



PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD

Advisory Function Policy and Procedure

Policy 2015-004

1. PCLOB Statutory Advice Function

a. Purpose. The purpose of this policy is to set forth procedures through which the Board may tender advice to the President and the departments, agencies, and elements of the executive branch. The Board exercises its advice function when it requests or receives information about a matter that is the subject of ongoing deliberation within the executive branch – that is, where the program, policy, or other matter is under discussion and there is not yet an executive branch decision. Once the matter has been settled within the executive branch, and there is no ongoing engagement to amend such legislation, regulation, or policy, the Board would only address the matter through its statutory oversight function.

b. Statutory Mandate. The Board’s enabling statute states that the Board shall review proposed legislation, regulations, and policies, and the development and implementation of new and existing legislation, regulations, and policies related to efforts to protect the Nation from terrorism, including the development, adoption, and implementation of information sharing guidelines. The Board shall 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. In providing advice on proposals to retain or enhance a particular governmental power, the Board shall 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.

c. Early Engagement. Early engagement by the Board – before final agency decision-making and when there is still time for the agency to consider the Board’s advice – is critical to its ability to provide meaningful advice.

2. Advisory Process

a. Exercise. The Board may exercise its advice function in response to a request from the President or a department, agency, or element of the executive branch, or upon its own initiative.

b. Voting. At the beginning of an engagement, the Board will vote to decide whether to exercise its advisory role. The vote will be governed by the Board's voting procedures.

c. Clarity of function. Once a vote to provide advice is complete, the Board will inform the President or affected department, agency, or element of the executive branch, as appropriate, that the Board is exercising its advisory function with respect to proposed legislation, regulations, policies, or guidelines or the development and implementation of such legislation, regulations, policies, or guidelines.

d. Forms of Board advice. The Board may provide advice orally or in writing. Board recommendations will be voted on by the Board, and the Board will clearly indicate its vote to the President or affected department, agency, or element of the executive branch. Advice provided by staff or individual Board Members does not constitute the advice of the Board and will not be referred to or relied upon as such.

i. Individual Member opinions. Individual Members may convey opinions to the President, relevant departments, agencies, and elements of the executive branch orally, in writing, or through their individual counselors, on matters falling within the purview of the Board's advice function. Opinions given by individual Members of the Board do not constitute advice of the Board. In such cases, Members or their individual counselors will expressly indicate that the opinions communicated are the individual views of the Member and do not constitute the view of or a recommendation from the Board.

ii. Staff-level work product. Staff work product may be shared with the President and the departments, agencies, and elements of the executive branch upon Board approval. Staff work product does not constitute Board advice.

e. Requests for Advice. The President or department, agency, or element of the executive branch should contact any Board Member or the Board's Executive Director to relay a request for advice. Requests for advice may be submitted in writing or orally. Any requests for advice received by PCLOB staff members will be forwarded to the Executive Director, who will subsequently consult with Board Members to determine whether and how the Board wishes to proceed. The Board will vote to determine whether it will accept the request for advice.

f. Engagement. The Board or its staff may require one or more discussions and/or briefings with the President or department, agency, or element of the executive branch to better understand the issues involved prior to engaging the Board in an advisory capacity. At a minimum, elements should be prepared to hold a call or meeting with PCLOB staff to answer clarifying questions before the staff briefs the Board on the request for advice. The Board then may request one or more discussions or briefings with the executive branch element(s) prior to issuing advice. Early engagement is important when the agency is seeking input from the full Board.

3. Notification to Congress and the President

a. Statutory Reporting Requirement. The Board is required to report to the President and the appropriate committees of Congress each proposal reviewed by the Board in an advisory capacity for which (1) the Board advised against implementation; and (2) notwithstanding such advice, actions were taken to implement.

b. Triggering the Reporting Requirement. The statutory provision described in paragraph (a) is triggered only when the Board votes against implementation of a proposal and conveys that advice to the President or the relevant department, agency, or element of the executive branch. Staff-level memoranda or meetings, or opinions of individual Board Members do not trigger this reporting requirement.

c. Notification. If the Board determines that the provision described in paragraph (a) is triggered, the Board will notify the President or the relevant department, agency, or element of the executive branch before the Board submits its report.

d. Tracking. Recommendations advising against the implementation of a proposal will be clearly marked and Board staff will track elements' responses to such recommendations.

4. Public Reporting:

a. Statutory Mandate. Pursuant to statute, the Board is required to make its reports, "including its reports to Congress," available to the public, and to "hold public hearings and otherwise inform the public of its activities, as appropriate," "consistent with the protection of classified information and applicable law."

b. Substance of Advice. The Board respects the interagency deliberative process and its underlying rationale: to facilitate frank and candid discussion within government as policies are being developed, and to enhance the quality of government decision-making. The Board recognizes that routinely

disclosing its advice regarding proposals concerning the development and implementation of counterterrorism legislation, regulations, policies, and guidelines could make executive branch agencies reluctant to seek PCLOB advice – a result that would ultimately undermine privacy and civil liberties interests. Therefore, the Board will not make public the substance of the Board’s advice, individual Member opinion, or staff work product that incorporates the particular advice given, without the consent of the receiving department, agency, or element of the executive branch, except to the extent required by the Board’s statutory mandate to report to Congress and the President or as otherwise legally required.

c. Other information. In handling other agencies’ information that is directly involved in the advice given by the Board, or Board work product that incorporates such information, the Board will, prior to responding to external requests for information, consult and coordinate with, and/or refer requests for information to, the originating agency, as appropriate and consistent with applicable law.

5. Post-Advice

a. Board Advisory Briefings. The Board may hold briefings with the President or departments, agencies, or elements of the executive branch to convey or elaborate upon advice from the Board. Any individual Board Member views beyond the scope of the Board’s advice will be clearly indicated as such, and do not constitute the views of the Board.

b. Status Meeting. The Board, and/or the President or departments, agencies, or elements of the executive branch, may request a post-advice status meeting on the element’s implementation of the Board’s recommendations.

6. Oversight. Engagement by the Board in its advisory function on a matter neither precludes the Board from exercising nor requires the Board to exercise its statutory oversight function with respect to that matter. Before conducting oversight on matters regarding which Board advice was previously offered, the Board will vote on whether to conduct such oversight. In any oversight review regarding a matter on which the Board previously provided advice, the Board will refrain from referring to the substance of such advice in any resulting oversight products.

7. Applicability. This policy provides guidance only and is not intended to have the force and effect of law or create or confer any rights, privileges, or benefits. The Board reserves the authority to modify this document as needed, in which case it will inform the relevant agencies.

8. Definitions

a. Board or PCLOB means the Privacy and Civil Liberties Oversight Board created pursuant to 42 U.S.C. § 2000ee.

b. Board Member or Member means any of the individual members of the Board, including the Chairman.

c. Chairman means the Chairman of the Board.

d. Counselor means any permanent or temporary employee of the Board, including an employee of another executive branch department or agency detailed to the Board, whose primary assigned responsibilities are to work for a specific Board Member.

e. Element of the Executive Branch or Element includes the Executive Office of the President and the departments or agencies of the executive branch.

f. Executive Director means the individual appointed by the Chairman to act as the Executive Director (or, in the event the Chairman position is vacant, the individual designated by the Board) to discharge the responsibilities assigned to the Executive Director.

h. Staff means any permanent or temporary Board employee(s), including an intern or employee of another executive branch department or agency detailed to the Board, except where these procedures specify a particular person.

Effective Date: Oct. 30, 2015

Certification: Eric Burg