the public has access to the NSB’s deliberations either through attendance in an open NSB session or through the ability to request a transcript. If the NSB holds deliberative discussions at a retreat, outside of the Sunshine Act, the public would not have insight into the NSB’s decision-making process because the retreats are not open to the public and transcripts are not available.

According to the Sunshine Act, the term “meeting” means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations 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.”⁴ Such a discussion does not have to result in a final decision.⁵ 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...”⁶

Because there are no transcripts for NSB retreats, we reviewed the NSB’s detailed retreat agendas and Executive Officer’s notes for three NSB retreats — September 2015, September 2016, and September 2017. We found NSB retreat agenda topics that appeared to involve substantive deliberations on NSB business, such as:

- September 2015 agenda topic: “Members have an opportunity to begin some long-term strategic planning in a dynamic, global context.”
- September 2015 agenda topic: “... early discussion on out-year plans,” which included discussions on the fiscal year 2018 budget and NSF’s portfolio balance.

⁴ *FCC v. ITT World Communications Inc.*, 466 U.S. 463, 471 (1984).

⁵ See Senate Report 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 public scrutiny.”); see also R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* 2d Ed, at 14-15 [Interpretive Guide].

⁶ Interpretive Guide at 15.



- September 2016 agenda topic: “To articulate a clear, consensus understanding of NSB’s purpose.” The discussion would result in “Draft statement of Board purpose.”
- September 2017 agenda topic: included an interactive session on congressional engagement and stated, “Goal: Develop strategies and best practices to prepare for and participate in Hill meetings.”

The NSBO staff explained that the NSB retreat agendas did not always accurately portray discussions that occurred. For example, the NSB retreat topic “Goal: Develop strategies and best practices to prepare for and participate in Hill meetings” was an educational presentation to NSB staff by an outside party that was teaching the NSB members ways to communicate with Congress, rather than NSB developing an official communication strategy. Meetings that are simply informational would fall outside the definition of the Sunshine Act. However, the NSBO should ensure agenda topics are accurately titled and that all planned discussions are not deliberative.

NSB Could Increase Openness of Deliberations

For 2 of 37 closed meetings we reviewed, the NSB could have held portions of the meetings in open session and portions in closed session to increase the openness of NSB deliberations. The August 13, 2015 plenary session included a discussion on NSF’s move from its Arlington headquarters to new space in Alexandria. Although the NSB appropriately closed portions of the meeting related to General Services Administration matters and union negotiations, the NSB could have discussed other portions of the meeting in open session, such as the update of ongoing construction. In another May 9, 2017 closed Committee on Strategy meeting, the NSB discussed Congress’ approval of the FY 2017 budget. Although the NSB appropriately closed a portion of the discussion that related to future budgets, the NSB could have included most of the discussion on the outcome of the FY 2017 budget in an open session.

The Sunshine Act established a general presumption that agency meetings should be held in the open. Increasing the number of discussions held in open sessions would help the NSB comply with the Act by conducting NSF’s business in public. The NSBO staff agreed the NSB could have split up discussions to increase transparency but told us that doing so would increase administrative burden.

NSB Could Clarify Information to be Discussed under “Director’s Remarks” Topic

The NSB sometimes included an agenda item, “Director’s Remarks,” on closed NSB Plenary or Plenary Executive meeting agendas. In the transcripts we reviewed, the Director discussed a variety of topics under “Director’s Remarks.” Sometimes these topics were administrative, such as NSF hiring updates, and other times the topics were more substantive, such as discussions on changes to NSF programs. In addition, sometimes the Director invited NSF staff to discuss topics of importance. For example, in the August 10, 2016 Plenary Closed meeting, the “Director’s Remarks” agenda topic included two presentations from NSF staff: one on a large facility awardee’s negotiated management fee, and the other on a large facility awardee’s merger.



The NSBO staff indicated they do not always know what the NSF Director will discuss during closed sessions. However, labeling the discussion “Director’s Remarks” makes it challenging for stakeholders to determine whether the conversation will include topics of interest to them. The NSB could clarify the information to be discussed by including on the public agenda brief descriptions of specific topics the NSF Director plans to discuss.

NSB Generally Complied with Procedural Requirements, but Could Make Further Improvements

Although the NSB and NSBO generally complied with the numerous procedural requirements in the Sunshine Act, they could further improve by ensuring closed meetings are fully transcribed, meeting participants introduce themselves and do not talk over each other, executive secretaries include all required elements in their presiding officer statements, and the NSB votes to change agenda topics as required by the Act.

NSB Transcripts Were Incomplete

In 37 closed NSB transcripts we reviewed, we identified:

- 497 times the transcripts stated either “inaudible” or “unintelligible”;
- 576 times the transcripts did not identify the speaker’s name and instead noted the speaker simply as a male or female speaker; and
- 54 times several people spoke at the same time with the term “speaking simultaneously.”

The Sunshine Act requires the agency to maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting. Further, it requires the transcript to identify each speaker.

According to the 2014 and 2016 editions of the *National Science Board Office Sunshine Act Manual*, a contractor normally is responsible for recording and transcribing all in-person closed meetings. For closed teleconferences, the NSBO liaison is responsible for confirming that a recording is made and the recording (or a transcription) is delivered to Board Counsel for archiving. However, the manual does not require the NSBO liaison to review the transcript to ensure it is accurate and complete.

A contractor transcribes the meeting from the audio recordings. We compared the audio recordings to the written transcripts for two meetings and identified multiple reasons for the poor quality of the transcripts. For example, we could hear certain information on the audio recordings that the contractor indicated was inaudible. In other situations, information was inaudible due to NSB members not speaking into microphones. Further, NSB members did not identify themselves before speaking, even when executive secretaries reminded NSB members to do so at the start of the closed teleconferences.



NSB is Missing One Transcript

The NSBO could not locate a December 10, 2015 closed NSB teleconference recording. According to the Sunshine Act, the agency must keep a complete transcript or electronic recording of each closed meeting. According to the NSBO, the NSBO liaison who supported this closed teleconference left NSF, and the NSBO does not know where the recording is located. Because the NSBO Board Counsel does not keep a log to track recordings, there was no way to know whether the NSBO liaison recorded or delivered the recording.

NSB Presiding Officer Statements Were Incomplete

Transcripts for 5 of 37 (14 percent) closed meetings we reviewed did not include complete presiding officer statements. In two transcripts, the presiding officer statement included attendees, date, and location, but not the time the meeting started. The presiding officer statement in the remaining three transcripts included attendees, but not the date, time, or location of the meeting. The Sunshine Act requires the agency retain a statement from the presiding officer of the meeting setting forth the time and place of the meeting and persons present. The NSBO could help ensure compliance with this requirement by having executive secretaries read from the script the NSBO develops at the start of each closed meeting, which includes the time and place of the meeting and persons present.

NSB Did Not Vote to Change Agenda Items

Although the NSBO announced changes to meeting agendas on the NSB's website and in the Federal Register, the NSB did not vote to change three agenda topics in the agendas for two of 88 sampled meetings:

- Plenary's (PL) open in-house meeting in November 2015; and
- Plenary's (PL) open in-house meeting in May 2016.

The agenda changes were related to the NSB's approval of action items during Plenary sessions, such as the approval of an NSB policy statement. According to the NSBO, sometimes it unintentionally omits agenda topics from Plenary sessions, but not committee sessions, such as with the three agenda changes we found. The NSBO explained only the full board, which typically meets during Plenary sessions, can approve action items. However, the NSB did not vote to include the action items in the agenda topics in the Plenary sessions. The NSBO assumed the votes to include the topics in the committee meeting were sufficient and that the NSB, without a vote, would take up matters requiring the full Board's action at Plenary sessions.

According to the Sunshine Act, the NSB may change the subject matter of a meeting following the public announcement only if the NSB determines by a recorded vote that agency business requires the change and no earlier announcement of the change was possible. The NSB must publicly announce the vote of each member to change the meeting. The NSBO cannot ensure the NSB had the opportunity to consider the transparency requirements in the Sunshine Act if the NSB does not vote to close agenda topics.



Recommendations

To further advance the NSB's compliance with the Sunshine Act requirements, we recommend NSBO staff:

1. Develop procedures to review retreat agenda topics to ensure they accurately reflect discussions that are to occur and are not deliberative.
2. Develop procedures to more carefully examine whether the NSB can split certain discussions between open and closed sessions to increase the transparency of its deliberations.
3. If using "Director's Remarks" as an agenda topic, include information about the subject matter to be discussed if such information is available.
4. Develop controls to ensure closed meetings are fully transcribed or recorded, including:
 - a. Quality controls to ensure contractors fully transcribe or record closed meetings.
 - b. A checklist for executive secretaries to remind members that only one person can speak at a time during the meetings and to speak into microphones. Executive secretaries should remind NSB members to turn on their microphones before speaking anytime a member fails to turn on their microphone during the closed session.
 - c. Controls to ensure transcripts identify speakers by name.
5. Develop additional policies and procedures to ensure the NSBO tracks and receives recordings or transcripts of all closed NSB meetings.
6. Develop a checklist for executive secretaries to use that outlines their responsibilities during a closed meeting, including reading the presiding officer script.
7. Develop controls to ensure the NSB votes to make changes to plenary agendas regardless if the NSB already voted to close the same topic at the committee level.

OIG Evaluation of Agency Response

The NSB and NSBO generally concurred with the findings and recommendations in the audit report and will develop an action plan to address the recommendations. The NSB is confident that the actions already begun and that its anticipated actions will mitigate our concerns and further enhance public access to NSB's meetings and deliberations. NSBO's response is included in its entirety in Appendix A.



Appendix A: Agency Response



DATE: March 4, 2019

TO: Mark Bell
Assistant Inspector General
Office of Audits

FROM: John Veysey, Executive Officer – National Science Board
Ann Bushmiller, Senior Legal Counsel – National Science Board

RE: Response to Official Draft Report, *Audit of the National Science Board's Compliance with the Government in the Sunshine Act 2015 - 2018*



The National Science Board (NSB) and the NSB Office appreciate the opportunity to review and respond to the Draft Report of the Audit of the National Science Board's Compliance with the Government in the Sunshine Act prepared by the Inspector General's office.

The NSB and NSB Office generally concur with the findings and recommendations in the audit report and will develop an action plan to address the recommendations. The NSB is confident that the actions already begun and its anticipated actions will mitigate these concerns and further enhance public access to NSB's meetings and deliberations.

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



Appendix B: Objectives, Scope, and Methodology

The America COMPETES Act requires us to conduct a triennial audit of the NSB's compliance with the *Government in the Sunshine Act*. The objectives of this performance 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, including its subdivisions, complied with the procedural requirements of the *Government in the Sunshine Act*.

Our audit covered NSB meetings held during the 3-year period of August 1, 2015, through February 28, 2018. During that time period, the NSB held 202 meetings — 117 open and 85 closed. We selected a statistically valid random sample of 88 of the 202 meetings — 38 closed meetings and 50 open meetings — and assessed compliance with the *Sunshine Act's* requirements for each meeting. We selected our sample using an 8 percent confidence interval with a 95 percent 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 on-site 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 50 of 117 open meetings and 38 of 85 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 the transcripts for 37 meetings and compared items discussed in each meeting to the *Sunshine Act* exemptions and case law. The NSBO could not provide the transcript for 1 of the 38 closed meetings selected. We also compared items discussed with agenda items announced in the public notice to determine whether the NSB complied with the *Sunshine Act* requirements of limiting discussions in closed meetings to agenda items announced in the public notice.

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 made recommendations in the report where we identified the NSB did not comply with the *Sunshine Act* and where internal controls could be strengthened. We did not identify any instances of fraud or illegal acts.

We conducted this performance audit between January 2018 and January 2019 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 findings and conclusions, based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions.



Appendix C: OIG Staff Acknowledgments

Elizabeth Goebels, Director, Audit Execution; Darrell Drake, Senior Auditor; Emma Bright, Program Analyst; Elizabeth Argeris Lewis, Communications Analyst/Executive Officer; and Catherine H. Walters and Jeanette Hyatt, Independent Report Referencers, made key contributions to this report.



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