



ELECTRONIC PRIVACY INFORMATION CENTER

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

Freedom of Information, Privacy Act, and Government in the Sunshine Act Procedures

6 CFR Chapter X

[PCLOB Docket No. 2013-0005; Sequence 1]

RIN 0311-AA01

Notice of Proposed Rulemaking

July 15, 2013

By notice published on May 15, 2013, the Privacy and Civil Liberties Oversight Board (“PCLOB” or “Board”) has proposed regulations implementing the Freedom of Information Act (“FOIA”), the Privacy Act of 1974, and the Government in the Sunshine Act (“Sunshine Act”).¹ Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to address the substantial risks to open government and agency accountability that the proposed regulatory changes raise.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC regularly submits

¹ Freedom of Information, Privacy Act, and Government in the Sunshine Act Procedures, 78 Fed. Reg. 28,532 (May 15, 2013) [hereinafter “Proposed Rule”] (codified at 6 C.F.R. pts. 1001-3).

administrative agency comments encouraging federal agencies to uphold the FOIA.² EPIC also engages in extensive Freedom of Information Act litigation.³ Additionally, EPIC publishes *Litigation Under Federal Open Government Laws Guide*, a leading guide for FOIA practitioners and requesters, and has specific expertise with respect to the history and purpose of the FOIA.⁴

EPIC has also regularly participated in PCLOB hearings and meetings, making recommendations to the agency – some of which were incorporated in the Board’s recent semi-annual report.⁵

PCLOB is Instrumental in Ensuring Government Accountability, Oversight, and Transparency

Under recommendation of the 9/11 Commission Report, PCLOB was established by the Intelligence Reform and Terrorism Prevention Act of 2004.⁶ Comprising of five members appointed by the President and confirmed by the Senate, PCLOB is an independent agency created to analyze and review executive branch counter-terrorism efforts for their impact on privacy and civil liberties.⁷

² EPIC, Comments of the EPIC to the Dep’t of the Interior on Proposed Freedom of Information Act Regulations (Nov. 13, 2012) (RIN 1093-AA15); EPIC, Comments of the EPIC to the Dep’t of Justice on Proposed Freedom of Information Act Regulations (Oct. 18, 2011) (RIN 1105-AB27).

³ See, e.g., *EPIC v. U.S. Dept. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *EPIC v. Dep’t of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); EPIC, Litigation Docket, <http://epic.org/privacy/litigation/>.

⁴ Harry A. Hammit et al., Elec. Privacy Info. Ctr., *Litigation Under the Federal Open Government Laws 2010* 138 (2010).

⁵ EPIC, EPIC Speaks to Oversight Board, Former Judge Questions FISC (July 10, 2013), <http://epic.org/2013/07/epic-speaks-to-oversight-board.html>.

⁶ *Privacy and Civil Liberties Oversight Board*, Federal Register, available at <https://www.federalregister.gov/agencies/privacy-and-civil-liberties-oversight-board>.

⁷ *Privacy and Civil Liberties Oversight Board*, United States Senate Committee on the Judiciary, available at <http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/PrivacyAndCivilLibertiesOversightBoard.cfm>.

As an oversight agency, PCLOB plays a critical role in ensuring that government agencies uphold statutory and regulatory mandates to safeguard individual privacy. One of PCLOB's fundamental roles is that of an "even-handed and dispassionate protector of basic liberties and privacy."⁸ Its mandate is twofold: (1) "analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties," and (2) "ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism."⁹ This mandate specifically includes review of information sharing practices of executive branch departments to ensure adherence to privacy and civil liberties values.¹⁰ Additionally, PCLOB "provides legal advice," "oversees compliance with the Privacy Act of 1974" and "also provides privacy training and prepares privacy reports for the President and Congress."¹¹ PCLOB's mandate to maintain a commitment to civil liberties amidst the war on terror is possible under the firm belief of its members that "privacy and established civil liberties can be accommodated with national security protections."¹²

⁸ *Senator Chuck Grassley Questions for the Record, Patricia M. Wald, Nominee to be a Member of the Privacy and Civil Liberties Oversight Board: Hearing Before the S. Comm. On the Judiciary, 112th Cong., 2 (2012) [hereinafter Wald Hearing] (responses to questions submitted for the record), available at <http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/upload/PatriciaWald-QFRs.pdf>.*

⁹ 42 USC § 2000ee (2012).

¹⁰ Memorandum from George W. Bush for the Heads of Executive Departments, Guidelines and Requirements in Support of the Information Sharing Environment (Dec. 16, 2005), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051216-10.html>.

¹¹ *Wald Hearing* at 3.

¹² *Id.* at 1.

Because PCLOB is a watchdog agency for government information practices, PCLOB's open government regulations must increase transparency concerning government activity affecting privacy and civil liberties. The agency must make records that it maintains freely available to ensure that PCLOB and other agencies uphold individual privacy rights. Moreover, the agency must improve upon its past practices and become a leader in holding public discussions on topical government privacy issues.

Scope of Proposed Rulemaking

The PCLOB's proposals would implement the agency's FOIA, Privacy Act, and Sunshine Act regulations. EPIC objects to several of the proposals as indicated below. These proposals would undermine the statutes they implement, are contrary to law, and exceed the authority of the agency. We urge the agency to make revisions to the proposals as EPIC has indicated.

I. Proposed FOIA Regulations

(1) Designation of Chief FOIA Officer

Under the proposed regulations,¹³ PCLOB would define "Chief FOIA Officer" as:

The Chairman or, in the absence of a Chairman, the senior official to whom the Board delegated responsibility for efficient and appropriate compliance with the FOIA.¹⁴

The Chairman, in turn, is defined as "the Chairman of the Board, as appointed by the President and confirmed by the Senate."¹⁵ PCLOB's Chief FOIA officer should be a senior official separate from the Chairperson and disinterested in the overall governance

¹³ See Proposed 6 C.F.R. § 1001.2 (Definitions); Proposed Rule at 28,533.

¹⁴ Proposed Rule at 28,533.

¹⁵ Proposed Rule at 28,533.

of the PCLOB. For several reasons, this officer's sole purpose and focus should be compliance with the FOIA and government transparency.

First, PCLOB's Chairperson may not have substantial FOIA experience to appropriately process FOIA appeals — the task to which PCLOB has assigned its Chief FOIA Officer.¹⁶ Second, having the PCLOB Chairperson determine whether to release records — some of which may subject PCLOB and its members to public scrutiny — may create a conflict of interest. Third, for PCLOB's Privacy Act regulations, PCLOB has proposed that its General Counsel or "principal legal advisor" should process Privacy Act appeals.¹⁷ Thus, PCLOB supports an independent advisor to evaluate administrative appeals. For this reason, PCLOB's Chief Privacy Officer should also maintain autonomy in making FOIA decisions. Fourth, other independent agencies like the Federal Communications Commission appoint a specific officer — not a Commissioner — to perform FOIA duties.¹⁸ Because PCLOB's General Counsel will process Privacy Act administrative appeals, PCLOB should consider also charging that person with processing FOIA administrative appeals. Accordingly, PCLOB should revise its proposed "Chief FOIA Officer" definition as follows:

Chief FOIA Officer means the Board's General Counsel, or his or her designee.

(2) Definition of Confidential Business Information

Under the proposed definitions, PCLOB would define "confidential business information" as

¹⁶ *Id.* at 28,535.

¹⁷ *Id.* at 28,538.

¹⁸ 47 C.F.R. § 0.441b (2013).

trade secrets and confidential, privileged, or proprietary business or financial information submitted to the Board by a person.¹⁹

The definition of “confidential business information” within the proposed rule is so broad that this standard does not provide a meaningful metric for the evaluation of business information.²⁰ EPIC proposes that the proposed rule adopt the language of Executive Order 12600, which states that confidential commercial information means “records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, because disclosure could reasonably be expected to cause substantial competitive harm.”²¹ Given PCLOB’s role as a body of oversight amongst agencies, the Board should adopt more transparent and objective criteria for review of confidential commercial information. The government should require a high standard to withhold from individuals information under FOIA exemption (b)(4). “Substantial competitive harm” is a sufficiently high standard to curtail erroneous withholdings. Accordingly, PCLOB should revise its proposed definition for “confidential business information” to:

records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, because disclosure could reasonably be expected to cause substantial competitive harm.

(3) Definition of “unusual circumstances”

Under the proposed definitions “unusual circumstances” would mean, “to the extent reasonably necessary for the proper processing of a FOIA request”:

¹⁹ Proposed Rule at 28,533.

²⁰ *See id.* (“Confidential business information means trade secrets and confidential, privileged, or proprietary business or financial information submitted to the Board by a person.”).

²¹ Exec. Order No. 12600, 52 Fed. Reg. 23,781 (June 23, 1987).

- (1) The need to search for and collect the requested records from physically separate facilities;
- (2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;
- or
- (3) The need for consultation with another agency having a substantial interest in the determination of the request.²²

The FOIA defines “unusual circumstances” as

- (I) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (II) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;
- or
- (III) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.²³

PCLOB’s proposed definition erases some of the safeguards envisioned by the original FOIA. Specifically, PCLOB’s first “unusual circumstance” alters the FOIA by replacing “field facilities or other establishments that are separate from the office” with just “physically separate facilities.”²⁴ This iteration simplifies the distinction that the FOIA intended to create at the exclusion of offices that may not be physically separate, but are nevertheless separate in other aspects, such as structurally.

PCLOB’s third “unusual circumstance” alters the FOIA by removing the “all practicable speed” requirement that the FOIA mandates.²⁵ This proposal would absolve PCLOB from a central prong of accountability expected of oversight agencies: providing publicly beneficial information as soon as possible. PCLOB should not adopt

²² Proposed Rule at 28,533–34.

²³ 5 USC § 552(a)(6)(B)(iii)(I)–(III) (2012).

²⁴ Proposed Rule at 28,534.

²⁵ *Id.*

its proposed definition for “unusual circumstances,” and instead should adopt the FOIA’s definition.

(4) Categories of Exemptions

While the PCLOB implementation of the FOIA exemptions in § 1001.4 largely echo the exemptions originally outlined in the FOIA,²⁶ PCLOB’s proposal for exemption (b)(5) should reflect the FOIA’s statutory language. As it is currently written, the proposed exemption is broad and violates the FOIA.

PCLOB’s proposal exemption 5 exempts from disclosure:

Inter-agency or intra-agency memoranda or letters that would be available at law to a party in litigation with the Board.

FOIA exemption (b)(5) exempts from disclosure:

inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

The statutory language is more precise than PCLOB’s proposal. Under the FOIA, inter or intra-agency memoranda and letters that “would not be available at law” are exempt under the FOIA. The PCLOB broadly exempts “memoranda or letters that *would* be available at law” (emphasis added). PCLOB’s proposal exempts records that are not privileged from disclosure. Other government agencies and the courts have adopted the FOIA’s (b)(5) exemption verbatim; the PCLOB adjustment of the language is unprecedented and risks broadening the exemption in a way unintended by the drafters

²⁶ 5 USC § 552(b)(1)–(9) (2012).

of FOIA.²⁷ PCLOB should therefore adopt FOIA’s language explaining exemption (b)(5).

(5) Proposed Process for Consultations and Referrals²⁸

Should PCLOB receive a request for a record and believe that the evaluation of releasability is best performed by another agency, PCLOB’s proposed FOIA regulations state that the FOIA Officer shall:

- (i) Respond to the FOIA requester after consulting with any other federal agency that has an interest in the record,” or
- (ii) Refer the responsibility for responding to the request to the department or agency best able to determine whether to disclose it”²⁹

The FOIA explicitly permits consultation of agencies with a “substantial interest” in cases of “unusual circumstances.”³⁰ However, use of the phrase “an interest,” as distinct from the phrase “a *substantial* interest,” suggests that the interest sufficient to delay processing a request in PCLOB’s proposed rule is less than substantial.

Because the agency may consult with any agency with an undefined interest in the record, this option runs the risk of creating unnecessary obstacles for requesters. FOIA regulations that have a net effect of “significantly impair[ing] requester’s ability to obtain a record or significantly increas[ing] the amount of time he must wait to obtain them” constitute improper withholdings of agency documents unless the agency can offer a reasonable explanation.³¹ Allowing PCLOB to delay response to a requester until it has consulted with *any* other federal agency that has “an interest” in the record

²⁷ See, e.g., *McKinley v. Board of Governors of Federal Reserve System*, 647 F.3d 331, 341 n.10 (D.C. Cir. 2011); *National Institute of Military Justice v. U.S. Dep’t of Defense*, 512 F.3d 677, 680 (D.C. Cir. 2008); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 n.3 (1975).

²⁸ See Proposed 6 C.F.R. § 1001.6(c). Proposed Rule at 28,535.

²⁹ *Id.*

³⁰ 5 U.S.C. § 552(a)(6)(B)(iii)(III) (2013).

³¹ *McGehee v. CIA*, 697 F. 2d 1095, 1110–11 (D.C. Cir. 1983).

could create tremendous delays and difficulties in obtaining records. There is no reasonable explanation for withholding agency documents simply on the grounds that other agencies may have some modicum of interest in their disclosure. This is especially true with PCLOB, as it is an oversight agency working with many other agencies; numerous agencies will likely have an interest in PCLOB records. To permit PCLOB consultations with each of these agencies that simply have an undefined interest in the record would unnecessarily frustrate FOIA rights.

Instead PCLOB's proposal 6 C.F.R. §1001.6(c)(1)(i) should be revised to:

Response to the FOIA requester after consulting with any other federal agency with a substantial interest in the record.

This language more closely aligns with the spirit of the FOIA and works to limit inter-agency consultation delays.³²

Another troubling proposed provision would permit PCLOB to impermissibly influence other agency classification procedures. PCLOB proposes, in relevant part, that:

(2) Whenever a request is made for information that has been classified or *may be appropriate for classification by another agency*, the FOIA Officer shall refer the responsibility for responding to that portion of your request to the agency that classified the information, *should consider the information for classification*, or has the primary interest in it, as appropriate.³³ (emphasis added).

³² See also *id.* at 1111 n.71 (“[T]he advantages that would be secured by delegating *all* responsibility for reviewing a document. . . rather than engaging in . . . ‘consultation’ . . . must then be balanced against any inconvenience to the requester caused by the referral.”); *Truesdale v. U.S. Dep’t of Justice*, 731 F. Supp. 2d 3, 7 (D.D.C. 2010) (holding that a deferring agency must articulate why the other agency is best able to process the request).

³³ See Proposed 6 C.F.R. § 1001.6(c) (2). Proposed Rule at 28,535.

Executive Order 13526 prescribes objective standards concerning what information may be properly classified and who has authority to classify said information. PCLOB's proposal would permit the agency to flag documents that are not classified, but that, for subjective and opaque reasons, PCLOB believes "may be appropriate" for classification. As an oversight agency, PCLOB would exceed its authority and contravene its mission if it adopted this provision because it unlawfully withholds information. With this provision, PCLOB would act not as a watchdog agency, but instead would shepherd government secrets that were not originally classified and presumably should not be classified. PCLOB should focus on whether agencies have properly classified information — not on how to classify documents that agencies have already determined do not warrant classification.

Accordingly, PCLOB's proposal 6 C.F.R. § 1001.6(c)(2) should be revised to:

(2) Whenever a request is made for information that has been classified, the FOIA Officer shall refer the responsibility for responding to that portion of your request to the agency that classified the information, or has the primary interest in it, as appropriate.

(7) Proposed Process for Administrative Appeals³⁴

The administrative appeal section of the proposed rule states that an administrative appeal must be received

within 60 days of the date of the letter denying your request, in whole or in part, or, in the case of the Board's failure to respond within the statutory time frame, of the date by which the board should have responded to your request.³⁵

This language is too ambiguous to meaningfully inform requesters of their obligations.

For example, if a request "should have" received expedited processing, a requester may

³⁴ See Proposed 6 C.F.R. § 1001.7, Proposed Rule at 28, 535.

³⁵ *Id.*

believe that the 60 days begins ten working days after the request is received. And if an agency claims an extension to respond, due to “unusual circumstances,” does the 60-day count begin after the extension or the initial statutory deadline of 20 working days?

The proposed language should be clarified to:

Your appeal must be in writing and received by the Chief FOIA Officer within 60 days of the date of the letter denying your request, in whole or in part, or, in the case of the Board’s failure to respond within the statutory time frame, within 60 days of the date of your FOIA request.

(8) Time frame for Board response³⁶

The PCLOB proposes a multi-track processing schedule that would

use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work or time needed to process the request.³⁷

As it stands, this provision is too vague. PCLOB should instead explicitly distinguish the different tracks it proposes. For example, the Department of the Interior divides its multi-track processing into: (1) simple (1–5 workdays), (2) normal (20 workdays), and (3) complex (over 20 workdays). While the default is the normal track, the FOIA coordinator will inform the requester “as soon as possible” if the request has been placed in the “complex” category, allowing for adjustment of the request.³⁸ This method of distinction is most preferable as it gives requesters notice of the processing time of their requests. Another alternative is bright-line distinctions by volume, such as the system in use by the Department of Justice Civil Rights Division. That division distinguishes three tracks through (1) expedited requests, (2) simple requests involving

³⁶ See Proposed 6 C.F.R. § 1001.8, Proposed Rule at 28,535.

³⁷ See Proposed 6 C.F.R. § 1001.8(b), Proposed Rule at 28,534.

³⁸ Bureau of Indian Affairs, FOIA Questions and Answers, <http://www.bia.gov/FOIA/QandA/index.htm>.

less than 3,000 pages of documents, and (3) complex requests involving more than 3,000 pages or requests for classified documents.³⁹

A more specifically delineated multi-track system promotes agency accountability and greater requester information as to the status of their request, reducing the amount of litigation stemming from confusion or frustration. In *Buc v. Food and Drug Admin.*, a poorly specified multi-track system was partly the reason behind the eventual FOIA litigation and order that the agency process the plaintiff's request immediately.⁴⁰ The FDA distinguished between a "Simple Track," which "require no more than one hour of search time and two hours of review time," and a slower "Complex Track" for those that do not qualify for the Simple Track.⁴¹ Two of the plaintiff's request had been queued in the Complex Track for over 18 months at the time of litigation.⁴²

EPIC therefore recommends PCLOB revise its multi-track processing to:

The Board will use one of three tracks based on the amount of time needed to process the request: (1) Simple: 1-5 workdays; (2) Normal: 20 workdays; or (3) Complex: over 20 workdays. Requesters should assume, unless notified by the PCLOB that their request is in the "Normal" track. The FOIA coordinator will notify a requester as soon as possible if the FOIA request has been placed in the "Complex" category.⁴³

(9) Expedited Processing

PCLOB proposes expedited processing that requires FOIA requesters to:

include a statement, certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for requesting expedited processing. If you are a person primarily engaged in disseminating information,

³⁹ United States Dep't of Justice, *Attachment B*, available at <http://www.justice.gov/oip/attachmentb.htm>.

⁴⁰ *Buc v. Food and Drug Admin.*, 762 F.Supp.2d 62 (D.D.C. 2011).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Bureau of Indian Affairs, FOIA Questions and Answers, <http://www.bia.gov/FOIA/QandA/index.htm>.

you must establish a particular urgency to inform the public about the federal government activity involved in the request, *beyond* the public's right to know about government activity generally.⁴⁴ (emphasis added).

The FOIA allows agencies to promulgate their own regulations regarding expedited review for cases where is a “compelling need” and by “other cases determined by the agency.”⁴⁵ “Compelling need” in turn is defined as either “the failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;” or “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”⁴⁶

Typically, other agencies do not impose such a condition beyond the two reasons that constitute “compelling need.” The Department of Health and Human Services requests that FOIA requesters for expedited review “explain your reasons.”⁴⁷ The U.S. Social Security Administration also only asks the requester to “explain your reasons fully in your request” in order for a determination to be made.⁴⁸ Other agencies, such as the Department of Homeland Security, only accept the two conditions.⁴⁹ PCLOB’s heightened standard is atypical and indistinct. Requiring requesters to establish a “particular urgency” beyond the general right to know about government activities ends up being rather redundant. Barring the broadest of requests, all FOIA requests are specifically geared towards a certain government activity beyond broad presumptions of openness and the right to know. Having this standard for expedited

⁴⁴ Proposed Rule at 28,536.

⁴⁵ 5 USC § 552 (a)(6)(E)(v)(I)–(II) (2012).

⁴⁶ *Id.*

⁴⁷ U.S. Dep’t of Health & Human Servs., Freedom of Information Act, <http://www.hrsa.gov/foia/index.html>.

⁴⁸ U.S. Social Security Admin., Guide to FOIA at SSA, <http://www.ssa.gov/foia/#a0=3&ht=1>.

⁴⁹ U.S. Dep’t of Homeland Security, FOIA Processing, <http://www.dhs.gov/foia-processing#1>.

review opens the door for arbitrary rejections of expedited review, potentially at the expense of the public being notified of time-sensitive, publicly beneficial information because the urgency demonstrated by the requester was not deemed “particular” enough. Accordingly, PCLOB should omit that clause, and the language should only require that requesters:

include a statement, certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for requesting expedited processing. If you are a person primarily engaged in disseminating information, you must establish a particular urgency to inform the public about the federal government activity involved in the request.

II. Proposed Sunshine Act Regulations

(1) Open Meetings⁵⁰

The Proposed Rule in 6 C.F.R. § 1003.3(b) states:

Board meetings, or portions thereof, shall be open to public participation only when an announcement to that effect is published under § 1003.4 . . . Public participation may be terminated at any time for any reason.⁵¹

This goes against the presumption for openness the Government in the Sunshine Act intended. Indeed, the Proposed Rule adopts that fundamental intent in § 1003.4(a), where it states “Except as otherwise provided . . . every portion of a Board meeting shall be open to public observation.”⁵² However, such a blank check allowing PCLOB to close off portions or all of any meeting for any reason undercuts both the intent of the Government in the Sunshine Act, as well as PCLOB’s fundamental mandate as an oversight organization. Unexplained and arbitrary closures of public meetings go against the grain of open government and the democratic process, especially when the

⁵⁰ Proposed 6 C.F.R. § 1003.3.

⁵¹ Proposed Rule at 28,539.

⁵² *Id.*

agency in question is charged with auditing the administrative actions taken by other government agencies to ensure accountability.

The proposed language also violates the narrowly constructed Sunshine Act exceptions to public meetings. The Sunshine Act was drafted with the intent of preserving a presumption of openness with a certain set of narrowly defined exceptions.⁵³ The Proposed Rule attempts to adopt the set of exceptions in § 1003.5.⁵⁴ The broad exception in § 1003.3(b) is not a statutorily permitted exception. And effective administration of these exceptions so as to ensure both open government without compromising important national security and civil liberty interests are practically impossible with such a blunt instrument. These narrowly tailored exceptions become almost meaningless if PCLOB can terminate public participation whenever it so chooses, EPIC recommends that PCLOB remove the last sentence in § 1003.3(b), and therefore the regulation should read

Board meetings, or portions thereof, shall be open to public participation only when an announcement to that effect is published under § 1003.4. Public participation shall be conducted in an orderly, non-disruptive manner and in accordance with any procedures the Chairman may establish.

This would be more consistent with the exceptions outlined in § 1003.5 as well as increase PCLOB's accountability and commitment to open government and effective oversight.

(2) Procedures for public announcement of meetings⁵⁵

The Board's procedures for public announcement of meetings and changes following public announcement do not meet statutory standards. The Proposed Rule's

⁵³ See 5 USC § 552b (b), (c)(1)–(10) (2012).

⁵⁴ Proposed Rule at 28,539.

⁵⁵ Proposed 6 C.F.R. § 1003.4.

Section §1003.4(c) provides that if this public announcement of meetings notice is not initially made in the Federal Register, it shall be “subsequently published” in the Federal Register.⁵⁶ This language falls short of that of the Sunshine Act, which states that notice shall be submitted for publication in the Federal Register “immediately following each public announcement.”⁵⁷ Allowing for publication of notice at *any* point subsequent to the initial notice given undermines the Sunshine Act’s purpose of providing the public with meaningful opportunities to participate in the functions of government. EPIC proposes striking the word “subsequently” from this section and replacing it with “immediately”. Thus the new language should be:

If public notice is provided by means other than publication in the Federal Register, notice will be immediately published in the Federal Register.

PCLOB’s proposed regulations also make clear that a public announcement must include *all* of the following: the time and place of the meeting; the subject matter of the meeting; whether the meeting is to be open, closed, or portions of the meeting will be closed; whether public participation will be allowed; and the name and telephone number of the person who will respond to requests for information about the meeting.⁵⁸ A recent public announcement by PCLOB failed to include the location of the meeting, stating the location was “still being determined,”⁵⁹ and the location was not published in the Federal Register until one day before the meeting.⁶⁰ On a related note, EPIC informs PCLOB that submission of materials and announcements to the Federal Register is different from publication in the Federal Register. The Federal Register does

⁵⁶ Proposed Rule at 28,539.

⁵⁷ 5 U.S.C. § 552b(e)(3) (2012).

⁵⁸ Proposed Rule at 28,539.

⁵⁹ Notice of a Meeting, 78 Fed. Reg. 39,021 (June 28, 2013).

⁶⁰ Notice of a Meeting, 78 Fed. Reg. 40,778 (July 8, 2013).

not instantaneously publish materials it receives. Accordingly, to have a public announcement published in the Federal Register “at least seven days prior to a meeting” as envisioned in the regulations, PCLOB must submit the announcement well in advance to the Federal Register for publication.

Further, EPIC strongly encourages PCLOB to establish a publicly available website to host, at a minimum, a list of Board members, contact information, announcements, upcoming events, meeting agendas, PCLOB publications and reports, minute meetings, public comments, and other pertinent PCLOB material.

(3) Changes following public announcement⁶¹

Proposed Section § 1003.7 of the regulations include rules for announcing changes following an initial public announcement.

The proposed regulation states:

(a) The time or place of a meeting may be changed following the public announcement described in section 1003.4 only if the Board publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) The subject matter of a meeting or the determination of the Board to open or close a meeting, or a portion thereof, to the public may be changed following public announcement if:

(1) A majority of all members determine by recorded vote that Board business so requires and that no earlier announcement of the change was possible; and

(2) The Board publicly announces such change and the vote of each member thereon at the earliest practicable time.

(c) The deletion of any subject matter announced for a meeting is not a change requiring the approval of the Board under subsection (b) of this section.⁶²

In this section, PCLOB makes a number of minor changes to statutory requirements that cumulatively add to significant reductions in oversight and accountability standards.

⁶¹ Proposed 6 C.F.R. § 1003.7.

⁶² Proposed Rule at 28,540.

First, publication to the Federal Register is not mentioned at all. Instead, the rules require only that the board “publicly announces” any change.⁶³ This contravenes the language of the statute, which requires that “*each* public announcement . . . [and] any change . . . shall also be submitted for publication in the Federal Register.”⁶⁴ EPIC recommends adding to this section a requirement that any announced changes be immediately submitted for publication in the Federal Register.

Second, the Proposed Rule surreptitiously renders ineffective the limits to the rules regarding changes to public meetings’ subject matter or openness in § 1003.7(b). The Sunshine Act states “The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection *only* if . . .” (emphasis added).⁶⁵ However, by removing the “only” on their adaptation of this clause, the Proposed Rule implies that other conditions could potentially allow changes in subject matter or whether the meeting is open or closed.⁶⁶ This clearly exceeds the agency’s statutory authority delegated by the Sunshine Act. EPIC recommends that the regulation reflect the statutory language.

Third, under § 1003.7(a) “[m]embers need not approve” changes to the time or place of a meeting.⁶⁷ This also is not in the language of the original statute. Last minute notice of meeting times and places have been issues with PCLOB public meetings in the

⁶³ *Id.*

⁶⁴ 5 U.S.C. §552b(e)(3).

⁶⁵ 5 U.S.C. §552b(e)(2).

⁶⁶ Proposed Rule at 28,540.

⁶⁷ *Id.*

past, and the lack of member approval needed to change the time and place may add arbitrariness and reduce stability and accountability to the public meeting process.

Fourth, under § 1003.7(c) PCLOB proposes that the Board will not have to approve “deletion of any subject matter.” This is yet another potential loophole that can be used to circumvent Board approval in dropping inconvenient agenda items from the meeting, to the detriment of a full and open public conversation and disclosure. EPIC recommends deletion of this provision.

Accordingly, Proposed section §1003.7 should be revised as:

(a) The time or place of a meeting may be changed following the publication in the Federal Register only if the Board publicly announces such change at the earliest practicable time.

(b) The subject matter of a meeting or the determination of the Board to open or close a meeting, or a portion thereof, to the public may be changed following public announcement *only* if:

(1) A majority of all members determine by recorded vote that Board business so requires and that no earlier announcement of the change was possible; and

(2) The Board publicly announces such change and the vote of each member thereon at the earliest practicable time.

(c) The deletion of any subject matter announced for a meeting requires the approval of the Board under subsection (b) of this section.

(4) Public availability and retention of transcripts, records, and minutes, and applicable fees⁶⁸

The Sunshine Act mandates that the public be able to access “transcripts, electronic recording, or minutes” in a “place easily accessible.”⁶⁹ This requirement is missing from the Proposed Rule.⁷⁰ The Proposed Rule simply states that the Board “shall make available to the public the transcript, electronic recording, or minutes of a

⁶⁸ Proposed Section §1003.9.

⁶⁹ 5 U.S.C. §552b(f)(2)

⁷⁰ Proposed Rule at 28540.

meeting . . .”⁷¹ As discussed above, the Board should create a website that will host PCLOB transcripts, records, and minutes.

III. Many of the Proposed Changes Put Forward by the PCLOB in the FOIA and Sunshine Act Regulations Are Not Only Contrary to Law but also to the Express Statements of the President and the Attorney General

Many of PCLOB’s proposed changes directly contravene the President’s statement on the transparency of the federal government. On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act, transparency and open government, and announced his intention to make the federal government more transparent:⁷²

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.⁷³

The President made clear the importance of open and accountable government: “We will achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it.”⁷⁴

⁷¹ *Id.*

⁷² Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies re: Freedom of Information Act (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/; Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies re: Transparency and Open Government (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

⁷³ *Id.*

⁷⁴ *Id.*

Attorney General Eric Holder has also made clear a “presumption of openness” governing federal records.⁷⁵ And Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee “will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations.”⁷⁶

Conclusion

As stated above, EPIC recommends that the Privacy and Civil Liberties Oversight Board revise the proposed regulations, remove the new barriers to access to government information, and incorporate new procedures that ease, not burden, the public’s efforts to learn about the activities of its government. As currently written, several of PCLOB’s proposed revisions are contrary to the Freedom of Information Act and Sunshine Act, exceed the scope of the agency’s rulemaking authority, and should be revised as indicated.

Respectfully submitted,

Marc Rotenberg, EPIC President and Executive Director
Ginger McCall, EPIC Open Government Project Director
Khaliah Barnes, EPIC Administrative Law Counsel
Eric Holmes, EPIC Law Clerk
Natalie Kim, EPIC Law Clerk

Electronic Privacy Information Center (EPIC)
1718 Connecticut Avenue, NW Suite 200
Washington, DC 20009
(202) 483-1140 (tel)
(202) 483-1248 (fax)

⁷⁵ Memorandum from Attorney General Eric Holder for the Heads of Executive Departments and Agencies re: Transparency and Open Government (Mar. 19, 2009), <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

⁷⁶ *Advancing Freedom Of Information In the New Era of Responsibility: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 66 (2009) (Statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56885/pdf/CHRG-111shrg56885.pdf>.