

NATIONAL SCIENCE FOUNDATION  
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OFFICE OF  
INSPECTOR GENERAL

**MEMORANDUM**

**DATE:** February 14, 2005

**TO:** Warren Washington, Ph.D.  
Chair, National Science Board

**FROM:** *Deborah H. Cureton*  
Deborah H. Cureton  
Associate Inspector General for Audit

**SUBJECT:** *Audit of the National Science Board Compliance with the Government in the Sunshine Act for 2004*  
OIG Report Number 05-2-007

Attached please find the final report on our annual audit of the National Science Board's compliance with the Government in the Sunshine Act for 2004, which we have also transmitted to the Congress, in accordance with the National Science Foundation Authorization Act of 2002. We received the Board's response to the official draft of the report and have included it, in full, as an appendix to this report.

The Board continues to demonstrate a clear intent to provide for greater access to, and increased openness in its meetings, but continues to experience some challenges in meeting many of the procedural requirements of the Sunshine Act. The Board has developed a time-phased action plan and is addressing our earlier recommendations that it develop formal policies and procedures for complying with the Sunshine Act that define the various participants' roles and responsibilities for complying with the Act's procedural requirements. This year, while we have provided the Board with several suggestions for improvements, we have made no new formal recommendations. As such, we do not require a response to this report.

I would like to express my appreciation for the courtesies and assistance provided by the staff of the National Science Board Office during the audit. If you have any questions, please contact Karen Scott at (703) 292-7966 or Kristen Stagliano at (303) 312-7615.

Attachment

cc : Dr. Christine Boesz  
Dr. Michael Crosby  
Ms. Karen Scott  
Ms. Melinda Kirsch  
Ms. Kristen Stagliano

**Audit of  
National Science Board  
Compliance with the  
Government in the Sunshine Act  
for 2004**

**National Science Foundation  
Office of Inspector General**

**February 14, 2005  
OIG 05-2-007**



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## Introduction

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### Background

The National Science Board (Board) is the governing entity of the National Science Foundation (NSF), an independent Federal agency established by the National Science Foundation Act of 1950. The Board is composed of 24 part-time, Presidentially appointed members, and the NSF Director, who are selected on the basis of their eminence in research or public affairs.

The Board has responsibility for providing national science policy advice to the President and to the Congress and for acting as the governing board of the NSF. The Board conducts its business during two-day meetings, which are generally held five to six times a year. Much of the Board's analysis and background work in preparation for Board discussion and action is done through its committees.

Currently, the Board has five standing committees: Executive, Audit and Oversight, Education and Human Resources, Programs and Plans, and Strategy and Budget. These committees, and other subcommittees and task forces, generally meet during the same two-day period as the full Board. In addition, the committees occasionally meet at other times throughout the year on an as-needed basis.

### The Government in the Sunshine Act

In the early 1970s, partially in response to the Watergate scandal, Congress enacted the Government in the Sunshine Act along with other anti-secrecy legislation. Congress intended the Sunshine Act to open the government's deliberation processes to public scrutiny.

The Act applies to agencies "headed by a collegial body composed of two or more individual members . . . and any subdivision thereof authorized to act on behalf of the agency,"<sup>1</sup> and covers some 50 Federal agencies, including the National Science Board. The Act requires that "every portion of every meeting of an agency shall be open to public observation"<sup>2</sup> with ten narrow exemptions for discussions of material that are likely to disclose:

- (1) National Defense and foreign policy;
- (2) Internal personnel rules and practices;

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<sup>1</sup> 5 U.S.C. §552b(a)(1).

<sup>2</sup> Id. at §552b(b).

- (3) Statutory exemptions;
- (4) Proprietary information;
- (5) Accusation of crime or formal censure;
- (6) Personal privacy;
- (7) Investigatory records;
- (8) Financial institution reports;
- (9)(A) Financial speculation and stability;
- (9)(B) Frustration of proposed agency action; and
- (10) Issuance of subpoena, participation in civil action or proceeding, or formal agency adjudications.<sup>3</sup>

While the Act does not require an agency to hold meetings, it does contain a number of procedural requirements that must be followed when an agency decides to meet for either a closed or open session. First, at least one week prior to each meeting, the agency must make a public announcement regarding the date, time, and place of the meeting and whether the meeting is to be open or closed.

Additionally, to close all or a portion of a meeting, an agency must vote to do so and make publicly available a written copy of the vote and a “full written explanation of its action closing the portion [of the meeting].”<sup>4</sup> Also, for a closed meeting, the agency’s General Counsel must publicly certify that the meeting may be closed under one of the Act’s exemptions. Finally, the agency must annually report to the Congress: any changes in the agency’s policies and procedures under the Act; a tabulation of the number of meetings held, exemptions applied, and the days of public notice provided; a brief description of litigation or formal complaints concerning the implementation of the Act; and any changes in law that have affected the open-meeting responsibilities of the agency.

### **Open Meetings of the National Science Board**

In accordance with the Government in the Sunshine Act, the National Science Board has traditionally opened its full-Board meetings to the public. However, prior to 2003, the Board did not provide public access to the meetings of its committees, subcommittees, taskforces, or other subdivisions.

The NSF Authorization Act of 2002, which became effective in December 2002, contained administrative amendments to the National Science Foundation Act pertaining to Board

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<sup>3</sup> 5 U.S.C. §552b(c).

<sup>4</sup> Id. at §552b(d)(3).

meetings. As part of these amendments, the Congress specified that in addition to meetings of the full Board, “all of its subcommittees, and task forces (and any other entity consisting of members of the Board and reporting to the Board) shall be subject to [the Sunshine Act].”<sup>5</sup>

Consequently, during 2003, the Board opened to the public for the first time, its committee and other subdivision meetings.

## **Audit Requirement**

In keeping with its interest in seeing greater openness in Board meetings, the Congress placed another requirement in the NSF Authorization Act directing that the NSF Office of Inspector General (OIG) “conduct an annual audit of the compliance by the Board with [the Sunshine Act].”<sup>6</sup> The audit is “to examine the proposed and actual content of closed meetings and determine whether the closure of the meetings was consistent with [the Act].”<sup>7</sup> In a report submitted to the Congress by February 15th of each year, the OIG is to make “recommendations for corrective actions that need to be taken to achieve fuller compliance with [the Sunshine Act] and recommendations on how to ensure public access to the Board’s deliberations.”<sup>8</sup>

This is the second annual audit of the Board’s Sunshine Act activities. Last year’s audit found a clear intent on the part of the Board to provide for greater access to and increased openness in its meetings. With respect to the Board’s decisions to close meetings, last year we found that the Board properly closed its meetings consistent with the exemptions contained in the Sunshine Act. However, we did note some challenges the Board faced in meeting the Act’s numerous procedural requirements and recommended that the Board develop and implement formal policies and procedures that define the various participants’ roles and responsibilities for complying with the Act’s numerous procedural requirements. The Board agreed with last year’s audit findings and prepared a corrective action plan for implementing our recommendations.

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<sup>5</sup> Pub. L. No. 107-368 (2002).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

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## Objectives, Scope, and Methodology

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In keeping with the statutory audit requirement, the objectives of our audit were to:

- Determine whether the Board and its subdivisions are in compliance with the procedural requirements of the Government in the Sunshine Act; and
- Determine whether the Board's closures of meetings were consistent with the exemptions contained in the Government in the Sunshine Act.

Our audit covered meetings of the Board held during the period January through December 2004. During this timeframe, the Board conducted 92 separate meetings of which 38, or 41 percent, were closed. For the purposes of this audit, we counted each of the various committee, subcommittee, and task force meetings separately, although they typically occur during the same two-day time period. Also, we considered a committee meeting with both an open and closed portion on the same day as two separate meetings: one open and one closed. However, we considered a committee meeting that met for more than one non-consecutive time frame during a single day, and was either entirely open or entirely closed, as one meeting. For example, an open Task Force on Polar Issues meeting from 1:00pm to 3:00pm, with a closed portion from 1:30pm to 2:00pm would count as two meetings. Likewise, an open Education and Human Resources Committee meeting from 9:00am to 10:00am and again from 1:00pm to 2:00pm on the same day, with no closed session, would count as one meeting.

To determine whether the Board complied with the procedural requirements of the Act, we met with agency personnel, and gathered and reviewed documentation for all meetings to determine whether the Board met the Act's requirements for public notice. For each of the 38 closed meetings, we reviewed documentation to determine whether the Board met the applicable Act requirements, including the vote to close and General Counsel certification. Finally, we reviewed the Board's most recent annual report to the Congress, submitted in 2004 for calendar year 2003, to

determine whether it complied with the Sunshine Act's reporting requirements.

To determine whether the Board closed its meetings in accordance with the Sunshine Act exemptions, we reviewed a sample of 15 of the 38 closed-meeting transcripts and compared them with meeting agendas, General Counsel certifications, and the Board's explanations for closing meetings.

We conducted our work between October 2004 and January 2005 in accordance with generally accepted government auditing standards.

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## Results of Audit

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Overall, we continued to find a clear intent on the part of the Board to provide for greater access to and increased openness in its meetings. With respect to the Board's decisions to close meetings, we found that the Board properly closed its meetings consistent with the exemptions contained in the Sunshine Act.

However, we also found that during 2004, the Board again experienced some challenges in meeting all of the many procedural requirements of the Sunshine Act, especially for those meetings that occurred outside of the regular two-day meeting schedule. We attributed many of these procedural challenges to the need for formal policies and procedures that were recommended in last year's audit and which would help provide the Board with a structure and protocol for handling the many Sunshine Act issues that arise in the daily conduct of Board operations. Such policies and procedures, once implemented, would ensure greater consistency and accountability in complying with the Sunshine Act's requirements. Consequently, we reiterate last year's recommendation that the Board develop, implement, and provide training on such policies and procedures.

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## Decisions to Close

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### **Meeting Closure is Consistent with Sunshine Act Exemptions**

The overall presumption of the Sunshine Act is in favor of open meetings. This is consistent with the Act's underlying policy that "the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government."<sup>9</sup> However, the Sunshine Act recognizes that circumstances exist in which public disclosure of a particular matter may not be in the government's best interest. As such, the Act has built-in exceptions to its open meeting requirement. Although the starting point for any meeting is always openness, an agency may choose to close a meeting if the discussion is likely to disclose information contained in one of the Act's ten exemptions.

During 2004, the Board closed 38, or 41 percent of its 92 total meetings for reasons involving 8 of the 10 exemptions contained in the Sunshine Act. Discussions in closed meetings involved the following topics:

- future budgets (exemption (3)),
- grants and contracts (exemptions (4), (6), and (9)(B)),
- specific personnel matters (exemptions (2) and (6)), and
- briefings on active investigations and enforcement actions (exemptions (5), (7), and (10)).

Our review of a sample of 15 of the 38 closed meetings found that the Board properly closed these meetings consistent with the Sunshine Act's exemptions. Discussions held during these closed sessions followed the planned agendas for the meetings and pertained to topics that the Board had decided were covered by one or more of the Act's exemptions.

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<sup>9</sup> Pub. L. No. 94-409, 90 Stat. 1241, at §2 (1976).

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## Procedural Compliance

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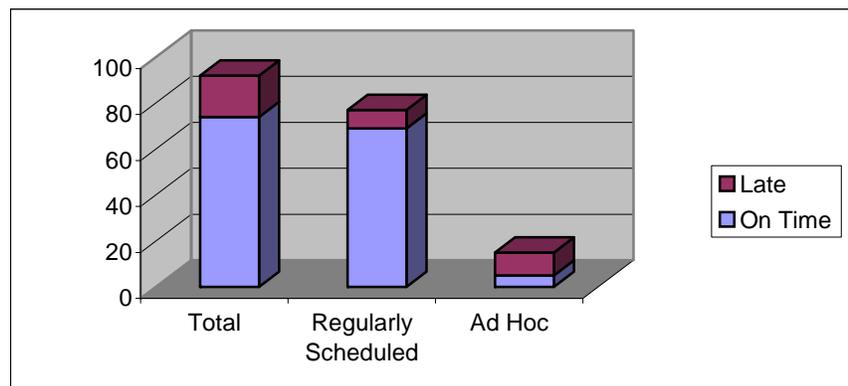
### **More Consistent Compliance with Procedural Requirements is Needed**

The Sunshine Act is replete with detailed procedural requirements that must be followed for both open and closed meetings. The Board has shown a clear intent to comply with these requirements and has been improving its procedural practices. For example, the Board now provides much more information to the public regarding its meetings via its website. This information is very useful in keeping the public informed of Board activities and is clearly in keeping with the intent of the Sunshine Act. However, the Board is continuing to experience some challenges and difficulties in ensuring that all of the various procedural requirements are met on a consistent basis.

### *Untimely and Limited Information Disseminated on Ad Hoc Meetings*

The Sunshine Act requires the agency to publicly announce the date, time, and place of a meeting and whether the meeting is open or closed. The announcement is to be made at least one week before the actual meeting date. In 74 of its 92 meetings (80 percent), the Board met this requirement. For the remaining 18 meetings, 8 related to a single announcement for the Board's regularly scheduled 2-day session in May 2004. For seven of these eight meetings, the public announcement was one day late, and one meeting was added to that session for which the notice was four days late.

Of greater concern is the lack of timely public notice provided for the other 10 committee meetings, which occurred on an ad hoc basis throughout the year. Of the 15 *ad hoc* meetings held during 2004, only 5 (33 percent) met the public notice requirement. For 7 of the remaining 10 *ad hoc* meetings, the notice was made 4 days in advance or less; and for 3, no public notice was given.



Furthermore, for closed meetings, the Sunshine Act requires an agency to make publicly available documentation of the decision and vote to close and General Counsel certifications of the decision to close. While the Board made public information regarding its votes to close meetings for all 30 of its closed meetings that occurred during the regular two-day sessions, it did not make this information public for any of the eight *ad hoc* meetings that were closed. The listings on the Board's website for these *ad hoc* meetings include only an agenda.

*Closed Meeting  
Transcripts Not  
Consistently  
Maintained*

While it has improved since 2003, the Board is still experiencing some difficulties maintaining complete transcripts of closed meetings. The Sunshine Act requires the Board to maintain a complete transcript or electronic recording of all closed meetings. During 2004, the Board met this requirement for 35 of its 38 closed meetings. One of the missing transcripts was for one of the closed *ad hoc* meetings.

*Annual Report to  
Congress Not Accurate*

The Sunshine Act requires the Board to submit an annual report to the Congress on certain aspects of its open meeting activities, including a tabulation of the number of meetings, the number of days of public notice given for each closed meeting, and the exemptions applied to closed meetings.

The Board's report on its 2003 meetings, submitted to the Congress in January 2004 met all of the statutory requirements, however, it did not accurately report on the public notice requirement. The Board's annual report states that, "all [2003 closed] meetings were [publicly] posted at least one week prior to the meeting." However, our audit of 2003 meetings, dated February 13, 2004, found that the Board fully met the public notice requirement for only 54 percent of the Board's total meetings.<sup>10</sup>

**Formalized Procedures  
Can Help Ensure  
Compliance**

We believe that many of these challenges and difficulties experienced by the Board in complying with the Sunshine Act are the result of a lack of formal policies and procedures. In our 2003 audit of the Board's compliance with the Act, we recommended that the Board develop such formal policies and procedures in order to address these procedural gaps in

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<sup>10</sup> Our audit reported on the public notice requirement for all meetings, not just closed meetings. A review of last year's data shows that 17 of the 30 closed meetings in 2003 (57%) met the public notice requirement.

compliance. The Board responded positively to our audit recommendations and agreed to develop and implement formal policies during 2004. However, the Board has not yet developed this much-needed guidance. Currently, the Board is in the process of hiring its own legal advisor who will be responsible for Sunshine Act compliance, among other things, and is expected to develop this formal policy. Consequently, the Board is expecting a delay in the implementation of this guidance to some time in the first half of 2005.

The impact of the delay in developing and implementing these policies and procedures is more than simply not having a few documents available on a website. The impact of operating without these policies and procedures is significant because it can affect both the Board's level of openness and its access to information. By providing more complete information regarding upcoming meetings and votes and reasons for closing meetings, the Board can better fulfill the Sunshine Act's objective of an open government that is transparent and accountable to the public taxpayer. Formal policies and procedures help ensure that the Board has a structure and process for deciding on Sunshine Act matters, for making information on its activities known and accessible by the public, and for avoiding issues such as insufficient public notice or missing transcripts of closed meetings.

Formal policies and procedures can also help the Board ensure that it is getting all of the information that it needs in order to effectively conduct its role of oversight of NSF activities. When NSF discovers issues that need to be raised to the Board, there is currently no formal and recognized protocol in place for ensuring that these issues come to the Board in a timely and organized manner with the proper level of public involvement. This was evidenced in a recent situation where a request to add agenda items arose within NSF just a few days before the Board meeting. Without a protocol for adding an item to an existing Board agenda, information may not have been shared with those in the best position to ensure that Sunshine Act procedures were followed. Moreover, the Board may not have had timely access to the best information on whether to hear these last-minute or *ad hoc* issues in open or closed sessions or to ensure that the appropriate NSF personnel were available to provide information for the Board's discussion. Formal

policies and procedures can ensure that all necessary individuals, such as the Board's Executive Officer, are involved in the agenda-setting and decision-making processes without limiting the flow of information between NSF and the Board.

The requirement to maintain complete transcripts, coupled with the public notice requirement, ensures that the public is aware of meetings that occur behind closed doors, and is provided access to those meetings through the availability of redacted versions of transcripts. Without proper notice and complete transcripts of closed meetings, this information cannot be made available and raises potential concerns about the transparency of the Board's operations. Having formal policies and procedures can help the Board ensure greater openness by providing a method for consistently making information regarding Board activities available to the public.

## **Recommendations**

In light of this crucial need for formal policies and procedures, we once again recommend that the Executive Officer of the National Science Board:

- Develop formal policies and procedures to address compliance with the procedural requirements of the Sunshine Act. The guidance should clearly describe all of the procedural requirements for both open and closed meetings, and should define the various roles and responsibilities of both NSF and Board members and staff involved in Sunshine Act compliance. Additionally, it should detail the necessary time frames within which activities must occur. The guidance should specifically address those requirements for which the Board has had difficulty meeting over the past two years, such as timely public notice and timely production of the Board vote and explanation to close, especially for *ad hoc* meetings. It may be appropriate to include in such guidance a sample calendar for the events that must both precede and follow a meeting, and a method such as a detailed checklist for ensuring those dates are met. These procedures should also include provisions for keeping the Board's Executive Officer informed of potential changes to upcoming meetings so that he can ensure compliance with the Act's procedural requirements.

- Provide training to all affected staff members, both within the Board office and NSF, on the new policies and procedures and Sunshine Act compliance in general. Such training will ensure that individuals who are responsible for and support compliance activities understand both the nature of those activities as well as their importance to Board accountability and openness.

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## Other Suggestions for Improvement

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When developing its formal policies and procedures for Sunshine Act compliance, the Board may wish to include procedures to address the following specific gaps in compliance. While some of these issues may seem minor and do not necessarily detract from the level of openness that the Board is providing, addressing them will allow the Board to be more fully compliant with the Act's requirements.

First, the Sunshine Act requires that the Board document its votes to close meetings and make them publicly available, including documentation of each member's vote on the question. Currently, while the Board makes most of this information publicly available, its public information does not reflect each member's vote on the question. However, this can be easily remedied within the Board's current public notice practices. The Board currently provides documentation of its votes to close as part of its Major Actions and Approvals memo posted to its website following each two-day meeting. This memo typically includes a statement that "the Board approved a resolution to close portions of" its upcoming meeting. By slightly changing this statement to "the Board unanimously approved" and by including a list of Board members present for this vote, the Board can quickly become fully compliant with this procedural requirement.

Second, the Sunshine Act requires that complete transcripts be made of all closed meetings and that redacted versions of these transcripts be made available, upon request, to the public. If complete written transcriptions of recorded meetings are to be available to the public, they must disclose the identity of each speaker. However, the written transcriptions that the Board does have do not identify each speaker. Rather, they typically include a list of members present for the meeting and then refer to each speaker as either "MS" (Male Speaker) or "FS" (Female Speaker). We recognize that it is difficult during lively discussions to continuously ask members to identify themselves every time they speak. However, in developing its new policies and procedures, the Board should strive to develop a method for identifying speakers in its written closed-meeting transcripts. Perhaps the Board could involve the Executive Secretary of each respective committee in this process as they are

present during these meetings and may be able to keep a better record of speakers' identities.

Finally, with respect to closed-meeting transcripts, the Board can significantly enhance its level of openness by providing redacted versions of closed-meeting transcripts on its website. Currently, the Board's policy is to provide such versions of transcripts upon request from a member of the public. However, the Sunshine Act does not require that a member of the public make such a request. Rather, the Act states that redacted versions of closed-meeting transcripts are to be made "promptly available to the public, in a place easily accessible to the public."<sup>11</sup> By providing this information on its website, the Board could expand its level of openness and comply with not only the letter of the law, but also its spirit. At the very least, the Board could provide notice to the public on its website that redacted transcripts of closed meetings are available upon request.

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<sup>11</sup> 5 U.S.C. §552b(f)(2).

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## **Agency Response**

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The National Science Board generally agreed with our comments. The Board's response is included in its entirety as an appendix to this report.

# National Science Board

February 10, 2005

MEMORANDUM

TO: Dr. Christine Boesz  
Inspector General, NSF

FROM: Dr. Michael P. Crosby *MP Crosby*  
Executive Office and NSB Office Director

SUBJECT: Response to Sunshine Act Audit

Thank you for the opportunity to review and respond to Office of Inspector General (OIG) January 21, 2005 draft Audit of the National Science Board (NSB, the Board) Compliance with the Government in the Sunshine Act for 2004. We were also provided with an excellent briefing of the draft Audit Report by Ms. Karen Scott (OIG Senior Audit Manager) and Ms. Kristen Stagliano (OIG Attorney Advisor).

The Board continues to be committed to fully complying with the Government in the Sunshine Act. This second annual IG audit of the compliance by the Board with the Sunshine Act was a welcomed opportunity to verify Board compliance and receive additional IG suggestions on how the Board Office (NSBO) may enhance its ability to ensure public access to the Board's deliberations.

As you will recall, the NSBO developed a Time-phased Action Plan to address suggestions and recommendations of OIG Audit Report for 2003. Although the OIG Audit Report for both 2003 and 2004 found the Board to be fully compliant, the Board remains committed to fully implementing the Time-phase Action Plan we had previously developed. Full implementation of this action plan is dependent, in large part, to the Board Office adding a full-time legal affairs coordinator to our staff.

The Board Office anticipates hiring a legal affairs coordinator in early 2005. That individual will be responsible for providing training early in 2005 to all NSB and appropriate NSF staff members on Sunshine Act compliance and its importance to Board accountability and openness. In response to comments and recommendations in the 2004 Audit Report, the Board Office will also be developing:

- guidelines and a schedule with timeline for events preceding and following meetings, and
- guidelines for adding items to already published meeting agenda, to include a process for obtaining votes of each Board Member to close teleconference meetings

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National Science Foundation

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Further, to alleviate quality issues with recording devices in the past, beginning with the February 2005 Board meeting, all closed sessions of Committee meetings will be transcribed by a court reporter, thereby implementing redundant recording of proceedings (tape recording and direct real-time transcription) and providing absolute name-identification of speakers. As suggested in the report, we are also considering the value and potential impacts of posting all redacted closed NSB plenary session transcripts to the NSB Website, making copies available in the NSF Library, and providing a public announcement that closed NSB committee session transcripts are available to the public upon specific request.

The NSBO has worked closely with your Office, and in particular with Ms. Scott and Ms. Stagliano, throughout the audit review. The working relationship between our staffs in this regard has, in my opinion, been very courteous, positive and productive. We look forward to continued consultation with you and your staff during the implementation of our action plan.

If you or your staff have any questions, please feel free to contact me directly.

cc: D. Cureton  
S. Fannoney  
K. Scott  
K. Stagliano  
W. Washington