

Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2018–2020

NATIONAL SCIENCE FOUNDATION
OFFICE OF INSPECTOR GENERAL

June 23, 2021
OIG 21-2-003





AT A GLANCE

Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2018–2020

Report No. OIG 21-2-003
June 23, 2021

WHY WE DID THIS AUDIT

By law, the National Science Foundation Office Inspector General is required to conduct an audit every 3 years of the National Science Board's (NSB) actions to achieve fuller compliance with the *Government in the Sunshine Act* (Sunshine Act) and to ensure public access to the NSB's deliberations. Our audit covered NSB meetings from March 1, 2018, through December 31, 2020.

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 the National Science Board Office (NSBO) improved compliance with the closure and procedural requirements in the Sunshine Act since our last audit. For example, transcripts for the closed meetings did a better job of identifying speakers and their comments, and all transcripts we requested were provided. Further, as a result of our last audit, the presiding officer's statement now includes a reminder to keep the discussion focused on the listed agenda items. The NSB could further enhance its compliance with the Sunshine Act, however, by ensuring a presiding officer's statement is included for each closed Plenary Executive meeting.

WHAT WE RECOMMEND

We made one recommendation to improve the NSB's and NSBO's ability to further enhance compliance with the Act.

AGENCY RESPONSE

The NSB and NSBO concurred with the recommendation in the audit report and will develop an action plan to address the recommendation. Their response is included in its entirety in Appendix A.

FOR FURTHER INFORMATION, CONTACT US AT OIGPUBLICAFFAIRS@NSF.GOV.



National Science Foundation • Office of Inspector General
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MEMORANDUM

DATE: June 23, 2021

TO: John Veysey
Executive Officer & Director
National Science Board
[REDACTED]

FROM: Mark Bell
Assistant Inspector General
Office of Audits

SUBJECT: Final Report No. 21-2-003, *Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2018–2020*

Attached is the final report for the audit of the National Science Board's Compliance with the *Government in the Sunshine Act* from 2018–2020. We have included NSBO's response to the report as an appendix.

This report contains one recommendation aimed at enhancing NSF's compliance with the Sunshine Act. NSF concurred with our recommendation. 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.

We appreciate the courtesies and assistance the NSBO staff provided during the audit. If you have any questions, please contact Elizabeth Kearns, Director, Audit Execution, at 703.292.7100 or oigpublicaffairs@nsf.gov.

cc: Ellen Ochoa Victor R. McCrary Ann Bushmiller
Allison Lerner Lisa Vonder Haar Darrell Drake
Elizabeth Kearns Kelly Stefanko Anneila Sargent



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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, Pub. L. No. 94-409), establishing the policy that “the public is entitled to the fullest practicable information regarding decision-making processes of the Federal Government.” 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 a covered 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 [a covered] agency must be open to public observation,” unless the agency determines that it should be closed based on 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 of the membership in favor of the closing and record the vote of each participating member. Within 1 day of such vote, the agency must make publicly available a written copy of the vote; a full, written explanation of its action closing the portion of the meeting; and a list of expected attendees and their affiliations. Also, for every closed meeting, the agency’s General Counsel or chief legal official must publicly certify that, in his or her opinion, the meeting may be closed to the public and reference each relevant Sunshine Act exemption. The agency must maintain a complete transcript or electronic recording of the closed meetings. In certain cases, the National Science Board (NSB) instead has the option of maintaining minutes.

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 Act*, as amended, specifies that the NSB and 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, and that such requirement applies to “meetings of the full Board,

Sunshine Act Exemptions

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

- (1) Disclose classified 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 certain investigatory records;
- (8) Disclose information related to the oversight of a financial institution;
- (9) Disclose information prematurely, which could lead to significant financial speculation in currencies, securities and commodities, or significantly endanger financial stability of any financial institution, or frustrate implementation of proposed agency action; or
- (10) Concern the agency’s issuance of a subpoena, participation in a civil action or proceeding, or a formal agency adjudication.



whenever a quorum is present; and to meetings of the subdivisions, whenever a quorum of the subdivision is present.”

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

Audit Requirement

By law, NSF OIG is required to conduct an audit every 3 years of the NSB’s compliance with the Sunshine Act and to make any recommendations for corrective actions to achieve fuller compliance and to ensure public access to the NSB’s deliberations.¹ The objectives of our audit were to:

- Determine whether the NSB’s closure of meetings were consistent with 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 March 1, 2018, through December 31, 2020. During that time period, the NSB held 217 meetings — 144 open and 73 closed. We selected a judgmental sample of 8 of the 217 meetings.² Based on improvements we noted in NSB’s compliance with the Sunshine Act requirements in our last two audits,³ we believed a smaller sample was warranted for this audit.

Results of Audit

The NSB Improved Its Compliance with the Sunshine Act

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. For example, transcripts for the closed meetings did a better job identifying speakers and their comments and all transcripts we requested were provided. Further, as a result of our last audit, the presiding officer’s statement now includes a reminder to keep the discussion focused on the listed agenda items.

¹ 42 USC § 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).

² Our review covered the federal register notice of 75 meetings because each NSB meeting included multiple meetings by individual committees, subcommittees, and task forces.

³ NSF OIG Report No. 16-2-007, *Audit of National Science Board’s Compliance with the Government in the Sunshine Act from 2012-2015*, and NSF OIG Report No. 19-2-004, *Audit of National Science Board’s Compliance with the Government in the Sunshine Act 2015-2018*.



We found that for the meetings in our sample, the NSB:

- Publicly announced each Sunshine Act meeting a week before the meeting on its website and submitted it for publication in the Federal Register;
- Voted in the majority to close each closed Sunshine Act meeting and maintained a copy of this vote along with the general counsel's closure certifications; and
- Maintained a recording of each closed Sunshine Act meeting.

The NSB Did Not Ensure It Included Presiding Officer Statements for Closed Plenary Executive Meetings

The NSB could further enhance its compliance with the Sunshine Act by ensuring a presiding officer's statement is included for each closed Plenary Executive meeting. The Sunshine Act requires the agency retain a copy of the statement from the presiding officer of the meeting setting forth the time and place of the meeting and the persons present.⁴ We found that the NSB did not include a presiding officer's statement for the closed Plenary Executive meeting we reviewed as part of our sample.

The NSBO stated this occurred because it considers each closed Plenary Executive meeting as a sub-meeting of the preceding closed Plenary meeting, for which it does include a presiding officer's statement, as opposed to a distinct and separate stand-alone meeting. However, procedurally, the NSBO treats them as a separate meeting. For example, it documents counsel certification of closure vote notice for Plenary Executive meetings and lists them in the federal register notice. The NSBO told us including a presiding officer's statement for the executive meeting is an unnecessary administrative burden because it involves a subset of those previously attending the larger session and it typically only lasts a few minutes. However, having a presiding officer's statement for each meeting is important because, among other things, it identifies the persons present and is required by the Sunshine Act. Without a separate presiding officer's statement, there is no record of who attends closed Plenary Executive meetings.

Isolated Sunshine Act Exceptions

We identified the following exceptions to compliance with the Sunshine Act, which we believed to be isolated and, therefore, did not recommend corrective action:

- One meeting was closed based on the Sunshine Act exemption that allows portions of Board meetings to be closed to the public if they are likely to disclose matters specifically exempted from disclosure by another statute, in conjunction with another statute that permits the closure of NSB meetings that consider proposed Foundation budgets for a particular fiscal year up until the President's budget request for that fiscal year is submitted to the Congress.⁵ We challenged the NSBO for using this exemption to close an FY 2018 budget discussion that occurred after the President's FY 2018 budget request had been

⁴ 5 USC 552b(f)(1)

⁵ 5 USC 552b(c)(3); 42 USC 1863



submitted to Congress. The NSBO's position was that the exemption was still applicable because the discussion involved a spending plan that had not yet been approved by Congress. However, because the statute's protection is limited to budget discussions held prior to the submission of that year's budget request, we question the NSBO's reliance on it to close a budget discussion occurring after that date.

- The NSB acknowledged an error occurred at the beginning of a closed Committee on Strategy meeting, which resulted in the Presiding Officer's statement not being fully transcribed. This was an isolated instance.
- In one closed meeting, a member discussed an issue that was not on the agenda announced to the public. The NSBO told us it was a continuation of a discussion from a previous meeting and not deliberative. Although it was not in compliance with the intentions of the Act, we agree that it did not appear to be a deliberative discussion.

Other Matter — NSB Retreats Potential Risk Area

In our two prior Sunshine Act audits, 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 and NSF's implementing regulations ensure the public has access to the NSB's deliberations on the joint conduct or disposition of agency business, either through attendance in an open NSB session or through the ability to request a transcript. If the NSB holds deliberative discussions at a closed retreat, in violation 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.

As a result of previous audits, the NSBO has taken corrective action including adding the following notice to retreat agendas:

Retreats are a means for members to meet and interact in a relaxed setting and build esprit de corps. Discussions are to remain general, exploratory, informational, or focused on internal processes. Discussions may not include deliberations to determine or result in the joint conduct or disposition of official agency business.

In addition, NSBO staff said that they attend nearly every retreat session and monitor discussions. If a discussion ventured into deliberations, they told us they would stop it. Because the NSB determines that its retreats are not "meetings" subject to the Sunshine Act, the discussions are not transcribed. Therefore, we cannot accurately determine the effectiveness of the NSB's new steps.

We agree that NSB retreats are not "meetings" under the Sunshine Act when they are held for the limited purpose of offering a relaxed setting for members to discuss only general, exploratory, or informational matters. Because we cannot accurately assess the NSB's additional steps, there remains some possibility that agenda topics can lead to such deliberations. Thus, we suggest the



NSBO continue to monitor NSB retreats and educate NSB staff on Sunshine Act requirements to address this risk.

Recommendation

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

1. Perform and record the presiding officer's statement for closed Plenary Executive meetings.

NSF OIG Evaluation of Agency Response

The NSB and NSBO concurred with the recommendation in the audit report and will develop an action plan to address the recommendation. Their response is included in its entirety in Appendix A.



Appendix A: NSB/NSBO's Response



June 16, 2021

MEMORANDUM

TO: Mark Bell
Assistant Inspector General
Office of Audits

FROM: John Veysey, Executive Officer
National Science Board [REDACTED]

Ann Bushmiller, Senior Legal Counsel [REDACTED]
National Science Board

SUBJ: Response to Official Draft Report, *Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2018 - 2020*

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 concur with the recommendation in the audit report and will present an action plan to address the recommendation shortly after the Final Report is issued.

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 Sunshine Act. The objectives of this performance audit were to:

- Determine whether the NSB's closure of meetings were consistent with 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 March 1, 2018, through December 31, 2020. During that time period, the NSB held 217 meetings — 144 open and 73 closed. We judgmentally selected a sample of eight of those meetings⁶ — six closed and two open meetings — and assessed compliance with the Sunshine Act's requirements for each meeting. The judgmental sample covered meetings from the NSB Plenary and three NSB committees. In addition, the sample covered teleconferences, on-site meetings, and meetings held virtually. We did not rely on computer-processed data to complete the audit.

To determine whether the NSB complied with the procedural requirements of the Sunshine Act, we interviewed agency personnel and gathered and reviewed documentation for the meetings in our judgmental sample. 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 transcript for each closed meeting.

To determine whether the NSB's closures of meetings were based on exemptions in the Sunshine Act, we reviewed the transcripts for six closed meetings and compared items discussed in each meeting to the Sunshine Act exemptions and case law. 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 assessed all five components of internal control. We identified in the report where the NSB did not fully comply with the Sunshine Act and where internal controls could be strengthened. We did not identify any instances of fraud or illegal acts.

⁶ Although we only selected a sample of eight meetings for procedural review, our review actually covered the federal register notice of 75 meetings because 6 of the sampled meetings were part of either on-site NSB meetings or NSB meetings conducted virtually. Each NSB meeting includes multiple meetings by individual committees, subcommittees, and task forces.



We conducted this performance audit between January 2021 and March 2021 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 reasonable basis for our findings and conclusions.

Elizabeth Kearns, Director, Audit Execution; Darrell Drake, Senior Auditor; Kelly Stefanko, Audit Manager; Elizabeth Argeris Lewis, Communications Analyst/Executive Officer; and Holly Snow, Independent Report Referencer, made key contributions to this report.



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