



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.

Privacy and Civil Liberties Oversight Board (“PCLOB”).⁵ To the greatest extent possible, the reports also must be in unclassified form and made available to the public.⁶

The Role of the PCLOB

In addition to receiving and reviewing P/CL officers’ semiannual reports, the PCLOB is directed by statute, when appropriate, to make recommendations to P/CL officers regarding their activities and to coordinate those activities on relevant interagency matters.⁷

The Board approved these Recommendations unanimously.

The Goal of these Recommendations

A central purpose of Section 803 reports is to foster transparency about the executive branch’s efforts to safeguard privacy and civil liberties, particularly in the context of protecting the nation from terrorism.⁸ To promote that statutory purpose, this document offers recommendations to P/CL officers that are intended to make their semiannual reports more informative and accessible. Reports that are more informative will allow Congress, the PCLOB, and the public to better assess how an important aspect of the 9/11 Commission Act has been implemented: the establishment of senior advisors within key agencies who promote due consideration of privacy and civil liberties. Genuinely informative reports also will reveal the types of issues that these P/CL officers are confronting today.

Many recommendations below involve suggestions about more robust ways to fulfill the reporting requirements of Section 803, thereby enhancing transparency. One underlying goal is to promote reports that include not only numerical information but also explanatory text that makes such numbers meaningful and provides insight into the privacy or civil liberties challenges that agencies are facing, as well as how P/CL officers are addressing those challenges.

Other recommendations below address statutory reporting requirements that are not consistently being fulfilled by all agencies. The Board recognizes that certain provisions in Section 803 may cause legitimate uncertainty about what is required, and that there are various ways to implement the statute’s requirements. The PCLOB makes these recommendations to assist P/CL officers with their reports by interpreting Section 803’s requirements and suggesting means of implementing them that will increase transparency about the work of the officers and their agencies.

⁵ 42 U.S.C. § 2000ee-1(f)(1)(A).

⁶ 42 U.S.C. § 2000ee-1(f)(1)(B), (g)(1).

⁷ 42 U.S.C. § 2000(d)(3). In addition, the PCLOB may designate new departments, agencies, or elements of the executive branch for coverage by the requirements of Section 803. *See id.* § 2000ee-1(a).

⁸ As noted, Section 803 reports must be “in unclassified form to the greatest extent possible,” and P/CL officers are directed to “make the reports of such officer, including reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law[.]” 42 U.S.C. § 2000ee-1(f)(1)(B), (g)(1).

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).

The Agency's Privacy and Civil Liberties Officer, Supporting Personnel, and Recent Initiatives

Section 803 encourages agency P/CL officers to inform the public about their efforts. Officers are required to issue semiannual reports that include “information on the discharge of each of the functions of the officer concerned” and that are made “available to the public to the greatest extent that is consistent with the protection of classified information and applicable law.”¹¹ P/CL officers are further directed to “otherwise inform the public of the activities of such officer, as appropriate[.]”¹²

√ *Recommendation 1: Describe the role of the Section 803 officer and the agency's institutional structures for safeguarding privacy and civil liberties.*

In light of Section 803's focus on appropriately informing the public about the activities of an agency's P/CL officer, Section 803 reports should include basic information, to the extent possible, about the P/CL officer and the personnel with whom he or she works to protect privacy and civil liberties.

The Section 803 officer. Consistent with the seniority that Section 803 officers are meant to possess and the prominent role they are meant to play within their agencies,¹³ as well as with the requirement to appropriately inform the public about their activities, reports should include the identity of the agency's Section 803 officer and explain his or her role within the agency.¹⁴

Supporting personnel. At each agency, responsibility for protecting privacy and civil liberties extends beyond the Section 803 officer. While most agencies have a centralized office headed by the Section 803 officer, agencies distribute these responsibilities differently. Thus, reports should explain the system for safeguarding privacy and civil liberties within the agency under the supervision of the Section 803 officer. If he or she leads an office or division focused on privacy and civil liberties, readers would be served by knowing, for instance, how big the office is, what types of personnel it includes (lawyers, policy specialists, etc.), and where it falls within the agency's organizational structure. Through what means does the office provide advice to agency leadership and others? How does it investigate and review agency actions and policies?¹⁵ Furnishing such information will help readers better

¹¹ 42 U.S.C. § 2000ee-1(f)(2), (g)(1).

¹² 42 U.S.C. § 2000ee-1(g)(2).

¹³ See page 3.

¹⁴ For example, see DEPARTMENT OF HOMELAND SECURITY, PRIVACY OFFICE, SECOND QUARTER FISCAL YEAR 2014 REPORT TO CONGRESS, at 1-3 (June 2014) (“DHS Privacy Report”), available at <http://www.dhs.gov/publication/dhs-section-803-reports-congress>; DEPARTMENT OF HOMELAND SECURITY, OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, QUARTERLY REPORT TO CONGRESS: THIRD AND FOURTH QUARTERS, FY 2014, APRIL 1 – SEPTEMBER 30, 2014, at 2-3 (Feb. 23, 2015) (“DHS CRCL Report”), available at <http://www.dhs.gov/reports-office-civil-rights-and-civil-liberties>. For an example from a non-Section 803 annual agency report, see DEPARTMENT OF THE TREASURY, 2014 ANNUAL PRIVACY AND DATA MINING REPORTS, at 2 (2015) (“Treasury Annual Report”), available at <http://www.treasury.gov/privacy/annual-reports/Documents/Annual%20Privacy%20and%20Data%20Mining%20Reports%20to%20Congress,%20Fiscal%20Year%202014.pdf>.

¹⁵ If such background information is included within other reports issued by the agency, Section 803 reports could either reproduce the same information or provide cross-references and Internet links to those other reports.

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 SEMI-ANNUAL 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

about “the number and types of reviews undertaken,” it affords little visibility into the P/CL officer’s efforts to investigate and review agency activities “to ensure that the agency is adequately considering privacy and civil liberties.”

To provide more information about how P/CL officers are discharging this responsibility, reports should include one-sentence descriptions of the reviews undertaken by the P/CL officer during the reporting period.²¹ Because the large number of reviews at some agencies could make them burdensome to discuss at length, these one-sentence descriptions could be limited to basic information about the agency activity or policy that was examined and the nature of the review conducted, including whether it involved consideration of privacy issues, civil liberties issues, or both.²²

In addition, a greater understanding of the “types of reviews” undertaken by the P/CL officer can be conveyed through paragraph-length descriptions of selected reviews in each semiannual report. As appropriate, these more detailed examples could explain in greater depth the agency actions or policies examined, how the review was conducted, and its findings or conclusions.²³

√ **Recommendation 4: Explain the nature of common and reoccurring types of reviews.**

Many of the reviews listed in existing Section 803 reports are standard types of reviews defined or mandated by statute or regulation, such as Privacy Impact Assessments. Others are reoccurring

PRIVACY AND CIVIL LIBERTIES OFFICER REPORT, SEMIANNUAL REPORT FOR FISCAL YEAR 2015, APRIL 1 – SEPTEMBER 30, 2015 (“DoD Report”), available at <http://dpcl.d.defense.gov/Reports.aspx>.

²¹ Where the review resulted in a report, assessment, or other document that is publicly available, Section 803 reports should include links to those public documents.

²² Section 803 does not distinguish between privacy responsibilities and civil liberties responsibilities, except to allow certain agencies to bifurcate them between different officers. See 42 U.S.C. § 2000ee-1(b). The statute describes the purpose of the “reviews” that P/CL officers must conduct as ensuring that their agency “is adequately considering privacy *and* civil liberties in its actions.” 42 U.S.C. § 2000ee-1(a)(2) (emphasis added).

For some types of reviews, it may be appropriate to simply list the number of such reviews conducted during the reporting period (as many agencies now do), rather than provide a sentence-length description of each review pursuant to Recommendation 3. This is particularly true where reviews consist of routine examinations that do not themselves involve a broader or systematic evaluation of an agency’s actions or policies. For example, reviewing privacy breaches (the loss of personally identifiable information in an agency’s control) could be characterized as “review[ing] . . . agency . . . actions . . . to ensure that such [agency] is adequately considering privacy,” 42 U.S.C. § 2000ee-1(a)(2), and such reviews are included in some P/CL officers’ Section 803 reports — but individually describing each such review would not sufficiently enhance understanding of the P/CL officer’s work to merit the potential burden entailed. Likewise, where a P/CL officer has instituted a practice of conducting initial or threshold analyses of matters to determine whether a more comprehensive analysis is necessary, individually describing each initial or threshold analysis may not be advisable. If a P/CL officer chooses not to individually describe reviews that fall within certain categories, the officer should take special care to explain what that category of reviews consists of, as discussed in Recommendation 4.

²³ See, e.g., DHS Privacy Report at 8-11 (providing paragraph-length descriptions of recent privacy reviews); DOJ Report at 4-5 (providing paragraph-length descriptions of two privacy reviews). Where classification restrictions preclude discussing particular reviews, either through one-sentence descriptions or illustrative one-paragraph examples, P/CL officers should utilize a classified annex, as discussed in footnote 41, below.

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

Section 803 requires that each report include information about “the type of advice provided” during the reporting period.”³⁰ The term “advice” here refers to guidance or recommendations provided by the P/CL officer to the head of the agency or to other agency officials.³¹ One apparent purpose of this requirement is to indicate how P/CL officers are fulfilling the role envisioned by the statute — that of a senior advisor who is consulted on policy decisions regarding efforts to prevent terrorism, and who provides advice to assist the agency in adequately considering privacy and civil liberties concerns in making such decisions.³² Another apparent purpose is to indicate the types of privacy and civil liberties questions that P/CL officers and their agencies are confronting.

In addition to “the type of advice” provided, P/CL officers also are directed to report on “the response given to such advice.”³³ Because advice is provided by P/CL officers to “the head of such department, agency, or element and other officials of such department, agency, or element,”³⁴ the “response given” to that advice means the response of the agency head or other agency officials to the guidance or recommendations of the P/CL officer.

√ ***Recommendation 5: Include “the type of advice provided and the response given to such advice,” through narrative descriptions of significant topics on which the officer provided advice and descriptions of responsive action taken by the agency or an assessment of the agency’s overall responsiveness.***

Section 803 calls for information on “the type of advice provided” by the P/CL officer during the most recent reporting period.³⁵ Some reports, however, simply include numerical counts of the times that advice was provided, grouping these instances of advice in categories with broadly worded labels like “Instructions,” “Request for Guidance,” and “Written Interpretations.” Moreover, no reports from any agency presently include information about “the response given” by the agency to the P/CL officer’s advice.³⁶

use by such [agency] of the power to ensure protection of privacy and civil liberties; and (C) that there are adequate guidelines and oversight to properly confine its use.” 42 U.S.C. § 2000ee-1(a)(4).

³⁰ 42 U.S.C. § 2000ee-1(f)(2)(B).

³¹ See 42 U.S.C. § 2000ee-1(a)(1), (a)(4). The term is not limited to advice that has been accepted by the agency and adopted as official policy, as some reports presently define it, nor does the term include actions taken by other agency officials besides the P/CL officer and his or her supporting staff.

³² Section 803 requires agency heads to “ensure” that each P/CL officer “is advised of proposed policy changes” and “is consulted by decision makers.” 42 U.S.C. § 2000ee-1(d).

³³ 42 U.S.C. § 2000ee-1(f)(2)(B).

³⁴ 42 U.S.C. § 2000ee-1(a)(1).

³⁵ 42 U.S.C. § 2000ee-1(f)(2)(B).

³⁶ One agency’s reports have in the past included information responsive to this requirement. See DEPARTMENT OF HOMELAND SECURITY, OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, QUARTERLY REPORT TO CONGRESS: FOURTH QUARTER, FY 2013 (JULY 1 – SEPTEMBER 30, 2013), at 17 (May 9, 2014) (listing the “recommendations made” by the office as a result of completed investigations and assigning those recommendations one of four labels: “awaiting response,” “all accepted,” “some accepted,” and “non-concur”), available at <http://www.dhs.gov/sites/default/files/publications/crcl-fy-2013-q4-quarterly-report.pdf>.

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.

P/CL officers is materially enhancing the consideration of privacy and civil liberties within their agencies.⁴¹

Procedures to Address Privacy and Civil Liberties Complaints

Another function of an agency's P/CL officer is to "ensure that such [agency] has adequate procedures to receive, investigate, respond to, and redress complaints from individuals who allege such [agency] has violated their privacy or civil liberties."⁴² Section 803 also suggests that P/CL officers may play a role in resolving individual complaints.⁴³

✓ *Recommendation 6: Describe the agency's procedures for responding to privacy and civil liberties complaints, including the role played by the P/CL officer in resolving complaints and ensuring that the procedures are adequate.*

Section 803 reports must include "information on the discharge of each of the functions of the officer concerned," one of which is ensuring the adequacy of the agency's complaint procedures.⁴⁴ Therefore, reports should include information on the officer's efforts to ensure that his or her agency has adequate procedures to receive and address complaints alleging privacy or civil liberties violations.⁴⁵

The statute also requires P/CL officers to report information about the disposition of individual complaints, as well as "the reviews and inquiries conducted, and the impact of the activities of such officer."⁴⁶ Compliance with this requirement may be difficult for some agencies, given the burden that would be entailed by providing such detailed information about large numbers of individual complaints. The requirement can be addressed, however, and transparency enhanced, by describing the procedures through which the agency receives, investigates, responds to, and redresses complaints from individuals who allege privacy or civil liberties violations — including the role played by the P/CL officer.

⁴¹ The Board recognizes that the distinction drawn in Section 803 between "reviews" and "advice" may not always hold in practice, because advice often is provided as a result of, or in the context of, an activity that qualifies as a review under 42 U.S.C. § 2000ee-1(a)(2). To the extent that a P/CL officer's activity satisfies the description of a "review" in subsection (a)(2) of the statute, it should be reported in accordance with Recommendation 3 above. To the extent that the same activity results in significant advice being provided to the agency by the P/CL officer, the type of advice provided can be incorporated into the narrative discussion called for by Recommendation 5.

⁴² 42 U.S.C. § 2000ee-1(a)(3).

⁴³ See 42 U.S.C. § 2000ee-1(f)(2)(D) (requiring information about "the impact of the activities of" the P/CL officer on the disposition of individual complaints and related inquiries).

⁴⁴ 42 U.S.C. § 2000ee-1(f)(2), (a)(3).

⁴⁵ Most reports discuss complaints only by addressing the two complaint-related topics listed in subsections (f)(2)(C) and (f)(2)(D) — i.e., "the number and nature of the complaints received" and "a summary of the disposition of such complaints." Those are not the only complaint-related topics that must be included in Section 803 reports, however. Subsection (f) requires information about the discharge of "each" of the P/CL officer's functions. Those functions, set forth in subsection (a), include ensuring the adequacy of complaint procedures.

⁴⁶ 42 U.S.C. § 2000ee-1(a)(3), (f)(2)(D).

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>.

“excessive force,” which offer readers a genuine sense of the subject and nature of a given complaint.⁵¹ Agencies should emulate this more descriptive approach.⁵²

Those agencies that receive fewer complaints (because their operations involve less interaction with the public, for instance) should consider providing one-phrase descriptions of each complaint, consistent with confidentiality concerns and the sensitivity of the information involved. Where doing so might create a risk that personnel within an agency who filed complaints could be identified by such descriptions, reports could instead rely on the use of appropriate descriptive categories, as described above.

The Disposition of Complaints

In addition to the number and nature of the complaints received, Section 803 reports must include “a summary of the disposition of such complaints.”⁵³ The “disposition” of complaints refers to how the agency as a whole ultimately resolved the complaint. It does not refer only to how the P/CL officer addressed or administered the complaint, as some reports appear to define the term.⁵⁴

√ *Recommendation 8: Summarize “the disposition” of complaints by using appropriately specific descriptive categories, supplemented by illustrative examples.*

Most reports use descriptive labels to indicate the disposition of complaints. In order to meaningfully provide “a summary of the disposition of such complaints,” however, these categories should be reasonably informative, providing some concrete sense of the outcome that resulted from the complaint. Some of the categories presently used by agencies do not provide this level of specificity.⁵⁵ As

⁵¹ See, e.g., DHS CRCL Report at 12 (including categories such as “Breach of confidentiality,” “Discrimination/profiling,” and “Inappropriate questioning/inspection conditions”).

⁵² For those agencies that are subject to FISMA reporting requirements, these more detailed descriptive categories can be designed to fit within the four broad categories that OMB Memorandum M-08-21 directs agencies to use. See footnote 51, above. Thus, utilizing more descriptive categories for privacy complaints in Section 803 reports need not require agencies to develop two separate frameworks for tracking the same privacy complaints. Civil liberties complaints are not addressed in FISMA or in OMB Memorandum M-08-21.

Agencies also may consider categorizing complaints along multiple dimensions, to allow a fuller picture to emerge of the types of complaints received. See DHS CRCL Report at 12-18 (categorizing the same investigations separately by “issue,” “situation,” and “component”).

⁵³ 42 U.S.C. § 2000ee-1(f)(2)(D).

⁵⁴ A primary function of P/CL officers is ensuring that the agency *as a whole* has adequate procedures for addressing complaints. 42 U.S.C. § 2000ee-1(a)(3). Section 803’s reporting requirements distinguish between the agency’s resolution of the complaint and the role that the P/CL officer played in that resolution. See 42 U.S.C. § 2000ee-1(f)(2)(D) (referencing “the disposition of such complaints” separately from “the impact of the activities of such officer”). Reporting only how a complaint was administered by the P/CL officer obscures whether a given complaint ultimately was determined to have merit, prompted policy changes, or was resolved in some other way.

⁵⁵ For instance, some agencies use categories such as “resolved” or “responsive action taken,” which could mean, among other outcomes, that (1) the complaint was found meritless and the complainant was notified

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

Departments and Their Component Agencies

Most of the entities subject to Section 803 are not individual agencies but rather departments that comprise multiple component agencies. Many of these individual components are large institutions in their own right whose activities significantly implicate privacy and civil liberties.⁵⁹ Some reports, however, do not make clear to what extent the P/CL officer's work addresses those component agencies, whether the reviews and advice listed in the officer's report include work done by privacy and civil liberties personnel in the component agencies, or whether the officer's report includes information about complaints involving the component agencies.

√ ***Recommendation 10: For departments that comprise multiple component agencies, clarify whether and how the reports and the P/CL officer's work involve those component agencies.***

Several of the departments that file Section 803 reports are comprised of multiple component agencies, but it is not always clear from their reports whether, and in what ways, their reports address activities relating to the component agencies. The P/CL officers from such departments should ensure that their reports provide clarity about which agencies are subject to investigation and review by the officer, which agencies receive advice from the officer, and which agencies' complaints are included in the officer's reports.

Reviews. Reports for departments that contain multiple component agencies should explain which of those components are "periodically investigate[d] and review[ed]" by the P/CL officer. Any descriptions of such reviews in the officer's Section 803 report should indicate the components to which they pertained.

Advice. Reports should indicate whether the P/CL officer and supporting personnel provide advice to officials in the department's component agencies (and if so, which components), or only to officials in the department itself. Any descriptions or examples of the type of advice provided should indicate the component agency to which the advice was directed.

Complaint Procedures. Reports should indicate whether privacy and civil liberties complaints that are directed at component agencies are processed and resolved by those components themselves or by the parent department. They also should indicate whether the department's P/CL officer works to ensure that the complaint procedures of the component agencies are adequate, and whether the P/CL officer participates in resolving individual complaints directed at component agencies.

P/CL officers' obligation to "periodically review" agency actions and policies to ensure that the agency is adequately considering privacy and civil liberties. *Id.* § 2000ee-1(a)(3).

⁵⁹ The DoD, for instance, includes the National Security Agency, while the DOJ includes the Federal Bureau of Investigation and the ODNI includes the National Counterterrorism Center. These component agencies have their own privacy and civil liberties personnel, whose duties are not defined by Section 803.

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.