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AUTHOR: Bernard Bell  
AFFILIATION: DC  
ADDRESSEE: ACUS Member or General Counsel  
SUBJECT: Outstanding Sunshine Act Surveys

ACTION: Appropriate  
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LETTER DATE: 11/23/2011

ACKNOWLEDGED No

SPECIAL HANDLING:

NOTES:

FILE LOCATION: ADAMS

DATE DUE:

DATE SIGNED:

**Joosten, Sandy**

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**From:** Scott Rafferty [SRafferty@acus.gov]  
**Sent:** Wednesday, November 23, 2011 1:37 PM  
**Subject:** Outstanding Sunshine Act Surveys  
**Attachments:** Agency Head Survey Final Oct 2011.pdf

Dear ACUS Member or General Counsel -

As you may know, Congress assigned to the Administrative Conference of the United States the responsibility for consulting with agencies on their regulations to implement the Sunshine Act, PL 94-409. Our consultant, Prof. Bernard W. Bell, has been in contact with you to seek your help in distributing a survey on the possible reform of the Sunshine Act. We believe input on this topic is quite critical, for the reasons set forth in the letter Chairman Verkuil addressed to the members of your board or commission. With the understanding that ACUS members or liaisons would facilitate distribution and responses, we have distributed this survey through your office. As you know, we also provided that we will treat responses as subject to the deliberative privilege, at the request of the respondent.

ACUS has conducted a number of surveys historically and has always enjoyed very high levels of cooperation. This has allowed us to share data that has been useful to agencies on a broad variety of issues. We hope to continue that role and seek your assistance.

Please use your best efforts in distributing the survey, reminding members of the survey deadline, and in encouraging them to complete the survey. As a convenience, I am attaching an additional copy of the commissioner/board member survey that you may wish to distribute. Alternatively, eligible recipients (i.e., commissioners and board members) can access this link: <https://www.surveymonkey.com/s/sunshineboardmembersurvey>

I would be grateful for your assessment of any obstacles or concerns, as well as your sense of how soon your office will be able to return the surveys. Of course, you or the commissioners (or board members) can communicate directly with Prof. Bell. If any of them prefer to provide some or all of the responses orally (or to speak in greater detail), please encourage them to speak with him.

Professor Bell can be reached by voice, fax, or email as follows:

Bernard W. Bell  
Professor & Herbert Hanoach Scholar  
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Scott Rafferty | Deputy Director of Research and Policy



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## Sunshine Act Project: Commissioner/Board Member Survey

### Sunshine Act Project: Commissioner/Board Member Survey

This survey is being conducted under the auspices of the Administrative Conference of the United States (ACUS). It seeks to gain information about the impact of the Government in the Sunshine Act (5 U.S.C. 552b) on the function and decision-making process of government commissions and boards.

#### CONFIDENTIALITY:

Unless you request otherwise, your responses to this survey will be treated as public information. If you request confidentiality, any of your data used in a report will be presented only aggregated with other data, and any of your narrative responses that appear will not show any attribution to you. Any requests by the public for underlying data and responses will be assessed in light of all applicable FOIA exemptions which protect the interagency deliberative process, privacy rights, and trade secrets.

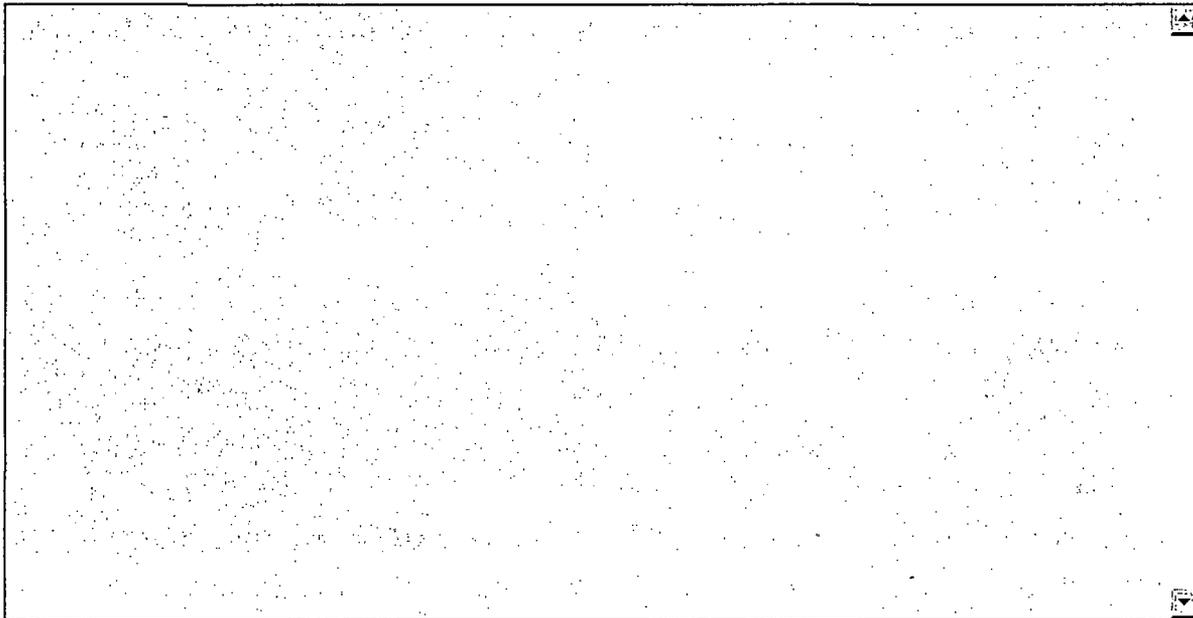
#### ASSISTANCE OF OTHERS IN ANSWERING SURVEY:

This survey seeks your own perspective, not any "institutional" position of your agency. Preferably you should answer the survey without consulting staff members. If you consult with staff, please note that you did so at the end of the survey.

#### DEFINITION:

In this survey, an open meeting is open to the public (or the open portion of a partially open/partially closed meeting). A closed meeting is a meeting of a quorum of the commission or board that is closed pursuant to the Sunshine Act exemptions (or the closed portion of a partially open/partially closed meeting).

**Please provide your name and identify the Commission/Board on which you serve. (As noted above, if you opt for confidentiality at the end of the survey your answers will not be attributed to you in any ACUS or ACUS consultant's report). If you wish to have a copy of your answers sent to you, please provide an email address to which the copy can be sent.**



# Sunshine Act Project: Commissioner/Board Member Survey

## Effect of Discussions at Meetings (Questions 1-4)

**1. How often has a discussion among Commission/Board members at an open Sunshine Act meeting changed your views on a particular issue?**

- Frequently
- On a number of occasions
- Seldom
- Never
- Not applicable (My Commission/Board has very few open meetings.)

**2. How often do you think you have changed the mind of another Commissioner/Board Member by any comments you made at an open Sunshine Act meeting?**

- Frequently
- On a number of occasions
- Seldom
- Never
- Not applicable (My Commission/Board has very few open meetings.)

**3. How often has a discussion among Commission/Board members at a closed Sunshine Act meeting changed your views on a particular issue?**

- Frequently
- On a number of occasions
- Seldom
- Never
- Not applicable (My Commission/Board has very few closed meetings.)

**4. How often do you think you have changed the mind of another Commissioner/Board member by any comments you made at a closed Sunshine Act meeting?**

- Frequently
- On a number of occasions
- Seldom
- Never
- Not applicable (My Commission/Board has very few closed meetings.)

# Sunshine Act Project: Commissioner/Board Member Survey

## Sources of Information about Your Colleagues' Views (Questions 5-6)

**5. How significant is each of the following sources in providing information about the views and positions of other members of your Commission/Board on issues before the Commission/Board? (You may identify sources not mentioned by using the "other sources" slot below.)**

	Very Important	Important	Not Important	Not Applicable
Discussions at <u>open</u> Sunshine Act meetings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Discussions at <u>closed</u> Sunshine Act meetings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Conversations with the Chairperson of your Commission/Board (If you are the chairperson, please select <b>Not Applicable</b> .)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Conversations with one or more Commissioners/Board members where the total number of participants does not constitute a quorum	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Emails from other Commission/Board members	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Memos or other written materials (excluding emails) from other Commission/Board members	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Conversations with your personal staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Conversations with agency staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Reviewing notations made as a part of notational/seriatim votes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Reviewing speeches or other communications of Commission/Board members to third parties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Other Sources: Please indicate any other sources and their importance (very important, important, not important) in the space below.**

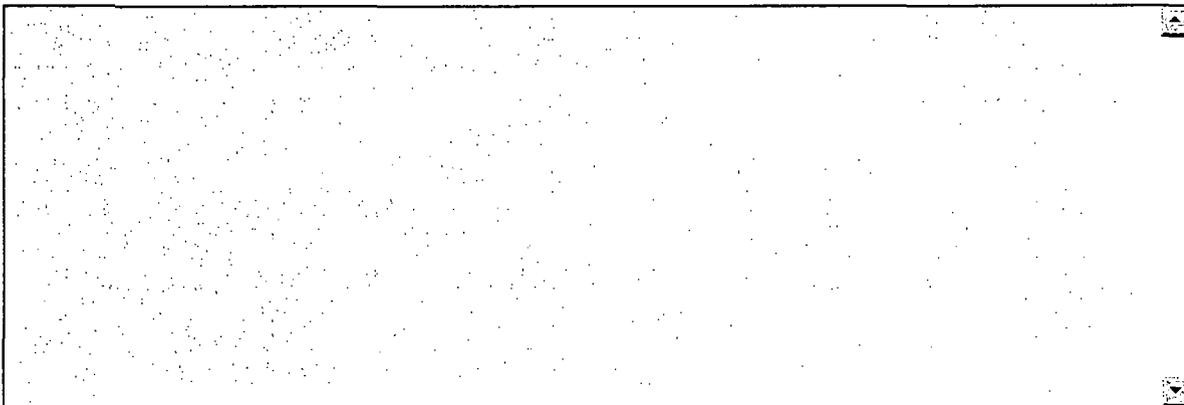
# Sunshine Act Project: Commissioner/Board Member Survey

**6. Do you believe you have adequate opportunities to learn about the views and positions of other Commissioners/Board Members?**

Yes

No

**If not, why not?**



**Sunshine Act Project: Commissioner/Board Member Survey**

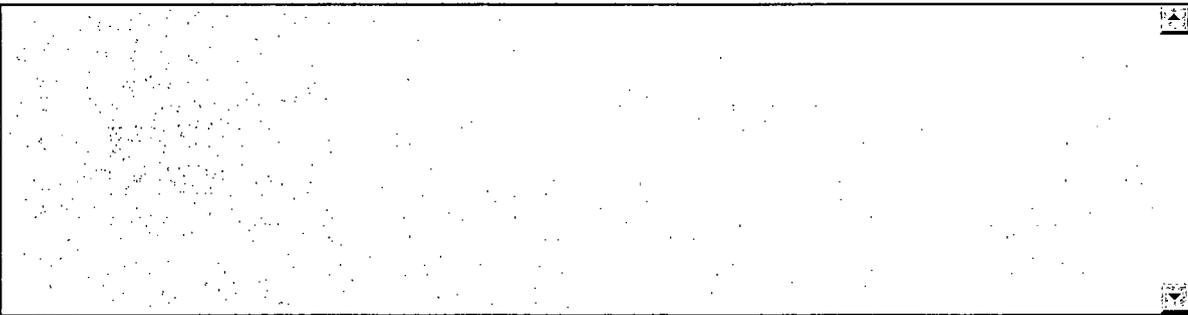
**Interactions Between Commissioners/Board Members (Questions 7-9)**

**7. Do you believe you have adequate opportunities to convince other Commissioners/Board Members of your position on issues before the Commission/Board?**

Yes

No

**If not, why not?**



# Sunshine Act Project: Commissioner/Board Member Survey

**8. How important is each of the following in terms of Commissioners'/Board Members' opportunity to work out compromises between their positions or narrow issues in dispute? (You may mention other modes of communication not listed by using the "other modes" slot below.)**

	Very Important	Important	Not Important	Not Applicable
Open Sunshine Act meetings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Closed Sunshine Act meetings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Series of meetings between groups of Commissioners/Board Members where the total number of participants does not constitute a quorum	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Email exchanges	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Memos or other written materials (excluding emails) from other Commission/Board members	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Meetings between staff members of various Commissioners/Board Members	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Other modes: Please specify any other modes of working out compromises or narrowing issues and their importance (very important, important, not important) in the space below.**

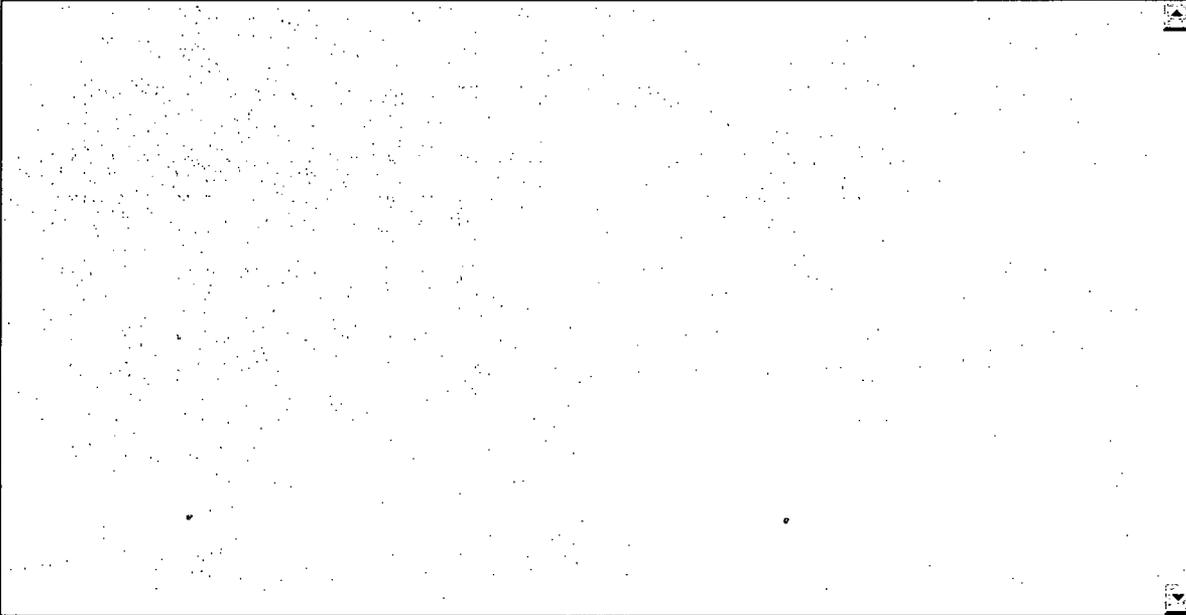
## Sunshine Act Project: Commissioner/Board Member Survey

**9. Do you believe that Commissioners/Board Members have adequate opportunities to work out compromises between their positions or narrow the issues in dispute?**

Yes

No

**If not, why do you feel the opportunities to work out compromises or narrow the issues are inadequate?**



# Sunshine Act Project: Commissioner/Board Member Survey

## Influences on Decisionmaking (Question 10)

**10. What, if any, influence do the views and positions of the following individuals have on your decision on issues before your Commission/Board?**

	Very influential	Substantially Influential	Little Influence	No influence at all	Not Applicable
Other Commissioners/Board Members	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Chairperson of your Commission/Board (If you are the Chairperson, please select <b>Not Applicable.</b> )	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Members of your personal staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Members of agency staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**If you would like to explain your answer, you may do so here:**

# Sunshine Act Project: Commissioner/Board Member Survey

## Notational Voting (Questions 11-14)

**Background:** Notational voting, also known as "sequential" or "seriatim" voting, involves circulation of an action item and supporting materials to each Commissioner/Board Member for him or her to vote on the matter.

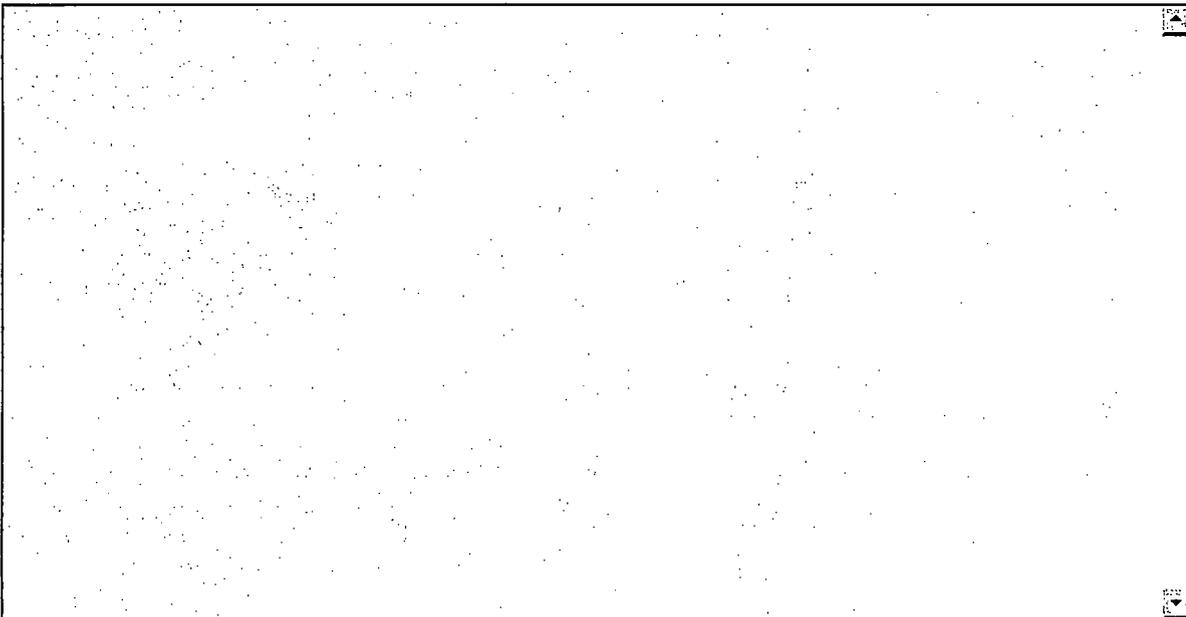
### 11. Does your Commission/Board engage in notational voting?

- Yes
- No (If your answer is "No," please skip to question 15.)

### 12. How frequently is a decision made by notational vote without a follow-up meeting when there is disagreement on the Commission/Board (as evidenced by conflicting notational votes, i.e. one or more yeas and one or more nays)?

- Almost always
- Frequently
- Infrequently
- Almost never

If you would like to explain your answer, you may do so below.

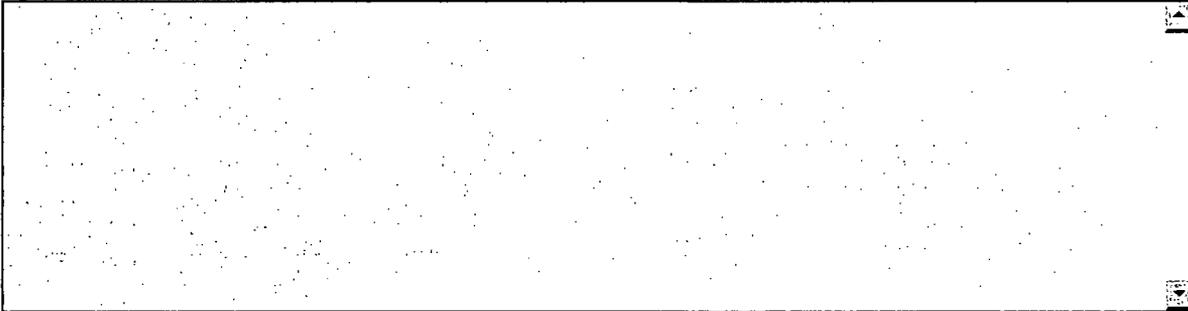


## Sunshine Act Project: Commissioner/Board Member Survey

**13. How frequently is the decision made by notational vote without a follow up meeting on novel matters of policy or novel issues of fact or law?**

- Almost always
- Frequently
- Infrequently
- Almost never

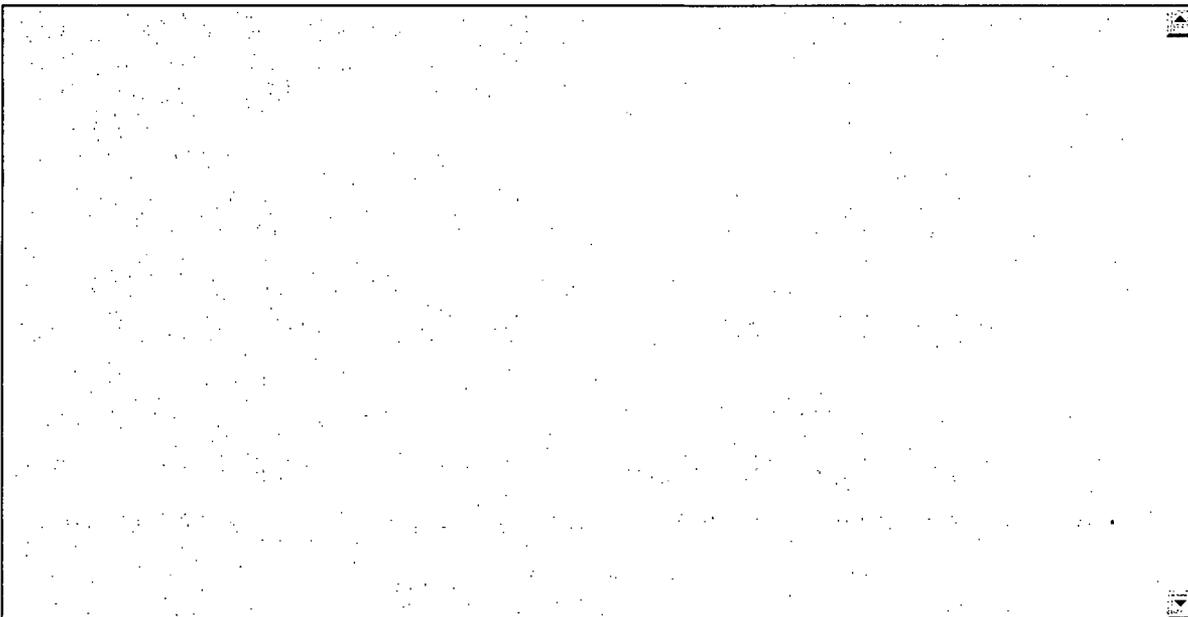
If you would like to explain your answer, you may do so below.



**14. Do you believe notational voting is used too frequently or not frequently enough by your Commission/Board?**

- Too frequently
- Just about the right amount
- Not frequently enough

If your answer is "too frequently" or "not frequently enough," please explain.



# Sunshine Act Project: Commissioner/Board Member Survey

## Brainstorming Sessions (Questions 15-17)

**Background:** Some have advocated that Commissions/Boards have sessions that are not focused on a particular issue before the board, but that are general brainstorming sessions, either (1) to come up with lines of inquiry or options for further consideration, or (2) to give the Commission/Board an opportunity to assess trends or discuss how the agency is performing in general. Please answer the questions below regarding brainstorming sessions.

**15. Does your Commission/Board have brainstorming sessions such as those described above?**

- Yes
- No (If your answer is "No," please skip to Question 17.)

**16. If you answered "yes" to the previous question, are the brainstorming sessions held as open Sunshine Act meetings?**

- Almost always unless an exemption applies
- Sometimes
- Never

**17. Regardless of whether your Commission/Board has brainstorming sessions, how important do you feel it is to have such sessions for the following purposes:**

	Very important	Somewhat important	Not important
Development of lines of inquiry or options for further consideration	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assessment of trends	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Discussions on the agency's performance	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**If you answered "very important" or "somewhat important" to any of the choices above, please provide one or two examples of subjects regarding which such brainstorming sessions would be particularly fruitful.**

## Sunshine Act Project: Commissioner/Board Member Survey

### Briefings (Questions 18-20)

**Background: Some have thought that being able to have closed staff briefings on general matters (such as basic concepts, legal doctrines, or trends relevant to the agency's responsibilities) is significant. Answer the questions below regarding staff briefings.**

**18. Does your Commission/Board have either open or closed meetings to receive briefings?**

- Yes
- No (If your answer is "No," please skip to Question 21.)

**19. If yes, are the meetings to receive briefings open to the public?**

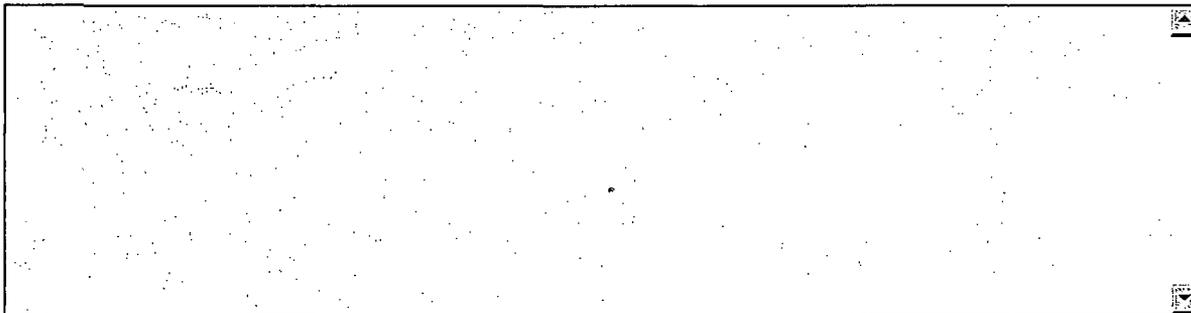
- All are
- Most are
- The number of closed and open meetings are about equal
- Most are not
- None are

## Sunshine Act Project: Commissioner/Board Member Survey

**20. Some Commissions/Boards have closed briefings that they do not consider subject to the Sunshine Act. (Such sessions might be referred to as "gatherings"). If your Commission/Board has such closed briefings, how easy or difficult is it for you to determine which comments or questions are consistent with the principle that Commissioners/Board Members cannot "deliberate" in closed briefing sessions (unless the meeting has been closed pursuant to an express exemption in the Sunshine Act)?**

- Very easy
- Easy
- Difficult
- Very difficult
- Not applicable, I am unaware of such a principle.

If you wish to explain or elaborate upon your response, you may do so here:



# Sunshine Act Project: Commissioner/Board Member Survey

## General Questions (Questions 21-23)

**21. How often do you discuss or explain your position or views at open Sunshine meetings?**

- Almost always
- Frequently
- On a number of occasions
- Seldom
- Never

If your answer to Question 21 is **almost always, frequently, or on a number of occasions**, please skip to Question 23.

**22. If your answer to the question above is "seldom" or "never," please answer the following question. How important, if at all, is each of the following in your decision not to speak more often? (You may mention other reasons for speaking infrequently by using the "other reasons" slot below.)**

	Very Important	Important	Slightly Important	Not a factor at all
I do not feel the need to speak more often.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I feel any such statement will have no effect on other members.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I am concerned about making an erroneous or inaccurate statement.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I feel that any such statement, even if factually accurate and correct, may cause confusion or mislead either regulated entities or the public.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I am following Commission/Board custom of not speaking extensively at open meetings.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

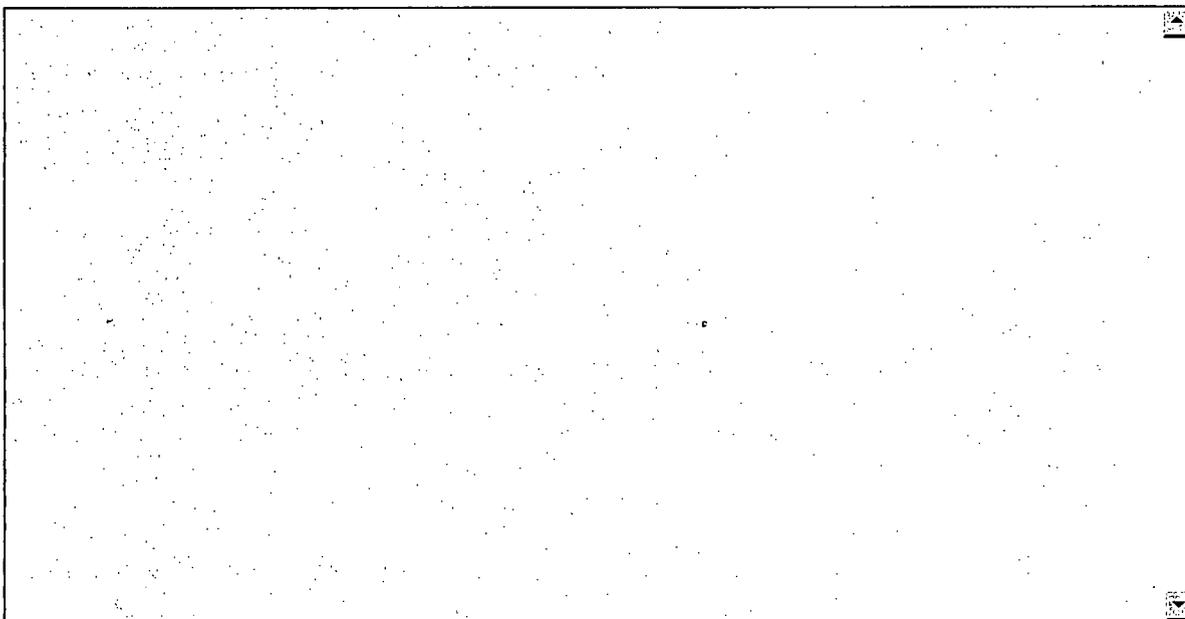
**Other Reasons:** Please specify other reasons and their importance (very important, important, slightly important, not a factor at all) in the space below.

# Sunshine Act Project: Commissioner/Board Member Survey

## 23. How often do the partisan affiliations of Commissioners/Board Members significantly inhibit the ability of the Commission/Board to work together?

- Almost always
- Frequently
- On a number of occasions
- Seldom
- Never
- On my Commission/Board, there is no requirement of political balance in appointments.

If you wish to explain or elaborate upon your response, you may do so here:



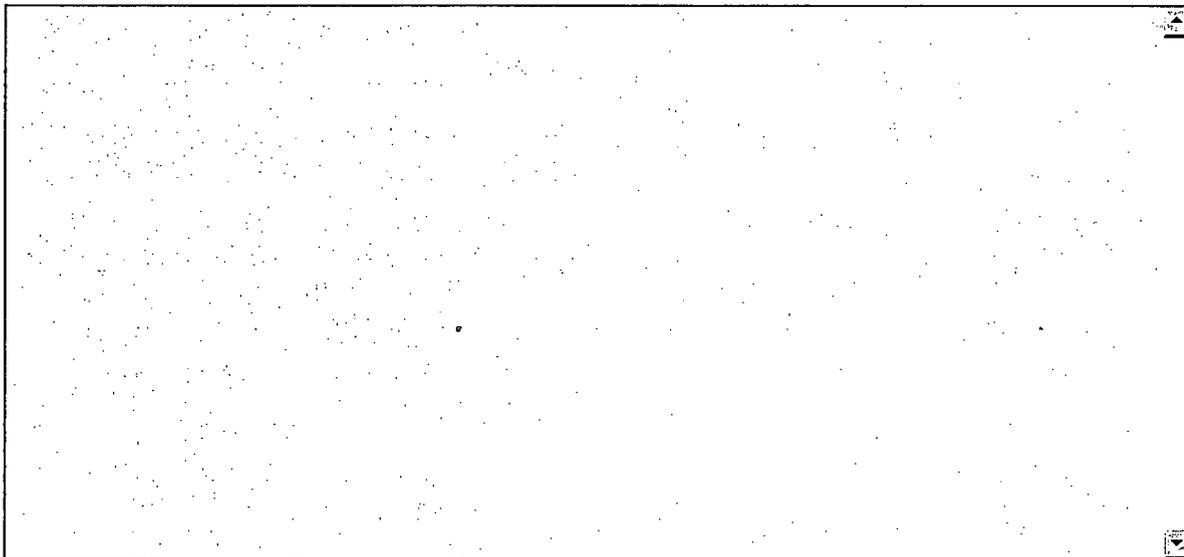
# Sunshine Act Project: Commissioner/Board Member Survey

## Overall Assessment of the Sunshine Act (Questions 24-25)

**24. Given the way your Commission/Board operates, do you think the quality of decisions would be better, worse, or about the same if they were made by an individual agency head rather than a Commission/Board?**

- Better
- About the same
- Worse

**If you would like to explain, you may do so here:**

A large, empty rectangular box with a thin black border, intended for the respondent to provide an explanation for their answer to question 24. The box is currently blank.

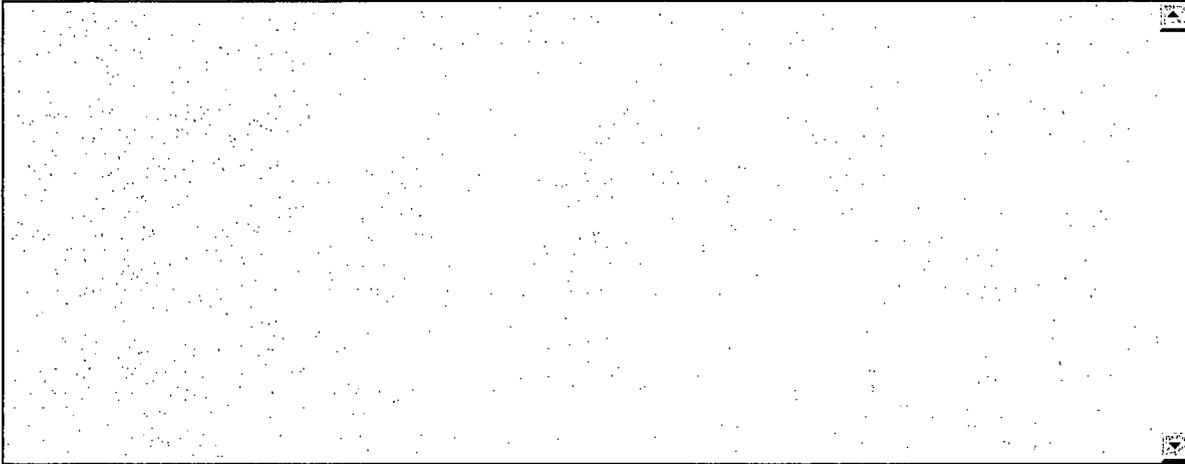
# Sunshine Act Project: Commissioner/Board Member Survey

## 25. Do you think the Sunshine Act should be modified?

Yes

No

If "yes," explain how you would modify it and why. If you answered "no," you may explain, if you wish, why the Act should not be modified.



# Sunshine Act Project: Commissioner/Board Member Survey

## Confidentiality/Assistance of Others/Further Comments

As noted at the beginning of this survey, Unless you request otherwise, your responses to this survey will be treated as public information. If you request confidentiality, any of your data used in a report will be presented only aggregated with other data, and any of your narrative responses that appear will not show any attribution to you. Any requests by the public for underlying data and responses will be assessed in light of all applicable FOIA exemptions which protect the interagency deliberative process, privacy rights, and trade secrets.

*Pitch for refraining from invoking confidentiality: reports that rely on comments made anonymously have less credibility than those which rely on sources that are willing to have their comments attributed.*

**Would you like to invoke the confidentiality provisions with respect to your answers?**

- Yes
- Yes, to a limited extent as described below.
- No

**Qualifications (e.g., invoke confidentiality only with regard to written responses to Questions 10 and 22; invoke confidentiality only as to my personal identity but not with respect to my agency's identity):**

**If you consulted with anyone in answering this survey, please identify such person or persons by position below:**

## Sunshine Act Project: Commissioner/Board Member Survey

**If you have any other thoughts or suggestions regarding the Sunshine Act, please indicate them in the space below.**

**This is the end of the survey. Please submit the survey by selecting the option below. If you would like to provide additional information on the Sunshine Act's application to your Commission or Board, please do so below or contact Professor Bernard W. Bell at [bbell@kinoy.rutgers.edu](mailto:bbell@kinoy.rutgers.edu).**