

**REQUEST FOR BOARD ACTION BY A BOARD MEMBER**

Requester: \_\_\_\_\_ Sullivan \_\_\_\_\_ June 21, 2016

Brief description of Requested Action: To enhance transparency, direct the General Manager to update on the Board's internet website the posted transcripts from the Board's closed meetings of June 3, 2015 and July 29, 2015 as indicated in the two attachments to this request. Each attachment contains text highlighted in yellow that indicates text already posted to the internet. Non-highlighted text are to be added to the posted transcripts upon approval of this request within three business days. The non-highlighted text contains deliberations on Recommendation 2015-1.

The Recommendation is now public. The Secretary has issued an Implementation Plan. There is no longer any applicable exemption under the Government in the Sunshine Act (5 USCS § 552b). In keeping with the broad purpose of the Sunshine Act, the public should have access to the transcript of our deliberations on Recommendation 2015-1.

Attachments (init)   2   (included clean version of any proposed document or modified document)

Summarize any time sensitive considerations: 5 USCS § 552b requires the Board to promptly make transcripts available to the public.

Requestor signature \_\_\_\_\_ //s// \_\_\_\_\_ June 21, 2016

Executive secretary \_\_\_\_\_ June 21, 2016

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING	COMMENT	DATE
Joyce L. Connery	<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"/>	_____
Sean Sullivan	<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"/>	_____
Bruce Hamilton	<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: Request for Board Action by Board Member Sean Sullivan; Direct the General Manager to Update on the Board's Internet Website the Posted Transcripts from the Board's Closed Meetings of June 3, 2015 and July 29, 2015**

**Doc Control#2016-300-015**


The Board, with Board Member(s) Sean Sullivan, Bruce Hamilton *approving*, Board Member(s) Jessie H. Roberson *disapproving*, Board Member(s) Joyce L. Connery, Daniel J. Santos *abstaining*, and Board Member(s) none *recusing*, have voted to approve the above document on June 24, 2016.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING*	COMMENT	DATE
Joyce L. Connery	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	06/24/16
Jessie H. Roberson	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	06/23/16
Sean Sullivan	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	06/23/16
Daniel J. Santos	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	06/22/16
Bruce Hamilton	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	06/21/16

\*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:** Joyce L. Connery

**SUBJECT:** Request for Board Action by Board Member, Sean Sullivan; Direct the  
General Manager to update on the Board's internet website the posted  
transcripts from the Board's closed meetings of June 3, 2015 and July 29,  
2015 as indicated in the two attachments to this request

**Doc Control# 2016-300-015**

Approved \_\_\_\_\_

Disapproved \_\_\_\_\_

Abstain

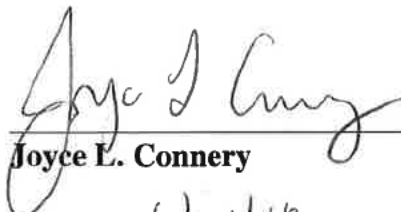
Recusal – Not Participating \_\_\_\_\_

**COMMENTS:**

Below \_\_\_\_\_

Attached \_\_\_\_\_

None



Joyce L. Connery

6/24/16

Date

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

**FROM:** Jessie H. Roberson

**SUBJECT:** Request for Board Action by Board Member, Sean Sullivan; Direct the  
General Manager to update on the Board's internet website the posted  
transcripts from the Board's closed meetings of June 3, 2015 and July 29,  
2015 as indicated in the two attachments to this request

**Doc Control# 2016-300-015**

**Approved** \_\_\_\_\_

**Disapproved**

**Abstain** \_\_\_\_\_


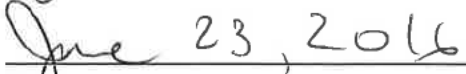
**Recusal - Not Participating** \_\_\_\_\_

**COMMENTS:**

**Below** \_\_\_\_\_

**Attached** \_\_\_\_\_

**None**

  
\_\_\_\_\_  
**Jessie H. Roberson**  
  
\_\_\_\_\_  
**Date**

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Sean Sullivan

**SUBJECT:** Request for Board Action by Board Member, Sean Sullivan; Direct the General Manager to update on the Board's internet website the posted transcripts from the Board's closed meetings of June 3, 2015 and July 29, 2015 as indicated in the two attachments to this request

Doc Control# 2016-300-015

Approved   X                        Disapproved                             Abstain       

Recusal – Not Participating       

**COMMENTS:**      Below   X        Attached                             None       

The request seeks release to the public of the portions of closed meeting transcripts dealing with the Recommendation that became Recommendation 2015-1, *Emergency Preparedness and Response at Pantex*. I made an identical request back in March, which was disapproved by the Board in early April by a vote of two in favor, three opposed. Comments from two Board Members who voted against my earlier request indicated that they were swayed in part by the fact that we had not yet received the Secretary's Implementation Plan. We have now received the Implementation Plan, so I am asking again.

The Government in the Sunshine Act (5 U.S.C. § 552b) requires the Board to promptly make available to the public all portions of transcripts not covered by an exemption. The Board did that in 2015 shortly after receiving the transcripts from the two meetings that are the subject of this request. At the time non-exempt portions were made available, the portions dealing with Recommendation 2015-1 were withheld because Sunshine Act exemption 3 applied. Exemption 3 ceased to apply when the final Recommendation was transmitted to the Secretary in November 2015.

The Sunshine Act's mandate to "make promptly available to the public" non-exempt transcripts is ambiguous as to whether it directs us to do so only once, promptly after the meeting, or continuously thereafter, promptly after conditions permit the release of previously exempt transcripts. In my view, the purpose of the Sunshine Act clearly favors the latter interpretation. Further, the Board's Code of Federal Regulations implementing the Sunshine Act provides, "If at some later time 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

ARCHIVE: Doc#2016-300-015, Request for Board Action by Board Member Sean Sullivan;  
Direct the General Manager to Update on the Board's Internet Website the Posted Transcripts  
from the Board's Closed Meetings of June 3, 2015 and July 29, 2015

public which has previously been withheld, such portion or information shall be made publicly available." 10 C.F.R. 1704.9. I believe that there is no further justification, and the transcripts should be released.

"No further justification" as used in our regulations implementing the Sunshine Act should, in my view, be limited to justifications permitted by the Sunshine Act itself. Thus, the transcripts should be released if there is no currently applicable exemption.

Exemption 3 clearly no longer applies. Our use of exemption 3 stems from our enabling statute and the interpretation that the public may be informed of information dealing with Recommendations only after the Secretary of Energy has received the final Recommendation. The only other exemption that could possibly apply is exemption 9(B) which provides that information may be withheld when premature disclosure would:

"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, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal."

We have already disclosed the nature and purpose of our action when we published the Recommendation. By its own terms, exemption 9(B) may no longer be used.

A legal treatise on the Sunshine Act suggests that DNFSB might be able to use exemption 9(B) so as not to frustrate the actions of another agency. See Richard K. Berg, Stephen H. Klitzman, & Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act* 86-7 (2nd ed. 2005). However, since the word 'agency' is used multiple times and always in the singular, a basic rule of statutory construction requires each use of 'agency' to refer to the same agency. Thus, even if 9(B) may be used by our agency in relation to DOE's actions, it cannot be used to mix DOE's actions (the Implementation Plan) with ours (the Recommendation), or to superimpose our intentions for their actions when assessing the potential for frustration.

Nor can we use closure of the Recommendation – an extra-statutory act we do by agreement with DOE – as the basis of an action that may be frustrated. We have informed the public of the nature and purpose of our action, as we were required to do under our enabling statute. The last clause of exemption 9(B) thus bars us from relying on the future Recommendation closure.

For all these reasons, I conclude that there is no longer any applicable Sunshine Act exemption. I believe we are required by law to release these transcripts. I further believe that in our regulations we promised the public that we would do so.



Sean Sullivan

6/23/16

Date

## Shelby Qualls

---

**From:** Daniel J. Santos  
**Sent:** Wednesday, June 22, 2016 5:26 PM  
**To:** Lotus Smith; Shelby Qualls  
**Subject:** RE: Notational Vote: Doc#2016-300-015 Request for Board Action by Board Member, Sean Sullivan; Direct the General Manager to update on the Board's internet website the posted transcripts from the Board's closed meetings of June 3, 2015 and July 29, 2015

Abstain with the following comment: This request for Board action is identical to the request for Board action Doc#2016-300-001 dated March 31, 2006, which was already acted on by the Board. The subject request for Board action does not provide information or context to justify a different action on my part.

**From:** Lotus Smith  
**Sent:** Tuesday, June 21, 2016 12:13 PM  
**To:** Steven Stokes <[REDACTED]>; James Biggins <[REDACTED]>; Mark Welch <[REDACTED]>; Bruce Hamilton <[REDACTED]>; Daniel J. Santos <[REDACTED]>; Jessie Roberson <[REDACTED]>; Joyce Connery <[REDACTED]>; Sean Sullivan <[REDACTED]>  
**Cc:** Shelby Qualls <[REDACTED]>; Nora Khalil <[REDACTED]>; Lotus Smith <[REDACTED]>; Katherine Herrera <[REDACTED]>  
**Subject:** Notational Vote: Doc#2016-300-015 Request for Board Action by Board Member, Sean Sullivan; Direct the General Manager to update on the Board's internet website the posted transcripts from the Board's closed meetings of June 3, 2015 and July 29, 2015

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

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

**FROM:** Members of the Board  
**SUBJECT:** Request for Board Action by Board Member, Sean Sullivan; Direct the General Manager to update on the Board's internet website the posted transcripts from the Board's closed meetings of June 3, 2015 and July 29, 2015 as indicated in the two attachments to this request

#### DOC#2016-300-015

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

Approved \_\_\_\_\_  
Disapproved \_\_\_\_\_  
Abstain \_\_\_\_\_  
Recusal – Not Participating \_\_\_\_\_

#### COMMENTS:

Below \_\_\_\_\_  
Attached \_\_\_\_\_  
None \_\_\_\_\_

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

**FROM:** Bruce Hamilton

**SUBJECT:** Request for Board Action by Board Member, Sean Sullivan; Direct the  
General Manager to update on the Board's internet website the posted  
transcripts from the Board's closed meetings of June 3, 2015 and July 29,  
2015 as indicated in the two attachments to this request

**Doc Control# 2016-300-015**

Approved

Disapproved

Abstain

Recusal - Not Participating

**COMMENTS:**

Below

Attached

None

  
Bruce Hamilton

21 JUN 2016

Date