

## **Rules Implementing the Government in the Sunshine Act**

**AGENCY:** Assassination Record Review Board (ARRB)

**ACTION:** Rulemaking (ARRB)

**SUMMARY:** The Assassination Records Review Board ("Board") was established by the ( ) Act (.) This NPRM initiates the Board's first rulemaking. All of the Board's regulations will eventually be codified in X CFR Chapter XXX.

This rulemaking being undertaken in response to (the decision of the United States Court of Appeals for the District of Columbia Circuit that the Board is an "agency" generally convened by) the Government in the Sunshine Act. ( ) The Sunshine Act relates to meetings of agencies of the United States government that are headed by collegial body composed of two or more members, a majority of whom are appointed by the President with the advice and consent of the Senate. The Act provides that "meetings", as specifically defined in the statute, shall be held in public except where stated exemptions apply. The board invites comments from interested groups and members of the public on these proposed rules implementing the Sunshine Act.

**DATES:** To be considered, comments must be mailed or delivered to the address listed below by (5 p.m. on January 30, 1991.)

**ADDRESSES:** Comments on the proposed rule should be mailed or delivered to the Office of the General Counsel, (Sheryl L. Walter, General Counsel, ARRB, 600 E Street, North West, 2nd Floor, Washington, D.C. 20530.) All comments will be placed in the Board's public files and will be available for inspection between (8:30 a.m. and 4:30 p.m., Mondays through Fridays,) in the Boards Public Reading Room at the same address. Comments should state prominently that they are being filed in Docket No. XXXX.

### **FOR FURTHER INFORMATION CONTACT:**

Sheryl L. Walter, General Counsel, ARRB, 600 E Street, North West, 2nd

Floor, Washington, D.C. 20530.

To discharge its responsibilities, the Board gathers as a collegial body at its Washington, DC offices, at ARRB facilities, and at other locations as appropriate. Since the Board, including its staff, is a small agency (currently authorized to fill up to equivalent of 100 full-time staff positions), member work both personally and collectively in the discharge of the Board's responsibilities under its statute.

Board activities include such matters as:

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The Act defines meetings and sets certain requirements for advance public notice of such meetings (5 U.S.C. 552b(e) and permits agencies to close meetings to public attendance and withhold information regarding meetings where an agency finds that any of ten exemptions enumerated in the Act applies, 5 U.S.C. 552b(c). The Act sets forth the procedures that must be followed by agencies in invoking one of these exemptions, 5 U.S.C. 552b(d), (f). Each agency is required to adopt, after opportunity for public comment, regulations to implement the Sunshine Act, 5 U.S.C. 552b(g).

Consistent with the requirement of 5 U.S.C. 552b(g), the proposed regulations implement the provisions of 5 U.S.C. 552b(b-f). The Board's proposed rules are modeled after Sunshine Act regulations promulgated and implemented by other collegial bodies such as the National Transportation Safety Board (NTSB), the Federal Deposit Insurance Corporation (FDIC), and the National Science Board. The proposed rules closely track the statutory language of the Sunshine Act as interpreted by the Supreme Court in *FCC v. ITT World Communications*, 466 U.S. 463 (1984). The proposed regulations also follow the exemptions set forth in the Act and fully implement the Act's procedural requirements regarding public notice of meetings, availability of transcripts or other records of meetings, and

*closure of meetings.*

### **Paperwork Reduction Act Statement**

*The proposed rule is not subject to the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, et seq.) because it does not contain any information collection requirements with the meaning of 44 U.S.C. 3502(4).*

### **Regulatory Flexibility Act Certification**

*As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-12), the Board certifies that this rule, if adopted, will not have a significant economic impact upon a substantial number of small entities and that, therefore, a regulatory flexibility analysis need not be prepared. 5 U.S.C. 605(b). The proposed rule would not impose any obligations, including any obligations on "small entities," as set forth in 5 U.S.C. 601(3) of the Regulatory Flexibility Act, or within the definition of "small business," as found in 15 U.S.C. 632, or within the Small Business Size Standards in regulations issued by the Small Business Administration and codified in 13 CFR part 121. Since the impact of the proposed rule is confined to the Board, the proposed rule does not fall within the purview of the Regulatory Flexibility Act.*

### **List of the Subjects in XX CFR Part XXXX**

*Sunshine act.*

### **The Proposed Regulations**

*Accordingly, title 10 of the Code of Federal Regulations is proposed to be amended by establishing a chapter XVII consisting of part 1704 to read as follows:*

#### **Chapter XVII-Assasination Records Review Board**

#### **PART 1704-RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT**

*Sec.*

*1704.X Applicability.*

- 1704.X Definitions.
- 1704.X Open meetings requirement.
- 1704.X Grounds on which meetings may be closed or information may be withheld.
- 1704.X Procedures for closing meetings, or withholding information, and request by affected persons to close a meeting.
- 1704.X Procedures for public announcement of meetings.
- 1704.X Changes following public announcement.
- 1704.X Transcripts, recordings, or minutes of closed meetings.
- 1704.X Availability and retention of transcripts, recordings, and minutes and applicable fees.

1704.XX Severability.

**Authority:** 5 U.S.C. 552b; 42 U.S.C. 2286, 2286b(c).

**§ XXXX.X Applicability.**

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings, as defined herein, of the Members of the Assassination Records Review Board (Board). The Board may waive the provisions set forth in this Part to the extent authorized by law.

(b) Requests for all documents other than the transcripts, recordings, and minutes described in XXXX.X shall be governed by Board regulations pursuant to the Freedom of Information Act (5 U.S.C. 552).

**XXXX.2 Definitions.**

As used in this part:

*Chairman* means the Member designated by the President to serve in said position, pursuant to 42 U.S.C. 2286(c).

*General Counsel* means the Board's principal legal officer, or an attorney

serving as Acting General Counsel.

*Meeting* means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official Board business. A meeting does not include:

(1) Notation voting or similar consideration of business, whether by circulation of material to the Members individually in writing or by a polling of the Members individually by telephone.

(2) Action by three or more Members to:

(i) Open or to close a meeting or to release or to withhold information pursuant to § XXXX.5;

(ii) Set an agenda for a proposed meeting(s);

(iii) Call a meeting on less than seven days' notice as permitted by § XXXX.6(b); or

(iv) Change the subject matter or the determinations to open or to close a publicly announced meeting under § XXXX.7(b).

(3) A session attended by three or more Members for which the purpose is to have the Board's staff or expert consultants to the Board brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(4) A session attended by three or more Member for which the purpose is to have the Assassination Records Review Board or other persons or organizations brief or otherwise provide information to the Board concerning any matter within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official Board business on such matters.

(5) A gathering of Members for the purpose of holding informal preliminary discussions or exchange of views which do not effectively

predetermine official action.

*Member* means an individual duly appointed and confirmed to the collegial body, known as "the Board."

*Presiding Officer* means the Chairman or any other Member authorized by the Board to hold meetings.

**§ XXXX.3 Open meetings requirement.**

Any meetings of the Board, as defined in § XXXX.2, shall be conducted in accordance with this part. Except as provided in § XXXX.4, the Board's meetings, or portions thereof, shall be open to public observation.

**§ XXXX.4 Grounds on which meetings may be closed or information may be withheld.**

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§ XXXX.5, XXXX.6, and XXXX.7 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

(a) Disclose matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and

(2) In fact properly classified pursuant to such Executive order;

(b) Relate solely to the internal personnel rules and practices of the Board;

(c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided, That such statute:*

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would:

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to a fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion to personal privacy;

(4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(5) Disclose investigative techniques and procedures; or

(6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the Board, except that this subsection shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action such proposal;

(i) Specifically concern the Board's issuance of a subpoena, or the Board's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct,

or disposition by the Board of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. § 554 or otherwise involving a determination on the record after opportunity for a hearing; or

(j) Disclose other information for which the Government in the Sunshine Act provides an exemption to the open meeting requirements of the Act.

**§ XXXX.5 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.**

(a) A majority of all Members may vote to close a meeting or withhold information pertaining to that meeting. A separate vote shall be taken with respect to any action under § XXXX.4. A majority of the Board may act by taking a single vote with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member's vote under the paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion of any of the grounds referred to in § XXXX.4 (e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the General Counsel, ARRB, 600 E Street NW, 2nd Floor, Washington, DC 20530. On motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the Board shall make available a written copy of such vote reflecting the vote of each Member on the question, and if a portion of a meeting is to be closed to the public a full written explanation of its action closing the

meeting and a list of all persons expected to attend and their affiliation.

(d) Before every closed meeting, the General Counsel of the Board shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provisions. A copy of such certification, together with the statement setting forth the time and place of the meeting and the persons present, shall be retained by the Board as apart of the transcript, recording, or minutes required by § XXXX.8.

**§ XXXX.^ Procedures for public announcement of meetings.**

(a) For each meeting, the Board shall make public announcement, at least one week before the meeting, of the:

- (1) Time of the meeting;
- (2) Place of the meeting;
- (3) Subject matter of the meeting;
- (4) Whether the meeting is to be open or closed; and
- (5) The name and business telephone number of the official designated by the Board to respond to requests for information about the meeting.

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

(1) A majority of all Members determines by recorded vote that Board business requires that such meeting be scheduled in less than seven days; and

(2) The public announcement required by paragraph (a) of this section is made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by §XXX.7, the Board shall submit a notice of public announcement for publication in the **Federal Register**.

**§ XXXX.7 Changes following public announcement.**

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

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

(1) A majority of all Members determines 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 paragraph (b) of this section.

**§ XXXX.8 Transcripts, recordings, or minutes of closed meetings.**

Along with the General Counsel's certification and presiding officer's statement referred to in §XXXX.5(d), the Board shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The Board may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to §XXXX.4(i). Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote.

**§ XXXX.X Availability and retention of transcripts, recordings, and minutes, and applicable fees.**

The Board shall make promptly available to the public the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at a closed meeting, except for such item, or items, of discussion or testimony as determined by the Board to contain matters which may be withheld under the exemptive provisions of §XXXX.4.

Copies of the nonexempt transcript or minutes, or transaction of such

recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. If at some later time the Board determines that there is no further justification for withholding a portion of a transcript, electronic recording, or minutes or other item of information from the public which has been previously withheld, such portion or information shall be made publicly available. The Board shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any Board proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

**§ XXXX.10 Severability.**

If any provision of this part or the application of such provision to any person or circumstances, is held invalid, the remainder of this part or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

