

GAO

Report to the Chairman, Subcommittee on
Federal Spending, Budget, and
Accounting, Committee on Governmental
Affairs, U.S. Senate

July 1988

INFORMATION DISCLOSURE

Government in the Sunshine Act Compliance at Selected Agencies



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General Government Division

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July 20, 1988

The Honorable Lawton Chiles
Chairman, Subcommittee on Federal Spending,
Budget, and Accounting
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report responds to your June 8, 1987, request and subsequent agreements with the Subcommittee that we examine the Government in the Sunshine Act activities of 12 agencies.¹ As agreed, our objectives were to determine the extent that the agencies (1) adhered to selected requirements of the law for meetings held during calendar year 1986 and (2) provided certain supplemental information in their 1986 annual reports as requested by congressional subcommittees.

Results in Brief

In general we found a high degree of agency compliance with the selected provisions of the law we reviewed. In the few instances where we could not verify compliance, the problem appeared to be the result of incomplete agency documentation. Agency compliance with the requests by three congressional subcommittees to provide supplemental information in their annual reports was lower. We classified the requested information into 22 categories and found that the agencies varied in the extent they provided information on each of the categories, with only one agency covering all 22 categories.

Background

The Government in the Sunshine Act was enacted in 1976 and declares that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the federal government. The act applies to agencies headed by a collegial body composed of two or more individual members appointed by the President of the United States and confirmed by the U.S. Senate. Accordingly, the act requires those agencies to open their meetings to public observation, except in instances where the agencies find that disclosure of information discussed at the meetings could be detrimental to the public interest. In such instances,

¹The 12 agencies reviewed were the: Equal Employment Opportunity Commission, Export-Import Bank of the United States, Federal Election Commission, Federal Labor Relations Authority, Federal Reserve System Board of Governors, Federal Trade Commission, Merit Systems Protection Board, National Labor Relations Board, Nuclear Regulatory Commission, Occupational Safety and Health Review Commission, Postal Rate Commission, and Securities and Exchange Commission.

the law provides 10 exemptions, such as for national defense, foreign policy, or law enforcement reasons, and detailed procedures under which agencies can close or partially close meetings to the public.

Agencies subject to the Government in the Sunshine Act are required to follow several requirements. These include:

- providing public notices of their meetings indicating such items as the time, location, subject of the meeting, whether the meeting is open or closed to the public, and the name and phone number of an agency official designated to respond to requests for information about the meeting;
- recording members' votes to close meetings to the public accompanied by a written statement (called a "meeting statement") explaining the closing action, and supported by a certification by the chief legal officer that the decision to close was appropriate;
- maintaining complete transcripts and/or electronic recordings or minutes of meetings; and
- submitting an annual report to Congress on their compliance with the act.

Objectives, Scope, and Methodology

To determine compliance with the above notification and administrative requirements of the act, we reviewed the records of a total of 47 out of 477 closed or partially closed meetings held by the 12 agencies in 1986. We selected four meetings randomly at each of 11 agencies and reviewed all three of the closed or partially closed meetings at the 12th agency. Additionally, from the 47 meetings, we randomly selected 24 and reviewed tapes or minutes to verify (1) whether meeting discussions agreed with exemption(s) cited in closing the meeting, and (2) if there was agreement between meeting discussions and the announced subject(s). We compared the 12 agencies' 1986 Sunshine Act annual reports to the law and to the supplemental information requested. Because our sample of meetings closed or partially closed during 1986 was limited, our results are not projected either to the agencies selected or to the federal government. Appendix I contains the details on our objectives, scope, and methodology; appendix II provides details on the findings outlined below.

Public Notice

Overall compliance with public notice requirements was high. Of the 47 meetings reviewed we found 43 meetings in compliance with announcement requirements. We could not determine compliance for four meetings due to incomplete documentation.

Meeting Closing Procedures

Compliance with required meeting closing procedures was also high. Our results showed that for the 47 meetings reviewed,

- 46 meetings had recorded votes to close the meetings,
- 41 meetings had meeting statements, and
- 45 meetings had closure certifications from the chief legal officer.

Incomplete documentation prevented us from determining compliance for the remaining meetings. For example, in one agency a file containing meeting statements was lost; in another agency the record of vote and the meeting statement were missing from the meeting file.

Meeting Transcripts, Tapes/Minutes

Our analysis showed that the agencies had recorded, by tape or minutes, the proceedings in 46 of the 47 meetings. In addition, for 24 of the 47 meetings we reviewed tapes or minutes to determine (1) if the exemption(s) cited to close a meeting was supported by the meeting discussion and (2) if the announced subjects were actually discussed as publicized. We found a high degree of agreement. We were able to verify agreement between the meeting discussion and cited exemptions in 21 of the meetings. In addition, we verified that 21 meetings were held in accordance with the announced subjects.

We were unable to verify the remaining cases due to incomplete documentation. For example, at two agencies we found interruptions in the tape recordings; and at an agency that prepares minutes, the minutes were missing from the meeting file.

Agencies' Annual Reports

Our review of the 1986 Sunshine Act annual reports showed that all 12 agencies addressed the three categories of information required by the law—the number of open and/or closed meetings held; the reasons for closing meetings; and a description of litigation, if any, brought against the agency under the law, including any costs assessed as a result of the litigation.

Compliance with the supplemental information requested by three congressional subcommittees was lower than for information required by the law. We classified the requested information into 22 categories, such as steps taken to enhance public comprehension of subjects discussed. (See app. III for our classification of the requested information.) Agencies varied in the extent that they provided information on each of the 22 items. For example, one agency addressed each of the 22 items, while another addressed only 2 of the 22 items.

As requested by the Subcommittee, we did not obtain official comments from the agencies regarding the information contained in this report. However, we discussed the information presented with agency officials who acknowledged the documentation problems we found and indicated their commitment to maintaining proper documentation. As agreed with the Subcommittee, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to the heads of the 12 agencies, the Director of the Office of Management and Budget, and other interested parties. Copies will be available to others upon request. Should you need further information, please contact Richard Caradine at 275-3532 or me at 275-8676.

Sincerely yours,



L. Nye Stevens
Associate Director

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Abbreviations

EEOC	Equal Employment Opportunity Commission
EIB	Export-Import Bank of the United States
FEC	Federal Election Commission
FLRA	Federal Labor Relations Authority
FRBG	Federal Reserve System Board of Governors
FTC	Federal Trade Commission
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
OSHRC	Occupational Safety and Health Review Commission
PRC	Postal Rate Commission
SEC	Securities and Exchange Commission

Objectives, Scope, and Methodology

The objectives of our review were to determine whether certain agencies were in compliance with key administrative provisions of the Government in the Sunshine Act.

To determine Sunshine Act requirements we reviewed the law, researched the act's legislative history, identified and evaluated Administrative Conference of the United States guidance —“An Interpretive Guide to the Government in the Sunshine Act” —as well as guidance from congressional subcommittees on actions needed to implement and comply with the annual report provision of the act. We contacted organizations such as Common Cause and the Public Citizen Litigation Group and reviewed a variety of reports on the history and operations of the Government in the Sunshine Act.

On the basis of the Subcommittee's June 8, 1987, request and subsequent agreements, we made our review at the following 12 agencies:

Equal Employment Opportunity Commission
Export-Import Bank of the United States
Federal Election Commission
Federal Labor Relations Authority
Federal Reserve System Board of Governors
Federal Trade Commission
Merit Systems Protection Board
National Labor Relations Board
Nuclear Regulatory Commission
Occupational Safety and Health Review Commission
Postal Rate Commission
Securities and Exchange Commission

We focused on Government in the Sunshine Act meetings closed or partially closed to the public that were held during calendar year 1986. The 12 agencies held 477 closed or partially closed meetings. Of this total we randomly selected four meetings at each of 11 of the 12 agencies and three meetings at the 12th agency for review. The 12th agency held only three closed or partially closed meetings in calendar year 1986, all of which we included in our review. For each of the selected meetings we examined the agency's compliance with provisions of the law pertaining to (1) providing notice to the public, including required information about the meeting; (2) documenting and recording the votes of the members to close a meeting or a portion; (3) documenting and maintaining a written explanation of the closing action, including a list of attendees; and (4) obtaining a chief legal officer certification that in the officer's

opinion the meeting may be closed to the public and stating each exemptive provision used.

To examine whether the subjects discussed in the closed/partially closed meetings (1) supported the exemptions cited by the agencies as authority to close a meeting and (2) agreed with the announced subjects, we listened to tape recordings and/or reviewed meeting minutes for 24 of the 47 meetings. Our selections consisted of two meetings randomly selected at each of the 12 agencies.

We reviewed each agency's 1986 Sunshine Act Annual Report to Congress for accuracy by verifying the number of meetings reported and their classification as open, closed, and partially closed. We also reviewed the reports' contents for compliance with requirements identified in the law and with other information requested for inclusion in future annual reports by congressional subcommittees in 1980 and 1985.

We designed our review to assess Sunshine Act compliance only at the agencies visited. Because our sample of meetings closed or partially closed during 1986 was limited, our results are not projected either to the agencies selected or to the federal government.

We did our work between August 1987 and March 1988 in accordance with generally accepted government auditing standards.

Detailed Results of Our Compliance Assessment of 1986 Closed or Partially Closed Meetings and Agencies' Sunshine Act Annual Reports

1986 Agency Sunshine Act Meetings

On the basis of our review of the 12 agencies' 1986 annual reports and available agency documentation, we determined that the total number of meetings held that were subject to the Sunshine Act equalled 704. We determined that the 12 agencies held 445 closed and 32 partially closed meetings for a combined total of 477 meetings.

Table II.1: 1986 Sunshine Act Meetings Held by Agency as Verified by GAO

Agency	Open	Closed	Partially closed	Total
EEOC	2	14	18	34
EIB	0	80	0	80
FEC	37 ^a	41	0	78
FLRA	2	8	0	10
FRBG	16	98	0	114
FTC	2	38	0	40
MSPB	2	3	0	5
NLRB	2	20	3	25
NRC	109	42	7	158
OSHRC	8	23	0	31
PRC	4	7	0	11
SEC	43	71	4	118
Total	227	445	32	704

^aIncludes both open meetings and public hearings.

Types of Meeting Announcements

While the Sunshine Act requires public notice of meetings, it provides agency heads with broad discretion as to the method used to announce the meeting. To determine the types of meeting notices used by agencies in announcing Sunshine Act meetings, we interviewed agency officials in conjunction with our review of meeting file documentation.

Table II.2 shows that all 12 agencies used one or more types of announcements for each of the 47 meetings reviewed. Eight of the 12 agencies used three or more types of announcements.

**Appendix II
Detailed Results of Our Compliance
Assessment of 1986 Closed or Partially
Closed Meetings and Agencies' Sunshine Act
Annual Reports**

II.2: Types of Meeting Announcement, by Agency

Agency	Posted notice	Recorded telephone message	Press release/ mailing	Federal Register	Total
EEOC	X	X	X	X	4
EIB	X				1
FEC	X		X	X	3
FLRA	X				1
FRBG	X	X	X	X	4
FTC	X	X	X		3
MSPB				X	1
NLRB	X		X	X	3
NRC	X	X	X	X	4
OSHRC	X				1
PRC		X	X	X	3
SEC	X		X	X	3

**Meeting
Announcements
Documented and in
Compliance**

Table II.3 shows the results of our determination of whether meeting announcements were documented and in compliance with the act. To test meeting announcement compliance, we first determined whether a meeting announcement was documented. If so, we evaluated the announcement on the basis of the specific requirements of the law. Because the meeting announcement requirements vary according to the type of closing procedure followed in meetings, we divided meetings into two groups: those closed by regulation, referred to as expedited closing procedures; and those closed under nonexpedited procedures.

For 43 of the 47 meetings we reviewed, we found documentation indicating that these meetings were announced. This documentation included a Federal Register notice and/or a prepared meeting notice for posting on the agencies' bulletin boards. We determined that agencies met all requirements for the 43 meetings where notices were documented.

For meetings closed under expedited procedures, agencies are required to provide for such closure in their regulations and to announce these meetings as soon as practical. Agencies have no time requirement as to when the announcement must be issued nor are they required to announce such meetings in the Federal Register. We determined that 28 of the 43 meetings were closed under expedited procedures. For these meetings, each agency had appropriately provided for the use of expedited procedures in its regulations and had documentary evidence of an announcement for each meeting.

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For meetings closed under nonexpedited procedures, agencies are required to announce meetings at least 7 days in advance and to publish meeting information in the Federal Register. For the 15 meetings closed under nonexpedited procedures, we found that the agencies published notices in the Federal Register and filed these notices with the Federal Register 7 or more days in advance.

For the remaining 4 of the 47 meetings reviewed, all held by the Export-Import Bank, we could not determine whether the meetings were announced. EIB agency meeting files did not contain evidence of a separately prepared meeting notice for the four meetings reviewed. Agency officials told us they post a copy of the general counsel's certification for closure of the meeting along with a short agenda, rather than prepare a separate notice. While we found both documents in the four meeting files, we could not verify that they had been posted for the meetings because each document lacked a bulletin board posting date.

Table II.3: Meeting Announcements Documented and in Compliance, by Agency

Agency	Number of meetings reviewed	Meeting notice documented	Meeting notice not documented	Meetings in announcement compliance
EEOC	4	4	0	4
EIB	4	0	4	0
FEC	4	4	0	4
FLRA	4	4	0	4
FRBG	4	4	0	4
FTC	4	4	0	4
MSPB	3 ^a	3	0	3
NLRB	4	4	0	4
NRC	4	4	0	4
OSHRC	4	4	0	4
PRC	4	4	0	4
SEC	4	4	0	4
Total	47	43	4	43

^aMSPB held only three closed meetings in 1986.

Closing Procedures Documented in Agency Meeting Files

The Sunshine Act requires that for each closed meeting, agencies (1) take a recorded vote to close the meeting; (2) prepare a meeting statement setting forth the time and place of the meeting and the persons expected to attend; and (3) have their general counsel or chief legal officer prepare a certification saying that in his or her opinion, the meeting may be closed to the public and stating the relevant exemptions that apply.

Table II.4 shows that we were able to verify compliance with these provisions for the majority of the meetings. In 46 of the 47 meetings, agency documentation substantiated that a recorded vote to close was taken. We found documentation indicating that meeting statements were prepared for 41 of the 47 meetings and that closure certifications were prepared for 45 of the 47 meetings reviewed.

Table II.4: Closing Procedures Documented in Agency Meeting Files, by Agency

Agency	Number of meetings reviewed	Recorded vote		Meeting statement		Closure certification	
		D	ND	D	ND	D	ND
EEOC	4	4	0	4	0	4	0
EIB	4	4	0	4	0	4	0
FEC	4	4	0	4	0	4	0
FLRA	4	3	1	3	1	4	0
FRBG	4	4	0	4	0	4	0
FTC	4	4	0	4	0	4	0
MSPB	3	3	0	2	1	3	0
NLRB	4	4	0	0	4	4	0
NRC	4	4	0	4	0	3	1
OSHRC	4	4	0	4	0	4	0
PRC	4	4	0	4	0	3	1
SEC	4	4	0	4	0	4	0
Total	47	46	1	41	6	45	2

D: Documented
 ND: Not Documented

Appendix II
 Detailed Results of Our Compliance
 Assessment of 1986 Closed or Partially
 Closed Meetings and Agencies' Sunshine Act
 Annual Reports

Meeting Record Agreement With the Cited Exemption(s) For Closure and Announced Subject Matter

To determine whether meeting discussions agreed with cited exemption(s) for closure and whether agency meetings were held in accordance with the announced subjects, we reviewed 24 agency meeting records. Table II.5 shows the results of this review.

Agency meeting records showed that meeting discussions fit cited exemptions in 21 of 24 meetings and that 21 of the 24 meetings were held in accordance with the announced subject. For the remaining meetings, incomplete documentation precluded us from making this determination.

For one meeting at EEOC and one meeting at PRC, we observed that the tape recording had been interrupted, precluding us from verifying agreement between meeting record and subject/exemptions cited for closure. We faced a similar situation for one meeting at FLRA, where we found no meeting minutes in the file documentation.

Table II.5: Meeting Record Agreement With the Cited Exemption(s) For Closure and Announced Subject Matter

Agency	Number of meetings reviewed	Type of record	Agreement with cited exemption(s)		Agreement with subject matter	
			V	CNV	V	CNV
EEOC	2	Tape	1	1	1	1
EIB	2	Tape	2	0	2	0
FEC	2	Tape	2	0	2	0
FLRA	2	Minutes	1	1	1	1
FRBG	2	Tape	2	0	2	0
FTC	2	Minutes	2	0	2	0
MSPB	2	Minutes	2	0	2	0
NLRB ^a	2	Minutes	2	0	2	0
NRC	2	Tape	2	0	2	0
OSHR	2	Tape	2	0	2	0
PRC	2	Tape	1	1	1	1
SEC	2	Tape	2	0	2	0
Total	24		21	3	21	3

V : Verified

CNV : Could not verify due to incomplete documentation.

^aFor one meeting NLRB held a brief discussion on a subject not included in the meeting announcement. However, the discussion was limited to deciding to hold an open meeting in the future.

1986 Sunshine Act Annual Report Accuracy in Reporting the Number and Type of Meetings Held

To assess reported meeting count and meeting classification accuracy, we compiled a list of meetings from available agency documentation and compared this with meetings tabulated on each agency's 1986 Sunshine Act Annual Report.

Table II.6 shows that 6 of the 12 agencies were accurate in their annual reported count and classification of meetings as open, closed, and partially closed. In four of the remaining six, the agencies were not accurate in their reported count and classification. The remaining two agencies reported an accurate total meeting count but misclassified specific meetings that had been held.

For the four agencies with reported inaccurate meeting counts, two agencies (EEOC and NLRB) were off by one. In the case of SEC and FTC, our tabulation of meetings showed that SEC had undercounted by five meetings and FTC had overcounted by seven. For the two agencies with meeting misclassifications only, both FEC and MSPB misclassified one meeting in their annual reports; however, their total meeting counts were accurate.

II.6: 1986 Sunshine Act Annual Report
 Accuracy in Reporting the Number and
 Type of Meetings Held, by Agency

Agency	Meeting count and classification		
	Accurate count and classification	Inaccurate count and classification	Inaccurate classification only
EEOC		X	
EIB	X		
FEC			X
FLRA	X		
FRBG	X		
FTC		X	
MSPB			X
NLRB		X	
NRC	X		
OSHRC	X		
PRC	X		
SEC		X	
Total	6	4	2

1986 Sunshine Act Annual Reporting Completeness in Addressing Legally Required and Congressionally Requested Information

Table II.7 shows 1986 Sunshine Act Annual Report completeness by comparing report content with requirements of the law as well as additional information requested by congressional subcommittees with oversight responsibility. The Sunshine Act specifically requires each agency to submit the following types of information in its Sunshine Act Annual Report:

"...a tabulation of the total number of agency meetings open to the public, the total number meetings closed to the public..."

"...the reasons for closing such meetings..."

"...a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency)..."

In addition to these requirements in the law, three congressional subcommittees asked agencies to provide additional information in their annual reports. In a 1980 letter, the Senate Subcommittee on Federal Spending Practices and Open Government and the House Subcommittee on Government Information and Individual Rights asked each agency subject to the Sunshine Act to provide certain supplemental information in future reports. In 1985 the Senate Subcommittee on Intergovernmental Relations sent a letter asking for similar information. In total, we classified the supplemental information requested in the two letters into 22 categories (listed in app. III).

Our review showed that all 12 agencies addressed all three information categories required by law in their 1986 Sunshine Act Annual Report. We found that 10 agencies addressed between 15 and 22 of the 22 additional categories identified in the guidance provided by Congress. The remaining two agencies addressed only 2 and 7 of the additional 22 categories.

**Appendix II
Detailed Results of Our Compliance
Assessment of 1986 Closed or Partially
Closed Meetings and Agencies' Sunshine Act
Annual Reports**

Table II.7: 1986 Sunshine Act Annual Reporting Completeness in Addressing Legally Required and Congressionally Requested Information, by Agency

Agency	Public Law 94-409 requirements addressed	Total number of 22 additional categories addressed	Specific categories not addressed (see app. III)
EEOC	Yes	2	3,4-22
EIB	Yes	17	11-13,15,17
FEC	Yes	18	8,11-13
FLRA	Yes	18	7,8,15,19
FRBG	Yes	21	19
FTC	Yes	22	All addressed
MSPB	Yes	21	18
NLRB	Yes	19	6,15,19
NRC	Yes	21	5
OSHRC	Yes	19	6,15,19
PRC	Yes	15	5,6,8,9,15,17,19
SEC	Yes	7	4-10,14-17,19-22

Supplemental Information Requested by Congressional Subcommittees to Be Included in Agency Annual Reports

The 1980 request from the Senate Subcommittee on Federal Spending Practices and Open Government and the House Subcommittee on Government Information and Individual Rights and the 1985 request from the Senate Subcommittee on Intergovernmental Relations asked agencies to provide certain supplemental information in their Sunshine Act annual reports. We classified the information requested into 22 categories.

(1) Agency name

(2) Calendar year

(3) Agency policy regarding budget meetings, meetings at which congressional testimony is discussed, and briefings of agency members by staff

Notation Voting

(4) Description of procedure

(5) Public availability of records involved in reaching decisions by notation procedure (record of notational vote, circulated written materials that provide the basis of the vote, and any other methods employed to explain reasoning of decisions reached through notational voting)

Public Observation

(6) Discussion of measures employed to ensure public observation and comprehension of subject matter discussed at meetings

(7) Availability of staff papers, reports, and other background information

(8) Specific procedures for making such background or working papers available to the public

(9) Agency's policy with respect to use of cameras and recording devices by public observers at open meetings

Public Notice

(10) Public locations of meeting notices

(11) Tabulation of the number of days' notice given for all of the agency's meetings

(12) Number of times less than 7 days' notice was given to the public

(13) In cases of (12) above, the number of days before the meeting when notice was given¹

(14) Public Interest—Discussion of procedure established for consideration of the public interest in determining to open or close a meeting

Transcripts, Recordings,
and Minutes of Closed
Meetings

(15) Discussion of procedures used to review periodically the continued application of an exemption to transcripts, recordings, and minutes of closed meetings

(16) Discussion of procedures used to make available to the public transcripts, recordings, and minutes

(17) Provide copy of any index system prepared by the agency to assist the public in obtaining and using transcripts, recordings, and minutes

(18) Tabulation of the total number of requests the agency received for transcripts or for the opportunity to listen to recordings of closed meetings and the number of requests granted or denied

(19) Description of review procedures a request is given, including by whom, and how long it takes the agency to respond to requests and to complete such review

(20) Requests to Open—Description of procedures for an individual to request that an agency meeting be open, including any procedures for agency reconsideration of a prior decision to close a meeting

(21) Formal Complaints—Description of substantive complaints agency has received on its Sunshine procedures and practices, including a discussion of the agency's disposition of each such complaint

(22) Ex Parte Communications—Provide a copy of agency guidance supplied to members and staff regarding ex parte communications

¹Requested in the 1985 Senate Subcommittee letter only.

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