

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS

TELEPHONIC MEETING OF THE
OPERATIONS AND REGULATIONS COMMITTEE

OPEN SESSION

Tuesday, August 17, 2010

11:02 a.m.

Legal Services Corporation
3333 K Street, N.W.
Washington, D.C. 20007

COMMITTEE MEMBERS PRESENT:

Thomas R. Meites, Chairperson
Jonann C. Chiles
Robert J. Grey, Jr.
Charles N.W. Keckler
Laurie I. Mikva
John G. Levi, ex officio

OTHER BOARD MEMBERS PRESENT:

(None)

STAFF AND PUBLIC PRESENT AT THE CORPORATION'S OFFICES:

Victor M. Fortuno, Interim President and General Counsel
Kathleen Connors, Executive Assistant to the President
Patricia Batie, Acting Corporate Secretary and FOIA Officer, Office of Legal Affairs
David L. Richardson, Treasurer and Comptroller
Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs
Mark Freedman, Senior Assistant General Counsel, Office of Legal Affairs
Linda Mullenbach, Senior Assistant General Counsel, Office of Legal Affairs
Atitaya Pratoomtong, Staff Attorney, Office of Legal Affairs
Laurie Tarantowicz, Assistant Inspector General and Legal Counsel, Office of the Inspector General
Thomas Hester, Associate Counsel, Office of the Inspector General
Alice C. Dickerson, Director, Director of Human Resources
John C. Meyer, Director, Office of Information Management
Stephen Barr, Media Relations Director, Government Relations and Public Affairs Office
Treefa Aziz, Government Affairs Representative, Government Relations and Public Affairs Office
Kamala Srinavasagam, Program Counsel III, Office of Compliance and Enforcement

Linda Perle, Center for Law & Social Policy (CLASP)

C O N T E N T S

OPEN SESSION	PAGE
1. Approval of agenda	4
2. Approval of minutes of the Committee's Open Session meeting of July 30, 2010	4
3. Consider and act on potential initiation of rulemaking to amend 45 CFR Part 1622 to remove from its requirements the Board's Search and Development Committees and the Board's Governance & Performance Review Committee when it is meeting to consider performance evaluations of the President and the Inspector General	5
Presentation by Mattie Cohan, Senior Assistant General Counsel Comment by Laurie Tarantowicz, Assistant Inspector General and Legal Counsel Public Comment	
4. Public Comment	48
5. Consider and act on other business	49
Adjourn to closed session	51
CLOSED SESSION	
6. Approval of minutes of the Committee's Closed Session meeting of July 31, 2010	
7. Consider and act on an employee benefits matter	
8. Consider and act on adjournment of meeting	
Motions: 4, 4, 45, 51	

1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHAIRMAN MEITES: This is the properly noticed
4 meeting of the Ops and Regs Committee. I am the chair,
5 Tom Meites, and I will accept a motion to approve the
6 agenda.

7 M O T I O N

8 MR. GREY: Move it.

9 MS. CHILES: Second.

10 CHAIRMAN MEITES: All in favor?

11 (A chorus of ayes.)

12 CHAIRMAN MEITES: And the agenda is approved.

13 Next, approval of minutes of our open session
14 meeting of July 30, 2010 in Milwaukee. Is there a
15 motion to approve those minutes?

16 M O T I O N

17 MR. GREY: Move it.

18 MS. CHILES: Second.

19 CHAIRMAN MEITES: All in favor say aye.

20 (A chorus of ayes.)

21 CHAIRMAN MEITES: We have two items of
22 business. The first is to consider and act on

1 potential initiation of rulemaking to amend 45 CFR Part
2 1620 to remove from its requirements the board's
3 Search, Development, and Governance & Performance
4 Review Committee, or some or all of those committees.
5 And the latter, what it means to consider performance
6 evaluation of the President and the Inspector General.

7 We've had several discussions of this already.

8 However, at the last board meeting there was an
9 indication from the board that given that we are about
10 to embark on the active part of a search for a new
11 president, that of the three committees, the one that
12 our attention should be focused on is the search
13 committee.

14 And I propose we do that. And if the members
15 of the committee want also to discuss the other two
16 committees, Governance & Performance Review and
17 Development, we certainly will do that. But let us
18 initially focus on the Search Committee.

19 According to the materials I received, we're
20 going to have a propose from management and the Office
21 of the Inspector General. Is that correct?

22 MS. COHAN: Yes.

1 CHAIRMAN MEITES: All right. Whoever's going
2 to speak first, introduce yourself and speak loudly.
3 And let me tell you that I've read all the materials,
4 and there is a matter which I do not believe is
5 properly considered.

6 It is assumed, I believe, that under the
7 regulation exemptions for meetings in which is more
8 problem, not the commercial or financial information
9 obtained from person which is privileged or
10 confidential, or information of a personal nature,
11 public disclose which would constitute a clearly
12 unwarranted invasion of personal privacy would allow
13 each of -- or any of the three committees, but more
14 particularly the search committee, for meeting in
15 closed session.

16 I would like someone to give us the basis of
17 that, for that conclusion, whether in the past, in
18 fact, the Search Committee has met in closed session
19 and if there have been any questions raised about the
20 propriety of it so meeting.

21 MS. COHAN: Okay.

22 CHAIRMAN MEITES: With that as background, go

1 ahead.

2 MS. COHAN: Absolutely. This is Mattie Cohan
3 with the Office of Legal Affairs. Before I start, I
4 will say that I have been asked to ask folks on the
5 phone to speak up more and to identify themselves when
6 they speak. I'm passing on that message.

7 I will start by answering your question, in
8 that previous Search Committees, yes, have met in
9 private. The Search Committee, especially -- and I'll
10 use this Search Committee as an example, has kind of
11 done two things.

12 The first work that the Search Committee did
13 was issue an RFP and review proposals and select and
14 recommend a search firm. We have in the past -- the
15 last search, we didn't go that RFP route. But we do
16 have previous examples of when we've hired like
17 financial services firms to run our 403(b) program.

18 We have done those -- some of those meetings,
19 where we've talked about their
20 financial -- confidential financial information, we've
21 done those in closed session. We have research on that
22 supporting that. So that's kind of an analogous

1 situation because we haven't done a competitive search
2 proposal, process, in a while.

3 And then with respect to the actual work of
4 the Search Committee in terms of suggesting, talking
5 about, vetting, interviewing candidates, those have
6 been held in private session. There's a whole -- in
7 closed session, sorry. There's a whole line of cases,
8 most of which come out of the FOIA situation rather
9 than Sunshine, but in this case the clearly unwarranted
10 invasion of personal privacy exceptions are generally
11 taken as co-extensive.

12 And there's a number of cases that hold that
13 the personal privacy information of someone who is not
14 yet an agency employee, that there is both a lesser
15 expectation of public interest in information about
16 those people, and a higher expectation of personal
17 privacy for those people.

18 So there's a whole host of case law protecting
19 information about people who are applying for but not
20 yet government employees. So that's where that case
21 law comes from.

22 I will say that to the extent that closing a

1 meeting -- the way the exemptions work is there are
2 very few situations in which a meeting that can be
3 closed must be closed. There are a few, but there are
4 situations in which, although a meeting would -- a
5 particular discussion would qualify for closure, the
6 board or the committee could still have a discussion in
7 public.

8 It was my understanding that -- and part of
9 that assumption about the closing of the sessions that
10 went into both the memo and the redrafted NPRM came
11 from an understanding that I had from the committee and
12 the board that they were really two administrative
13 concerns that the board and the committee had about the
14 Sunshine Act, one of which being the necessity for the
15 board to vote to close the meeting, and the necessity
16 that the board vote every time that there's going to be
17 a meeting if we know we're going to be closing it
18 anyway; and then the other one being the seven-day
19 advance public notice.

20 Certainly if there were meetings that the
21 committee did not want to have or the board did not
22 want to have closed, they could vote not to close them.

1 So I hope -- does that answer your question? Do you
2 want any more about that? I don't want to flog this if
3 that answered your question.

4 CHAIRMAN MEITES: Yes. I think where I end up
5 with is that an alternative that's available to us,
6 which has been used in the past, at least for this
7 search, is to use board-authorized closed sessions of
8 the Search Committee --

9 MS. COHAN: Correct.

10 CHAIRMAN MEITES: -- as we've done in the
11 past.

12 MS. COHAN: Correct.

13 CHAIRMAN MEITES: Which would not require us
14 to initiate any kind of rulemaking under the kind of
15 time pressure which we might be facing. Is that
16 correct?

17 MS. COHAN: That's correct. And so a third
18 option that I did not include in this paper, but is
19 certainly an option, is that the committee can just do
20 what it's been doing and kind of go along on an ad hoc
21 basis, setting up meetings when it wants and making
22 sure that if that meeting is going to be held in closed

1 session, that there is some opportunity for the board
2 to vote to close that particular meeting, without doing
3 anything differently.

4 CHAIRMAN MEITES: Mattie, when you say the
5 board has to vote, we had some confusion about a
6 notational vote before. Can you explain the ways that
7 the board can act?

8 MS. COHAN: Sure. At the board can vote in
9 a -- to vote to close a meeting doesn't require in
10 itself being called a meeting and public noticed. But
11 a gathering of the board would then require, whether
12 it's by telecon or in person, a majority vote.

13 If the board is going to take official actions
14 by notational vote, which is just basically a
15 sequential set of paper, something that gets faxed out
16 and then each member just responds, again by paper,
17 notational votes must unanimous for whatever the motion
18 is to carry.

19 So if, for example --

20 CHAIRMAN MEITES: Go ahead.

21 MS. COHAN: -- if the board wanted to vote to
22 close a particular meeting, if the board was meeting by

1 telecon, or if they were at dinner the night before the
2 meeting, so there's a gathering of a quorum of them,
3 they could vote -- a majority of the board could vote
4 to close that meeting. But it would not have to be
5 unanimous.

6 CHAIRMAN MEITES: So that for this -- the
7 first method of meeting, we don't have to give formal
8 notice. It could be done just by an e-mail from Pat
9 saying, we're going to have a phone call but X, and we
10 could do that informally. Is that correct?

11 MS. COHAN: To discuss for the board to vote
12 to close the meeting, yes. The organization of the
13 board members to have that vote is not itself a meeting
14 subject to sunshine. So yes, so an e-mail saying,
15 we're going to get together at 11:30 to vote to close
16 the next meeting of the Search Committee, that can be
17 done informally, and that vote can be taken and a
18 majority vote will close the meeting.

19 If it's done by a notational vote --

20 MS. MIKVA: Where does the requirement --

21 CHAIRMAN MEITES: Who's speaking, please?

22 Identify yourself. Go ahead.

1 MS. MIKVA: This is Laurie Mikva. Where does
2 the requirement that notational vote be unanimous,
3 where does that come from?

4 MS. COHAN: That is in the bylaws, I believe.
5 That is in the LSC bylaws.

6 MS. MIKVA: Thank you.

7 MR. LEVI: But this is the problem that I'm
8 having. First of all, briefings, as I understand, or a
9 report from the consultant as to what they've been
10 doing at which no decisions are going to be made, that
11 doesn't require any notice or closure or anything. Is
12 that correct?

13 MS. COHAN: A briefing, which is basically a
14 one-way transmission of information from the consultant
15 to the committee, is not a "meeting" under sunshine and
16 does not have to be noticed. The rub is that it's not
17 just that decisions are made but that if deliberations
18 take place. Once the committee members start talking
19 amongst themselves --

20 MR. LEVI: No. I understand. But I'm asking
21 a precise legal question. That's correct. A one-way
22 transmission of information from the Search Committee

1 to the -- sorry, from the consult to the Search
2 Committee is a briefing, is not a meeting under
3 sunshine, and none of the Sunshine Act staff is
4 implicated with that. That's correct.

5 MR. LEVI: Then tell me -- then the next is,
6 we're down to -- we're now at the point where we're
7 past the briefing stage, which is probably a [audio
8 blip], and they've actually started to -- they've
9 started to have candidates. And there are actual
10 discussions about the candidates.

11 Is that a meeting?

12 MS. COHAN: That is a meeting.

13 MR. LEVI: The interview of a candidate?

14 MS. COHAN: That is a meeting.

15 MR. LEVI: Why --

16 MS. COHAN: Okay. I'll back up. If you have
17 a candidate in, and all you are doing is meeting with
18 the candidate, and it's just a question from -- I mean,
19 that's an interesting question. If all it is is a
20 series questions between --

21 MR. LEVI: This is extremely important. The
22 seven-day notice issue is very pertinent to search

1 committees --

2 MS. COHAN: Right. Can --

3 MR. LEVI: -- because candidates may need to
4 be scheduled on a moment's notice, and they may have
5 other offers pending.

6 MS. COHAN: Right.

7 MR. LEVI: And the committee needs to be
8 adroit and quit. So this is extremely important, and
9 the seven-day notice issue is not to be minimized here
10 as a problem. It's a huge issue, unless what you're
11 saying, on the last board telephone call where I raised
12 this issue about establishing the right ahead of time
13 to have closed meetings without the seven-day notice
14 but giving one general notice, I was told that would
15 only exist for 30 days or something.

16 MS. COHAN: That's correct. If I -- let me
17 address your legal point first, if I may. I think
18 there is an interesting legal question. If all that is
19 happening is if individual members of the committee are
20 asking questions of the interviewee, okay, and there is
21 no discussion amongst them, there is an argument to be
22 made that that might not be a meeting.

1 Although I think there's also an argument to
2 be made that to the extent that -- if I'm watching a
3 give-and-take between another person and the
4 interviewee, if I'm on the Search Committee, watching
5 that colloquy between my colleague and the interviewee
6 does in fact impart information that helps
7 solidify -- I'm not ignoring their conversation. It's
8 not like I'm only coming in and interviewing
9 one-on-one.

10 If there's a group interview, all of the
11 information that is adduced is part of the committee's
12 deliberative process. So I don't think the legal
13 answer to that particular question is cut and dried.

14 That said -- that said --

15 MR. LEVI: Wait a minute. But that's quite
16 important because it's also raising an expense issue
17 that we have to get a court reporter each time, which
18 is not an insignificant expense. If you envision that
19 there could be ten or twenty such interviews, we could
20 be talking about \$40,000 in transmission fees.

21 MS. COHAN: John --

22 MR. LEVI: This is, to me, a ridiculous

1 expense.

2 MS. COHAN: I agree that that would be very
3 expensive. However, what could be done and what has
4 been done in the past for interviews is that the
5 sessions have merely been recorded, passively recorded.
6 We have not had a court reporter, so we have incurred
7 those costs.

8 MR. LEVI: No, but that's a chilling effect on
9 the interview because the individual in the room being
10 potentially asked personal stuff, and even possibly
11 hasn't told their current employer that they're under
12 consideration, they may feel very skittish about
13 anything being recorded by anything.

14 MS. COHAN: But to the --

15 MR. LEVI: Nobody trusts that these things are
16 kept confidential.

17 MS. COHAN: Well, all I -- I hear what you're
18 saying, John. I will say that in the past --

19 MR. LEVI: No one argues --

20 MS. COHAN: -- this is what --

21 MR. LEVI: Nobody argues for -- what I hear
22 you guys saying is, we've always done it this way.

1 It's been okay. I don't think it's been okay. I don't
2 think we --

3 CHAIRMAN MEITES: Well, John --

4 MR. LEVI: So I'm willing to run this search
5 through these traps. I'm willing to put up with this.

6 But I don't think that the Corporation should sit
7 there saying, oh, this has worked wonderfully for us in
8 the past, and incidentally, therefore we should just
9 keep it in the future because you know what? I'd like
10 you guys to tell me what other government agencies and
11 government corporations run their searches under the
12 sunshine.

13 MS. COHAN: Well, any agency that is subject
14 to the Sunshine Act runs their searches subject to the
15 requirements of the Sunshine Act. Most government
16 agencies are not subject to the Sunshine Act because
17 they don't have governing bodies. They have a single
18 point head of the agency. The EPA has an
19 administrator. They are not an agency subject to the
20 Sunshine Act.

21 But agencies that are subject to the Sunshine
22 Act do have to do this. And like I said, with the case

1 law about protecting the information about government
2 interviewees, government position interviewees, a lot
3 of that comes out of the FOIA context, where there are
4 written records regarding an interviewee, whether it's
5 sort of -- whether it's e-mails or other written
6 reports comparing various candidates that the
7 decision-maker is using to make the decision about
8 hiring.

9 Those records are made and kept, and there is
10 a body of case law which says they do not have to be
11 released publicly and they are not released publicly.
12 And the same has been true about recordings made of
13 interviews with candidates for positions here.

14 Those interviews have been recorded, and those
15 recordations are kept privately. And were somebody to
16 ask for one of them, although I'm not the direct FOIA
17 officer, I believe the answer would be, no. That's
18 something that's withholdable and we're not going to
19 release it. So --

20 CHAIRMAN MEITES: Mattie, this is Tom. We got
21 you off track, and let's try to get you -- my fault. I
22 want to get you back on track --

1 MR. LEVI: It's totally my fault. Tom, it's
2 my fault.

3 CHAIRMAN MEITES: Well, in any event, we've so
4 far been discussing two possibilities. One is that we
5 continue business as usual, which does not require any
6 board action, any rulemaking. The other is to exempt,
7 by rule, search committee proceedings from our own
8 homemade Sunshine Act.

9 Mattie, why don't you discuss those two
10 possibilities and what management's position is on it.

11 MS. COHAN: Sure. What we haven't discussed
12 is a couple of the options that were in my memo. Do
13 you want me to skip over those for now?

14 CHAIRMAN MEITES: No. Your options are
15 mechanical. They are ways to avoid having to call the
16 board too often to vote on closed meetings. I think
17 that that's not the core issue. It seems the board
18 could just do a phone-around to get that handled, and
19 you might want a protocol to make it even easier.

20 But it seems to me that the administrative
21 burden on the staff in getting the board to say, yes,
22 we want a closed meeting a week from Thursday,

1 authorize a closed meeting, is something we can work
2 out. I would rather you focused on the substantive
3 issue, whether management prefers that we continue
4 business as usual or recommends that in fact we have a
5 rulemaking, which may lead to a change in our
6 regulation.

7 MS. COHAN: I'm going to let Vic, as
8 management, speak to that.

9 PRESIDENT FORTUNO: I think that in terms
10 of --

11 CHAIRMAN MEITES: Vic, you've got to speak as
12 loud as you can.

13 PRESIDENT FORTUNO: I'm sorry. I think that
14 the characterization of "business as usual" is kind of
15 broad. I think that, for example, John did highlight a
16 point which I think is available to the board. I think
17 that so long as the interview is in the way of a
18 briefing, the interview can occur without triggering
19 all of the Sunshine Act requirements.

20 What you have to be careful of is that you
21 don't, while having an interview, treat it as a
22 briefing, where you're simply acquiring information

1 from the candidate, that you don't start to -- board
2 members start to weigh the relative merits of the
3 candidates and others.

4 So you just want to make sure --

5 CHAIRMAN MEITES: Let me ask you, let's say
6 that the search committee interviews John Smith, and he
7 leaves and someone says, in passing, "Boy, that guy
8 just doesn't have what it takes." That would not be a
9 proper remark, would it?

10 PRESIDENT FORTUNO: No, it would not, because
11 that would be said to your colleagues and potentially
12 influence the views of your colleagues. And that is
13 what deliberation's all about.

14 MR. LEVI: Well, what if it went something
15 like this? You had seven interviews. A couple people
16 were in person. A couple of people were on the line.
17 The interview's over and nothing more is said. There
18 are seven such interviews, but we know with the
19 seventh, when that's concluded, we're going to have a
20 meeting following it as we did -- that's what we did
21 with the interviews with the search firms.

22 We did not make comments about the search

1 firms. We just conducted the interviews, and then we
2 had a meeting that was noticed later on that then
3 discussed the relative merits.

4 PRESIDENT FORTUNO: And that, I think, is
5 fine. If there are seven pristine interviews -- and in
6 fact, that's always been the case. I think the reason
7 why a recording was made was if anyone ever challenged
8 whether sunshine was violated, it's easier to
9 demonstrate that it was not if you have a recording of
10 the session and can produce that for an in camera
11 inspection by the court.

12 On the other hand --

13 MR. LEVI: The other way, it's easier to prove
14 that it was if someone makes the remark that I
15 hypothesized.

16 PRESIDENT FORTUNO: That's right. You're able
17 to produce a recording, if we're sued, and suits of
18 this nature occur, and the Corporation has been sued
19 over the years, to produce the recording to demonstrate
20 that, in fact, no, it wasn't said.

21 On the other hand, while we're free --

22 MR. LEVI: Which way does that argue, then, as

1 to whether we should continue this practice?

2 PRESIDENT FORTUNO: Well, and that's what I
3 was getting at, was I think that characterizing the
4 practice as just we have to continue to record, I don't
5 think we have to continue to record. I think that so
6 long as there are these pristine interviews, I think
7 they're fine without triggering sunshine.

8 I think that any time you're going to have
9 deliberations, discussions among board members weighing
10 relative merits, that has to be noticed. I think so
11 long as you're walking that line, you're fine.

12 I think that in the past, the reason why the
13 recording has been made as been out of an abundance of
14 caution. As I said, it's easier to prove that
15 something didn't occur if you have a recording of the
16 session. Otherwise, what happens is you get into
17 essentially a swearing contest. So you have
18 depositions, and folks --

19 CHAIRMAN MEITES: The recording is kind of a
20 side issue. Can you give us management's
21 recommendation on whether we should continue our
22 practice, which is to have both the interviews and the

1 deliberations, in closed session; or a hybrid that John
2 is suggesting, do the interviews, be very careful not
3 to deliberate, and then have a formal closed session
4 meeting; or the third alternative that emerges when we
5 notice our agenda to amend our regulation to except the
6 Search Committee? What is management's position on
7 that?

8 PRESIDENT FORTUNO: I think it's fair to say
9 management position is that we would not foreclose that
10 option for the board. So if the board elected to go
11 with the interviews not treated as closed session
12 because they were strictly handled as a briefing, we
13 would not want to be in a position of telling the board
14 you should or should not.

15 Were I in your shoes, I might be inclined to
16 go with the recording just as a safeguard. But then
17 again, the countervailing considerations have been, I
18 think, laid very well by John Levi, for example, and
19 others. So I think you can do that. And I don't
20 think --

21 CHAIRMAN MEITES: Vic, excuse me. Go back to
22 the main choice, between some kind of operating under

1 our present regulation, or amendment the regulation to
2 except the Search Committee. Which does management
3 recommend to us?

4 PRESIDENT FORTUNO: Going with not amending
5 the regulation, and instead revising the process that
6 has been employed to, for example, follow the outline
7 described by John Levi, which I think --

8 CHAIRMAN MEITES: What's the basis for that
9 recommendation?

10 PRESIDENT FORTUNO: Just that I think that,
11 one, to engage in a rulemaking is going to take so much
12 time that by the time you accomplish it, you will have
13 been done with the interviews. So it will not address
14 the immediate concern here.

15 If, on the other hand, you want to do the
16 rulemaking because you're concerned about future issues
17 and are willing to address the search in the way that I
18 think John proposed earlier, you can do that.

19 I think that whether we exclude certain
20 committees from sunshine can be a delicate issue; I
21 think it'll attract some attention. I think we need to
22 be mindful of the fact that the reason why we're

1 subject to sunshine to begin with was that back in the
2 '70s, there was some concern about transparency, so we
3 were statutorily subjected to sunshine when we hadn't
4 been prior to that.

5 So I think it's a complicated issue, and I
6 think it's one that has to be studied carefully if
7 we're going to undertake a revision of sunshine to
8 withdraw from it certain committees. And I think that
9 you will hear differing views on whether it can be
10 accomplished at all.

11 I think the IG is here, or the IG's folks, and
12 I think they'll tell you that it can't be accomplished
13 at all. I'm not sure I agree with so --

14 MR. LEVI: What would be the basis for that?

15 PRESIDENT FORTUNO: Pardon me?

16 MR. LEVI: What would be the basis for that?

17 CHAIRMAN MEITES: Well, wait. John, let's
18 wait till we get to the IG because it's not Vic's
19 position, I know from past debates about this. Why
20 don't we just hold it for a minute.

21 MR. LEVI: Well, it's clear to me that we're
22 stuck for this search because you're saying how

1 complicated the rulemaking would be. But I'm also
2 trying to avoid the -- when you say make a recording,
3 that's not -- once you go down that road, you've got to
4 have that done professionally. We're talking about a
5 not insignificant expense here, which I'm really
6 wondering about the propriety of.

7 PRESIDENT FORTUNO: I think what's happened in
8 the past is that it's been a small handheld recorder
9 that's been placed on the table. The interviewee has
10 been told in advance of the session, and then again at
11 the session. At the session, it's with the recorder
12 on, explaining why it's being done and getting the
13 interviewee's consent.

14 It's not been an expensive recorder. I think
15 that now that we're farther along technology-wise, for
16 example, the interviews that were done for inspector
17 general used a digital recorder as opposed to the old
18 analog. But we're talking about a \$150 piece of
19 equipment which I think we already have.

20 So I'm not sure that cost is a salient
21 consideration here. But I think what happens then is,
22 for example, describing what's happened in the past, in

1 the case of the IG search, when the chair of -- when
2 the interviews were concluded for the day, the chair of
3 the committee would call up. I would go down with a
4 technician, who would take it out of the machine, hand
5 it to me. I would then have it --

6 MR. LEVI: But these interviews are not going
7 to take place at LSC. They're going to take place
8 around the country. People may be on the telephone.
9 It's not --

10 PRESIDENT FORTUNO: I mean, we can go through
11 the mechanics of it. I don't know if you want to do
12 that. I mean, obviously, if you're in Chicago or San
13 Francisco --

14 MR. LEVI: But I'm just nixing that
15 recommendation. It's idiotic.

16 PRESIDENT FORTUNO: Well, I think you can take
17 the tape out of the machine and put it in an envelope
18 and just seal it.

19 MR. LEVI: What I'm saying is you've got
20 people in ten different cities on the phone.

21 PRESIDENT FORTUNO: Yes.

22 MR. LEVI: There is no way that my putting a

1 Sidley Austin recorder on a conference room table is
2 going to pick up people from all over the country on
3 the telephone. And we're not having these interviews
4 conducted in a conference room with everybody present.

5 And I'm not going to put the Corporation to that
6 expense, of having everybody fly to a meeting.

7 So I don't accept management's view that this
8 is a cheap and easy thing to conduct, and I don't think
9 it's well thought through. And frankly, it's
10 disappointing to me that it isn't.

11 CHAIRMAN MEITES: John, let me ask to hear
12 from other members of the committee. The floor is
13 open. Introduce yourself before you speak, please.

14 PROFESSOR KECKLER: This is Charles Keckler.
15 And I think that -- I think it's well taken that
16 whatever we do with this search and go -- I think that
17 this -- it's obvious that this process has been
18 burdensome and has raised some concerns, and that if we
19 can streamline in the future, I think that will be
20 useful both for future searches for the candidates that
21 we interview.

22 One of the things, the proposals that's sort

1 of out there to somewhat limit this burden has to do
2 with us not discussing candidates at all after we spend
3 perhaps an hour or two hours, three hours with them,
4 perhaps, if there's more than one.

5 And I think that's kind of inefficient in the
6 sense that we'll lose a lot of our thoughts and our
7 capacity to make some initial discussions and
8 deliberation at the time at which an interview is done.

9 That's the way I've always done interviews, and I
10 think the way a lot of us have. And that obviously
11 moves into deliberations.

12 So I think that that's not really a very good
13 solution, to have interviews where we can't discuss the
14 candidates and give our immediate impressions. And so
15 I think that those meetings with candidates should
16 incorporate some level of deliberation, and thus should
17 be meetings.

18 And because of that, they have those burdens.

19 And because of that, at least for the future, we ought
20 to consider a rulemaking.

21 CHAIRMAN MEITES: But at the present time, you
22 would go with just closing the Search Committee meeting

1 by meeting. Is that correct?

2 PROFESSOR KECKLER: Well, I think that option
3 2 on the protocol, which we have a monthly
4 notational --

5 CHAIRMAN MEITES: Don't use the word
6 "notational." Just --

7 PROFESSOR KECKLER: All right.

8 CHAIRMAN MEITES: Go ahead.

9 PROFESSOR KECKLER: A monthly meeting to close
10 the sessions of the Search Committee for the next 30
11 days seems like -- I'd leave it to others to see -- it
12 seems --

13 MR. LEVI: That doesn't seem difficult.

14 PROFESSOR KECKLER: It doesn't seem that
15 unworkable. And so perhaps we can use that for now.

16 CHAIRMAN MEITES: Other committee members?

17 MR. LEVI: What Charles said, Tom, it does
18 strike me that maybe the interview itself is separate
19 from the deliberations. So you're not going to talk
20 about the candidate in the candidate's -- so it seems
21 like maybe at that point the interview ends; then maybe
22 there's a meeting. See what I'm saying?

1 CHAIRMAN MEITES: Yes, it is. I'm in a little
2 different place than you are, John. Our committee is
3 only working on -- is working on whether we are going
4 to recommend a rulemaking.

5 MR. LEVI: Right.

6 CHAIRMAN MEITES: In the course of this
7 discussion -- I want to know what the committee thinks
8 about that. But in the course of the discussion, if we
9 don't recommend a rulemaking, how can we fine-tune the
10 existing procedure?

11 MR. LEVI: Right.

12 CHAIRMAN MEITES: And that's fine with me,
13 too, for discussion. But the focus, I think, really
14 should be on the first question of whether we recommend
15 a rulemaking to exempt a search committee. So let me
16 focus on that, at least for the time being.

17 Other committee members?

18 MR. GREY: This is Robert. What's the time
19 frame for making -- what's the --

20 CHAIRMAN MEITES: Robert, I'm having trouble
21 hearing you. A little louder, please.

22 MR. GREY: What's the time frame for

1 rulemaking?

2 CHAIRMAN MEITES: Vic or Mattie?

3 MS. COHAN: The LSC Act requires that if we're
4 going to change our rules, that we provide a 30-day
5 comment period, generally, and that there's adequate
6 notice for comment, which is generally 30 days. And it
7 specifies that changes in rules not become effective
8 until 30 days after the date of the adoption and
9 publication of whatever the final rule is.

10 So at this point you're looking at a couple of
11 months at the very least. We have done rulemakings on
12 shorter notice in emergency situations, but those have
13 generally been when we are focusing on implementing a
14 statutory requirement or loosening a requirement on
15 grantees.

16 I don't know that this particular type of
17 rulemaking really would meet the generally accepted
18 standards for less than the notice that's required in
19 the statute.

20 PRESIDENT FORTUNO: Yes. I think -- this is
21 Vic. And I think, generally speaking, if you're going
22 to undertake a rulemaking of this nature, you're

1 talking about three months, maybe more, easily. I
2 think that can be shortened slightly by having meetings
3 quickly so that you don't have a passage of time between
4 meetings.

5 But you would have to authorize a -- you would
6 have to make a recommendation to the board. The board
7 would have to meet to authorize the publication for
8 comment. We would then -- mechanically, it would take
9 a couple of days for that to actually appear in the
10 Federal Register. The statute requires that we give at
11 least 30 days' notice, I believe --

12 MS. COHAN: I think --

13 PRESIDENT FORTUNO: -- a reasonable
14 opportunity for comment, which has been construed as at
15 least 30 days.

16 MS. COHAN: And then 30 days prior to the
17 effective date for the final rule.

18 PRESIDENT FORTUNO: And then what would happen
19 is any comments that are received would have to be
20 considered. So that would mean some time to consider
21 and present to the committee whatever comments are
22 received because that's the whole purpose of the

1 publishing for comment, is to allow for that.

2 And then once those comments are presented to
3 and considered by the committee, the committee makes a
4 recommendation to the board. The board meets,
5 considers a recommendation, and if it elects to
6 promulgate a revised regulation, it instructs us to do
7 so. And then, again, that just takes a few days to get
8 the supplementary information that accompanies the
9 publication to the Federal Register.

10 And then, once it gets to the Federal
11 Register, they publish it. That normally takes three
12 days or so. And it does not become effective any
13 sooner than 30 days from the actual date of
14 publication.

15 So that's why I say I think you're looking at
16 three months, easily.

17 CHAIRMAN MEITES: Robert? Robert, does that
18 answer your question?

19 MR. GREY: It does. [Audio blip]. First of
20 all, I think we ought to be an agency that is
21 responsive to the needs of the public that we serve,
22 and that we ought to do that in a transparent way, but

1 we ought to do that with the understanding of the
2 business necessity that we as board members and as
3 conservators of the public good are charged with
4 exercising.

5 To me, that means making sound, thoughtful
6 managerial decisions in the best interest of those that
7 we serve and the trust that we've been given.

8 It seems to me that we ought to engage -- in
9 my thought, or at least for us to consider, perhaps
10 doing this on a parallel track; that we continue with
11 the search in earnest, and to the extent that the
12 committee needs to consider matters in confidence
13 because of the applicants and their privacy issues,
14 that we understand that that kind of meeting can occur
15 in a particular month based on the schedule of the
16 search firm, and that we allow ourselves and give
17 ourselves permission to have a board vote on those
18 meetings to give the search committee permission to do
19 that.

20 That seems to me to be just a normal course of
21 handling this in the moment. But I don't see any
22 reason why we shouldn't undertake the rulemaking

1 process simultaneously. I mean, it would inform us
2 about doing it, for one. I'd like to -- I don't mind
3 going through a rulemaking process; I mean, if that's
4 what we do, that's what we do as an agency.

5 And we ought to be transparent about doing the
6 rulemaking and why we're doing it, and that we think
7 it's good -- it makes managerial sense to do it,
8 because we're undertaking this search. And to the
9 extent that the rulemaking concludes before we finish,
10 great; then we can use that process. If it concludes
11 afterwards, fine. Now we're prepared for any other
12 search that we think fits that requirement, of a
13 high-level executive person whose confidentiality needs
14 to be preserved in a certain process. That's my
15 thought.

16 CHAIRMAN MEITES: Robert, I think that -- let
17 me put together both your thought and Charles' thought,
18 if I can, and see if we can get close to a consensus,
19 that we -- our recommendation to the board is that the
20 search committee proceed, as it believes necessary, in
21 closed session, using option 2 of the board, which will
22 give a month-by-month permission to go in closed

1 session.

2 But at the same time, and using the experience
3 of the Search Committee to guide the board in deciding
4 whether to change the rule and institute a rulemaking,
5 that we continue the rulemaking part of this till the
6 next board meeting, or indeed, till the board meeting
7 after that so we could have the experience of the
8 Search Committee as a basis to decide whether to keep
9 the present rule or not.

10 Is that where you're at? Is that a statement
11 of your position, consistent with Charles' position?

12 MR. GREY: I mean, only to the extent that I
13 am prepared personally to recommend that we start the
14 rulemaking process. If that means that we need to have
15 a board meeting to do that, then I'm willing as a
16 committee person to say, at this moment I am willing to
17 vote for a -- to vote for recommending to the board
18 that it engage in the rulemaking process that has been
19 outlined.

20 CHAIRMAN MEITES: All right. Could I hear
21 from the rest of the committee on that? We'll treat
22 that as an almost motion till we hear from the rest of

1 the committee.

2 MS. MIKVA: This is Laurie Mikva. I have a
3 question. I vaguely recall, from when we did
4 rulemaking about attorneys' fees, that there's another
5 option for sort of generating discussion around an
6 issue. Mattie, can you remind me what that is?

7 MS. COHAN: Oh, the Corporation can always
8 issue what's called an advanced notice of proposed
9 rulemaking. And an advanced notice of proposed
10 rulemaking is generally used throughout agencies when
11 the agency is considering doing something, but they're
12 not like really sure exactly how they want to go about
13 doing something.

14 So they're not at the point where they're
15 ready to actually propose some text and get comments on
16 a specific regulatory change, but rather, when they've
17 kind of got a big picture issue in mind and they want
18 to throw some questions out to the public to get
19 feedback.

20 And so, in this particular instance, some of
21 those questions might be, how does the public feel like
22 they would be impacted if the committee -- if either

1 the Search Committee or any other committees were
2 removed from the Sunshine Act regulation? If they want
3 to comment on what they see as the legality of that as
4 well as the practical issues, an NPRM can be published
5 to do some of that information-gathering and
6 temperature-taking.

7 MS. MIKVA: Okay.

8 CHAIRMAN MEITES: Robert, does that make sense
9 to you? Rather than go ahead with the rulemaking, to
10 go ahead and test the water, giving the committee and
11 the board a chance to take the public's temperature on
12 this?

13 MR. GREY: Sure. I don't have any problem
14 with that. I just --

15 MR. LEVI: How do you take the public
16 temperature?

17 CHAIRMAN MEITES: You ask for comment on the
18 topic. And people will committee.

19 MR. LEVI: I see.

20 MR. GREY: Well, let me --

21 PROFESSOR KECKLER: This is -- sorry.

22 MR. GREY: No. Go ahead.

1 PROFESSOR KECKLER: This is Charles Keckler.
2 I'm just saying that if we -- assuming we were to go
3 ahead, not in an interim rule fashion or anything like
4 that but in a notice of proposed rulemaking, the
5 comment would -- it seems a comment would come in that
6 fashion as well.

7 MS. COHAN: That's true.

8 CHAIRMAN MEITES: Laurie, do you have a
9 preference for one or the other?

10 MS. MIKVA: No. Not necessarily.

11 CHAIRMAN MEITES: Okay. Let me ask management
12 if it has a preference.

13 PRESIDENT FORTUNO: No. No, we're -- no
14 preference on the part of management.

15 CHAIRMAN MEITES: We can go either way and you
16 don't see any tremendous pitfalls in either course of
17 action?

18 PRESIDENT FORTUNO: No.

19 MR. LEVI: I want to say I thought Robert put
20 it very succinctly and appropriate. And I want to also
21 assure everybody that we're going to run the search
22 appropriately, and assume that this rulemaking is not

1 going to be done in time to impact, and that it's not
2 an emergency of a kind that would required
3 advanced -- we've worked with it up till this point and
4 we'll continue to work with it.

5 But I think that Robert's point is an
6 important one, which is our obligation is fiduciary,
7 and as trustees, and as confirmed by the Senate, for
8 our experience in the rest of our lives, what we bring
9 here to this Corporation as a 501(c)(3), the best of
10 our own expertise, to recommend to this Corporation for
11 its orderly functioning in the future.

12 And if we are in a position as a board to
13 leave the campsite in better shape than we found it,
14 and some of us feel that this -- may feel, based on our
15 life's experience --

16 CHAIRMAN MEITES: Actually, I have a
17 preference for the advanced notice. I'm somewhat
18 troubled by the idea of starting --

19 MR. LEVI: Right.

20 CHAIRMAN MEITES: -- a formal rulemaking
21 because it presumably well might cover all three
22 committees, and we don't have any idea what the

1 development committee is going to need yet. And if you
2 start a rulemaking, a fellow board member once told me,
3 it starts the freight train and it's very hard to stop
4 it. And if it's stopped, there could be some egg on
5 our face.

6 So I would prefer we propose an advanced
7 notice of rulemaking exempting all three committees
8 from the Sunshine Act and see what response we get from
9 the public, from Congress, from members of -- people
10 who have been through our Search Committee. And so I
11 do have a preference we use the advanced rather than
12 committing ourselves to a formal rulemaking.

13 MR. LEVI: That's a good suggestion.

14 CHAIRMAN MEITES: Comments of other board
15 members or public comment? Then we'll see if we can
16 frame a motion.

17 MS. PERLE: Tom, this is Linda Perle.

18 CHAIRMAN MEITES: You have to talk loud.

19 MS. PERLE: This is Linda Perle. My
20 preference would certainly be to get comments through
21 the advanced notice of rulemaking rather than through a
22 regular rulemaking. I think there will be concerns in

1 the community about the notion of making the operation
2 of this board less transparent than it has been in the
3 past.

4 And I think I may have been somebody that
5 said, with regard to a previous rulemaking, that once
6 the train has left the station, it becomes sort of an
7 inevitable conclusion that the rulemaking is adopted.

8 So I would be in favor of the advanced notice
9 of rulemaking to air the issues and to allow you to get
10 some feedback from the community and from the public
11 before kind of advancing to the rulemaking stage.

12 CHAIRMAN MEITES: All right. Thank you. Any
13 other public comment?

14 (No response.)

15 CHAIRMAN MEITES: If not, Charles or Robert,
16 do you want to try to frame a motion for the committee
17 that encompasses what seems to be emerging as our view?

18 MR. GREY: I'll take a stab at it.

19 CHAIRMAN MEITES: Go ahead.

20 M O T I O N

21 MR. GREY: I think that the motion would be
22 that we undertake -- and you have to help me with the

1 words here -- but an advanced comment --

2 MS. COHAN: An advanced notice of proposed
3 rulemaking.

4 CHAIRMAN MEITES: What is it, Mattie?

5 MR. LEVI: Advanced notice of proposed
6 rulemaking. That's just the term that's used.

7 MR. GREY: Okay. That we propose an advanced
8 notice of rulemaking with regard to the committees, the
9 three committees, that would be subject to sunshine.
10 And what are the three?

11 MS. COHAN: Well, the three -- right now, all
12 of the board's committees are subject to the Part 62
13 regs.

14 MR. GREY: No. I understand that.

15 MS. COHAN: The three that have been talked
16 about have been Search, the Governance and Performance
17 Review Committee when it is performing its performance
18 reviews function, and the Development Committee.

19 MR. GREY: That those committees -- that we
20 ask for advanced comment on those three committees as
21 possibly being exempt from sunshine.

22 MS. COHAN: Correct.

1 CHAIRMAN MEITES: All right. And --

2 MS. MIKVA: This is --

3 CHAIRMAN MEITES: Go ahead.

4 MS. MIKVA: This is Laurie Mikva. Do we need
5 to actually have language for a proposed rule?

6 CHAIRMAN MEITES: No.

7 MS. COHAN: No.

8 MS. MIKVA: No? No.

9 MS. COHAN: No. That's the whole point of an
10 ANPRM, is that you don't have proposed rule change
11 language.

12 MS. MIKVA: Okay. Okay.

13 CHAIRMAN MEITES: All right. Robert, let me
14 suggest that you add to your motion a second part, that
15 we recommend to the board that it adopt a monthly -- a
16 procedure to monthly authorize the Search Committee to
17 close its meetings.

18 MR. GREY: I would so amend my motion to
19 include that.

20 CHAIRMAN MEITES: Is there a second to the
21 motion?

22 MS. MIKVA: Second.

1 CHAIRMAN MEITES: Any further discussion?

2 (No response.)

3 CHAIRMAN MEITES: Hearing none, let's have a
4 vote. All in favor of the motion?

5 (A chorus of ayes.)

6 CHAIRMAN MEITES: Anyone opposed?

7 MS. CHILES: This is Jonann Chiles. I'm
8 opposed.

9 CHAIRMAN MEITES: Okay. And that completes
10 our work on, I believe, the public part of the agenda.
11 Any public comment before we go into closed session?

12 MR. LEVI: Well, can I just ask a question of
13 Mattie and company there?

14 MS. COHAN: Sure.

15 MR. LEVI: In terms of the Development
16 Committee, now that it -- maybe this is not the time to
17 ask it, but if the Development Committee is, among
18 itself, decided who might consider asking this or that
19 foundation to support an initiative, is that a
20 deliberative type thing that needs to be discussed
21 in -- does that require a closed session? What does
22 that require?

1 MS. COHAN: Well, if the committee is not
2 outside 1622, a meeting to consider who to ask for
3 what, how much money, that would be a meeting.
4 Depending on the very substance of the discussions,
5 it's possible that those discussions could legitimately
6 be held in private session, in a closed session.
7 That's something that I'd really want to know more
8 details about the actual -- the specific discussion.

9 MR. LEVI: Sure. But just hypothetically.

10 MS. COHAN: But I'm not --

11 CHAIRMAN MEITES: John -- John --

12 MS. COHAN: I think there's --

13 MR. LEVI: We'll talk later on.

14 MS. COHAN: Yes. I think there is definitely
15 some that could.

16 MR. GREY: This is Robert.

17 CHAIRMAN MEITES: Go ahead, Robert.

18 MR. GREY: I think it's important, having made
19 the motion, that with regard to giving the public an
20 idea of what we mean when we ask for this, it's going
21 to be important to describe the circumstances
22 supporting the request.

1 CHAIRMAN MEITES: Yes.

2 MR. GREY: And so as we look at these three
3 committees, that there is a rational basis upon which
4 we think that an exemption would be needed. And I
5 think it's incumbent upon us to be very accurate about
6 that so that it's transparent, when the public looks at
7 this, that they can say, oh, I understand that, or, I
8 understand that and I disagree with it.

9 MR. LEVI: Correct.

10 CHAIRMAN MEITES: All right. I think it is
11 now appropriate for us to move to closed session. But
12 before then, I would like to have the chairman's
13 privilege of saying a few words.

14 I have resigned as chair of this committee as
15 of the close of this meeting. I would like to thank
16 all of you for the chance to work with you, and I think
17 in the seven years I've been chair, we haven't done any
18 harm and maybe some good.

19 I will accept a motion to go into closed
20 session.

21 MR. LEVI: Motion to go into closed session.

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M O T I O N

MR. GREY: Move it.

CHAIRMAN MEITES: Second?

MS. MIKVA: Second.

CHAIRMAN MEITES: All in favor vote aye.

(A chorus of ayes.)

CHAIRMAN MEITES: All right.

(Whereupon, at 11:55 a.m., the open session
committee meeting was adjourned to executive session.)

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