

December 8, 1994

TO: Assassination Records Review Board Members
FROM: Sheryl Walter
RE: Government in the Sunshine Act

This memo summarizes the provisions of the Government in the Sunshine Act (5. U.S.C. section 552b) with which the Board must 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 board business must be announced at least one week in advance by 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 must be kept of all portions of all meetings, and made publicly available except for portions voted to remain closed by a majority of the board.

Summary

1. For Sunshine Act purposes, a meeting is the "deliberations of at least the number of members required to take action on behalf of the board where such deliberations determine or result in the joint conduct or disposition of official board business." Conference calls are "meetings" if a quorum participates and conducts business, but board members may individually consider business circulated to them in writing without triggering the act's provisions. A "meeting" simply to determine the scheduling of 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, openness is limited to the public's right to observe the proceedings and does **not** include a right of public participation.
3. All or part of a meeting may be closed pursuant to one or more statutory exemptions, but the burden is on the board to prove that the exemptions, which are narrowly construed, apply. Even if exemptions technically apply, a meeting should be open if the public interest so requires. Exempt discussions must be segregated from discussions regarding non-exempt matters and each item of business must be considered in determining whether an exemption applies allowing closure.

4. Exemptions allowing a portion or portions of an open meeting to be closed if the board determines that there will likely be disclosure of the following types of information 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 people of crimes 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 interfere with enforcement proceedings, deprive a person of a fair trial or impartial adjudication, constitute an unwarranted invasion of personal privacy, 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 a board conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, disclose investigative techniques and practices, or 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 board action unless the board 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 board action on such proposal. ¹ (Ex.9)
- h. Concerns the board's issuance of subpoenas or issues related to and involve participation in civil actions or adjudications. This includes policy discussions incidental to discussion of litigation strategy. (Ex.10)²

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

b. A person whose interest may be directly affected by a portion of a meeting

¹ This exemption is narrowly construed to apply only to those discussions that "would permit either financial gain at government expense or circumvention of board regulation."

² Other exemptions, unlikely to be triggered by the Board's work here, involve disclosure of trade secret/confidential business information and matters regarding regulation of financial institutions.

may request the board to close that portion under the exemptions regarding personal privacy, criminal accusation, or law enforcement information.

c. Each time the Board 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.

6. Notice Provisions.

a. All notices must be published in the Federal Register. The board must give notice, at least a week in advance, of a meeting's subject matter, time, place, and whether all or part of the meeting is open or closed; the notice must also provide the name and phone number of the official designated to respond to information requests about the meeting.

b. 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.

c. No change in the time and place of the meeting can be made after public notice absent a public announcement of the change at the earliest practicable time.

Change in the subject matter of or public access to a meeting after public notice can be made if a majority of the board members by recorded vote determine "that board business requires the change and that no earlier announcement of the change was possible," and the Board must notify the public of such change and each members' vote upon the change at the earliest practicable time."

7. Complete transcripts, electronic recordings, or minutes adequate to record fully the proceedings of each meeting or portion of a meeting, whether closed or open to the public, must be maintained. In all cases the identity of each speaker must be identified.

a. Public access to such records must be provided on request under the Freedom of Information Act (subject to that act's withholding exemptions).

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.