

42 USC 2000ee: Privacy and Civil Liberties Oversight Board

Text contains those laws in effect on February 11, 2018

From Title 42-THE PUBLIC HEALTH AND WELFARE

CHAPTER 21E-PRIVACY AND CIVIL LIBERTIES PROTECTION AND OVERSIGHT

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§2000ee. Privacy and Civil Liberties Oversight Board**(a) In general**

There is established as an independent agency within the executive branch a Privacy and Civil Liberties Oversight Board (referred to in this section as the "Board").

(b) Findings

Consistent with the report of the National Commission on Terrorist Attacks Upon the United States, Congress makes the following findings:

- (1) In conducting the war on terrorism, the Government may need additional powers and may need to enhance the use of its existing powers.
- (2) This shift of power and authority to the Government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life and to ensure that the Government uses its powers for the purposes for which the powers were given.
- (3) The National Commission on Terrorist Attacks Upon the United States correctly concluded that "The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend."

(c) Purpose

The Board shall-

- (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.

(d) Functions**(1) Advice and counsel on policy development and implementation**

The Board shall-

- (A) review proposed legislation, regulations, and policies related to efforts to protect the Nation from terrorism, including the development and adoption of information sharing guidelines under subsections (d) and (f) of section 485 of title 6;
- (B) review the implementation of new and existing legislation, regulations, and policies related to efforts to protect the Nation from terrorism, including the implementation of information sharing guidelines under subsections (d) and (f) of section 485 of title 6;
- (C) advise the President and the departments, agencies, and elements of the executive branch to ensure that privacy and civil liberties are appropriately considered in the development and implementation of such legislation, regulations, policies, and guidelines; and
- (D) in providing advice on proposals to retain or enhance a particular governmental power, consider whether the department, agency, or element of the executive branch has established-
 - (i) that the need for the power is balanced with the need to protect privacy and civil liberties;
 - (ii) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties; and
 - (iii) that there are adequate guidelines and oversight to properly confine its use.

(2) Oversight

The Board shall continually review-

(A) the regulations, policies, and procedures, and the implementation of the regulations, policies, and procedures, of the departments, agencies, and elements of the executive branch relating to efforts to protect the Nation from terrorism to ensure that privacy and civil liberties are protected;

(B) the information sharing practices of the departments, agencies, and elements of the executive branch relating to efforts to protect the Nation from terrorism to determine whether they appropriately protect privacy and civil liberties and adhere to the information sharing guidelines issued or developed under subsections (d) and (f) of section 485 of title 6 and to other governing laws, regulations, and policies regarding privacy and civil liberties; and

(C) other actions by the executive branch relating to efforts to protect the Nation from terrorism to determine whether such actions-

(i) appropriately protect privacy and civil liberties; and

(ii) are consistent with governing laws, regulations, and policies regarding privacy and civil liberties.

(3) Relationship with privacy and civil liberties officers

The Board shall-

(A) receive and review reports and other information from privacy officers and civil liberties officers under section 2000ee-1 of this title;

(B) when appropriate, make recommendations to such privacy officers and civil liberties officers regarding their activities; and

(C) when appropriate, coordinate the activities of such privacy officers and civil liberties officers on relevant interagency matters.

(4) Testimony

The members of the Board shall appear and testify before Congress upon request.

(e) Reports

(1) In general

The Board shall-

(A) receive and review reports from privacy officers and civil liberties officers under section 2000ee-1 of this title; and

(B) periodically submit, not less than semiannually, reports-

(i)(I) to the appropriate committees of Congress, including the Committee on the Judiciary of the Senate, the Committee on the Judiciary of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Homeland Security of the House of Representatives, the Committee on Oversight and Government Reform of the House of Representatives, the Select Committee on Intelligence of the Senate, and the Permanent Select Committee on Intelligence of the House of Representatives; and

(II) to the President; and

(ii) which shall be in unclassified form to the greatest extent possible, with a classified annex where necessary.

(2) Contents

Not less than 2 reports submitted each year under paragraph (1)(B) shall include-

(A) a description of the major activities of the Board during the preceding period;

(B) information on the findings, conclusions, and recommendations of the Board resulting from its advice and oversight functions under subsection (d);

(C) the minority views on any findings, conclusions, and recommendations of the Board resulting from its advice and oversight functions under subsection (d);

(D) each proposal reviewed by the Board under subsection (d)(1) that-

(i) the Board advised against implementation; and

(ii) notwithstanding such advice, actions were taken to implement; and

(E) for the preceding period, any requests submitted under subsection (g)(1)(D) for the issuance of subpoenas that were modified or denied by the Attorney General.

(f) Informing the public

The Board-

(1) shall make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law; and

(2) shall hold public hearings and otherwise inform the public of its activities, as appropriate and in a manner consistent with the protection of classified information and applicable law, but may, notwithstanding section 552b of title 5, meet or otherwise communicate in any number to confer or deliberate in a manner that is closed to the public.

(g) Access to information

(1) Authorization

If determined by the Board to be necessary to carry out its responsibilities under this section, the Board is authorized to-

(A) have access from any department, agency, or element of the executive branch, or any Federal officer or employee of any such department, agency, or element, to all relevant records, reports, audits, reviews, documents, papers, recommendations, or other relevant material, including classified information consistent with applicable law;

(B) interview, take statements from, or take public testimony from personnel of any department, agency, or element of the executive branch, or any Federal officer or employee of any such department, agency, or element;

(C) request information or assistance from any State, tribal, or local government; and

(D) at the direction of a majority of the members of the Board, submit a written request to the Attorney General of the United States that the Attorney General require, by subpoena, persons (other than departments, agencies, and elements of the executive branch) to produce any relevant information, documents, reports, answers, records, accounts, papers, and other documentary or testimonial evidence.

(2) Review of subpoena request

(A) In general

Not later than 30 days after the date of receipt of a request by the Board under paragraph (1)(D), the Attorney General shall-

(i) issue the subpoena as requested; or

(ii) provide the Board, in writing, with an explanation of the grounds on which the subpoena request has been modified or denied.

(B) Notification

If a subpoena request is modified or denied under subparagraph (A)(ii), the Attorney General shall, not later than 30 days after the date of that modification or denial, notify the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(3) Enforcement of subpoena

In the case of contumacy or failure to obey a subpoena issued pursuant to paragraph (1)(D), the United States district court for the judicial district in which the subpoenaed person resides, is served, or may be found may issue an order requiring such person to produce the evidence required by such subpoena.

(4) Agency cooperation

Whenever information or assistance requested under subparagraph (A) or (B) of paragraph (1) is, in the judgment of the Board, unreasonably refused or not provided, the Board shall report the circumstances to the head of the department, agency, or element concerned without delay. The head of the department, agency, or element concerned shall ensure that the Board is given access to the information, assistance, material, or personnel the Board determines to be necessary to carry out its functions.

(5) Access

Nothing in this section shall be construed to authorize the Board, or any agent thereof, to gain access to information regarding an activity covered by section 3093(a) of title 50.

(h) Membership

(1) Members

The Board shall be composed of a full-time chairman and 4 additional members, who shall be appointed by the President, by and with the advice and consent of the Senate.

(2) Qualifications

Members of the Board shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience, and without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party. The President shall, before appointing an individual who is not a member of the same political party as the President, consult with the leadership of that party, if any, in the Senate and House of Representatives.

(3) Incompatible office

An individual appointed to the Board may not, while serving on the Board, be an elected official, officer, or employee of the Federal Government, other than in the capacity as a member of the Board.

(4) Term

Each member of the Board shall serve a term of 6 years, except that-

(A) a member appointed to a term of office after the commencement of such term may serve under such appointment only for the remainder of such term; and

(B) upon the expiration of the term of office of a member, the member shall continue to serve until the member's successor has been appointed and qualified, except that no member may serve under this subparagraph-

(i) for more than 60 days when Congress is in session unless a nomination to fill the vacancy shall have been submitted to the Senate; or

(ii) after the adjournment sine die of the session of the Senate in which such nomination is submitted.

(5) Quorum and meetings

The Board shall meet upon the call of the chairman or a majority of its members. Three members of the Board shall constitute a quorum.

(i) Compensation and travel expenses**(1) Compensation****(A) Chairman**

The chairman of the Board shall be compensated at the rate of pay payable for a position at level III of the Executive Schedule under section 5314 of title 5.

(B) Members

Each member of the Board shall be compensated at a rate of pay payable for a position at level IV of the Executive Schedule under section 5315 of title 5 for each day during which that member is engaged in the actual performance of the duties of the Board.

(2) Travel expenses

Members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for persons employed intermittently by the Government under section 5703(b) ¹ of title 5, while away from their homes or regular places of business in the performance of services for the Board.

(j) Staff**(1) Appointment and compensation**

The chairman of the Board, in accordance with rules agreed upon by the Board, shall appoint and fix the compensation of a full-time executive director and such other personnel as may be necessary to enable the Board to carry out its functions, without regard to the provisions of title 5 governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no rate of pay fixed under this subsection may exceed the equivalent of that payable for a position at level V of the Executive Schedule under section 5316 of title 5.

(2) Appointment in absence of chairman

If the position of chairman of the Board is vacant, during the period of the vacancy, the Board, at the direction of the unanimous vote of the serving members of the Board, may exercise the authority of the chairman under paragraph (1).

(3) Detailees

Any Federal employee may be detailed to the Board without reimbursement from the Board, and such detailee shall retain the rights, status, and privileges of the detailee's regular employment without interruption.

(4) Consultant services

The Board may procure the temporary or intermittent services of experts and consultants in accordance with section 3109 of title 5, at rates that do not exceed the daily rate paid a person occupying a position at level IV of the Executive Schedule under section 5315 of such title.

(k) Security clearances**(1) In general**

The appropriate departments, agencies, and elements of the executive branch shall cooperate with the Board to expeditiously provide the Board members and staff with appropriate security clearances to the extent possible under existing procedures and requirements.

(2) Rules and procedures

After consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence, the Board shall adopt rules and procedures of the Board for physical, communications, computer, document, personnel, and other security relating to carrying out the functions of the Board.

(l) Treatment as agency, not as advisory committee

The Board-

(1) is an agency (as defined in section 551(1) of title 5); and

(2) is not an advisory committee (as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.)).

(m) Authorization of appropriations

There are authorized to be appropriated to carry out this section amounts as follows:

(1) For fiscal year 2008, \$5,000,000.

(2) For fiscal year 2009, \$6,650,000.

(3) For fiscal year 2010, \$8,300,000.

(4) For fiscal year 2011, \$10,000,000.

(5) For fiscal year 2012 and each subsequent fiscal year, such sums as may be necessary.

(Pub. L. 108–458, title I, §1061, Dec. 17, 2004, 118 Stat. 3684 ; Pub. L. 110–53, title VIII, §801(a), Aug. 3, 2007, 121 Stat. 352 ; Pub. L. 114–113, div. M, title III, §305, Dec. 18, 2015, 129 Stat. 2913 ; Pub. L. 115–118, title I, §108, Jan. 19, 2018, 132 Stat. 15 .)

REFERENCES IN TEXT

Section 5703 of title 5, referred to in subsec. (i)(2), was amended generally by Pub. L. 94–22, §4, May 19, 1975, 89 Stat. 85 , and, as so amended, does not contain a subsec. (b).

Section 3(2) of the Federal Advisory Committee Act, referred to in subsec. (l)(2), is section 3(2) of Pub. L. 92–463, which is set out in the Appendix to Title 5, Government Organization and Employees.

CODIFICATION

Section was formerly set out as a note under section 601 of Title 5, Government Organization and Employees.

AMENDMENTS

2018-Subsec. (f). Pub. L. 115–118, §108(b)(1), substituted "The Board" for "The Board shall" in introductory provisions.

Subsec. (f)(1). Pub. L. 115–118, §108(b)(2), substituted "shall make its" for "make its".

Subsec. (f)(2). Pub. L. 115–118, §108(b)(3), substituted "shall hold public" for "hold public" and inserted before period at end ", but may, notwithstanding section 552b of title 5, meet or otherwise communicate in any number to confer or deliberate in a manner that is closed to the public".

Subsec. (j)(2) to (4). Pub. L. 115–118, §108(a), added par. (2) and redesignated former pars. (2) and (3) as (3) and (4), respectively.

2015-Subsec. (g)(5). Pub. L. 114–113 added par. (5).

2007-Pub. L. 110–53 amended section generally, substituting provisions relating to Privacy and Civil Liberties Oversight Board, consisting of subsecs. (a) to (m), for provisions relating to Privacy and Civil Liberties Oversight Board, consisting of subsecs. (a) to (l).

EFFECTIVE DATE OF 2007 AMENDMENT

Pub. L. 110–53, title VIII, §801(d), Aug. 3, 2007, 121 Stat. 358 , provided that:

"(1) IN GENERAL.-The amendments made by subsection (a) and subsection (b) [amending this section] shall take effect 180 days after the date of enactment of this Act [Aug. 3, 2007].

"(2) TRANSITION PROVISIONS.-Subsection (c) [enacting provisions set out as a note under this section] shall take effect on the date of enactment of this Act."

SECURITY RULES AND PROCEDURES

Pub. L. 110–53, title VIII, §801(b), Aug. 3, 2007, 121 Stat. 357 , provided that: "The Privacy and Civil Liberties Oversight Board shall promptly adopt the security rules and procedures required under section 1061(k)(2) of the National Security Intelligence Reform Act of 2004 [42 U.S.C. 2000ee(k)(2)] (as added by subsection (a) of this section)."

TRANSITION PROVISIONS

Pub. L. 110–53, title VIII, §801(c), Aug. 3, 2007, 121 Stat. 357 , provided that:

"(1) TREATMENT OF INCUMBENT MEMBERS OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD.-

"(A) CONTINUATION OF SERVICE.-Any individual who is a member of the Privacy and Civil Liberties Oversight Board on the date of enactment of this Act [Aug. 3, 2007] may continue to serve on the Board until 180 days after the date of enactment of this Act.

"(B) TERMINATION OF TERMS.-The term of any individual who is a member of the Privacy and Civil Liberties Oversight Board on the date of enactment of this Act shall terminate 180 days after the date of enactment of this Act.

"(2) APPOINTMENTS.-

"(A) IN GENERAL.-The President and the Senate shall take such actions as necessary for the President, by and with the advice and consent of the Senate, to appoint members to the Privacy and Civil Liberties Oversight Board as constituted under the amendments made by subsection (a) [amending this section] in a timely manner to provide for the continuing operation of the Board and orderly implementation of this section [amending this section and enacting provisions set out as notes under this section].

"(B) DESIGNATIONS.-In making the appointments described under subparagraph (A) of the first members of the Privacy and Civil Liberties Oversight Board as constituted under the amendments

made by subsection (a), the President shall provide for the members to serve terms of 2, 3, 4, 5, and 6 years beginning on the effective date described under subsection (d)(1) [set out above], with the term of each such member to be designated by the President."

EX. ORD. NO. 13353. ESTABLISHING THE PRESIDENT'S BOARD ON SAFEGUARDING AMERICANS' CIVIL LIBERTIES

Ex. Ord. No. 13353, Aug. 27, 2004, 69 F.R. 53585, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to further strengthen protections for the rights of Americans in the effective performance of national security and homeland security functions, it is hereby ordered as follows:

SECTION 1. Policy. The United States Government has a solemn obligation, and shall continue fully, to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions.

SEC. 2. Establishment of Board. To advance the policy set forth in section 1 of this order (Policy), there is hereby established the President's Board on Safeguarding Americans' Civil Liberties (Board). The Board shall be part of the Department of Justice for administrative purposes.

SEC. 3. Functions. The Board shall:

- (a)(i) advise the President on effective means to implement the Policy, and (ii) keep the President informed of the implementation of the Policy;
- (b) periodically request reports from Federal departments and agencies relating to policies and procedures that ensure implementation of the Policy;
- (c) recommend to the President policies, guidelines and other administrative actions, technologies, and legislation, as necessary to implement the Policy;
- (d) at the request of the head of any Federal department or agency, unless the Chair, after consultation with the Vice Chair, declines the request, promptly review and provide advice on a policy or action of that department or agency that implicates the Policy;
- (e) obtain information and advice relating to the Policy from representatives of entities or individuals outside the executive branch of the Federal Government in a manner that seeks their individual advice and does not involve collective judgment or consensus advice or deliberation;
- (f) refer, consistent with section 535 of title 28, United States Code, credible information pertaining to possible violations of law relating to the Policy by any Federal employee or official to the appropriate office for prompt investigation;
- (g) take steps to enhance cooperation and coordination among Federal departments and agencies in the implementation of the Policy, including but not limited to working with the Director of the Office of Management and Budget and other officers of the United States to review and assist in the coordination of guidelines and policies concerning national security and homeland security efforts, such as information collection and sharing; and
- (h) undertake other efforts to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by Federal law, as the President may direct.

Upon the recommendation of the Board, the Attorney General or the Secretary of Homeland Security may establish one or more committees that include individuals from outside the executive branch of the Federal Government, in accordance with applicable law, to advise the Board on specific issues relating to the Policy. Any such committee shall carry out its functions separately from the Board.

SEC. 4. Membership and Operation. The Board shall consist exclusively of the following:

- (a) the Deputy Attorney General, who shall serve as Chair;
- (b) the Under Secretary for Border and Transportation Security, Department of Homeland Security, who shall serve as Vice Chair;
- (c) the Assistant Attorney General (Civil Rights Division);
- (d) the Assistant Attorney General (Office of Legal Policy);
- (e) the Counsel for Intelligence Policy, Department of Justice;
- (f) the Chair of the Privacy Council, Federal Bureau of Investigation;
- (g) the Assistant Secretary for Information Analysis, Department of Homeland Security;
- (h) the Assistant Secretary (Policy), Directorate of Border and Transportation Security, Department of Homeland Security;
- (i) the Officer for Civil Rights and Civil Liberties, Department of Homeland Security;
- (j) the Privacy Officer, Department of Homeland Security;
- (k) the Under Secretary for Enforcement, Department of the Treasury;
- (l) the Assistant Secretary (Terrorist Financing), Department of the Treasury;
- (m) the General Counsel, Office of Management and Budget;

- (n) the Deputy Director of Central Intelligence for Community Management;
- (o) the General Counsel, Central Intelligence Agency;
- (p) the General Counsel, National Security Agency;
- (q) the Under Secretary of Defense for Intelligence;
- (r) the General Counsel of the Department of Defense;
- (s) the Legal Adviser, Department of State;
- (t) the Director, Terrorist Threat Integration Center; and
- (u) such other officers of the United States as the Deputy Attorney General may from time to time designate.

A member of the Board may designate, to perform the Board or Board subgroup functions of the member, any person who is part of such member's department or agency and who is either (i) an officer of the United States appointed by the President, or (ii) a member of the Senior Executive Service or the Senior Intelligence Service. The Chair, after consultation with the Vice Chair, shall convene and preside at meetings of the Board, determine its agenda, direct its work, and, as appropriate to deal with particular subject matters, establish and direct subgroups of the Board that shall consist exclusively of members of the Board. The Chair may invite, in his discretion, officers or employees of other departments or agencies to participate in the work of the Board. The Chair shall convene the first meeting of the Board within 20 days after the date of this order and shall thereafter convene meetings of the Board at such times as the Chair, after consultation with the Vice Chair, deems appropriate. The Deputy Attorney General shall designate an official of the Department of Justice to serve as the Executive Director of the Board.

SEC. 5. Cooperation. To the extent permitted by law, all Federal departments and agencies shall cooperate with the Board and provide the Board with such information, support, and assistance as the Board, through the Chair, may request.

SEC. 6. Administration. Consistent with applicable law and subject to the availability of appropriations, the Department of Justice shall provide the funding and administrative support for the Board necessary to implement this order.

SEC. 7. General Provisions. (a) This order shall not be construed to impair or otherwise affect the authorities of any department, agency, instrumentality, officer, or employee of the United States under applicable law, including the functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable laws and Executive Orders concerning protection of information, including those for the protection of intelligence sources and methods, law enforcement information, and classified national security information, and the Privacy Act of 1974, as amended (5 U.S.C. 552a).

(c) This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, or any of its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any other person.

GEORGE W. BUSH.

¹ See References in Text note below.

