

November 15, 1994

TO: Assassination Records Review Board Members
cc: Assassination Records Review Board Staff

FROM: Sheryl Walter, General Counsel

RE: Government in the Sunshine Act Compliance

For your information, below is a summary of the provisions of the Government in the Sunshine Act (5 U.S.A. section 552b) (Sunshine Act), with which the Board needs to comply when it holds meetings to conduct board business.

Briefly, all meetings attended by a majority of board members at which deliberations result in the conduct or disposition of official agency business must be announced at least one week in advance by a notice in the Federal Register. The law presumes all meetings are open to public observation, (but does not require public participation) subject to certain exemptions which permit closure of all or portions of a meeting to the public. The board must determine in advance of issuing a meeting notice whether all or part of the meeting will be closed and that decision must be included in the notice. Transcripts or an equivalent record of all portions of all meetings must be kept and made publicly available except for those portions exempt by law. If you have any questions, please let me know.

Summary

1. A meeting for Sunshine Act purposes is the "deliberations of at least the number of 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, with some exceptions.
 - a. Conduct of business as well as the final votes are included in the definition of meeting.
 - b. Conference calls are included if a quorum participates, but the law permits board members to individually consider business circulated to them in writing.
 - c. A "meeting" simply to schedule a future meeting is not covered by the act.
2. Although the presumption is that all parts of a meeting are open to the public, regardless of whether the public has requested to attend, this openness is limited to the public's right to observe the proceedings and does **not** provide a right of public participation.
3. Grounds for closing meetings: All or part of a meeting may be closed if information will likely be discussed that falls under one or more of the following exemptions. The Board has the burden to prove that an exemption, all of which are narrowly construed, applies. Even if exemptions technically apply, a meeting should be open if the public interest requires. Exemptions include:

- a. National security information (Ex.1)
 - b. Internal board rules or procedures (Ex.2)
 - c. Information otherwise exempted by statute from public release (e.g., the identities of current intelligence agents) (Ex. 3)
 - d. Accusing a person of a crime or formally censuring them (Ex.5)
 - e. Personal information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (Ex.6)
 - f. Investigatory records compiled for law enforcement purposes, to the extent that the release of the information would:
 - i. Interfere with enforcement proceedings,
 - ii. Deprive a person of a fair trial or impartial adjudication,
 - iii. Constitute an unwarranted invasion of personal privacy,
 - iv. Disclose the identity of a confidential source and, for records compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,
 - v. Disclose investigative techniques and practices, or
 - vi. Endanger the life or physical safety of law enforcement personnel.. (Ex 7)
 - g. Premature disclosure of information that would likely significantly frustrate implementation of a proposed agency action unless the agency has already publicly disclosed the nature of the proposed action or where the board is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal. (This applies only to discussions that "would permit either financial gain at government expense or circumvention of agency regulation.) (Ex.9)
 - h. Discussions concerning the Board's issuance of subpoenas or issues related to and participation in civil actions or adjudications. This includes policy discussions incidental to discussion of litigation strategy. (Ex.10)¹
4. Exempt discussions must be segregated from discussions regarding non-exempt matters.

¹Other exemptions, unlikely to be triggered by the board's work, cover the disclosure of trade secret/confidential business information and information regarding regulation of financial institutions.

Each item of business must be examined to determine whether an exemption applies allowing closure applies.

5. Procedures to close all or part of a meeting:

a. No portion of a meeting may be closed without a majority of the board members voting to close it. A single vote may be taken with respect to a series of meetings in which a portion or portions are proposed to be closed so long as each meeting in the series involves the same matters and occurs no more than 30 days after the initial meeting in the series.

b. Each member's vote must be recorded; no proxies are allowed.

c. A person whose interest may be directly affected by a portion of a meeting may request the agency to close that portion under the exemptions regarding personal privacy, criminal accusation, or law enforcement information.

d. Each time an agency votes to close all or part of a meeting, within one day a full written explanation of the decision with a list of all persons expected to attend the meeting and their affiliations must be made publicly available. A record of each member's vote following an unsuccessful vote to close a meeting must also be made publicly available within one day of the vote.

7. Notice Provisions

a. The board must give notice, at least a week in advance and published in the

Federal Register, of:

i. A meeting's subject matter, time, place, and whether all or part of the meeting is open or closed.

ii. The notice must also provide the name and phone number of the official designated to respond to information requests about the meeting.

iii. By a recorded vote of the majority of the board, shorter notice may be provided in emergency situations, but notice must still be provided at

the earliest practicable time.

b. Meeting changes after notice publication

i. Change in the time and place of the meeting cannot be made after the earliest practicable time absent a public announcement of the change at the

after

ii. Change in the subject matter of or public access to a meeting

public notice can be made if:

* A majority of the board members by recorded vote

determine

"that agency business requires the change and that no earlier announcement of the change was possible," and

** The agency must notify the public of such change and each members' vote upon the change at the earliest practicable time.

8. Complete transcripts or electronic recordings adequate to record fully the proceedings of each meeting, including portions closed to the public, must be maintained, with each speaker identified.

a. Public access to such records must be provided upon request, unless the contents are exempt from release.

b. Information in transcripts, recordings, or minutes may not be withheld from the public unless a majority of the board members by recorded vote (no proxies) votes to withhold it. Information regarding the "same particular matters" may be voted on at once.