



6820-B3

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

6 CFR Parts 1001 and 1003

[PCLOB Case 2017-001; Docket No. 2017-0001; Sequence No. 1]

RIN 0311-AA03

**Freedom of Information Act and Government in the Sunshine Act
Procedures**

AGENCY: Privacy and Civil Liberties Oversight Board.

ACTION: Final rule.

SUMMARY: The Privacy and Civil Liberties Oversight Board is updating its Freedom of Information Act regulation to conform to the FOIA Amendments Act of 2016 and updating its Sunshine Act regulation to clarify how public meetings will be announced and how changes to the meeting may occur after public announcement.

DATE: Effective: **[Insert date 30 days after date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Parker Dupree, Deputy General Counsel, Privacy and Civil Liberties Oversight Board, at 202-296-4682 or lynn.parker.dupree@pclub.gov.

SUPPLEMENTARY INFORMATION

I. Background

The changes to the Freedom of Information Act are conforming amendments to reflect the requirements of the

FOIA Improvement Act of 2016. The changes to the Sunshine Act regulation are conforming amendments that reflect changes to the agency's Sunshine Act procedures.

II. Regulatory Analysis and Notices

Executive Order 12866

This final rule is not a "significant regulatory action" within the meaning of Executive Order 12866. The economic impact of these regulations should be minimal, therefore, further economic evaluation is not necessary.

Regulatory Flexibility Act, as amended

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 601 et seq.), generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice and comment rulemaking under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a number of small entities. Small entities include small businesses, small organizations, and small government jurisdictions. The Board considered the effects on this rulemaking on small entities and certifies that this final rule will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, requires each agency to assess the effects of its regulatory actions on state, local, and tribal governments, and the private sector. Agencies must prepare a written statement of economic and regulatory alternatives anytime a proposed or final rule imposes a new or additional enforceable duty on any state, local, or tribal government or the private sector that causes those entities to spend, in aggregate, \$100 million or more (adjusted for inflation) in any one year (defined in UMRA as a "federal mandate"). The Board determined that such a written statement is not required in connection with this final rule because it will not impose a federal mandate, as defined in UMRA.

National Environmental Policy Act

The Board analyzed this final rule for purposes of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., and determined that it would not significantly affect the environment; therefore, an environmental impact statement is not required.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through

regulations. This final rule does not include an information collection for purposes of the PRA.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and the Board determined that it does not have sufficient implications for federalism to warrant the preparation of a Federalism Assessment.

List of Subjects in 6 CFR Parts 1001 and 1003

Administrative practice and procedure, Public availability of information, Meetings.

Dated: July 19, 2017.

Lynn Parker Dupree,
Deputy General Counsel,
Alternate Designated Agency Ethics Official,
Privacy and Civil Liberties Oversight Board.

For the reasons set forth in the preamble, the Board amends 6 CFR parts 1001 and 1003 as set forth below:

PART 1001—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

1. The authority citation for part 1001 continues to read as follows:

Authority: 5 U.S.C. 552, as amended; Executive Order 12600.

2. Amend § 1001.2 by revising the definition “Chief FOIA Officer” to read as follows:

§ 1001.2 Definitions.

* * * * *

Chief FOIA Officer means the senior official to whom the Board delegated responsibility for efficient and appropriate compliance with the FOIA.

* * * * *

3. Revise § 1001.5 to read as follows:

1001.5 Requests for records.

(a) You may request copies of records under this part by email to FOIA@pclob.gov or in writing addressed to FOIA Officer, Privacy and Civil Liberties Oversight Board. Requestors should check the Board’s website at <https://www.pclob.gov> for the Board’s current mailing address. Please provide contact information, such as your

phone number, email address, and/or mailing address, to assist the Board in communicating with you and providing released records.

(b) Your request shall reasonably describe the records sought with sufficient specificity, and when possible, include names, dates, and subject matter, in order to permit the FOIA Officer to locate the records with a reasonable amount of effort. If the FOIA Officer cannot locate responsive records based on your written description, you will be notified and advised that further identifying information is necessary before the request can be fulfilled. Requesters who are attempting to reformulate or modify such a request may discuss their request with the Board's FOIA Officer or FOIA Public Liaison. If a request does not reasonably describe the records sought, the Board's response to the request is likely to be delayed.

(c) Although requests are considered either FOIA or Privacy Act requests, the Board processes requests for records in accordance with both laws so as to provide the greatest degree of lawful access while safeguarding an individual's personal privacy.

(d) Your request should specify your preferred form or format (including electronic formats) for the records you seek. We will accommodate your request if the record

is readily available in that form or format. When you do not specify the form or format of the response, we will provide responsive records in the form or format most convenient to us.

4. Amend § 1001.6 by—
 - a. Removing "and" from the end of paragraph (b) (3);
 - b. Removing the period from the end of paragraph (b) (4) and adding "; and" in its place;
 - c. Adding paragraph (b) (5);
 - d. Revising paragraph (c) (1); and
 - e. Adding paragraph (d).

The additions and revision read as follows:

§ 1001.6 Responsibility for responding to requests.

* * * * *

(b) * * *

(5) A statement notifying you of the assistance available from the Board's FOIA Public Liaison and the dispute resolution services offered by OGIS.

(c) * * *

(1) Upon receipt of a FOIA request for a record within the Board's possession, the FOIA Officer should determine if the Board or another federal agency is best able to determine eligibility for disclosure under the

FOIA. As to any such record, the FOIA Officer must proceed in one of the following ways:

(i) Consultation. When records originated with the Board, but contain within them information of interest to or originated by another agency or Federal Government office, the FOIA Officer must consult with that other entity prior to making a release determination

(ii) Referral. When the FOIA Officer believes that a different agency is best able to determine whether to disclose the record the FOIA Officer will refer the responsibility for responding to the request regarding that record to that agency (but only if that other department or agency is subject to FOIA). Ordinarily, the department or agency that originated the record will be presumed best able to determine whether to disclose it. However, if the FOIA Officer and the originating agency jointly agree that the Board is in the best position to respond regarding the record, then the record may be handled as a consultation.

* * * * *

(d) Coordination. The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made is classified for national security reasons or otherwise could harm an interest protected by an applicable exemption, such as the

exemptions that protect personal privacy or national security interests. For instance, if the Board locates within its files materials originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such an instance, in order to avoid harm to an interest protected by an applicable exemption, the Board will coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination will then be conveyed to the requester by the Board.

5. Revise § 1001.7 to read as follows:

§ 1001.7 Administrative appeals.

(a) You may appeal an adverse determination related to your FOIA request, or the Board's failure to respond to your FOIA request within the prescribed time limits, to the Chief FOIA Officer, Privacy and Civil Liberties Oversight Board. Requestors should check the Board's website at <https://www.pclob.gov> for the Board's current mailing address.

(b) Your appeal must be in writing, sent to the address posted on the Board's website in accordance with paragraph (a) of this section, and it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the letter denying your request, in whole or in part. The appeal should clearly identify the agency determination that is being appealed and the assigned case request number. In case of the Board's failure to respond within the statutory time frame, you may submit an administrative appeal at any time until an agency response has been provided. For the most expeditious handling, your appeal letter and envelope, or subject line of the electronic transmission, should be marked "Freedom of Information Act appeal."

(c) Your appeal letter should state facts and may cite legal or other authorities in support of your request.

(d) On receipt of any appeal involving classified information, the Chief FOIA Officer must take appropriate action to ensure compliance with applicable classification rules.

(e) The Chief FOIA Officer shall respond to all administrative appeals in writing and within the time frame stated in § 1001.8(d). If the decision affirms, in whole or in part, the FOIA Officer's determination, the letter

shall contain a statement of the reasons for the
affirmance, including any FOIA exemption(s) applied, and
will inform you of the FOIA's provisions for court review.
If the Chief FOIA Officer reverses or modifies the FOIA
Officer's determination, in whole or in part, you will be
notified in writing and your request will be reprocessed in
accordance with that decision. The Board may work with
Office of Government Information Services (OGIS) to resolve
disputes between FOIA requestors and the Board. A
requester may also contact OGIS in the following ways: Via
mail to OGIS, National Archives and Records Administration,
8601 Adelphi Road-OGIS, College Park, MD 20740
(ogis.archives.gov), via email at ogis@nara.gov, or via the
telephone at 202-741-5770 or 877-684-6448. Facsimile is
also available at 202-741-5769.

6. Amend § 1001.9 by adding a sentence to the end of
paragraphs (c) and (f) to read as follows:

§ 1001.9 Business information.

* * * * *

(c) * * * Any information provided by a submitter
under this subpart may itself be subject to disclosure
under the FOIA.

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(f) * * * The Board also must notify the requester when it notifies the submitter of its intent to disclose the requested information, and whenever a submitter files a lawsuit to prevent the disclosure of the information.

7. Revise § 1001.10 to read as follows:

§ 1001.10 Fees.

(a) We will charge fees that recoup the full allowable direct costs we incur in processing your FOIA request. Fees may be charged for search, review or duplication. As a matter of administrative discretion, the Board may release records without charge or at a reduced rate whenever the Board determines that the interest of the United States government would be served. We will use the most efficient and least costly methods to comply with your request. The Board may charge for search time even if no records are located or the records located are exempt from disclosure. If the Board fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, unless the circumstances outlined in paragraph (o) of this section are met.

(b) With regard to manual searches for records, we will charge the salary rate(s) (calculated as the basic rate of pay plus 16 percent of that basic rate to cover benefits) of the employee(s) performing the search.

(c) In calculating charges for computer searches for records, we will charge at the actual direct cost of providing the service, including the cost of operating computers and other electronic equipment, such as photocopiers and scanners, directly attributable to searching for records potentially responsive to your FOIA request and the portion of the salary of the operators/programmers performing the search.

(d) We may only charge requesters seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review—that is, the review undertaken the first time we analyze the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. We may assess the costs for such subsequent review. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage.

(e) Records will be duplicated at a rate of \$.10 per page, except that the Board may adjust this rate from time

to time by rule published in the Federal Register. For copies prepared by computer, such as tapes, CDs, DVDs, or printouts, we will charge the actual cost, including operator time, of production. For other methods of reproduction or duplication, we will charge the actual direct costs of producing the document(s). If we estimate that duplication charges are likely to exceed \$25, we will notify you of the estimated amount of fees, unless you indicated in advance your willingness to pay fees as high as those anticipated. Our notice will offer you an opportunity to confer with Board personnel to reformulate the request to meet your needs at a lower cost. If the Board notifies you that the actual or estimated fees are in excess of \$25.00, your request will not be considered received and further work will not be completed until you commit in writing to pay the actual or estimated total fee, or designate some amount of fees you are willing to pay, or in the case of a noncommercial use requester who has not yet been provided with your statutory entitlements, you designate that you seek only that which can be provided by the statutory entitlements. The Board's FOIA Officer or Public Liaison are available to assist you in reformulating your request to meet your needs at a lower cost.

(f) We will charge you the full costs of providing you with the following services:

- (1) Certifying that records are true copies; or
- (2) Sending records by special methods such as express mail.

(g) We may assess interest charges on an unpaid bill starting on the 31st calendar day following the day on which the billing was sent. Interest shall be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the Board.

(h) We will not charge a search fee for requests by educational institutions, non-commercial scientific institutions, or representatives of the news media. A search fee will be charged for a commercial use request.

(i) The Board will not charge duplication fees for requests by educational institutions, non-commercial scientific institutions, or representatives of the news media for a non-commercial use request if the agency fails to comply with the FOIA's time limits in which to respond to a request.

(j) Except for a commercial use request, we will not charge you for the first 100 pages of duplication and the first two hours of search.

(k) You may not file multiple requests, each seeking portions of a document or documents, solely for the purpose of avoiding payment of fees. When the Board reasonably believes that a requester, or a group of requesters acting in concert, has submitted requests that constitute a single request involving clearly related matters, we may aggregate those requests and charge accordingly.

(l) We may not require you to make payment before we begin work to satisfy the request or to continue work on a request, unless:

(1) We estimate or determine that the allowable charges that you may be required to pay are likely to exceed \$250; or

(2) You have previously failed to pay a fee charged within 30 calendar days of the date of billing.

(m) In cases in which the Board requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If you do not pay the advance payment within 30 calendar days after the date of the Board's fee determination, the request will be closed.

(n) Upon written request, we may waive or reduce fees that are otherwise chargeable under this part. If you request a waiver or reduction in fees, you must demonstrate

that a waiver or reduction in fees is in the public interest because disclosure of the requested records is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in your commercial interest. After processing, actual fees must exceed \$25, for the Board to require payment of fees.

(o) If the Board has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Board may charge search fees, or, in the case of requesters described in paragraph (h) of this section, may charge duplication fees, if the following steps are taken. The Board must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the agency must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Board may charge all applicable fees incurred in the processing of the request.

8. Add § 1001.11 to read as follows:

§ 1001.11 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

PART 1003—IMPLEMENTATION OF THE GOVERNMENT IN THE SUNSHINE ACT

9. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 552b.

10. Amend § 1003.4 by revising paragraph (c) and adding paragraphs (d) through (f) to read as follows:

§ 1003.4 Procedures for public announcement of meetings.

* * * * *

(c) When a meeting has been called by the Chairman, the notice shall contain such agenda items as the Chairman designates. The notice shall be circulated to Members in advance of publication and Members, by majority vote, may add additional agenda items.

(d) When a meeting is called by a majority of Members, the notice shall contain such agenda items as have been approved by a majority of the Board.

(e) The Executive Director will ensure that the final agenda for the meeting conforms to the notice published in the Federal Register.

(f) If public notice is provided by means other than publication in the Federal Register, notice will be promptly submitted to the Federal Register for publication.

11. Revise § 1003.7 to read as follows:

§ 1003.7 Changes following public announcement.

(a) The time, place, and agenda items of a meeting following the public announcement described in § 1003.4, 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.

(b) Changes to the time, place and agenda items of a meeting called by the Chairman pursuant to § 1003.4(c) must be made with the concurrence of the Chairman, except that when Members have, by majority vote, added additional agenda items, the addition of those agenda items does not require the Chairman's concurrence.

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