

APPENDIX 4

REQUEST FOR BOARD ACTION BY A BOARD MEMBER

Requester: Board Member Jessie Roberson March 17, 2017

Brief description of Requested Action: I propose the Board approve by notational vote closing the meeting scheduled for March 23, 2017 pursuant to 5 USC 552b(c)(3) (disclose matters specifically exempted from disclosure by statute) and (9)(B) (likely to significantly frustrate implementation of a proposed agency action) consistent with Agency Counsel guidance.

The meeting agenda, see attached topics, is being conducted to discuss potential recommendations. The Board determines that public participation would likely disclose matters specifically exempted by statute (10 CFR 1704.4c) and /or disclose information for which premature disclosure would likely frustrate implementation of a proposed action of the Board (10 CFR 1704h).

Attachments (init) (included clean version of any proposed document or modified document)

Summarize any time sensitive considerations:

Requestor signature signature on file March 17, 2017

Assistant Executive secretary signature on file March 17, 2017

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICPATING	COMMENT	DATE
Sean Sullivan	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Bruce Hamilton	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Jessie H. Roberson	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Daniel J. Santos	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Joyce L. Connery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____

Final Disposition Summary

Executive Secretary signature _____ [Click here to enter a date.](#)

AFFIRMATION OF BOARD VOTING RECORD

SUBJECT: RFBA by Board Member Jessie Roberson to Approve by Notational Vote Closing the Meeting Scheduled for March 23, 2017

Doc Control#2017-300-048

The Board, with Board Member(s) Jessie H. Roberson, Daniel J. Santos, Joyce L. Connery *approving*, Board Member(s) Sean Sullivan, Bruce Hamilton *disapproving*, Board Member(s) none *abstaining*, and Board Member(s) none *recusing*, have voted to approve the above document on March 21, 2017.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING*	COMMENT	DATE
Sean Sullivan	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	03/21/17
Bruce Hamilton	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	03/21/17
Jessie H. Roberson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	03/17/17
Daniel J. Santos	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	03/17/17
Joyce L. Connery	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	03/20/17

*Reason for Not Participating:

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Board Members.


Assistant Executive Secretary to the Board

Attachments:

1. Voting Summary
2. Board Member Vote Sheets

cc: Board Members
OGC
OGM Records Officer
OTD

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

NOTATIONAL VOTE RESPONSE SHEET

FROM: Sean Sullivan

SUBJECT: RFBA by Board Member Jessie Roberson to Approve by Notational Vote Closing the Meeting Scheduled for March 23, 2017

Doc Control#2017-300-048

Approved_____ **Disapproved** **X**_____ **Abstain**_____

Recusal – Not Participating_____

COMMENTS: **Below** **X**_____ **Attached**_____ **None**_____

The request seeks to invoke exemption 9(B) of the Government in the Sunshine Act as one of two exemptions justifying the closure of the Board's meeting. The request is either unnecessary or improper, depending on future action. The other exemption sought, which is justifiable and entirely sufficient, is exemption 3. The Board's approved agenda for the meeting covers one or more topics that may result in a recommendation to the Secretary of Energy. Exemption 3 permits closure when the presence of the public would likely disclose matters specifically exempted from disclosure by statute. The Board's enabling statute provides that the public may not learn of a Board recommendation until the Board has transmitted a final version to the Secretary. Hence, exemption 3 is appropriate.

Exemption 9(B) permits closure when the presence of the public is likely to significantly frustrate implementation of a proposed agency action. As noted, exemption 3 is sufficient to close the meeting and withhold relevant portions of the transcript from the public until a final recommendation is transmitted to the Secretary, but after that *there is no agency action to be frustrated*. Having advised the Secretary by formal recommendation, the Board's action is done. Action, if any, the Secretary may take to implement a Board recommendation is by law completely at the Secretary's own discretion. Congress gave the Board no statutory role in the development or execution of the Secretary's implementation plan. While the Board has historically passed judgment upon developed implementation plans and sometimes criticized their execution, that role is informal, extra-statutory, and completely reliant in its effectiveness upon the judgment of the Secretary. Thus, even if exemption 9(B) is invoked and appropriately applied, it does not permit withholding closed meeting information from the public any longer than otherwise permitted under exemption 3.

The Board has previously improperly applied exemption 9(B) to withhold transcripts after transmitting a recommendation. Prior to issuing Recommendation 2015-1, *Emergency Preparedness and Response at Pantex*, the Board deliberated in closed meetings and initially

withheld relevant portions of the transcripts from publication. In November 2015, the Board transmitted the final recommendation to the Secretary and thereafter Sunshine Act exemption 3 no longer applied. Pursuant to the Board's regulations implementing the Sunshine Act, the Board at that time was required to publish the portions of closed meeting transcripts containing deliberations related to Recommendation 2015-1.¹ However, the Board did not immediately comply with its regulation. In April 2016, the Board by vote of 3-2 refused to disclose the transcripts (see Board notational vote document 2017-300-1, dated April 7, 2016, available on the Board's public website). Two Members voting against release commented that release should not occur prior to the development of the Secretary of Energy's implementation plan (one of those Members offered additional reasons), while the third disapproving Member provided no comment at all. The Secretary subsequently issued his implementation plan on June 16, 2016, and on June 24 the Board by vote of 2-1 (with 2 abstentions) voted to release the closed meeting transcripts (see Board notational vote document 2017-300-15, dated June 24, 2016, available on the Board's public website).

Withholding transcripts from the public to avoid the possibility that the public might influence the Secretary's implementation plan is improper. There is no provision in law permitting such action. Exemption 9(B) does not permit such action. The Sunshine Act (5 U.S.C. § 552b) provides that meetings may be closed and transcripts withheld:

“where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to ... (9) disclose information the premature disclosure of which would ... (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action ...”

There are two possible applications of the above statutory language, each a variation on the phrase “in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action.” The first is ‘in the case of *DNFSB*, be likely to significantly frustrate implementation of a proposed *DNFSB recommendation*.’ However, the *DNFSB* publishes its recommendations immediately upon transmitting them to the Secretary, as it is required to do by our enabling statute. Thus, even if disclosure of a closed meeting transcript might frustrate implementation of the Board's recommendation, the last clause of exemption (B) precludes its application after the recommendation is published. A second possibility, turning on the words ‘*any* agency’, is ‘in the case of *DOE*, be likely to significantly frustrate implementation of a proposed *DOE implementation plan*.’ But even stretching the statute to include this possibility does not permit the Board to withhold transcripts after issuing a recommendation. During the interval between the Board's issuance of a recommendation and the Secretary's issuance of an implementation plan, the Board cannot properly determine that *DOE*'s implementation plan will likely be frustrated. Since no *DOE* plan exists, the Board

¹ See 10 C.F.R. Part 1704.9, “If at some later time (after the initial withholding) the Board determines that there is no further justification for withholding a portion of a transcript, electronic recording, or minutes or other item of information from the public which has previously been withheld, such portion or information shall be made publicly available.”

could not make any determination. Moreover, a controlling court case interpreting exemption 9(B) held that the exemption may only be used in circumstances where potential unilateral private (i.e., non-government) action might defeat the government's purpose.² There is no logical scenario where the Board's closed meeting deliberations could provide to a non-government actor the knowledge to defeat in advance the Secretary's purpose of defense nuclear facility safety measures that he may choose to implement. Once the implementation plan does exist, the exception clause bars application of 9(B) because the Secretary is required by law to publish the implementation plan. Thus, no matter how the language of 9(B) is interpreted, the provisions of the Board's enabling statute regarding recommendations and implementation plans as applied to the 9(B) language yields a result requiring the Board to cease application of the exemption once a recommendation is made public.

Finally, there is certainly no provision in any statute suggesting the Board could withhold information from the public so as to keep information from other government officials.

In summary, properly applied, exemption 9(B) expires by its terms at the same time that exemption 3 does – upon transmitting and publishing a recommendation – and therefore its invocation in the current request is unnecessary. The Board has previously improperly applied exemption 9(B) to withhold information from the public that the public was entitled to by law and the Board was required by regulation to divulge on its own initiative. If its application here is a prelude to improper withholding in the future, invocation of 9(B) is improper.

I therefore disapprove.



Sean Sullivan

3/21/17

Date

² See *Common Cause v. Nuclear Regulatory Com.* 674 F.2d 921, 933 (D.C. Cir. 1982). Citing to examples found in the legislative history of the Sunshine Act, the D.C. Court of Appeals held, "We construe Exemption 9(B) to cover those situations delineated by the narrow general principles which encompass all four legislative examples. In each of these cases, disclosure of the agency's proposals or negotiating position could affect private decisions by parties other than those who manage the federal government-exporters, potential corporate merger partners, government employees, or owners of real property. The private responses of such persons might damage the regulatory or financial interests of the government as a whole, because in each case the agency's proposed action is one for which the agency takes final responsibility as a governmental entity."

DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET

FROM: Bruce Hamilton

**SUBJECT: RFBA by Board Member Jessie Roberson to Approve by Notational Vote
Closing the Meeting Scheduled for March 23, 2017**

Doc Control#2017-300-048

Approved _____ **Disapproved** **X** **Abstain** _____

Recusal – Not Participating _____

COMMENTS: **Below** **X** **Attached** _____ **None** _____


This request proposes to close the scheduled March 23, 2017 meeting of the Board pursuant to 5 U.S.C. § 552b(c)(3) and 5 U.S.C. § 552b(c)(9)(B). These are two exemptions to public disclosure allowed in certain cases by The Government in the Sunshine Act.

Exemption (3) reads, "...disclose matters specifically exempted from disclosure by statute...." The Atomic Energy Act (as amended) directs the Board to make available to the public any recommendation and any related correspondence *after* it has been received by the Secretary of Energy. In *Natural Resources Defense Council v. DNFSB*, the Court held that the Board is prohibited from providing to the public draft recommendations until the recommendations have been submitted (the triggering event) to the Secretary of Energy or the President. Once a recommendation has been made public, there is no longer any statutory authority under exemption (3). In other words, after the triggering event, exemption (3) to The Government in the Sunshine Act no longer exempts meeting deliberations from being disclosed to the public.

Exemption (9)(B) allows for withholding information from the public which is likely to, "...disclose information the premature disclosure of which would ... in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action," This would apply to the situation prior to issuance of a recommendation, but during that time, exemption (9)(B) would be redundant to exemption (3). An argument has been made that exemption (9)(B) should still be invoked in order to protect meeting minutes from public disclosure even *after* the recommendation has been issued, because public disclosure of the Board's deliberations could frustrate DOE's implementation plan. This is a specious argument, since the "proposed agency action" of exemption (9)(B) is the recommendation itself, and once it has been issued, it is no longer "proposed agency action."

Closing the meeting pursuant to exemption (3) alone is sufficient. Adding exemption (9)(B) is not necessary because exemption (3) is sufficient, and it is not prudent because it implies that disclosure of the meeting minutes may still not be required once the recommendation is issued.

I therefore disapprove.


Bruce Hamilton

03/21/17 *A. G. Gully* for BH
Date

DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET

FROM: Jessie H. Roberson

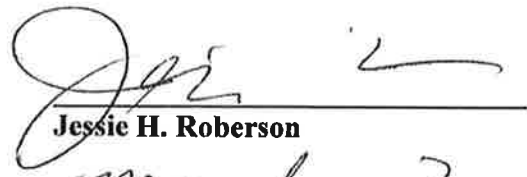
SUBJECT: RFBA by Board Member Jessie Roberson to Approve by Notational Vote Closing the Meeting Scheduled for March 23, 2017

Doc Control#2017-300-048

Approved **Disapproved** **Abstain**

Recusal – Not Participating

COMMENTS: **Below** **Attached** **None**



Jessie H. Roberson
March 2, 2017

Date

Cameron Shelton

From: Daniel J. Santos
Sent: Friday, March 17, 2017 10:53 AM
To: Cameron Shelton; Shelby Qualls
Subject: RE: Notational Vote: Doc#2017-300-048, CUI - BLUE FOLDER

Approved.

From: Cameron Shelton
Sent: Friday, March 17, 2017 10:36 AM
To: Bruce Hamilton <[REDACTED]>; Daniel J. Santos <[REDACTED]>; Jessie Roberson <[REDACTED]>; Joyce Connery <[REDACTED]>; Sean Sullivan <[REDACTED]>
Cc: Katherine Herrera <[REDACTED]>; James Biggins <[REDACTED]>; Richard Reback <[REDACTED]>; Steven Stokes <[REDACTED]>; Richard Tontodonato <[REDACTED]>; ExSec <[REDACTED]>; Adam Poloski <[REDACTED]>; Chris Roscetti <[REDACTED]>; John Pasko <[REDACTED]>; Timothy Dwyer <[REDACTED]>
Subject: Notational Vote: Doc#2017-300-048, CUI - BLUE FOLDER

This email is an electronic record of Notational Vote. Voting ballot will follow shortly. Also, accepting electronic votes.

Password to follow.

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET**

FROM: Members of the Board
SUBJECT: RFBA by Board Member Jessie Roberson to Approve Closing the Meeting Scheduled for March 23, 2017

DOC# 2017-300-048

Office Directors are copied and should provide input, if applicable.

Approved _____
Disapproved _____
Abstain _____
Recusal – Not Participating _____

COMMENTS:

Below _____
Attached _____
None _____

Cameron Shelton
Assistant Executive Secretary
Office of the Chairman

DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET

FROM: Joyce L. Connery

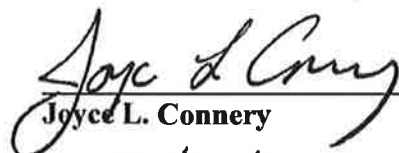
SUBJECT: RFBA by Board Member Jessie Roberson to Approve by Notational Vote
Closing the Meeting Scheduled for March 23, 2017

Doc Control #2017-300-048

Approved **Disapproved** **Abstain**

Recusal – Not Participating

COMMENTS: **Below** **Attached** **None**



Joyce L. Connery
3/20/17

Date