




FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

January 20, 2012

MEMORANDUM FOR: GREGORY T. LONG
EXECUTIVE DIRECTOR

FROM: THOMAS K. EMSWILER 
GENERAL COUNSEL

SUBJECT: Government in the Sunshine Act

I am responding to your request for guidance on the Government in the Sunshine Act.

DISCUSSION:

The Government in the Sunshine Act (P. L. 94-409, 90 Stat. 1241, *codified at* 5 U.S.C. § 552b) mandates that meetings of any Federal agency headed by a collegial body, a majority of whom are appointed by the President with the advice and consent of the Senate, be open to the public. 5 U.S.C. § 552b(a)(1). The FRTIB is a Federal agency headed by a collegial body, the majority of whom are appointed by the President with the advice and consent of the Senate. Thus, the FRTIB must comply with the requirements of the Government in the Sunshine Act.

The legislative history of the Sunshine Act and court decisions interpreting the Sunshine Act break the definition of meeting into three elements:

- First, a meeting must include at least the number of agency members required to take action on behalf of the agency, in other words, a quorum. Note, however, that physical presence is not required. A conference telephone call or possibly a series of two-party calls would qualify as a meeting if the other requirements are met. Conf. Rep., 11; H. Rep. I, 8.

An exception to the Government in the Sunshine Act allows members to individually consider a matter if it is circulated to each member sequentially in writing. Conf. Rep. at 11. In my view, unlike a series of two-party calls, conducting business sequentially in writing would not be jointly conducting business because conducting business in writing would not involve collaboration or an exchange of views.

- Second, the required number of members must be in a position to exchange views. The use of the word "joint conduct" in the Sunshine Act is intended to exclude instances, for example, where an agency member

gives a speech concerning agency business and other members are in the audience. However, as noted above, a series of two-party calls could qualify as a meeting when the calls are aimed at determining Agency business.

- Third, a meeting must consist of "deliberations [that] determine or result in the joint conduct or disposition of official agency business."¹
 - A meeting occurs only where a quorum of members actually conducts or disposes of (resolves) official agency business. However, the term "meeting" applies to more sessions than the one at which the collegial body finally and formally resolves an issue or makes a decision. It includes deliberations that are likely to cause individual participating members to form reasonably firm positions regarding the matter. Natural Resources Defense Council v N.R.C., 216 F3d 1180 (D.C. Cir. 2000).²

The Congress did not want meetings to be merely "reruns staged for the public after agency members have discussed the issue in private and determined their views." S. Rep. No. 94-354, at 18. "The whole decision making process, not merely its results, must be exposed to public scrutiny." Id.

- Informal background discussions that simply clarify issues or expose varying views do not rise to the level of a meeting.³
- Similarly, discussions designed only to implement decisions already reached do not constitute a meeting subject to the act.⁴

¹ Excluded from the definition of "meeting" are deliberations to determine whether to close a meeting, to withhold information from a meeting notice, to call a meeting on short notice, or to change the time, place, or subject matter of a meeting. The purpose of this exclusion is to avoid an endless chain of meetings to close meetings.

² See also S. Rep. 94-354, p. 19 (1975) ("the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions").

³ "[I]nformal background discussions [that] clarify issues and expose varying views" are a necessary part of an agency's work. See S. Rep. No. 94-354, p. 19 (1975). This would include briefings to the Board members by Agency staff.

⁴ FCC v. ITT World Communications, 466 U.S. 463, 471-72 (1984) (sessions that provided general background information to FCC Commissioners and permitted them to engage with their foreign counterparts in an exchange of views by which decisions already reached by the Commission could be implemented were permissible—they did not lead to additional official action by the FCC).

REMEDIES AVAILABLE:

Any person who believes an agency is in violation of the Sunshine Act may bring action against that agency in federal court. 5 U.S.C. § 552b(h)(1). The action must be brought within sixty days after the meeting in which the alleged violation took place, and must be brought in the District of Columbia, in the district where the agency has its headquarters, or in the district where the meeting was held. Id. The burden of proof for establishing that it was appropriate to not hold the meeting in the public is on the agency. Id. The court may afford any relief it deems appropriate but may not enjoin, set-aside, or invalidate any action taken in the meeting. Id. § 552b(h)(2)

SUMMARY:

Provided the discussions are not sufficiently focused on discrete proposals or issues so as to cause or be likely to cause the individual Board members to form reasonably firm positions regarding matters pending or likely to arise before the FRTIB, it is permissible to have: (a) spontaneous casual discussions among Board members of a subject of common interest; (b) briefings of Board members by staff or outsiders where the Board members are primarily receivers of information or views and only incidentally exchange views with one another; (c) general discussions of subjects which are relevant to the FRTIB's responsibilities but which do not pose specific problems for resolution; and (d) exploratory discussions, so long as they are preliminary in nature, there are no pending proposals for action, and the merits of any proposed action would be open to full consideration at a later time.

Discussions focused on discrete proposals or issues that are likely to cause the Board members to form reasonably firm positions regarding matters pending or likely to arise before the FRTIB are meetings that must be conducted in the Sunshine. Even a series of two-party calls can constitute a meeting that must be conducted in the Sunshine when the series of calls involves a quorum of the Board members (normally three).