

Billing Code 6820-TD

ASSASSINATION RECORDS REVIEW BOARD

36 CFR CHAPTER 14

*Rules Implementing the Government in the Sunshine Act*

**AGENCY:** *Assassination Records Review Board*

**ACTION:** *Final Rulemaking*

**SUMMARY:** *The Assassination Records Review Board (Review Board) was established by the President John F. Kennedy Assassination Records Collection Act of 1992 (JFK Act). This final rulemaking will constitute the Review Board's second rulemaking. All of the Review Board's regulations will eventually be codified at 36 CFR Part 1400 et seq. This rulemaking is undertaken in response to the Government in the Sunshine Act (Sunshine Act). The Sunshine Act relates to meetings of agencies of the United States government that are headed by collegial bodies 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 defined in the Sunshine Act, shall be held in public except where stated exemptions apply.*

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

***Background***

*To discharge its responsibilities, the Review Board gathers as a collegial body at its Washington, D.C., office and at other locations as appropriate. Since the Review Board, including its staff, is a small agency, Review Board Members work both personally and collectively in the discharge of the Review Board's responsibilities. Review Board activities include such matters as: reviewing classified and restricted government records relating to the*

*assassination of President Kennedy; determining whether such classified and restricted records should be opened and made available to the public; identifying additional assassination records in the possession of governments and individuals; holding public hearings related to assassination records; and ensuring government office compliance with the JFK Act.*

*The Sunshine 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 to withhold information regarding meetings where an agency finds that any of ten exemptions enumerated in the Sunshine Act applies, 5 U.S.C. § 552b(c). The Act further sets forth the procedures that must be followed by agencies in invoking one of these exemptions, 5 U.S.C. § 552b(d), (f). The Review Board 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). This rule has been made following a review of the Sunshine Act, regulations promulgated and implemented by other collegial bodies under the Sunshine Act, and the opinion of the Supreme Court of the United States in FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984). The proposed regulations are intended to follow the exemptions set forth in the Sunshine Act and to implement fully the Sunshine Act's procedural requirements regarding public notice of meetings, availability of transcripts or other records of meetings, and closure of meetings.

#### **Notice and Comment Process**

The proposed Sunshine Act regulations were issued for comment in the Federal Register on June 26, 1995 with a closing date of July 26, 1995.

In addition to being published in the Federal Register, the proposed

regulations were sent to six federal agencies with an interest in the Review Board's work (the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Justice, the National Archives, the Office of Management and Budget, and the Administrative Conference of the United States (ACUS)). The staff also sent copies of the regulations directly to fifteen individuals who have shown a particular interest in the work of the Review Board. Several of the individuals are closely connected with public interest groups that also had the opportunity to distribute the copies more widely to their membership.

### **Response to Comments**

The Review Board received only four sets of comments, one from the ACUS and the other three from the public (one of which was complimentary and offered no substantive changes).

ACUS proposed four possible amendments to the regulations, each of

which was effectively incorporated in the final regulations. The first suggestion pertains to Section 1405.2, which permits the staff to brief Review Board members outside of formal meetings. ACUS stated that although the proposed regulation complied with the Sunshine Act, it would be advisable to ensure that briefings do not devolve into deliberations regarding Review Board business. The ACUS suggestion was incorporated by amending the section to include the following provision: "The General Counsel will inform the Review Board if developing discussions at a briefing or gathering should be deferred until a notice of an open meeting can be published in the Federal Register."

ACUS also proposed that the Review Board amend the regulations to require a vote for all changes to its agenda, including deletions. Although other agencies have permitted agenda deletions to be made without a recorded vote, the Review Board decided that it would be advisable to

*adopt the proposal of ACUS and delete Section 1405.7(c).*

*ACUS found some ambiguity with respect to the standard that would be applied towards the eventual release of the Review Board's own records in Section 1405.8, particularly those of the closed meetings. It is the Review Board's position that the eventual release of Review Board records should be made under the terms of the JFK Act (rather than FOIA). In order to clarify the standard under which Review Board records will themselves be reviewed for declassification, clarifying language was added.*

*Finally, ACUS made some practical proposals with respect to recording or taking notes at Board meetings as described in Section 1405.5(f).*

*Because the Review Board has decided to record its closed meetings, it had previously addressed these remaining issues.*

*As a member of the public, the Committee on Political Assassinations asserted that the Review Board (COPA) should bear in mind that the public*

interest should be taken into account when the Review Board considers whether to close a meeting under Section 1405.4. The Review Board approved the comment by COPA and adopted new language to reflect COPA's suggestion.

One member of the public "protested" restrictions (e), (g), and (h) of Section 1405.4 (pertaining to reasons for which the Review Board may properly close meetings). These restrictions are authorized by the Sunshine Act. If the commentator's suggestions were to be adopted, the Review Board would lose its discretion to close a meeting with respect to these three exceptions. Accordingly, the Review Board did not accept the proposal at the same time it recognized that it may open a meeting in its sound discretion when these subjects are being discussed. This member of the public also requested that Section 1405.5(b) be abolished. This section provides that a member of the public who may be directly affected by matters that the

Review Board would discuss at an open meeting may request that the meeting be closed. This suggestion also was not adopted in order continue the Review Board's discretion within the parameters of the law. Finally, the member of the public requested that notice of meetings be published in the Federal Register two weeks (rather than one week) in advance.

Although the comment raises a legitimate concern (sufficient notice), it can be addressed in a different manner. Because Review Board agenda items frequently change, additional notice of the particular items to be addressed cannot always be known two weeks before meetings. But in order to address the concern, I would advise that the Review Board provide as much advance notice as it can of the dates of Review Board meetings and that such information be distributed through the mailing lists. This will provide the public with notice of Board meetings months in advance of the time they will be held, but gives the Board flexibility to change the particular

*agenda items as circumstances develop.*

### ***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 Review Board certifies that this rule, if adopted, will not have a significant economic impact upon a substantial number of small entities and that 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 Review Board, the proposed rule does not fall within the purview of the Regulatory Flexibility Act.

#### *List of the Subjects in 36 CFR Part 1405*

*Sunshine Act*

#### *The Proposed Regulations*

Title 36 of the Code of Federal Regulations is proposed to be amended by establishing at chapter 14 part 1405 to read as follows:

#### *Chapter 14--Assassination Records Review Board*

#### **PART 1405 -RULES IMPLEMENTING THE GOVERNMENT IN THE**

#### **SUNSHINE ACT**

Sec.

1405.1 *Applicability.*

1405.2 *Definitions.*

1405.3 *Open meetings requirement.*

1405.4 *Grounds on which meetings may be closed or information may be withheld.*

1405.5 *Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.*

1405.6 *Procedures for public announcement of meetings.*

1405.7 *Changes affecting a meeting following the public announcement of a meeting.*

1405.8 *Availability and retention of transcripts, recordings, and minutes and applicable fees.*

1405.9 *Severability.*

Authority: 5 U.S.C. 552b; 44 U.S.C. 2107.

§ 1405.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings of the Review Board. The Review 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 1405.8 shall be governed by Review Board regulations pursuant to the Freedom of Information Act (5 U.S.C. 552).

§ 1405.2 Definitions.

As used in this part:

Review Board means the Assassination Records Review Board created pursuant to 44 U.S.C. 2107. 7.

Chairperson means the Member elected by the Board to serve in said

position pursuant to 44 U.S.C. 2107.7(f).

General Counsel means the Review Board's principal legal officer, or an attorney serving as Acting General Counsel.

Government office means any office of the Federal Government that has possession or control of assassination records as set forth in 44 U.S.C. 2107.3(5).

Meeting means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official Review 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 § 1405.5;

(ii) Set an agenda for a proposed meeting;

(iii) Call a meeting on less than seven days' notice as permitted by § 1405.6(b); or

(iv) Change the subject matter or the determinations to open or to close a publicly announced meeting under § 1405.7(b).

(3) A session attended by three or more Members for which the purpose is to receive briefings from the Review Board's staff or expert consultants, provided that members of the Review Board do not engage in deliberations at such sessions that determine or result in the joint conduct of disposition of official Review Board business on such matters. The General Counsel will inform the Review Board if developing discussions at a briefing or gathering should be deferred until a notice of an open meeting can be published in the Federal Register.

(4) A session attended by three or more Members for which the purpose is to receive informational briefings from representatives of government offices discussing classified or otherwise restricted information in accordance with the provisions of the JFK Act, provided that Members of the Review Board do not engage in deliberations at such sessions that determine or result in the joint conduct of disposition of official Review Board business on such matters.

(5) A gathering of three or more Members for the purpose of holding informal preliminary discussions or exchanges of views, but that does not effectively predetermine official Review Board action.

Member means a current member of the Review Board as provided by law.

Presiding Officer means the Chairperson or any other Member authorized by the Review Board to preside at a meeting.

§ 1405.3 Open meetings requirement.

Any meetings of the Review Board, as defined in § 1405.2, shall be conducted in accordance with this part. Except as provided in § 1405.4, the Review Board's meetings, or portions thereof, shall be open to public observation.

§ 1405.4 Grounds on which meetings may be closed or information may be withheld.

A meeting may be closed when the Review Board properly determines that an open meeting would disclose information that may be withheld under the criteria enumerated below. Similarly, information that otherwise would be required to be disclosed under §§ 1405.5, 1405.6, and 1405.7 may also be withheld under these criteria. All records of closed meetings shall, however, be disclosed at a future date consistent with the terms and requirements of the JFK Act. Except in a case where the

Review Board finds that the public interest requires otherwise, the criteria for closing meetings are whether information disclosed at such meetings 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 Review 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 is 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) Specifically concern the Review Board's issuance of a subpoena, or the Review 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 Review 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

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

§ 1405.5 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 each action under § 1405.4. A majority of the Review 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 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 no proxies shall be permitted.

(b) Any person whose interests may be directly affected if a portion of a meeting is open may request the Review Board to close that portion of the meeting on the grounds referred to in § 1405.4 (e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the Office of the General Counsel, Assassination Records Review Board, 600 E Street, N.W., 2nd Floor, Washington, D.C. 20530. On the motion of any Member, the Review 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 Review Board shall make publicly available a written copy of such vote reflecting the vote of each Member on the question. If a portion of a meeting is to be closed to the public, the Review Board shall make available

a full written explanation of its action closing the meeting (or portion thereof) and a list of all persons expected to attend the meeting and their affiliation.

(d) For each closed meeting, the General Counsel shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification shall be available for public inspection.

(e) For each closed meeting, the Presiding Officer shall issue a statement setting forth the time, place, and persons present. A copy of such statement shall be available for public inspection.

(f) For each closed meeting, with the exception of a meeting closed pursuant to 1405.4(h), the Review Board shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting. For meetings or portions thereof that are closed

pursuant to 1405.4(h), the Review Board may maintain a set of minutes in lieu of such transcript or recording. 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 roll call vote. The records of closed meetings, in addition to all other records of the Review Board, shall be included as permanent records in the JFK Collection at the National Archives as provided by the JFK Act.

§ 1405.6 Procedures for public announcement of meetings.

(a) For each meeting, the Review 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 Review 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 Review 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.

§ 1405.7 Changes affecting a meeting following the public announcement of a meeting.

(a) After there has been a public announcement of a meeting, the time

or place of such meeting may be changed only if the Review Board publicly announces such change at the earliest practicable time. Members need not approve such change by recorded vote.

(b) After there has been a public announcement of a meeting, the subject matter of such meeting, or the determination of the Review Board to open or to close a meeting or a portion thereof to the public, may be changed only when:

(1) A majority of all Members determines, by recorded vote, that Review Board business so requires and that no earlier announcement of the change was possible; and

(2) The Review Board publicly announces such change and the vote of each Member thereof at the earliest practicable time.

§ 1405.8 Availability and retention of transcripts, recordings, and

minutes, and applicable fees.

In accordance with the provisions of the JFK Act, the Review Board shall retain the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at a closed meeting for inclusion as a permanent record in the JFK Collection at the National Archives. The public shall have access to such records consistent with the provisions of the JFK Act which, according to the understanding of the Review Board, supersedes the Sunshine Act and FOIA. Copies of any 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 unless otherwise provided by the terms of the JFK Act. If at some later time the Review 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 had been previously withheld, such portion or information shall be made publicly available.

§ 1405.9 Severability.

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

Dated: August 3, 1995

David G. Marwell

Executive Director