



PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD

Reports under Section 803 of the 9/11 Commission Act: Recommendations for Privacy and Civil Liberties Officers

June 10, 2016

Introduction to Section 803

Section 803 of the Implementing Recommendations of the 9/11 Commission Act of 2007 requires certain executive branch departments, agencies, and elements to designate at least one senior official as a “privacy and civil liberties officer.”¹ In enacting the statute, Congress explained that such officers are meant “to function as a source of advice and oversight on privacy and civil liberties matters to the agency.”²

More specifically, Section 803 directs that each privacy and civil liberties officer “serve as the principal advisor” to the agency with respect to three issues: (1) assisting the agency in appropriately considering privacy and civil liberties concerns in the development and implementation of laws and policies related to efforts to protect the nation against terrorism; (2) investigating and reviewing agency actions and procedures to ensure that the agency is adequately considering privacy and civil liberties in its actions; and (3) ensuring that the agency has adequate procedures to respond to complaints from individuals who allege that the agency has violated their privacy or civil liberties.³

Each agency’s privacy and civil liberties officer (“P/CL officer”) must issue semiannual reports on the discharge of each of his or her functions under the statute.⁴ These “Section 803 reports” are to be submitted to the head of the P/CL officer’s agency, designated congressional committees, and the

¹ 42 U.S.C. § 2000ee-1(a). The entities covered are the Office of the Director of National Intelligence, the Central Intelligence Agency, and the Departments of Defense, Health and Human Services, Homeland Security, Justice, State, and the Treasury.

² H.R. Rep. No. 110-259, at 322 (2007) (Conf. Rep.).

³ 42 U.S.C. § 2000ee-1(a)(1), (a)(2), (a)(3). Except where otherwise noted, this document uses the word “agency” for all entities subject to Section 803, although such entities include not only agencies but also departments and offices.

⁴ 42 U.S.C. § 2000ee-1(f). Before its amendment in 2014, the statute required quarterly reports.

Apart from enhancing the content of Section 803 reports, it is important that all agencies covered by the statute comply with their obligations by designating P/CL officers to carry out the functions enumerated in the statute and issue semiannual reports on their activities.

Agency Support for Privacy and Civil Liberties Officers

The privacy and civil liberties officers at many of the agencies covered by Section 803 have small offices with limited personnel assisting them. Even in larger offices, personnel typically have responsibility for a variety of reporting requirements imposed by different authorities, in addition to their substantive duties promoting civil liberties and privacy. In some cases, these other reporting requirements are similar to those of Section 803.

To carry out the purpose of Section 803, it is imperative that agencies support their privacy and civil liberties officers by providing them with the resources and personnel needed to fulfill their duties and adequately report on their activities. The statute provides that the head of every department, agency, or element concerned “shall ensure that each privacy officer and civil liberties officer . . . has the information, material, and resources necessary to fulfill the functions of such officer.”⁹ Section 803 officers must be “senior” officials who “report directly to the head of the department, agency, or element concerned,” are “advised of proposed policy changes,” and are “consulted by decision makers.”¹⁰ The significant role that these officers are meant to play within their agencies demands a commensurate expenditure of resources in order for agencies to remain in compliance with the law.

Recommendations

The Board has selected ten recommendations for the improvement of Section 803 reports that it believes are feasible, can be implemented promptly, and will offer significantly more transparency about efforts within executive branch agencies to safeguard privacy and civil liberties. These recommendations seek to take into account the workloads of P/CL officers and avoid diverting their time and focus from the substantive responsibilities on which they are meant to report. The Board has drawn upon existing Section 803 reports for illustrative examples of practices that it recommends be adopted across agencies.

These recommendations apply to all agencies covered by Section 803, but the Board recognizes the significant differences in structure and activities among those agencies. The Board welcomes the opportunity to consult with P/CL officers on how best to implement these recommendations in the context of their agencies.

⁹ 42 U.S.C. § 2000ee-1(d)(1).

¹⁰ 42 U.S.C. § 2000ee-1(a), (c)(1), (d)(1)-(3).

understand who is safeguarding privacy and civil liberties within each agency and how they go about doing it.¹⁶

✓ ***Recommendation 2: Highlight notable privacy and civil liberties initiatives undertaken or completed during the reporting period.***

Some efforts undertaken by the P/CL officer and supporting personnel during the reporting period will have absorbed more attention than others, will involve more significant issues, or will represent new or noteworthy endeavors. To provide a sense of the most significant of these efforts, reports should include a section devoted to highlighting one or more of them.¹⁷

The Number and Types of Reviews Undertaken

Section 803 directs each P/CL officer to periodically “investigate and review” the agency’s actions, as well as its policies, procedures, guidelines, and related laws (and their implementation), to ensure that the agency “is adequately considering privacy and civil liberties in its actions.”¹⁸ Reports must include “information on the number and types of reviews undertaken” during the reporting period.¹⁹

✓ ***Recommendation 3: Briefly describe the reviews undertaken, supplemented by more detailed illustrative examples.***

Presently, most reports describe the reviews conducted during the reporting period in a table, with one column listing certain categories of privacy or civil liberties reviews, and the other column indicating the number of such reviews completed.²⁰ While this approach does offer some information

¹⁶ For a short example, see DEPARTMENT OF JUSTICE, CHIEF PRIVACY AND CIVIL LIBERTIES OFFICER AND THE OFFICE OF PRIVACY AND CIVIL LIBERTIES, PRIVACY AND CIVIL LIBERTIES ACTIVITIES QUARTERLY REPORT, FOURTH QUARTER, FY 2014, JULY 1, 2014 – SEPTEMBER 30, 2014, at 1 (2015) (“DOJ Report”), available at <http://www.justice.gov/opcl/reports>. The cover letters that accompany the ODNI’s Section 803 reports when transmitted to Congress and the PCLOB have similar information. For a fuller example (from a non-Section 803 report), see Treasury Annual Report, *supra*, at 7-9.

¹⁷ See, e.g., DEPARTMENT OF THE TREASURY SEMIANNUAL 2015 REPORT ON PRIVACY AND CIVIL LIBERTIES ACTIVITIES PURSUANT TO SECTION 803 OF THE IMPLEMENTING RECOMMENDATIONS OF THE 9/11 COMMISSION ACT OF 2007, FOR THE REPORTING PERIOD AUGUST 1, 2014 TO JANUARY 31, 2015, at 1-2 (2015) (“Treasury Report”) (describing recent initiatives by the Office of Privacy, Transparency, and Records), available at <http://www.treasury.gov/privacy/annual-reports/Pages/default.aspx>. The cover letters that accompany the ODNI’s Section 803 reports when transmitted to Congress and the PCLOB similarly highlight significant endeavors of the P/CL officer during the reporting period.

¹⁸ 42 U.S.C. § 2000ee-1(a)(2).

¹⁹ 42 U.S.C. § 2000ee-1(f)(1)(A).

²⁰ See, e.g., OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, CIVIL LIBERTIES AND PRIVACY OFFICE, QUARTERLY REPORT OF THE ODNI CIVIL LIBERTIES PROTECTION OFFICER PURSUANT TO SECTION 803 OF THE 9/11 COMMISSION ACT OF 2007, JANUARY 1, 2014 – MARCH 31, 2014 (July 2014) (“ODNI Report”), available at <https://www.dni.gov/index.php/about/organization/civil-liberties-privacy-office-reports>; DEPARTMENT OF DEFENSE

reviews conducted periodically by the P/CL officer based on agency needs.²⁴ Reports would be more informative if they explained what these types of reviews entail, and what the P/CL officer does when conducting them. Therefore, before enumerating the individual reviews conducted during the reporting period, reports should briefly explain what each *type* of review subsequently listed consists of.²⁵ This will allow readers to better understand how those reviews help safeguard privacy or civil liberties.²⁶

Relatedly, reports also should clarify whether the reviews conducted by the P/CL officer (including both reoccurring and one-time-only reviews) are focused exclusively on ensuring legal compliance, or whether they more broadly involve policy-based assessments about whether privacy and civil liberties are being adequately considered, even where the agency's actions fall within statutory, regulatory, and constitutional limits.²⁷

The Type of Advice Provided, and the Response Given to Such Advice

A key function of Section 803 officers is providing advice to their agencies concerning efforts to protect the nation from terrorism. The purpose of this advice is to help the agencies appropriately consider privacy and civil liberties concerns when developing and implementing policies related to those efforts.²⁸ When such advice pertains to “proposals” to “retain or enhance a particular governmental power,” the P/CL officer is further directed to consider independently whether the agency has established that three enumerated criteria are met.²⁹

²⁴ See, e.g., DOJ Report at 4 (“Data breach and incident reviews,” “Legislation, testimony, and reports”).

²⁵ See, e.g., DOJ Report at 1-3 (providing paragraph-length descriptions of types of privacy reviews).

²⁶ Such explanations would be especially helpful for those types of reviews that are less common or are specific to an individual agency (e.g., “FISA Compliance Reviews,” “OMB M-10-22 Reviews”). Where certain types of reviews always involve conducting the same steps or examining the same questions, these explanations also can be used to reduce repetition when describing individual reviews under Recommendation 3, above.

²⁷ Some reports appear to define the term “review” to include only examinations meant to ensure legal compliance (e.g., “an activity to ensure compliance with requirements established in controlling authorities”) or even examinations that are themselves required by law to be conducted (e.g., “privacy and civil liberties activities delineated by controlling authorities, such as the Privacy Act”). Others appear to interpret the mandate to conduct reviews as broader than assessing whether agency action violates statutory, regulatory, or constitutional limits. See, e.g., DHS CRCL Report at 9 (explaining that the office “conducts in-depth examinations of the . . . civil liberties implications and effects of selected . . . DHS programs, and provides suggestions for improvements to those programs”). More clarity on this point would better convey the nature of P/CL officers’ work at each agency.

Some P/CL officers and their supporting personnel provide both a legal compliance check and a policy determination when conducting a privacy and civil liberties review; in such cases, policy questions can be intertwined with legal questions. This recommendation is not intended to encourage reports to make an artificially rigid distinction between legal and policy considerations, but rather to explain to readers how and to what extent the P/CL officer’s reviews address both considerations.

²⁸ P/CL officers are directed to “assist the head of such [agency] and other officials of such [agency] in appropriately considering privacy and civil liberties concerns when such officials are proposing, developing, or implementing laws, regulations, policies, procedures, or guidelines related to efforts to protect the Nation against terrorism.” 42 U.S.C. § 2000ee-1(a)(1).

²⁹ Specifically, “the officer shall consider whether such [agency] has established — (A) that the need for the power is balanced with the need to protect privacy and civil liberties; (B) that there is adequate supervision of the

Instead of asking P/CL officers to report the *content* of the advice they provide to their agencies, Section 803 requires them to report “the type” of advice provided, which can be conveyed by describing the topics or situations to which their advice related. To be truly informative, however, such descriptions must be detailed enough to afford readers a genuine sense of the areas on which officers are providing advice to their agencies.³⁷ This information can be conveyed through narrative text in which the P/CL officer describes the significant topics on which he or she provided advice during the reporting period. That text could be followed by descriptions of responsive actions taken by the agency or by the P/CL officer’s qualitative assessment of how responsive the agency was overall to his or her advice during the reporting period.³⁸

The Board recognizes that, to some degree, the types of issues on which P/CL officers provide advice will remain constant from reporting period to reporting period. But the Board also expects that shifts will occur over time in the issues receiving the most attention, particularly because Section 803 reports are meant to describe the activities of the agency’s “principal advisor” on privacy and civil liberties matters.³⁹ Similarly, even though an agency’s responsiveness to the advice of its P/CL officer may not fluctuate greatly from one reporting period to the next, the officer’s periodic assessment of this question in each report will provide an opportunity to note any changes that do occur.

To the extent feasible, moreover — consistent with confidentiality concerns and the sensitivity of the information involved — P/CL officers should try to include a small number of brief examples in their reports that illustrate occasions in which the officer provided advice to the agency and the agency responded.⁴⁰ Such examples will give readers a more concrete sense of how the work being done by

³⁷ Such descriptions should make clear whether the P/CL officer’s advice related to privacy, civil liberties, or both, because officers are directed to advise their agencies “in appropriately considering privacy *and* civil liberties concerns.” 42 U.S.C. § 2000ee-1(a)(1) (emphasis added). See footnote 23, above.

³⁸ Describing the topics or situations about which advice was provided, together with an assessment of the agency’s overall responsiveness, will not disclose what a P/CL officer advised an agency to do, or whether the agency opted to follow any particular course of action. Instead, it will indicate the *types* of issues about which P/CL officers are providing advice, and how fulsomely their agencies are implementing that advice. Likewise, this method will not require P/CL officers to artificially segregate the advice they offer into discrete individual “instances” of having provided advice, or to attempt to characterize the response given by the agency in each such instance. The process through which P/CL officers provide advice to their agencies, and through which the agencies respond, typically is long-term and iterative — thus making narrative descriptions of the advice, combined with qualitative assessments of the agency’s overall responsiveness, a more accurate means of conveying “the type of advice provided and the response given to such advice.” 42 U.S.C. § 2000ee-1(f)(2)(B).

³⁹ 42 U.S.C. § 2000ee-1(a).

⁴⁰ These examples should concentrate on advice “related to efforts to protect the Nation against terrorism,” which is the focus of the “advice” function in Section 803. See 50 U.S.C. § 2000ee-1(a)(1). Agencies could use a classified annex if necessary, for the benefit of Congress and the PCLOB. See *id.* § 2000ee-1(f)(1)(B). The Board encourages P/CL officers to make full use of the statutory option for a classified annex, to provide Congress and the PCLOB with examples that illustrate the range of activities and policies on which officers have provided advice, along with those that the officer has investigated and reviewed. For many agencies, an unclassified report may not be fully representative of the P/CL officer’s notable activities.

Such descriptions could include the following information: (1) the agency's mechanisms for accepting complaints; (2) how complaints are processed; (3) how the agency deals with complaints that are determined to be frivolous, not credible, or not actually directed at the agency in question (and whether they are counted as "complaints" for reporting purposes); (4) how the P/CL officer becomes aware of complaints; (5) the role played by the P/CL officer, if any, in investigating or resolving complaints, including how the officer coordinates with other personnel or divisions; (6) how complaints are formally resolved — i.e., if the agency's procedures are meant to result in determinations about whether individual complaints have merit, determinations about whether changes to policy are warranted in light of the complaint, assistance to the individual who submitted the complaint, or other outcomes; and (7) the P/CL officer's efforts to ensure the adequacy of the procedures.⁴⁷

The Number and Nature of the Complaints Received

Section 803 reports must include, for the reporting period in question, "the number and nature of the complaints received by the department, agency, or element concerned for alleged violations."⁴⁸ Most reports respond to this requirement by providing a table that lists in one column certain categories of complaints and in another column the number of complaints received within each category.

✓ *Recommendation 7: Provide the "nature of" the complaints received by using appropriately specific descriptive categories.*

Under Section 803, reports must include "the number *and nature* of the complaints received."⁴⁹ Because it might be burdensome for agencies that receive large numbers of complaints to describe each of them individually, the use of categories with descriptive labels can help to convey the "nature" of the complaints. In order to be meaningful, however, these labels should have a reasonable degree of specificity. Several agencies presently describe their complaints using some variation of the following four broad labels: "process & procedural, operational, redress, referred."⁵⁰ Categories that are more narrow and descriptive than this are needed to meaningfully convey the "nature" of complaints. For example, some agencies employ more specific categories such as "conditions of detention" and

⁴⁷ See, e.g., DHS CRCL Report at 10-11 (describing the process for investigating complaints).

⁴⁸ 42 U.S.C. § 2000ee-1(f)(3).

⁴⁹ 42 U.S.C. § 2000ee-1(f)(2)(C) (emphasis added).

⁵⁰ These categories derive from a 2008 Office of Management and Budget memorandum that provided instructions on complying with the Federal Information Security Management Act ("FISMA") and on agency privacy management programs. See OMB Memorandum M-08-21, FY 2008 Reporting Instructions for the Federal Information Security Management Act and Agency Privacy Management, at 38 (July 14, 2008), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-21.pdf>.

a result, readers cannot tell how a particular complaint was resolved — whether it led to some form of redress for the complainant, a mutually agreed upon solution, a policy change, a determination that the complaint was unsubstantiated, or some other outcome. To make Section 803 reports more informative, agencies should use a broader range of more specific categories to describe “the disposition” of the complaints they receive.

This approach can be supplemented by short narratives about selected complaints and their dispositions, to the extent consistent with confidentiality concerns and the sensitivity of the information involved. Such narratives offer greater insight into the types of complaints that an agency receives and the ways that the agency addresses those complaints.⁵⁶ Those agencies that receive fewer complaints, for whom it may be feasible to provide one-phrase narrative descriptions of each individual complaint (without creating a risk of identifying internal complainants, as discussed in the previous recommendation), could include the dispositions of such complaints within the same text.

For all agencies, complaints that were received but not resolved during a particular reporting period should have their dispositions included in subsequent reports.⁵⁷

✓ ***Recommendation 9: Highlight the most significant issues, challenges, or trends raised by the complaints received.***

Labeling individual complaints and their dispositions with appropriately specific descriptive categories, as recommended above, will offer more information than is available at present about the types of complaints an agency is receiving. On its face, however, this information may provide only a limited sense of which complaints raise the most significant questions about agency actions, or the extent to which numerous complaints raise common issues. To the extent feasible, therefore, reports also should include some qualitative analysis in which the P/CL officer identifies any systemic issues, trends, or potential problem areas that have been brought to light through complaints alleging privacy or civil liberties violations during the reporting period. Such analysis can help Congress, the PCLOB, and the public better assess whether any topics of complaint are raising significant questions that may deserve additional inquiry.⁵⁸

accordingly; (2) the complaint was found meritorious and remedial action was taken, or (3) an alleged problem raised by a complainant was worked out to his or her satisfaction.

⁵⁶ See, e.g., DoD Report, Appendix (providing paragraph-length examples of complaints received and their dispositions); DHS Privacy Report at 18-19 (same).

⁵⁷ See, e.g., DHS Privacy Report at 17 & n.18 (“These totals include complaints opened and closed during this reporting period, and complaints opened in prior reporting periods but closed during this reporting period.”).

⁵⁸ The Board recognizes that complaints may not indicate systematic problems, and that changes in the number and nature of complaints over time may be attributable to factors other than agency practice. The Board also recognizes that some agencies, due to the nature of their interactions with the public, are likely to receive complaints on certain topics consistently. The purpose of this recommendation is to call upon agency P/CL officers to assess periodically whether the complaints being received do in fact reveal systematic privacy or civil liberties implications or trends. Conducting such assessments, and explaining the resulting findings, advances not only the goal of informing the public about the nature of the complaints received, see 42 U.S.C. § 2000ee-1(f)(2)(C), but also

Complaints and Dispositions. Reports should indicate whether or not they include information about complaints directed at component agencies.⁶⁰ If so, the reports should separate these complaints by component, to make clear which complaints were directed at which components.⁶¹

⁶⁰ See, e.g., DHS Privacy Report at 17-19.

⁶¹ See, e.g., DHS CRCL Report at 12-13, 17-18.