

APPENDIX 4

REQUEST FOR BOARD ACTION BY A BOARD MEMBER

Requester: Jessie H. Roberson July 1, 2016

Brief description of Requested Action: I request that the Board approve tasking Staff, that is OGC (lead) and OGM, to propose a policy for Board approval on this topic. The staff should seek Board Member input at the beginning of the development and any external expertise they deem necessary during the development. The policy should be submitted to the Board within 60 business days following the approval of this RFBA.

Justification: On July 1, 2015, the Board approved Doc#2015-115 tasking OGC to conduct a line-by-line analysis of the Board's statute to determine whether any additional policy statements need to be created given recent revisions to the statute. OGC responded on April 7, 2016, focusing on recommended policies for safety issues. One additional topic for which a Board policy does not exist to date relates to providing Board Members with full access to all information relating to the performance of the Board's functions, powers, and mission. There are disagreements among Board Members regarding compliance and implementation of the Board's statute (§ 2286(c)(2) and (c)(5) and the May 2015 Office of Legal Counsel opinion related to this topic. To better position the agency and create structure regarding this topic, I propose the following:

1. The applicable passage in our statute and the OLC opinion rely on the Chairman implementing policies set by the Board. There is no policy set by the Board on this topic. We have no structure and no interagency transparency. Current agency policies specific to handling of employee privacy information do not envision this type of access.
2. The OLC opinion states: "We note that, upon obtaining these records, the Board Member will be required to adhere to any applicable requirements concerning the records' subsequent use or disclosure, including restrictions found in the Privacy Act and any other applicable laws or regulations." The formal record keeping requirements are also not defined and not documented and therefore do not afford the Board Members or agency employees awareness. Board Members do not even know if their own privacy records could be demanded by another Board Member. Records management, caretaking, retention and review, and the design and formalization of disclosures should be defined upfront and included in the proposed Policy.

Attachments (init) n/a (included clean version of any proposed document or modified document)

Summarize any time sensitive considerations: none

Requestor signature signature on file July 1, 2016

Assistant Executive secretary signature on file July 1, 2016

APPENDIX 4

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING	COMMENT	DATE
Joyce L. Connery	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Jessie H. Roberson	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Sean Sullivan	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Daniel J. Santos	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Bruce Hamilton	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
Final Disposition Summary						

Executive Secretary signature _____ [Click here to enter a date.](#)

Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

AFFIRMATION OF BOARD VOTING RECORD

SUBJECT: Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

Doc Control#2016-300-021

The Board, with Board Member(s) Joyce L. Connery, Jessie H. Roberson, Daniel J. Santos *approving*, Board Member(s) Sean Sullivan, Bruce Hamilton *disapproving*, Board Member(s) none *abstaining*, and Board Member(s) none *recusing*, have voted to approve the above document on July 11, 2016.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING*	COMMENT	DATE
Joyce L. Connery	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	07/11/16
Jessie H. Roberson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	07/07/16
Sean Sullivan	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	07/07/16
Daniel J. Santos	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	07/06/16
Bruce Hamilton	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	07/08/16

*Reason for Not Participating:

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Board Members.


Assistant Executive Secretary to the Board

Attachments:

1. Voting Summary
2. Board Member Vote Sheets

cc: Board Members
OGC
OGM Records Officer
OTD

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

NOTATIONAL VOTE RESPONSE SHEET

FROM: Joyce L. Connery

SUBJECT: Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information


Doc Control#2016-300-021

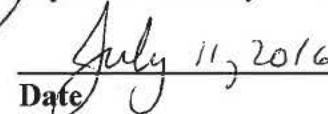
Approved X **Disapproved** _____ **Abstain** _____

Recusal – Not Participating _____

COMMENTS: **Below** X **Attached** _____ **None** _____

As discussed in an off-site meeting in October, Board Members, in light of the NDAA language and the Department of Justice memo, noted the need for a policy regarding the access to information that may have other restrictions such as privacy act. The discussion revolved around information that would be relevant to policy matters. I believe, and I heard stated by others in a discussion in October, that a policy would be prudent before allowing access to personnel and other sensitive records in order to avoid the perception of capricious and arbitrary access and to have a formal process for documenting access. In particular, it is important to inform the staff of any access to their information and have policies in place so that they are assured of the protection of their privacy, particularly in matters that are personal in nature or could have reputational impact. I support this motion for putting together a Board-agreed policy into place prior to individuals accessing information. Additionally, a clearly articulated policy would help safeguard the agency from legal action should an employee feel that his or her information was accessed or used inappropriately.



Joyce L. Connery


Date

DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET

FROM: Jessie H. Roberson


SUBJECT: Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

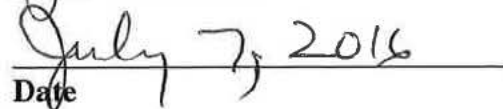
Doc Control#2016-300-021

Approved **Disapproved** _____ **Abstain** _____
Recusal - Not Participating _____

COMMENTS: **Below** **Attached** _____ **None** _____

A policy is clearly necessary, otherwise there would not be fundamentally different views on how to execute and give meaning to the words added to the Board's Statute. Only the Board, within this agency, can give meaning to how to operate under the provision added.



Jessie H. Roberson


Date

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

NOTATIONAL VOTE RESPONSE SHEET

FROM: Sean Sullivan

SUBJECT: Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

Doc Control#2016-300-021

Approved _____ Disapproved X Abstain _____

Recusal – Not Participating _____

COMMENTS: Below X Attached _____ None _____

On June 24, 2016, I requested access to the performance appraisals of the members of the Senior Executive Service at our agency. I have not been granted the access that I requested.

Initially, I understand that my request was not honored because I had not stated a reason for obtaining access. The law appears plain to me – it says that I get access, and that the Chairman may not withhold that access – and the law does not require that I provide a reason. Nevertheless, I informed the Chairman and senior staff that I wish to see the appraisals to determine whether the Board has adequate policies governing SES performance. To date, I have not been informed by the Chairman nor any senior staff member whether this reason is sufficient for their purpose and, if it is not, then what additional information would constitute a sufficient reason.

Instead, I next came to understand that if I had a policy in mind, I should first advance that policy to the Board before obtaining access. This appears to me to be an illogical reversal of proper order. I wish to see the information *in order to* inform myself as to what, if any, policy(ies) I might propose. Certainly, I should not have to know what answer I have in mind before I look at relevant data. In any event, the law providing me “full access to all information” does not have as a prerequisite that I first identify a specific policy proposal.

On Wednesday, June 29, 2016, I asked the Chairman by email to please respond and tell me: 1) what additional information, if any, is necessary to satisfy whatever requirements are being imposed on me for access, 2) whether I must state a specific policy proposal prior to obtaining access, and 3) whether the Chairman’s position is that I cannot be granted access in order that I may determine through that access what policy or policies I should propose. The Chairman has not replied with an answer to these questions.

ARCHIVE: Doc#2016-300-021, Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

On Friday, July 1, 2016, the Vice Chairman submitted this current proposal calling for a Board policy to be developed by OGC and OGM regarding Board Member access to employee information.

On Tuesday, July 5, 2016, having not received any reply from the Chairman to my email of Wednesday, June 29, I orally inquired of her as to whether a reply would be forthcoming. I now understand that my request for information, as well as answers to the questions I posed regarding the sufficiency of my stated reason, are stayed pending the development of the policy called for in the instant proposal of the Vice Chairman.

However, the law provides me with full access, and that provision of law is not subject to the Board's policy-making authority. No Board policy may legally restrict the full access granted to me by law. A policy requiring reasonable safeguards (such as sign-in and sign-out of documents) but not substantively restricting access, would be fine. In the absence of such a policy, as an officer of the U.S. government, I am on my own to ensure information provided is appropriately safeguarded while in my possession. Moreover, policy-or-no-policy, the law directs that I have full access.

In April of 2014, I made a request for access to SES performance appraisals that was identical to the request I make now. My request was the first such request for access following a revision to our enabling statute effected by the FY 2013 National Defense Authorization Act adding the "Board-Member-full-access-to-information" provision. My April 2014 request was initially denied, and the issue was referred to the Department of Justice for a legal interpretation of the statutory provision granting each Board Member full access to information. In May 2015, DOJ's Office of Legal Counsel issued an opinion stating that as a Board Member I had a right to the information and that the Chairman was compelled to grant that access.

While the DOJ OLC opinion was still pending, Congress began the process of further amending our enabling statute, and with the enactment of the FY 2016 National Defense Authorization Act the following additional provision became law: "In carrying out paragraph (5)(B), the Chairman may not withhold from any member of the Board any information that is made available to the Chairman regarding the Board's functions, powers, and mission (including with respect to the management and evaluation of employees of the Board)."

Thus, in the past four years, Congress has twice amended our statute addressing the issue of Board Member access to agency information – once to say each Member gets it, and again to say the Chairman may not withhold. The second statutory revision expressly addresses information with respect to "evaluation of employees". Additionally, DOJ OLC has ruled that based solely on the first provision, a Board Member must get access, and the Chairman is compelled to grant access. I don't know how the law could be any clearer.

Nevertheless, I am not getting access. I also understand that I am now expected to wait until the policy requested by this current proposal of the Vice Chairman is developed and approved. The Vice Chairman's proposal will grant 60 business days – about three calendar months – for OGC and OGM to develop a proposed policy. Then we would have to go through our Board approval process – typically one month long, and sometimes much longer – for approval, assuming we approve of the proposed policy at all. So a request that I made on June 24 *might* be granted by

Thanksgiving. Such delay is not “full access.” Indeed, for the Chairman to insist on such delay does, in my view, constitute “withholding.”

The Vice Chairman’s request to have OGC and OGM formulate a Board policy points the DOJ OLC opinion wherein DOJ noted, “upon obtaining these records, the Board Member will be required to adhere to any applicable requirements concerning the records’ subsequent use or disclosure, including restrictions found in the Privacy Act and any other applicable laws or regulations.” However, DOJ did *not* say that additional agency policies were needed. And in fact, in 2015, after DOJ ruled that the Chairman was compelled to provide to me the access I had requested in 2014, that access was provided without any additional policy development. I note that the Vice Chairman does not say in her request that a policy is necessary before access may be granted, and only that in her opinion a policy on the matter would “better position the agency.” I anticipate, however, that an affirmative vote on this request will be interpreted as a ruling by the Board supporting the position that I understand the Chairman to have already taken – that information access must wait for the policy. Such a conclusion would not comport with the law, or the DOJ opinion, nor even with the Vice Chairman’s written request.

Finally, I am not in favor of having the current General Manager and Acting General Counsel lead the effort to develop a policy on the matter. Both individuals have been central to the actions taken (or not taken) in response to my June 24 request. While I do not know what advice they may have given the Chairman, I do know that they have advised her, and that access has not been granted. I expect that if the current proposal of the Vice Chairman is approved, the subsequent policy proposed will contain express limitations on the Board Member’s full right of access – limitations that will run counter to the law.

I therefore oppose the request.



Sean Sullivan

7/7/16

Date

Shelby Qualls

From: Daniel J. Santos
Sent: Wednesday, July 06, 2016 4:55 PM
To: Shelby Qualls; Lotus Smith
Subject: RE: Notational Vote Doc#2016-300-021, Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information - BLUE FOLDER

Approved with the following comment:

A policy is necessary to provide needed structure, clarity, accountability, and transparency regarding the appropriate and legal use of information made available to agency employees including us Board Members.

From: Shelby Qualls
Sent: Wednesday, July 06, 2016 3:33 PM
To: Mark Welch <[REDACTED]>; James Biggins <[REDACTED]>; Neysa Slater-Chandler <[REDACTED]>; Steven Stokes <[REDACTED]>; Katherine Herrera <[REDACTED]>; Nora Khalil <[REDACTED]>; Bruce Hamilton <[REDACTED]>; Daniel J. Santos <[REDACTED]>; Jessie Roberson <[REDACTED]>; Joyce Connery <[REDACTED]>; Sean Sullivan <[REDACTED]>
Cc: Lotus Smith <[REDACTED]>; Shelby Qualls <[REDACTED]>
Subject: Notational Vote Doc#2016-300-021, Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information - BLUE FOLDER

This email is an electronic record of Notational Vote. Voting ballot will follow shortly. Also, accepting electronic votes.

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET**

FROM: Members of the Board
SUBJECT: Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

DOC#2016-300-021

Office Directors have provided their input.

Approved _____
Disapproved _____
Abstain _____
Recusal – Not Participating _____

COMMENTS:

Below _____
Attached _____
None _____

DEFENSE NUCLEAR FACILITIES SAFETY BOARD
NOTATIONAL VOTE RESPONSE SHEET

FROM: Bruce Hamilton

SUBJECT: Request for Board Action by Vice Chairman Jessie H. Roberson to Direct OGC and OGM to Develop Policy Regarding Board Member Access to Employee Information

Doc Control#2016-300-021

Approved _____ Disapproved X Abstain _____

Recusal – Not Participating _____

COMMENTS: Below X Attached _____ None _____

This Request for Board Action relates to a matter which has been evolving since April 2014; namely, that Board members have been declined access to internal Agency personnel records.

I personally chanced upon this obstacle when I requested access to the Agency's telework records. In March, I began a modest review regarding Agency telework policies and practices, and I requested access to a sampling of telework records. My request to date has been unfulfilled; only redacted records have been provided to me. The Privacy Act was cited as justification for withholding the information I requested.

In June, I offered the following points to the DNFSB Chairman for her consideration in effecting my continuing request for access to the un-redacted records. I quote them here in their entirety:

"1. The enabling statute of the DNFSB states, "Each member of the Board, including the Chairman and Vice Chairman, shall – have full access to all information relating to the performance of the Board's function, powers, and mission ...," (42 U.S.C. § 2286.(c)(5)(B)). The statute also states, "... the Chairman shall be the chief executive officer of the Board and, subject to such policies as the Board may establish, shall exercise the functions of the Board with respect to – the appointment and supervision of employees ...," (42 U.S.C. § 2286.(c)(2)(A)). Logically: the Board shall have full access to all information related to the Board's functions; one of the functions of the Board is supervision of employees; supervision of employees is accomplished using administrative tools such as staff telework agreements and time & attendance records;

therefore, you, I, and the other members of Board must be allowed full (unredacted) access to staff telework agreements and their time & attendance records.

“The Privacy Act states that disclosure may be made, “... to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties ...” (5 U.S.C. § 552a.(b)(1)). Our enabling statute grants us access to these records without further qualification in order for us to perform of our duty to establish policies; the Privacy Act allows disclosure to us because we have the need for the records in the performance of our duty to establish policy.

“The statutes give Board members full access whether or not they are considering a specific policy issue in advance. The phrase, “...subject to such policies as the Board may establish ...,” stipulates the power the Board has to direct the Chairman in the performance of his or her duties as the Agency’s CEO. A Board member may review records and decide a policy needs revision or that a new policy is needed, or he or she may decide that there is no need for any action. To require that a Board member must articulate a policy issue in order to be allowed access to a record is to put the cart before the horse.

“2. A U.S. Department of Justice Memorandum of May 21, 2015 addressed a similar question regarding Board member access to the Agency’s SES performance appraisals, stating: “... we conclude that the Board’s organic statute requires, and the Privacy Act allows, the Chairman to grant the requesting Board member access to SES performance appraisals.” The DOJ memorandum offered its opinion on only the narrow question of SES performance evaluations because that was the question asked to DOJ by the DNFSB Chairman. The legal reasoning and logic provided in the Memorandum, however, would apply correspondingly to the question of Board Member access for other Agency records, including my request for telework records. In February of this year, you acknowledged your full support for individual Board Member’s access to information as interpreted by this Memorandum in your answer to a Question for the Record from Chairman Mike Rogers of the House Armed Services Committee’s Subcommittee on Strategic Forces.

“3. Members of government boards have a fiduciary responsibility to the public trust to provide oversight for their agencies. It is right for the public to expect that our Board members pay attention to internal operations, have an ear for problems of waste, fraud and abuse, and probe into areas where there are questions or concerns, taking corrective action when problems are found and/or reporting them to the appropriate manager, inspector general, or legal enforcement authority. A widely accepted principle of leadership is that persons charged with responsibility must have commensurate authority. In practical terms, our Board members’ fiduciary oversight responsibility to internal operations must include the authority to access the Agency’s internal information. A Board member has the responsibility to protect any classified or private information accessed, but that is the duty of the Board member. It is more than reasonable to believe that in drafting and amending our enabling statute, legislators expected Board members to carry out this fiduciary responsibility for identifying and acting on internal agency

problems, and that they intended for us to have authority to access information commensurate with that level of responsibility.”

My original purpose in reviewing telework records was to conduct a modest review. I am now more concerned that in preventing my (and by extension all Board members’) access to internal Agency information, the Agency is not conforming to its own enabling statute, the DOJ opinion, and a general expectation of public trust.

The wording of the enabling legislation is clear, concise and sufficient. While an agency policy might facilitate the process, none is needed. Given the history of the past few years, I am more concerned that such a policy, if enacted, would provide another layer of bureaucracy which would further obstruct Board member access to agency records.

I therefore disapprove.


Bruce Hamilton

8 July 2016
Date