

# MEMORANDUM

April 27, 1998

To: T. Jeremy Gunn  
Executive Director &  
General Counsel  
Sunshine Act File (3.3.1)

From: Ronald G. Haron  
Associate General Counsel

Subject: Application of Sunshine Act to Review Board Meetings

You have asked me to prepare a legal opinion determining whether the Review Board is obligated, under the Government in the Sunshine Act ("Sunshine Act"), to open to the public any meetings it might have with respect to the proposed Final Report for the President.

It is my opinion that Review Board meetings to discuss the Final Report, including drafts thereof or proposed recommendations, would have to be open meetings under the Sunshine Act (unless a specific exemption applies). The federal court cases, discussed below, suggest that meetings discussing non-final recommendations or requests should be opened to the public. In addition, there does not appear to be an applicable exemption that would permit closing such a Board meeting.

I have also spoken with attorneys for several other independent agencies subject to the Sunshine Act, as well as the former General Counsel for the Administrative Conference of the United States, who previously provided the Review Board with advice on the Sunshine Act. They saw no basis under the Sunshine Act for closing a meeting at which proposed recommendations to the President or Congress would be discussed.

## 1. Sunshine Act Cases

The case of *Public Citizen v. National Economic Commission*, 703 F. Supp. 113 (D.D.C. 1989), is most on point. In *National Economic Commission*, the court ruled that the Sunshine Act precluded the Commission from holding closed meetings with respect to the formulation of final recommendations to the President and the Congress for reducing the Federal budget deficit. The court rejected the argument that open discussion of budget and economic issues, prior to submission of the final recommendations, would create market speculation and thereby frustrate the agency's mandate. 703 F. Supp. at 117.

In *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921 (D.C. Cir. 1982), at issue were agency discussions of proposed budget requests being considered for submission to OMB. The court of appeals ruled that the NRC could not close such meetings.

Finally, in *Natural Resources Defense Council v. Defense Nuclear Facilities Safety Board*, 969 F. 2d 1248 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 2332 (1993), the court of appeals did permit the agency to hold closed meetings with respect to the discussion of final recommendations to be submitted to the Secretary of Energy and the President regarding the safety of nuclear facilities. However, the court based its opinion on the agency's enabling statute, which the court interpreted as specifically providing that the agency's recommendations be made available to the public "only after" submission to the Secretary and President. 969 F. 2d at 1251. Accordingly, the court found that, under exemption 3 of the Sunshine Act, there was no agency discretion to open the meetings at issue. In the JFK Act, there is no comparable provision regarding public release of the Final Report.

Based on my analysis of these cases, it is my opinion that the Sunshine Act presumptively requires that any Review Board meetings regarding the Final Report be opened to the public unless a specific exemption applies.

## 2. Views of Other Agencies

I spoke with several officials from other agencies subject to the Sunshine Act or the Federal Advisory Committee Act ("FACA"), which incorporates Sunshine Act provisions. No one could provide me with a basis for closing a meeting discussing proposed recommendations or drafts of a report. For example, Dan Guttman, former Executive Director of the Advisory Committee on Human Radiation Experiments, advised me that this Committee did hold public meetings regarding drafts of its report. This Committee was subject to FACA. In addition, I spoke with Gary J. Edles, former General Counsel for the Administrative Conference of the United States, who previously provided the Review Board with detailed comments regarding its regulations on the Sunshine Act. Mr. Edles saw no basis for closing a meeting that discusses proposed recommendations to Congress or the President.