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LEGAL SERVICES CORPORATION

45 CFR Part 1622

Public Access to Meetings Under the Government in the Sunshine Act

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SUPPLEMENTARY INFORMATION: Under the terms of the Legal Services Corporation Act, as amended., 42 U.S.C. 2996e(g), LSC is subject to the Government in the Sunshine Act.² The Sunshine Act provides for public access to meetings of agencies in order to provide the public with information regarding agency decisionmaking, while protecting the rights of individuals and the ability of the Government to carryout its responsibilities. 5 U.S.C. 552(b). LSC has implemented Sunshine Act procedures through the adoption of regulations found at 45 CFR Part 1622.

Under the provisions of §1622.3, “every meeting of the Board, a committee or a council shall be open in its entirety to public observation except as otherwise provided in §1622.5.” The regulation defines “committee” as “any formally designated subdivision of the Board established pursuant to §1601.27^[3] of the By-Laws of the Corporation.” 45

² Absent this authority, LSC would not otherwise be subject to the Sunshine Act since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

³ 45 CFR Part 1601, which used to set forth the By-laws of the Corporation, was removed from the Code of Federal Regulations in 1994 because the By-Laws are purely internal procedural rules that do not affect the rights and interests of parties outside the Corporation. 59 FR 21666 (April 26, 1994). References to Part 1601 in Part 1622 are to be read as referring to the commensurate provision in the By-Laws.

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CFR §1622.2. As noted in the preamble to the original Sunshine Act rule adopted by LSC, “[t]he open meeting requirements of the Sunshine Act apply not only to meetings of the full decisionmaking body, but also to meetings of ‘any subdivision thereof authorized to act on behalf of the agency.’ The regulations go beyond the requirements of the statute by applying the open meeting provisions to every committee appointed pursuant to § 1601.26^[4] of the Corporation's By-Laws, regardless of the committee's membership or responsibility.” 43 FR 1807 (January 12, 1978).

It has been suggested by the LSC Office of Inspector General that LSC lacks the legal authority to amend the regulation as proposed herein because the Governance and Performance Review Committee⁵ is in fact a subdivision of the Board authorized to act on behalf of the agency. The OIG finds support for this position in the legislative history of the Sunshine Act, as reported in the *Interpretive Guide to the Government in the Sunshine Act* by Richard Berg, Steven Klitzman and Gary Edles (Second edition, 2005) (hereinafter “the Guide”), which is widely regarded as the most definitive source of guidance available on the scope and application of the Sunshine Act. In particular, the OIG notes that the report of the House Government Operations Committee states that “panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission or to conduct hearings on behalf of the agency” are included within the meaning of subdivision. The Guide at 5. The Guide also notes that “[a]t a minimum a subdivision must have a specified membership and fixed responsibilities.” *Id.* However, the Guide does not suggest that *any* committee with a specified

⁴ In 1978, the establishment of committees was covered in §1601.26. In 1984, Part 1601 was amended and the relevant section was changed to §1601.27. 49 FR 23050 (June 4, 1984). A subsequent revision of Part 1622 updated the cross-referenced section number. 49 FR 30939 (August 2, 1984).

⁵ And, presumably all of the Board's standing Committees.

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membership and fixed responsibilities is *necessarily* a subdivision for the purposes of the Act. Moreover, the Guide goes on to note that “[o]n the other hand, where a committee of members has been directed to draw up and submit an informal recommendation to the full collegial body, it is hard to regard such an assignment as an authorization to act on behalf of the agency in any meaningful sense” and that “[a] gathering of less than a quorum of the full body does not become a subdivision merely because it is preparing a recommendation for the full body.” *Id.*

The Corporation’s position since the original 1978 adoption of its regulations implementing the Sunshine Act has been that its Committee’s are not authorized to act on behalf of the Board and, are not, therefore subdivisions subject to the requirements of the Sunshine Act. It was not suggested to LSC during the rulemaking at the time that that determination was legally unsupportable. Moreover, in the intervening thirty-plus years, LSC has received no indication from anyone in Congress that its position on this matter was legally incorrect. Rather, recent reauthorization bills for LSC introduced in both the House and Senate (H.R. 3764; S. 718, respectively) would amend the LSC Act to legislatively subject all committees of the Board of Directors to the open meeting provisions of the Sunshine Act. While not definitive, this is suggestive that LSC’s position (that the Board’s Committees are not subdivisions of the Board authorized to act for the Board and, therefore subject to open meetings requirements) has been legally correct; if it were not, there would be no need for Congress to change the language of the LSC Act to expressly extend the Sunshine Act provisions to all of the Board’s

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Committees.⁶ All things considered, LSC continues to believe that its Committees, including the Governance a

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committee meetings subject to the provisions of Part 1622 presents challenges not

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Part 1622 in its entirety. However, for all other purposes the Governance and Performance Review Committee will remain a “committee” under the definition and the requirements of Part 1622 will apply to meetings of that Committee when it is discussing any other business that may come before it. As noted above, LSC believes that this action is fully consistent with its statutory obligations under the Sunshine Act. Further, because the Governance and Performance Review Committee is not authorized to act for the Corporation, the Committee will have to