



## Privacy & Civil Liberties Oversight Board

### BOARD MEETING Meeting Minutes: Open Session March 5, 2013

A meeting of the Privacy and Civil Liberties Oversight Board was held on Tuesday, March 5, 2013. The open portion of the meeting was held at the General Services Administration, National Capital Region Building, 301 7<sup>th</sup> Street, SW, Room 1034, Washington, D.C. 20207.

**Members Present:** Rachel Brand, Elisebeth Collins Cook, James X. Dempsey, Patricia Wald

#### **I. Call to Order**

Ms. Cook acted as the presiding officer. The meeting was called to order by unanimous vote of the Board at 10:03 a.m.

#### **II. Approval of Proposed Minutes from the October 31, 2012 Board Meeting**

Ms. Cook asked if there were any questions or comments on the proposed minutes. There being none, Ms. Cook called for a vote to approve the proposed minutes from the October 31, 2012 meeting. The proposed minutes were approved – 4 ayes; 0 nays.

#### **III. Business Items**

##### **A. Board Information**

Ms. Cook introduced Susan Reingold, Chief Administrative Officer, Privacy and Civil Liberties Oversight Board, to provide an update on the status of the Board's stand-up activities.

##### ***i. Update on Status of Stand-Up Activities***

Ms. Reingold provided the following update on the status of the Board's stand-up activities:

The Board was created as an independent agency within the executive branch. As such, it has no affiliation with or support structure provided by an existing federal agency or department. This presents an enormous challenge since the Board must identify the necessary infrastructure to run the agency and support its day-to-day operations, while at the same time beginning to address its oversight responsibilities.

Since its last meeting, the Board has been establishing a budget and staffing plan; finding office space; establishing support for IT and communications capabilities at both the

unclassified and classified levels; establishing HR, logistics, security, and financial support structures in order to be able to bring in a full complement of qualified personnel; and engaging in informational sessions with federal agencies to better understand their counterterrorism related programs and responsibilities.

The Board has made significant progress in all of these areas, but continues to face significant challenges as it strives to reach a full operational capability. The Board has developed a general staffing plan and working budget for both FY2013 and FY2014. The major costs that the Board expects to incur during its FY13 and FY14 start-up period are in the area of personnel and facilities/IT costs. The Board's funding is generally designated as two-year funds. As a result, the Board currently has funds available from the original \$900,000 that it was funded for FY2012. This two-year money has been the source of the Board's funds during the FY2013 Continuing Resolution. In addition to the carryover from FY2012, the President's Budget Request for FY2013 specifically included \$900,000 for the Board. The Board will receive that entire appropriation, also designated as two-year money, if the Continuing Resolution spans the entire fiscal year. The Board works closely with the Office of Management and Budget and has been included in the formulation of the President's FY2014 Budget, as well as maintained contact with the appropriations committees in Congress.

By law, the Chairman is designated as the Board official who shall appoint and fix the compensation of personnel as may be necessary to enable the Board to carry out its functions. The law also allows for any federal employee to be detailed to the Board from another federal agency. In the absence of a Chairman, and in order to support the Board sufficiently so that it can function at an initial operating capability, the Board is looking to bring in a limited number of employees from other federal agencies on detail assignments.

In December 2012, the Board engaged the services of a Chief Administrative Officer, who is now responsible for managing the administrative steps necessary to establish the Board's initial operating capability, and a Legal Counsel, who is responsible for rendering expert legal assistance to the Board members on all matters related to the organization's operations. These individuals are on loan to the Board from the Office of the Director of National Intelligence and the Department of Transportation, respectively, and are operating out of their agency spaces until the Board has its own dedicated office space and communications capabilities.

In early February, the Board put out a general call to federal agencies, looking for additional qualified personnel to take a one-year detail assignment with the Board; several extremely qualified candidates have responded. The Board has entered into two fee-for-service agreements with the General Services Administration for human resources-related support and budget/payroll support. The Board also continues to work with the General Services Administration to secure office space that would allow the Board to carry out its mandate in an environment where it has access to information at all levels of classification.

The Board is researching options for provisioning the Board's unclassified and classified IT support, to include email, office automation, help desk, electronic file storage, archiving requirements, and website development and maintenance. Because Congress established the

Board as an independent agency, we have no departmental infrastructure that exists to support us (to include something as basic as an Internet Service Provider).

In mid-December, the four Board Members were granted their security clearances by the Office of the Director of National Intelligence (ODNI). All non-intelligence community agency organizations that have a requirement to work with classified information must have an Intelligence Community sponsor in order to ensure that the proper steps and procedures have been put into place in order to legally access such information. As a result, the Board continues to consult with the ODNI and others regarding operational requirements and costs.

Numerous introductory and informational meetings have been scheduled since the Board Members were sworn in. A list of those meetings has been provided as a hand-out and will be addressed in more detail under the Agenda Topic “Board Discussion – Summary of Informational Meetings.”

#### **ii. Status of Internal Policies and Procedures**

Ms. Cook noted that the Board, as an independent federal agency, is subject to all of the laws and regulations that apply to other federal agencies, which brings with it numerous requirements. Ms. Cook indicated that the Board had made progress in meeting these requirements. Specifically, the Board published its No FEAR Act Notice in the Federal Register and adopted a PII Breach Reporting and Response Policy. Ms. Cook indicated that the Board would consider for approval at today’s meeting a Notice of Proposed Rulemaking (NPRM) to establish procedures for the Board’s administration of the Freedom of Information Act, Privacy Act, and Government in the Sunshine Act; an Interim Security Policy; and a rulemaking delegating certain of the Board’s authorities to the Chairman, Executive Director, and General Counsel.

Ms. Cook indicated that the Board is continuing these efforts and is working on the implementation of its ethics program, in consultation with the Office of Government Ethics and Legal Counsel; a records management program, in consultation with the National Records and Archives Administration; and has begun work on its first semi-annual report to Congress.

### **B. Board Action**

#### **i. Notice of Proposed Rulemaking: FOIA, Privacy Act, Sunshine Act**

Ms. Cook asked if the Board had any questions or comments on the draft Notice of Proposed Rulemaking (NPRM). Mr. Dempsey indicated that he had noticed some typos and other non-substantive items in the NPRM that might need to be corrected. There were no additional comments. Ms. Cook asked for a vote to approve the draft NPRM for publication in the Federal Register and to authorize Legal Counsel to take steps necessary to facilitate publication. The NPRM was approved and Legal Counsel authorized to submit for publication in the Federal Register -- 4 ayes; 0 nays.

## **ii. Interim Security Rules and Procedures**

Ms. Cook indicated that the Board is required by its enabling legislation to adopt security procedures for the physical, communications, computer, document, personnel, and other security related to carrying out the functions of the Board. While the Board is working to establish office space and communications and computer networks, the staff has prepared Interim Security Procedures Policy. The Interim Security Procedures Policy directs staff to revise the policy once the Board has identified permanent office space, and a computer and communications system.

Ms. Cook asked if there were any comments on the draft Interim Security Procedures Policy. There being none, Ms. Cook asked for a vote to approve the Interim Security Procedures Policy. The Interim Security Procedures Policy was approved -- 4 ayes; 0 nays.

## **iii. Delegation Rule**

Ms. Cook stated that the Board is required to publish a statement of its organization and operations in the Federal Register. Staff prepared a draft rulemaking that provides for a delegation of certain Board authorities to the Chairman, Executive Director, and General Counsel. This delegation of authority is intended to contribute to effective and efficient Board operations. Claire McKenna, Legal Counsel, Privacy and Civil Liberties Oversight Board, stated that this rulemaking would be published in the Federal Register but was not subject to notice and comment under the Administrative Procedures Act.

Ms. Cook asked if Members had comments on the proposed delegation rule. Ms. Brand stated that the rule delegates authorities to the Chair, Executive Director, and General Counsel and that each of these positions is currently vacant. Ms. Brand, noted, however, that the delegation addresses the exercise of those authorities in the event of vacancies. There were no additional comments. Ms. Cook asked for a vote to approve the draft delegation rulemaking and to authorize Legal Counsel to submit the draft to the Federal Register for publication as a final rule. The delegation rule was approved and Legal Counsel authorized to submit the rule to the Federal Register for publication -- 4 ayes; 0 nays.

## **C. Board Discussion: Summary of Informational Meetings**

Ms. Cook stated that the Board participated in a series of informational briefings on federal counterterrorism programs. Ms. Cook summarized these meetings as follows:

FISA Amendments Act: Ms. Cook recognized that many of the individuals and groups that attended the Board's October 31 meeting identified the FISA Amendments Act as a key area of interest. Ms. Cook noted that although the Board members did not have their security clearances in time to participate meaningfully in the reauthorization debate, the Board has since begun consideration of the implementation of the FISA Amendments Act. The Board received a comprehensive briefing from the National Security Agency on the implementation

of the FISA Amendments Act. Ms. Cook expressed the Board's appreciation of the time and effort NSA dedicated to the preparation and presentation of the briefing. Ms. Cook indicated that it was her impression that a great deal of effort had been dedicated to implementing the FISA Amendments Act in a responsible manner. Ms. Cook also noted that the Board intended to follow up on some aspects of this program, as determined during the closed session of today's meeting.

Fusion Centers: Ms. Cook stated that, at the Board's October 31 meeting, a number of individuals suggested that the Board consider the activities of Fusion Centers. The Board received a briefing from the U.S. Senate Permanent Subcommittee on Investigations about its report on Fusion Centers and from the relevant offices at the Department of Homeland Security. Ms. Cook expressed the Board's appreciation of the information provided by both entities and indicated that the Board would continue to monitor emerging issues. Ms. Cook noted that Fusion Centers are not organized and operated solely for counterterrorism purposes; therefore, the Board will continually assess the scope of its oversight of this activity based on its statutory authorities and available resources. Ms. Cook indicated that the Board anticipates future briefings related to the Suspicious Activity Reporting program.

National Counterterrorism Center (NCTC): The Board received two separate briefings from NCTC and the Department of Homeland Security on the implementation of the Attorney General's NCTC guidelines. Ms. Cook expressed the Board's appreciation of the time and effort dedicated to these briefings. Ms. Cook stated that the Board anticipates continued involvement in this area, as the Board understands the potential risks of providing databases that contain a high percentage of U.S. person information that may have been collected for purposes other than counterterrorism. Ms. Cook noted that the Board urged (and will continue to urge) NCTC to act with greater transparency when developing and implementing new guidelines.

Information Sharing Environment: The Board received a briefing from the ISE Program Manager. Ms. Cook expressed the Board's appreciation of the seriousness with which the ISE Program Manager approaches his task. Consistent with the Board's statutory mandate, the Board will provide advice and oversight on the implementation and administration of ISE programs.

Cybersecurity: Ms. Cook stated that numerous bills have been introduced in Congress that contemplate a role for the Board in the area of cybersecurity. To date, these bills have not been enacted. The President's recent executive order on cybersecurity, however, includes a role for the Board. The Board received a briefing on the executive order and will work as part of the interagency process on implementation of the executive order.

#### **D. Board Discussion: Next Steps**

##### ***i.* Planned Future Informational Briefings**

Ms. Cook stated that the Board will continue to receive informational briefings on federal counterterrorism programs. The Board will meet with Department of Justice and FBI staff regarding implementation of the Attorney General guidelines on FBI domestic activities. Ms. Cook also stated that the Board has requested a briefing on the classified legal memorandum about the use of drones abroad, and is interested in a briefing from the President's Intelligence Advisory Board. In addition, the Board may request an informational briefing on the domestic use of drones.

**ii. Potential Future Public Meetings**

Ms. Cook indicated that the Board's focus currently is on informational briefings about programs that fall within its statutory mandate. The Board, however, is considering the possibility of public forums to solicit input on topics such as "What is Privacy?" and "Which Civil Liberties are Affected?" Ms. Cook stated that the Board welcomes public input on these questions and, in addition, input on other potential meeting topics.

**iii. Development of the Board's Fiscal Year 2013 to Fiscal Year 2014 Agenda: Potential Areas of Focus**

**a. Cross-cutting Issues: Transparency and Training**

Ms. Cook stated that there are two areas of focus that the Board views as cross-cutting: transparency and training. Ms. Cook noted that many commenters at the Board's October 31 meeting mentioned transparency. Similarly, training is a recurring theme. As a result, the Board would like to consider training across several programs.

Ms. Cook expressed the Board's acknowledgement of the efforts that federal agencies have undertaken to be more transparent, particularly with respect to counterterrorism programs. The Board further acknowledges that transparency, in this area, presents several challenges. Ms. Cook proposed that the Board confer with federal agencies about ways the Board can assist agency efforts to be more transparent and that the Board direct staff to develop a strategy to implement this proposal. Ms. Cook asked if Board members had comments on the proposal. There being none, Ms. Cook asked that the Board approve the proposal. The proposal was approved – 4 ayes, 0 nays.

Ms. Cook next proposed that the Board direct the Office of the Director of National Intelligence to provide the Board with an inventory of all of the privacy and civil liberties training provided to federal, state, local, and tribal employees engaged in counterterrorism programs funded by the federal government. Ms. Cook further proposed that this inventory be submitted to the Board within 120 days of communicating the task to the ODNI. Ms. Cook asked if Board members had comments on the proposal. There being none, Ms. Cook asked that the Board approve the proposal. The proposal was approved – 4 ayes, 0 nays.

## **b. Program Specific**

Ms. Cook indicated that the Board anticipates continued involvement in the federal government's implementation of FISA Amendments Act, the NCTC Guidelines, and the cybersecurity executive order.

Ms. Cook asked if Board members had any comments on these areas of focus.

Ms. Wald stated that the Board has received in-depth informational briefings on a variety of counterterrorism programs and that these issues are complex. Ms. Wald noted that the Board needs staff to move to the next step of delving into the substantive aspects of its mission; however, without a Chairman, the Board cannot hire staff but must rely on detailees from other agencies. Ms. Wald concluded that the appointment of a Chairman is critical to moving forward on its substantive work.

Mr. Dempsey noted that the Board has taken preliminary action on many of the issues raised by the public during the Board's October 31, 2012 meeting, including the cross-cutting issues of transparency and training. Mr. Dempsey stated that the Board's next steps are to prioritize and determine what areas it would like further information on and will be discussing some of this in closed session at today's meeting. Mr. Dempsey also noted that the Board has accomplished quite a bit in a short time, particularly given that members only received their security clearances in December, are part-time, and subject to caps on days of service under ethics rules. In addition, the Board has limited staff. Mr. Dempsey emphasized that the Board will need to prioritize going forward.

Ms. Wald noted that many non-governmental organizations have examined and written reports on counterterrorism programs. Ms. Wald asked that these NGOs share these reports with the Board, if they would contribute to the Board's work on these matters. Ms. Reingold stated that organizations can email reports to her at [susanbr@dni.gov](mailto:susanbr@dni.gov).

Ms. Brand expressed her agreement with Board member remarks. Ms. Brand reiterated Ms. Cook's expression of the Board's appreciation of the time and effort federal agencies dedicated to the background briefings provided to the Board. Ms. Brand indicated that she was impressed by the attention given to establishing processes to protect privacy and civil liberties. Ms. Brand also noted that she is looking forward to an opportunity to obtain public input on the question of "what is privacy."

Mr. Dempsey noted that the term privacy is used as an umbrella term for a set of principles and that it will be helpful to the Board to explore this question.

Ms. Wald stated that "privacy" has not been comprehensively or conceptually defined by the courts and that the Board is interested in hearing from experts in this field. Ms. Wald further noted that members of the Board has met with European privacy officials and has additional meetings scheduled. The Board is interested in discussing the types of issues they are confronted with and how they are handled.

Mr. Dempsey stated that the Board is committed to the Board's stand-up to ensure that the Board, as a new federal agency, is built on a solid foundation. Mr. Dempsey noted that the administrative activities related to stand-up are an important part of their agenda, as the Board's first members.

#### **IV. Public Participation**

Ms. Cook invited comments from the meeting attendees. [A list of the attendees is on file with the Board.]

The following topics were addressed in comments from the public: the potential future public forums on privacy and civil liberties; GPS tracking, third party data, the cybersecurity executive order, Fusion Centers, and drones; the Board's organization and operation under its enabling legislation; the timing of the Federal Register notice for the Board meeting; the Board's interpretation of what constitutes a "counterterrorism program"; and the Board's area of focus related to privacy and civil liberties training.

The Board responded to the comments from the meeting attendees in the following ways:

Ms. Cook and Ms. Wald indicated that the Board is aware of the privacy and civil liberties issues presented by topics raised in public comments. Ms. Cook mentioned that the Board's statutory mission is specific to counterterrorism programs and noted that, as the Board determines its agenda, it will need to be sensitive to where it should best focus its limited resources in light of its statutory mandate.

Ms. Cook stated that the Board has requested a briefing on the targeted killing program and the classified legal memorandum related to that program. Ms. Cook noted that this initial informational briefing will help the Board assess whether this activity falls within the scope of the Board's statutory mandate. Ms. Cook also stated that the Board discussed domestic drone use during its briefing with the Department of Homeland Security and that briefing indicated that DHS's use of drones was not focused on counterterrorism activities. Ms. Cook noted that the Board needs to further consider the extent to which drone use fits within its statutory mandate.

Ms. Brand, speaking only for herself, stated that the Board will have made substantial progress toward establishing itself as an agency by the time the Chairman is confirmed. Ms. Brand continued by noting that it would have been helpful if Congress had included in the Board's authorizing legislation a requirement that another agency provide the Board with interim administrative support.

Ms. Cook agreed that the lack of administrative support presents a challenge. Ms. Cook noted that Congress created the Board as an independent agency with specific goals in mind, but the consequence is that the Board must spend a significant amount of its time addressing administrative matters related to start up. Mr. Dempsey added that Board members, finally

confirmed, need to focus on the statute as it is written. Mr. Dempsey indicated that the Board may evaluate whether statutory changes may be helpful once it has been in operation a full year. Ms. Wald stated that Board members are part time and subject to requirements on how the number of days members can work are calculated under applicable ethics laws. Ms. Wald noted that these limits are very impeding. Ms. Brand stated that many of the current challenges will be resolved once the Board's full-time Chairman is confirmed.

Ms. Wald noted that some agencies seem to have defined for themselves those programs they consider to be counterterrorism programs and, therefore, the Board has not had occasion to specifically identify programs as “counterterrorism programs.” Ms. Cook added that agencies have not attempted to restrict the Board's access to information on the basis that a particular program is not counterterrorism-related. Ms. Wald noted that some agencies have distinguished between international and domestic counterterrorism programs.

Mr. Dempsey responded to public comments about the timing of the meeting notice by noting that publishing notice is among the administrative challenges confronted by the Board at this stage of start-up. Ms. Cook added that the Board appreciates this point and is working on improving this process. Board members expressed their agreement with a commenter’s suggestion to create an electronic mailing list to notify interested parties of upcoming Board meetings as soon as possible. Ms. Brand stated that the Board will use its website to provide more notice and transparency once established.

Ms. Cook stated that the Board’s interest in training is not limited to the privacy and civil liberties training, but includes the complete counterterrorism training provided. Ms. Cook suggested that that Board consider how to communicate its request to the ODNI to ensure that the Board receives an inventory of relevant training.

## **V. Board Discussion: Open**

Ms. Cook asked if Board members had additional comments or items for discussion. Members responded by thanking the meeting’s attendees for their comments and participation.

## **VI. Adjourn Open Session**

Upon conclusion of the discussion, Ms. Cook asked the Board to adjourn the open portion of the meeting. The Members voted in favor of adjourning the open portion – 4 ayes; 0 nays.