

DEPARTMENT OF HOMELAND SECURITY
OFFICE FOR CIVIL RIGHTS AND CIVIL
LIBERTIES AUTHORIZATION ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 4713

TO AMEND THE HOMELAND SECURITY ACT OF 2002 TO MAKE
CERTAIN IMPROVEMENTS IN THE OFFICE FOR CIVIL RIGHTS
AND CIVIL LIBERTIES OF THE DEPARTMENT OF HOMELAND
SECURITY, AND FOR OTHER PURPOSES



OCTOBER 19, 2020.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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2d Session }

SENATE

{ REPORT
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DEPARTMENT OF HOMELAND SECURITY OFFICE FOR
CIVIL RIGHTS AND CIVIL LIBERTIES AUTHORIZATION
ACT

OCTOBER 19, 2020.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 4713]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 4713) to amend the Homeland Security Act of 2002 to make certain improvements in the Office for Civil Rights and Civil Liberties of the Department of Homeland Security, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

H.R. 4713, the Department of Homeland Security Office for Civil Rights and Civil Liberties Authorization Act, codifies the Office for Civil Rights and Civil Liberties (CRCL) at the Department of Homeland Security (DHS or the Department), and defines the du-

ties and responsibilities of the CRCL Officer. The Act also requires the U.S. Government Accountability (GAO) to conduct a review of the implementation of CRCL's requirements to engage with individuals and communities whose civil rights and civil liberties may be affected by programs and policies by DHS.

II. BACKGROUND AND THE NEED FOR LEGISLATION

In response to the terrorist attacks on September 11, 2001, Congress enacted the *Homeland Security Act of 2002* (HSA), which created the Department.¹ Since its inception, the Department has developed and implemented a vast array of programs and policies that affect the civil rights and civil liberties of the public. The establishment of the Department's biometric entry and exit pilots and programs highlights the need to ensure that DHS has robust civil rights and civil liberties policies and procedures in place.

According to the Bureau of Transportation Statistics, in the years since the HSA was enacted, the number of yearly domestic and international passengers traveling on airlines increased by approximately 389 million passengers.² The massive increase in passenger travel necessitates the Transportation Security Administration and the Customs and Border Protection to use technology to expedite passenger screening while also protecting our national security and the civil rights and civil liberties of the traveling public. In accordance with the *Intelligence Reform and Terrorism Prevention Act of 2004*,³ DHS began collecting biometric entry data in 2004⁴ and began conducting biometric exit pilots in 2016⁵ in airports.

It is important that civil rights and civil liberty protections are fully integrated within DHS programs, such as its biometric entry and exit programs. In testimony before the House Committee on Homeland Security, Chuck Romine, Director of the Information Technology Laboratory at the National Institute of Standards and Technology, when discussing biometric and facial recognition technology currently in use across DHS components, stated, “[f]alse positives may also present privacy and civil rights and civil liberties concerns such as when matches result in additional questioning, surveillance, errors in benefit adjudication, or loss of liberty.”⁶

The HSA established the Office for CRCL and required the Secretary of Homeland Security to appoint an officer to lead it.⁷ However, the HSA did not fully delineate the responsibilities and duties of CRCL or the officer. Specifically, the current law requires the officer to “review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees

¹ Homeland Security Act of 2002, Pub. L. No. 107–296, § 705, 116 Stat. 2135 (2002), available at https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf.

² U.S. Dep’t of Transportation, *Bureau of Transportation Statistics*, https://www.transtats.bts.gov/Data_Elements.aspx?Data=1.

³ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638, available at <https://www.govinfo.gov/content/pkg/PLAW-108publ458/html/PLAW-108publ458.htm>.

⁴ U.S. Gov’t Accountability Office, GAO–17–170, *DHS Has Made Progress in Planning for a Biometric Air Exit System and Reporting Overstays, but Challenges Remain* (Feb. 2017), available at <https://www.gao.gov/assets/690/683690.pdf>.

⁵ U.S. Dep’t of Homeland Sec., U.S. Customs & Border Protection, *Biometric Air Exit* (Jan. 4, 2018), available at <https://www.cbp.gov/travel/biometrics/air-exit>.

⁶ *Facial Recognition Technology*, NIST (Feb. 6, 2020), <https://www.nist.gov/speech-testimony/facial-recognition-technology-frt-0>.

⁷ *Id.*

and officials of the Department.”⁸ The only other responsibility specified in the current law, other than a reporting requirement to Congress, requires the officer to publicly advertise information on the functions of CRCL and how to get in contact with him or her.⁹

H.R. 4713 aims to better ensure the CRCL Office integrates civil rights and civil liberty protections into DHS programs and activities, such as its biometric entry and exit programs, when necessary. The Act expands the head officer’s codified responsibilities to assist in achieving that goal, by providing policy advice and recommendations, conducting periodic reviews and assessments of programs and activities as the officer deems necessary, and investigating potential violations. The Act also requires DHS to designate a civil rights and civil liberties officer within each operational component to assist in coordination of policy and protections across the Department.

Additionally, the Act provides the head of the CRCL Office with specific authorities to access information. The legislation states the Officer must have timely access to records, documentations, and other information from the Department and its components. It also allows the head to administer an oath, affirmation, or affidavit, when necessary.

It is worth noting that in the House-passed version of H.R. 4713, the Officer was provided with the authority to subpoena documents from outside DHS. This provision raised considerable concerns. Therefore, Chairman Ron Johnson offered an amendment to strike the provision from the legislation, which was approved during the business meeting.

III. LEGISLATIVE HISTORY

Representative Al Green (D–TX–9), along with Representative Bennie Thompson (D–MS–2), introduced H.R. 4713 on October 17, 2019. Representative Van Taylor (R–TX–3) joined as a cosponsor on October 29, 2019. The House of Representatives passed H.R. 4713 under suspension of the rules by voice vote on December 9, 2019. The Act was referred to the Senate Committee on Homeland Security and Governmental Affairs.

The Committee considered H.R. 4713 at a business meeting on March 11, 2020. During the business meeting, Ranking Member Gary Peters offered a substitute amendment as modified that was adopted by a voice vote *en bloc*. Senators Johnson, Portman, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, Sinema, and Rosen were present for the vote on the amendment.

Chairman Ron Johnson offered an amendment to strike a provision that would have given the head of the CRCL office the authority to subpoena documents from outside DHS. The amendment was adopted by a voice vote *en bloc*. Senators Johnson, Portman, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, Sinema, and Rosen were present for the vote. Senators Hassan and Harris were recorded for the record as voting “No” on the amendment.

⁸*Id.*

⁹*Id.*

Senator Kyrsten Sinema offered an amendment to include the Language Access Program in the responsibilities of the office lead. The amendment was adopted by a voice vote *en bloc*. Senators Johnson, Portman, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, Sinema, and Rosen were present for the vote on the amendment.

The Act, as amended, was approved by a voice vote *en bloc*. Senators Johnson, Portman, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, Sinema, and Rosen were present for the vote. Senators Scott and Hawley were recorded for the record as voting “No”.

IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

Section 1. Short title

This section names the Act as the “Department of Homeland Security Office for Civil Rights and Civil Liberties Authorization Act.”

Section 2. Officer for civil rights and civil liberties

Subsection (a) codifies the establishment of the head of the CRCL office and requires the individual to directly report to the Secretary of Homeland Security.

Subsection (b) lays out the responsibilities of the head of the CRCL office. These responsibilities include ensuring programs and policies comply with overarching civil rights and civil liberties laws and protections; conducting civil rights and civil liberties assessments, when appropriate, before DHS implements programs or policies as well as periodically after implementation; providing policy recommendations related to civil rights and civil liberties; investigating complaints by employees of DHS and from members of the public of possible civil rights and civil liberty abuses; coordinating with the DHS Privacy Office; and leading equal employment opportunity programs and the language access program, among other responsibilities.

Subsection (c) provides transparency into the complaints filed by individuals against an office or component of the Department and investigations carried out by the head of the office. The head of the office must notify the complainant within 30 days of CRCL’s receipt of the complaint and information regarding the determination about the initiation of a review, assessment, investigation, or referral to the Department’s Office of Inspector General. Additionally, the head of the office must make information related to findings and recommendations and a summary of investigations with final recommendations publicly available on a semiannual basis. These summaries must be sent to the relevant heads of the operational component and congressional committees. The summary to congressional committees must be submitted without prior comment or changes by leadership within DHS or the Office of Management and Budget, unless the head of the office asks for such comment or change.

Subsection (d) requires each operational component to designate a lead civil rights and civil liberties officer to coordinate with CRCL on related matters.

Subsection (e) grants timely access of information, such as records and documents, regarding programs and policies within the

head of the office's responsibilities. This subsection also authorizes the head of the office to administer an oath, affirmation, or affidavit, in performing related duties.

Subsection (f) requires a report by March 31st of each year to appropriate congressional committees on the implementation of this Act. This subsection requires the report to include, among other things: a list of programs and activities the office conducted a civil rights and civil liberties impact assessment on; a list of programs that have not had an impact assessment within the last five years; a summary of investigations resulting in recommendations to components or the DHS Secretary; information related to the equal employment opportunity responsibilities; and information related to staffing of the CRCL office.

Section (c) adds the House Committee on Homeland Security to the list of congressional committees that receives a report on privacy and civil liberties already submitted by agencies.

Sec. 3. Comptroller general review

This section requires the GAO to, within two years of enactment of this Act, review and submit a report to appropriate congressional committees on the CRCL Office's implementation of the Act with respect to its engagement with individuals and communities whose civil rights and civil liberties may be affected by programs and policies by DHS.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 13, 2020.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4713, the Department of Homeland Security Office for Civil Rights and Civil Liberties Authorization Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Madeleine Fox.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

| H.R. 4713, Department of Homeland Security Office for Civil Rights and Civil Liberties Authorization Act | | | |
|---|------|-------------------------------------|---------------|
| As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on March 11, 2020 | | | |
| By Fiscal Year, Millions of Dollars | 2021 | 2021-2025 | 2021-2030 |
| Direct Spending (Outlays) | 0 | 0 | 0 |
| Revenues | 0 | 0 | 0 |
| Increase or Decrease (-) in the Deficit | 0 | 0 | 0 |
| Spending Subject to Appropriation (Outlays) | 2 | 14 | not estimated |
| Statutory pay-as-you-go procedures apply? | No | Mandate Effects | |
| Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031? | No | Contains intergovernmental mandate? | No |
| | | Contains private-sector mandate? | No |

H.R. 4713 would authorize the existing Office for Civil Rights and Civil Liberties within the Department of Homeland Security (DHS). The act outlines specific responsibilities for the office, including oversight of DHS's compliance with and integration of current civil rights law into its activities. The act also would require assessments of the effects of DHS's regulations on civil rights and civil liberties.

Although DHS already carries out many of the act's requirements, H.R. 4713 would broaden some responsibilities and require DHS to undertake new activities. Using information from the department, CBO expects that DHS would need 16 full-time equivalent employees to carry out the act. At an average cost of \$139,000 per employee, CBO estimates that implementing the oversight responsibilities would cost \$11 million over the 2021–2025 period.

H.R. 4713 would require DHS to report periodically to the Congress about its investigations of abuses of civil rights and civil liberties, among other topics. The Government Accountability Office also would be required to report on DHS's engagement of communities such as recent immigrants whose members' civil rights and civil liberties may be affected by its activities. CBO estimates that meeting all of those reporting requirements would cost \$3 million over the 2021–2025 period. That cost is based on the average cost of reports for those agencies.

In total, implementing the act would cost \$14 million over the 2021–2025 period, as detailed in Table 1. Any spending would be subject to the availability of appropriated funds. The costs of the legislation fall in budget function 750 (administration of justice).

TABLE 1.—ESTIMATED INCREASES IN SPENDING SUBJECT TO APPROPRIATION UNDER H.R. 4713

| | By fiscal year, millions of dollars— | | | | | |
|-------------------------------|--------------------------------------|------|------|------|------|-----------|
| | 2021 | 2022 | 2023 | 2024 | 2025 | 2021–2025 |
| Estimated Authorization | 2 | 3 | 3 | 3 | 3 | 14 |
| Estimated Outlays | 2 | 3 | 3 | 3 | 3 | 14 |

The CBO staff contact for this estimate is Madeleine Fox. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italics*, and existing law in which no change is proposed is shown in roman):

HOMELAND SECURITY ACT OF 2002

* * * * *

TITLE VII—MANAGEMENT

* * * * *

SEC. 705. [ESTABLISHMENT OF] OFFICER FOR CIVIL RIGHTS AND CIVIL LIBERTIES.

[(a) IN GENERAL.—The Secretary shall appoint in the Department an Officer for Civil Rights and Civil Liberties, who shall—

[(1) review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the Department; and

[(2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer.

[(b) REPORT.—The Secretary shall submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees of Congress on an annual basis a report on the implementation of this section, including the use of funds appropriated to carry out this section, and detailing any allegations of abuses described under subsection (a)(1) and any actions taken by the Department in response to such allegations.]

(a) IN GENERAL.—There is established within the Department an Office for Civil Rights and Civil Liberties. The head of such Office is the Officer for Civil Rights and Civil Liberties (referred to in this section as the “Officer”), who shall report to the Secretary.

(b) RESPONSIBILITIES.—The Officer shall carry out the following responsibilities:

(1) Oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department.

(2) Integrate civil rights and civil liberties protections into all programs and activities of the Department.

(3) Conduct civil rights and civil liberties impact assessments, including, as appropriate, prior to the implementation of new Department regulations, initiatives, programs, or policies.

(4) Conduct periodic reviews and assessments of policies, procedures, and activities of the Department relating to civil rights and civil liberties, including reviews initiated by the Officer.

(5) Provide policy advice, recommendations, and other technical assistance relating to civil rights and civil liberties to the Secretary and to heads of components, directorates, and offices and other personnel within the Department.

(6) Review, assess, and investigate complaints, including complaints filed by members of the public, and information indicating possible abuses of civil rights or civil liberties at the Department, unless the Inspector General of the Department determines that any such complaint should be investigated by the Inspector General of the Department determines that any such complaint should be investigated by the Inspector General.

(7) As the Officer determines necessary, initiate reviews, investigations, and assessments of the administration of the programs and activities of the Department relating to civil rights and civil liberties.

(8) Coordinate with the Privacy Officer to ensure that—

(A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and

(B) Congress receives appropriate reports regarding such programs, policies, and procedures.

(9) Lead the equal employment opportunity programs of the Department, including complaint management and adjudication, workforce diversity, and promotion of the merit system principles.

(10) On a semi-annual basis, make publicly available through accessible communications channels, including the website of the Department—

(A) information on the responsibilities and functions of, and how to contact, the Office;

(B) summaries of the investigations carried out pursuant to paragraph (6) that result in final recommendations that are issued by the Officer; and

(C) summaries of impact assessments carried out pursuant to paragraph (3) or (7) that are issued by the Officer.

(11) Engage with individuals and communities whose civil rights and civil liberties may be affected by programs and activities of the Department, including by informing such individuals and communities about report and redress processes and advising the Secretary and heads of components, directorates, and offices and other personnel within the Department of concerns raised by such individuals and communities.

(12) Lead the Language Access Program for the Department to ensure the Department can effectively communicate with all the individuals impacted by programs and activities of the Department, including those with limited English proficiency.

(c) **TRANSPARENCY.**—

(1) **COMPLAINTS.**—In the case of a complaint made concerning allegations of abuses of civil rights and civil liberties under paragraph (6) of subsection (b), the Officer shall—

(A) provide to the individual who made the complaint notice of the receipt of such complaint within 30 days of receiving the complaint; and

(B) inform the complainant of the determination of the Officer regarding the initiation of a review, assessment, or

investigation within the Office, a referral to the Inspector General of the Department, or any other action taken.

(2) INVESTIGATIONS.—*In the case of an investigation initiated by the Officer pursuant to paragraph (6) or (7) of subsection (b) in which findings or recommendations are issued, the Officer—*

(A) shall, on a semi-annual basis, make publicly available through accessible communications channels, including the website of the Department—

(i) the findings and recommendations of the Officer, if any; and

(ii) a summary of the investigations that result in final recommendations that are issued by the Officer; and

(B) shall not include in such findings, recommendations, or summary any personally identifiable information related to any individual involved in such investigation.

(3) SUBMITTAL TO HEADS OF OPERATIONAL COMPONENTS.—*The Officer shall transmit a copy of each summary produced under paragraph (2) to the Secretary and to the head of each relevant operational component of the Department.*

(4) REPORTS TO CONGRESS.—*Upon the conclusion of any investigation conducted by the Officer under paragraph (6) or (7) of subsection (b) in which findings or recommendations are issued, the Officer shall submit to Congress a report on the investigation, which shall be prepared and submitted without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or the Office of Management and Budget, unless the Officer seeks such comment.*

(d) COMPONENT CIVIL RIGHTS AND CIVIL LIBERTIES OFFICER.—*The head of each of the operational components of the Department, in consultation with the Officer, shall designate a career appointee (as such term is defined in section 3132 of title 5, United States Code) from such component as the Officer for Civil Rights and Civil Liberties of that component. The Officer for Civil Rights and Civil Liberties of each such component shall coordinate with and provide information to the Officer for Civil Rights and Civil Liberties of the Department on matters related to civil rights and civil liberties within the component.*

(e) ACCESS TO INFORMATION.—*The Officer—*

(1) shall have access in a timely manner to all records, reports, audits, reviews, documents, papers, recommendations, and other materials available to the Department that relate to programs and operations with respect to the responsibilities of the Officer under subsection (b); and

(2) may, to the extent the Officer determines necessary, and subject to the approval of the Secretary, administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the responsibilities of the Officer under this section.

(f) ANNUAL REPORT.—*Not later than March 31 of each year, the Officer shall submit to the appropriate committees and subcommittees of Congress a report on the implementation of this section during the year preceding the year during which the report is sub-*

mitted. Each such report shall include, for the year covered by the report—

(1) a list of Department programs and activities for which civil rights and civil liberties impact assessments were conducted, or policy advice, recommendations, or other technical assistance was provided;

(2) a list of Department programs and activities relating to civil rights and civil liberties that have not had impact assessments conducted during the 5-year period ending on the date of enactment of the Department of Homeland Security Office of Civil Rights and Civil Liberties Authorization Act;

(3) an assessment of the efforts of the Department through the Language Access Program to effectively communicate with all individuals impacted by programs and activities of the Department, including those with limited English proficiency;

(4) a summary of investigations resulting in recommendations issued under paragraph (6) or (7) of subsection (b) by the Officer to the Secretary or the head of a component, directorate, or office, together with information on the status of the component, directorate, or office's implementation of such recommendations;

(5) information on the diversity and equal employment opportunity activities of the Department, including information on complaint management and adjudication of equal employment opportunity complaints and efforts to ensure compliance throughout the Department with equal employment opportunity requirements;

(6) a description of any efforts to engage with individuals and communities whose civil rights and civil liberties may be affected by activities carried out by the Department, including public meetings; and

(7) information on total staffing for the Office for Civil Rights and Civil Liberties, including—

(A) the number of full-time, part-time and contract support personnel; and

(B) information on the number of employees whose primary responsibilities include supporting the Officer in carrying out paragraph (9) of subsection (b).

* * * * *

UNITED STATES CODE

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TITLE 42—THE PUBLIC HEALTH AND WELFARE

* * * * *

CHAPTER 21E—Privacy and Civil Liberties Protection and Oversight

* * * * *

SEC. 2000ee-1. PRIVACY AND CIVIL LIBERTIES OFFICERS.

(a) * * *

(f) PERIODIC REPORTS.—

(1) * * *

(A)(i) to the appropriate committees of Congress, including the Committee on the Judiciary of the Senate, the Committee on the Judiciary of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, *the Committee on Homeland Security of the House of Representatives*, the Committee on Oversight and Government Reform of the House of Representatives, the Select Committee on Intelligence of the Senate, and the Permanent Select Committee on Intelligence of the House of Representatives;

* * * * *

