

## MEMORANDUM

September 26, 1996

To: David G. Marwell

From: T. Jeremy Gunn

Subject: Sunshine Act

I am writing in response to your request for a short summary of the basic provisions of the Sunshine Act with respect to rules governing Board meetings, particularly regarding the possibility of Board meetings in Executive Session.

Under Federal law, the Review Board “shall not jointly conduct or dispose of agency business other than in accordance with [the Sunshine Act].” § 522b(b). The Board’s own regulations effectively incorporate this provision of the statute. *See* 36 CFR 1405.2(5). Although the Board may conduct business outside of a “meeting” (*e.g.*, by notation voting), all “meetings” of the Board must comply with the requirements of the Sunshine Act.

“Meetings” are defined as “deliberations of at least [a quorum] where such deliberations determine or result in the joint conduct or disposition of official agency business . . . .” § 552b(a)(2). Unless the Board is conducting business pursuant to a properly noticed and recorded meeting, Board members “may not engage in deliberations at such sessions that determine or result in the joint conduct or disposition of official Review Board business . . . .” 36 CFR 1405.2(4). Although Board members may hold “informal preliminary discussion or exchanges of views [such discussions may] not effectively predetermine official Review Board action.” 36 CFR 1405.2(5).

There are two types of meetings that the Board may conduct: open and closed. Open meetings are open to the public. Meetings may be closed *only* when the subject of the meeting is covered by one of the specifically enumerated provisions permitting closure under the Sunshine Act. The most obvious exceptions are discussions of classified information or of litigation strategy. Subjects for which closed meetings would *not be permissible* would include whether to hold a public hearing, travel plans, whether a new staff member should be hired, or Board discussion of review of records (when such discussion does not include classified or privileged information).

Whenever the Board meets in a closed meeting, it is required to make either a tape recording of the meeting (or create a verbatim stenographic transcript). The General Counsel is required to issue a certification that all closed meetings were closed pursuant to one of the enumerated provisions of the Sunshine Act.

There is no provision under the Sunshine Act wherein the Board could conduct a meeting in "Executive Session" and deliberate on Board business unless all of the provisions pertaining to closed meetings were observed. In other words, the Board cannot legally meet and deliberate on Board business in a closed session unless there is a verbatim recording and unless the General Counsel certifies that the meeting was closed pursuant to an enumerated provision of the Sunshine Act permitting a closed meeting.

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