

Risk Assessment of the National Science Board's Compliance with the Government in the Sunshine Act from 2021-2023





At a Glance

Risk Assessment of the National Science Board's Compliance with the Government in the Sunshine Act from 2021-2023

OIG 25-09-001 | January 29, 2025

WHY WE DID THIS RISK ASSESSMENT

The National Science Foundation (NSF) Office of Inspector General (OIG) is required to conduct a risk assessment every 3 years of the National Science Board's (NSB or Board) actions to achieve full compliance with the *Government in the Sunshine Act* (Sunshine Act or Act) and to ensure public access to the NSB's deliberations. The objective of our risk assessment was to identify the NSB's risks of noncompliance with the Sunshine Act and determine whether the NSB has adequate controls in place to mitigate those risks. Our risk assessment covered NSB meetings between January 1, 2021, and December 31, 2023.

WHAT WE FOUND

We determined that the NSB has adequate controls in place to mitigate the risks of noncompliance with the Act, and it is not necessary to conduct a further compliance review. Specifically, the NSB's and National Science Board Office's (NSBO) policies and procedures ensured the NSB generally complied with the Sunshine Act's procedural and closure requirements for open and closed meetings. For example, the NSB and the NSBO provided public notice of meetings, posted agenda topics, voted to close meetings, maintained General Counsel certificates and bases for closures, and recorded meetings. Additionally, the NSB implemented procedures to ensure annual NSB retreat discussions did not include deliberative discussions.

Although we found minor instances of noncompliance with procedural requirements, we determined that the NSBO's proposed actions will mitigate risks of noncompliance with the Sunshine Act and ensure transparency in the Board's decision-making processes.

We will continue to monitor risk areas for compliance in our triennial risk assessments.

WHAT WE RECOMMEND

This report contains no recommendations.

AGENCY RESPONSE

The NSB and the NSBO concurred with the concerns and observations in the risk assessment. The NSB's response is attached to the report as Appendix B.

CONTACT US

For congressional, media, and general inquiries, email OIGPublicAffairs@nsf.gov.



U.S. NATIONAL SCIENCE FOUNDATION
Office of Inspector General

MEMORANDUM

DATE: January 29, 2025

TO: John J. Veysey
Executive Officer and Director
National Science Board



FROM: Theresa S. Hull
Assistant Inspector General
Office of Audits, Inspections, and Evaluations

SUBJECT: Final Report No. 25-09-001, *Risk Assessment of the National Science Board's Compliance with the Government in the Sunshine Act from 2021-2023*

Attached is the final report on the subject risk assessment. We have included the NSB's response to the draft report as an appendix. This report contains no recommendations.

We appreciate the courtesies and assistance NSB staff provided during the risk assessment. If you have any questions, please contact Elizabeth Kearns, Audit Director, at 703-292-7100 or OIGPublicAffairs@nsf.gov.

CC: Darío Gil, Victor McCrary, Wanda Ward, Scott Stanley, Ann Bushmiller

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Abbreviations

FY	Fiscal Year
NSB or Board	National Science Board
NSBO	National Science Board Office
NSF	National Science Foundation
OIG	Office of Inspector General
Sunshine Act or Act	<i>Government in the Sunshine Act</i>

Background

According to the *National Science Act of 1950* (Pub. L. No. 81-507), NSF is an independent federal agency created by Congress “[t]o promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense; and for other purposes.” The Act further states that NSF “shall consist of a National Science Board [NSB or Board] ... and a Director.” Jointly, the Board and the Director pursue the goals and function of NSF, including the duty to “recommend and encourage the pursuit of national policies for the promotion of research and education in science and engineering.”

Government in the Sunshine Act

In 1976, Congress passed the *Government in the Sunshine Act* (Pub. L. No. 94-409), establishing as U.S. policy that “the public is entitled to the fullest practicable information regarding the decision[-]making processes of the Federal Government.” The purpose of the Act is to “provide the public with [that] information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.”

The Sunshine Act contains substantive and procedural requirements to help ensure transparent deliberations on agency business. Generally, “every portion of every meeting of [a covered] agency shall be open to public observation,” unless the agency properly determines that a portion or portions of the meeting should be closed based on one or more exemptions, as shown in Figure 1.

According to NSF regulation,¹ before closing all or a portion of a meeting to the public, the NSB must vote by a majority of all Board members in favor of the closing (proxies do not count toward a majority) and record the individual vote of each member present. Within one day of such vote, the Board must make the following information publicly available: a written record of the vote, a written explanation of the Board’s action, and a list of all individuals expected to attend the meeting. For every meeting closed pursuant to one or more of the 10 exemptions of the Sunshine Act, the General Counsel or chief legal official of NSF must publicly certify that, in their opinion, the meeting may be closed to the public and state each relevant exemption.

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 specifically exempt from disclosure by statute;
4. Disclose trade secrets and privileged or confidential 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 the premature disclosure of which would be likely to (A) lead to financial speculation or endanger financial stability, or (B) significantly frustrate implementation of proposed agency action; or
10. Concern the agency’s issuance of a subpoena, participation in civil action or proceeding, or formal agency adjudications.

Figure 1. Sunshine Act Exemptions

Source: NSF OIG depiction of the Sunshine Act

¹ 45 Code of Federal Regulation Part 614, *Government in the Sunshine Act Regulations of the National Science Board*

According to the regulation, the Board must retain a copy of the General Counsel's certification; a statement from the presiding officer of the meeting stating the time, place, and persons present for the meeting; and a complete transcript or electronic recording adequate to fully record the portion of each closed meeting. The Board must maintain this documentation "for at least three years after the meeting and at least one year after the Board completes consideration of any proposal, report, resolution, or similar matter discussed in any closed portion of the meeting."

The Board must publicly announce every meeting at least one week before the scheduled date. The announcement must include the meeting time, place, subject matter, what portions, if any, are to be closed to the public, and contact information. The Board may publish an announcement less than a week before the meeting or after the meeting occurred only if the Board determines, by a recorded vote, that agency business requires the meeting to be called on short or "after-the-fact" notice and the meeting is announced at the earliest practicable time. Likewise, if the time and place of a meeting changes after the public announcement, the Board must announce the change at the earliest practicable time.

According to the NSF Act, as amended, 42 U.S.C. 1862n-5(a)(2), the Board and its committees, subcommittees, task forces, and any other entity that is made up of Board members and reports to the Board are subject to the Sunshine Act in order to ensure transparency of the Board's entire decision-making process. This requirement applies to meetings of the full Board and to meetings of its subdivisions whenever a quorum is present.

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

Risk Assessment Objectives

NSF OIG is required to conduct a triennial risk assessment of the NSB's compliance with the Sunshine Act and conduct a compliance review if deemed necessary by the risk assessment.² The objectives of our risk assessment were to identify the NSB's risks of noncompliance with the Act and determine whether the NSB has adequate controls to mitigate those risks.

Our risk assessment covered NSB meetings and retreats between January 1, 2021, and December 31, 2023. We reviewed all NSB Sunshine Act notices, meeting agendas, bases for closures, change notices, and meetings held on short notice from 2021 through 2023 for open and closed NSB meetings. We also selected a judgmental sample of 8 meetings (5 open to the public and 3 closed) for further compliance testing based on past audit findings from 2012 through 2021. Please see Appendix A for further information about our objectives, scope, and methodology.

² The *CHIPS and Science Act of 2022* (Public Law No. 117-167) changed the auditing requirements for NSF OIG's review of the NSB's compliance with Sunshine Act requirements. Prior to this change, NSF OIG was required to conduct an audit every three years. Now the NSF OIG is required to conduct a risk assessment every three years and then a compliance review only if deemed necessary by the risk assessment. See 42 USC § 1862n-5(a)(3).

Results of Risk Assessment

We determined that the NSB has adequate controls in place to mitigate the risks of noncompliance with the Act and it is not necessary to conduct a further compliance review. Specifically, the NSB's and NSBO's policies and procedures ensured that the NSB generally complied with the Sunshine Act's procedural requirements for open and closed meetings. Although we found minor instances of noncompliance with procedural requirements, we determined the NSBO's proposed actions will mitigate risks of noncompliance with the Sunshine Act and ensure transparency regarding the Board's decision-making process. Lastly, following up on prior audit recommendations, our risk assessment determined the NSB implemented procedures to ensure annual NSB retreat discussions did not include deliberative discussions. We will continue to monitor risk areas for compliance in our future triennial risk assessments.

NSB and NSBO Have Developed Adequate Controls

Based on our review of the NSB's and NSBO's internal controls, including the NSBO's October 2021 *Sunshine Act Guide* (Guide), we determined that the NSB has adequate controls to ensure its compliance with the Sunshine Act, as required by the NSF Act.

The NSBO's Guide supports compliance with the Sunshine Act by identifying NSB official meetings that are covered by the Act. Additionally, it provides information for determining which agenda items the NSB may close and the general procedural requirements for closing a meeting. Instructions are included for the required timing and forms of public notice of covered meetings, how to handle changes to publicly noticed meetings, and the requirements for public access to meetings and transcripts or other recordings of meetings.

The Guide also highlights examples of roles and responsibilities for Executive Secretaries, NSB legal counsel, NSBO and NSF staff, and NSB members, who each help ensure compliance with the Act. For example, "[w]hen an agenda item is proposed to be considered in a closed session, the NSB Counsel, in consultation with the NSB Office Director and others who may include the NSB Liaison, Executive Secretary, NSB or committee chair, and NSF General Counsel, will determine whether the agenda item and expected nature of the associated discussion is covered by an open meeting exemption."

NSB Counsel provides legal advice and counsel on the Sunshine Act to the NSB members, NSBO and NSF staff, and Executive Secretaries. NSB Counsel also provides Sunshine Act training to new NSB members and staff and "as-needed" training to NSBO staff and Executive Secretaries. Additionally, NSB Counsel and NSB staff monitor the NSBO's administration of and compliance with Sunshine Act requirements. Further, the Guide states that steps will be taken to ensure compliance with the Act's requirements if compliance deficiencies are identified.

NSB Generally Complied with Meeting Closure Requirements

The NSB has adequate controls and processes to ensure official meetings are held in the open as required. We selected three closed meetings for review based on risks identified in prior audits.³ We had concerns with the basis for closing one of the three meetings.

Specifically, NSB closed a meeting based on the Sunshine Act exemption that allows a portion of a meeting to be closed if that part of the meeting is likely to disclose matters specifically exempted from disclosure by another statute.⁴ In relying on this exemption, the NSB cited 42 USC 1863(k), which allows portions of NSB “meetings in which the Board considers proposed Foundation budgets for a particular fiscal year” to be closed until the President’s budget for that fiscal year is submitted to Congress. We disagree with the reliance on exemption (c)(3), in conjunction with 42 USC 1863(k), to close the meeting about an FY 2022 budget discussion that occurred after the President’s FY 2022 budget request had been submitted to Congress. According to the NSBO, the discussion included the corresponding FY 2022 spending plan that had not yet been approved by the Office of Management and Budget and Congress. Therefore, the NSBO concluded the discussion was not appropriate for public disclosure.

The NSBO acknowledged the exemption was incorrectly used to close the meeting and told us the Board will determine which exemption, if any, it may apply to close spending plan discussions in the future.

We also found that in two cases, the NSF Directorate did not prepare a formal memorandum justifying the use of exemption 9(B) to close meetings before NSB Counsel review, as required by NSBO policy. This exemption allows portions of Board meetings to be closed to the public if the discussion would disclose information, the premature disclosure of which would “be likely to significantly frustrate implementation of a proposed agency action,” except when the agency has already publicly disclosed the content or nature of the proposed action, or where the agency is statutorily required to proactively make such disclosure prior to taking final agency action.⁵ Specifically, for one meeting, the documentation we received from the NSBO included draft language confirming the support for using exemption 9(B). For the other meeting, the NSBO stated that it discussed the rationale for closure for exemption 9(B) with the General Counsel before the meeting, but the NSBO did not file the summary. Although we are not questioning the NSB’s reliance on exemption 9(B) as a basis to close these two meetings, we are noting where the NSBO could improve compliance with its internal policies.

³ NSF OIG Report No. 21-2-003, *Audit of the National Science Board’s Compliance with the Government in the Sunshine Act from 2018-2020*, June 23, 2021; and NSF OIG Report No. 19-2-004, *Audit of the National Science Board’s Compliance with the Government in the Sunshine Act from 2015-2018*, March 8, 2019

⁴ 5 USC § 552b(c)(3)

⁵ 5 USC § 552b(c)(9)(B)

We did not find any agenda items in our sample of closed meetings that should have been held in open session.

NSB Generally Complied with Sunshine Act Procedural Requirements

We found the NSB generally complied with Sunshine Act procedural requirements to provide public access and notification of meetings. All five open meetings from our sample complied with Sunshine Act procedural requirements. Additionally, closed meetings from our sample complied with most of the Act's procedural requirements. Specifically, the NSB and NSBO:

- provided public notice of meetings;
- voted to close meetings;
- maintained General Counsel certificates and bases for closures;
- recorded meetings;
- posted detailed agenda topic descriptions; and
- kept meeting discussions focused on agenda items.

We identified the following minor procedural instances of noncompliance with the Sunshine Act. For the three closed meetings in our sample, the presiding officer's statement did not include the place of the meeting (a teleconference) and the persons present. The NSBO acknowledged that the presiding officer's statement should include the meeting place, even for teleconferences, and all persons present. The NSBO plans to develop procedures, including a written attendance list, to consistently capture all persons present. We determined these actions will mitigate the risk of noncompliance with the procedural requirements of the Act.

NSB Improved Sunshine Act Compliance for Discussions Held at Retreats

In prior audits, we identified concerns that agenda topics could lead to deliberations at closed NSB retreats.⁶ Any deliberative discussions that take place at such retreats could lead to violations of the Act. Based on our review of two annual NSB retreat agendas and NSBO staff's retreat notes, we determined that no deliberative discussions took place and that retreat discussions remained general, informational, and exploratory.

Additionally, as a result of our previous audits, the NSBO provided guidance⁷ to ensure the following notice was included in retreat agendas:

⁶ NSF OIG Report No. 21-2-003, NSF OIG Report No. 19-2-004, NSF OIG Report No. 16-2-007

⁷ NSBO *Sunshine Act Guide*, October 2021

Retreats are intended to serve as a means for members to meet and interact in a relaxed setting and build esprit de corps. Discussions are to remain general, exploratory, informal, preliminary, informational[,] or tentative. The topics for discussion may not include deliberations to determine or result in the joint conduct or disposition of official agency business. The Board's Executive Officer and Counsel monitor Board retreats to ensure compliance with the Act.

NSBO staff stated that they review retreat agendas to ensure there is no expectation for action items during the retreat. NSBO or senior staff also monitor discussions to ensure compliance with the Act. We found that the NSBO included this reminder in the two most recent NSB retreat agendas.

OIG Evaluation of Agency Response

The NSB and the NSBO concurred with the concerns and observations in the risk assessment. The NSB's response is attached to the report as Appendix B.

Appendix A: Objective, Scope, and Methodology

The objectives of this risk assessment were to identify the NSB's risks of noncompliance with the Sunshine Act and determine whether the NSB has adequate controls in place to mitigate those risks.

We identified noncompliance risks by reviewing past audit findings and corresponding corrective actions from 2012 through 2021, including the following reports:

- NSF OIG Report No. 16-2-007, Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2012-2015, February 10, 2016
- NSF OIG Report No. 19-2-004, Audit of the National Science Board's Compliance with the Government in the Sunshine Act 2015-2018, March 8, 2019
- NSF OIG Report No. 21-2-003, Audit of the National Science Board's Compliance with the Government in the Sunshine Act from 2018-2020, June 23, 2021

The scope of this risk assessment included NSB meetings and retreats held during the 3-year period of January 1, 2021, through December 31, 2023. We reviewed all NSB Sunshine Act notices, meeting agendas, bases for closures, change notices, and meetings held on short notice from 2021 through 2023 for open and closed NSB meetings. We selected a judgmental sample of meetings to review for further compliance testing. Specifically, we selected 8 meetings (5 open to the public and 3 closed to the public) out of the universe of 159 meetings based on the potential for risks such as the NSB:

- not clarifying topics to be discussed as part of the "Director's Remarks";
- discussing issues not listed on the agenda;
- using the exemption to close meetings for budgetary discussions; and
- using the exemption to close meetings for discussions that would be likely to significantly frustrate the implementation of a proposed agency action.

Additionally, we selected open meetings for our sample that had a potential risk of noncompliance with procedural requirements, such as:

- meetings held on short notice;⁸
- meetings that did not have a posted YouTube link to the videoconference; and
- meetings that did not have a Sunshine Act meeting notice posted to the NSB's website.

Further, we selected two retreats out of the three annual NSB retreats to review for compliance with the Act. We reviewed the three annual NSB retreat agendas covered during our scope period which include the 2021, 2022, and 2023 NSB retreats. Based on our analysis of the

⁸ According to the Act, if it is not possible to give the required 1-week public notice, a majority of the Board must determine, by recorded vote, that agency business requires holding the open or closed meeting on shorter notice and the meeting announcement must be publicly posted at the earliest practicable time.

agendas, we selected the 2021 and 2023 retreats for review because both agendas included topics that could potentially result in deliberative discussions.

To determine whether the NSB complied with procedural requirements of the Sunshine Act, we reviewed documentation for NSB meetings, including written transcripts and audio recordings, meeting agendas, Sunshine Act notices, basis for closing meetings, closure vote notices, General Counsel certificates, short notices, change notices, and attendance. We tested our sample for risk areas identified during prior audits, such as timely public notice, incomplete transcripts, insufficient presiding officer statements, and the inappropriate use of exemptions to close meetings. In addition, we reviewed NSB retreat agendas and retreat meeting notes held during the scope period to determine if topics NSB discussed at retreats were deliberative and thus should have been held as a Sunshine Act meeting since this was identified as a potential risk area in prior audits. We identified in the report isolated exceptions to compliance with the Sunshine Act's procedural and closure requirements.

To determine whether the NSB has adequate controls in place to mitigate the risks of noncompliance with the Sunshine Act, we interviewed NSBO staff and assessed documentation, such as the NSB's and NSBO's policies and procedures for procedural and closure compliance. We acknowledged in the report actions the NSB and NSBO are taking to strengthen internal controls to ensure compliance with the Act. We did not identify any instances of fraud or illegal acts.

We did not rely on computer-processed data to complete the risk assessment.

We conducted this risk assessment between February 2024 and May 2024 with integrity, objectivity, and independence, as required by the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Federal Offices of Inspector General*.⁹ Those standards set forth the overall quality framework for managing, operating, and conducting the work of Offices of Inspector General. The review adhered to applicable professional standards and was conducted with objectivity, independence, due professional care, quality assurance and followed procedures to ensure accuracy of the information presented.

⁹ Council of the Inspectors General on Integrity and Efficiency, *Quality Standards for Federal Offices of Inspector General*, August 2012

Appendix B: Agency Response



MEMORANDUM

DATE: December 20, 2024

TO: Theresa S. Hull
Assistant Inspector General
Office of Audits, Inspections, and Evaluations

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

RE: Response to Official Draft Report, *Risk Assessment of the National Science Board's Compliance with the Government in the Sunshine Act from 2021-2023*

The National Science Board (NSB) and the NSB Office appreciate the opportunity to review and respond to the official draft report of the *Risk Assessment of the National Science Board's Compliance with the Government in the Sunshine Act from 2021-2023* prepared by the Inspector General's office.

The NSB and NSB Office concur with the concerns and observations in the risk assessment and will provide a brief memo in January 2025 outlining plans to improve internal procedures. The NSB and NSB Office look forward to collaborating with your office in the coming years. If you have any questions concerning our responses, please contact Ann Bushmiller (abushmil@nsf.gov, 703/292-8304).

National Defense Authorization Act

General Notification

Pursuant to Pub. L. No. 117-263 § 5274, business entities and non-governmental organizations specifically identified in this report have 30 days from the date of report publication to review this report and submit a written response to NSF OIG that clarifies or provides additional context for each instance within the report in which the business entity or non-governmental organizations is specifically identified. Responses that conform to the requirements set forth in the statute will be attached to the final, published report.

If you find your business entity or non-governmental organization was specifically identified in this report and wish to submit comments under the above-referenced statute, please send your response within 30 days of the publication date of this report to OIGPL117-263@nsf.gov, no later than March 3, 2025. We request that comments be in .pdf format, be free from any proprietary or otherwise sensitive information, and not exceed two pages. Please note, a response that does not satisfy the purpose set forth by the statute will not be attached to the final report.

About Us

NSF OIG was established in 1989, in compliance with the *Inspector General Act of 1978* (5 USC 401-24). Our mission is to provide independent oversight of NSF to improve the effectiveness, efficiency, and economy of its programs and operations and to prevent and detect fraud, waste, and abuse.

Contact Us

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