

**Department of Defense**  
**Privacy and Civil Liberties Officer Report**



**Semiannual Report for Fiscal Year 2018**  
**October 1, 2017 – March 31, 2018**

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## I. INTRODUCTION

The Department of Defense (“DoD” or “Department”) submits this Privacy and Civil Liberties Officer Report covering the activities of the DoD Privacy and Civil Liberties Officer (PCLO) for the first semiannual reporting period of fiscal year 2018: October 1, 2017 through March 31, 2018.

Section 803 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-53 (hereinafter referred to as “Section 803”), requires the DoD to designate a senior officer to serve as the Department’s principal advisor on privacy and civil liberties matters, and to report on a semiannual basis the activities of this officer.<sup>1</sup> The Chief Management Officer (CMO)<sup>2</sup> of the Department serves as the Privacy and Civil Liberties Officer (PCLO) and reports to and advises the Deputy Secretary of Defense and the Secretary of Defense on these matters.

Section 803 Reports describe the privacy and civil liberties activities of the DoD PCLO, including:

- Information on the number and types of reviews undertaken;
- The type of advice provided and the response given to such advice;
- The number and nature of the complaints received by the Department for alleged privacy and civil liberties violations; and
- A summary of the disposition of such reported complaints, the reviews and inquiries conducted, and the impact of the activities of such officer.

The DoD is committed to protecting and promoting privacy and civil liberties in its operations and programs, consistent with the Department’s mission to defend the nation. In keeping with the Department’s leadership and collaboration in this area, this report includes the activities of the PCLO and the Senior Agency Official for Privacy (SAOP) in establishing policy and guidelines, as well as the efforts of the DoD Component privacy and civil liberties officials who implement those policies, and the compliance mechanisms which safeguard the personal information, privacy, and civil liberties of individuals.

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<sup>1</sup> 42 U.S.C. § 2000ee-1.

<sup>2</sup> See <http://cmo.defense.gov/Home.aspx> for further information regarding the Office of the Chief Management Officer.

## II. THE DOD PRIVACY AND CIVIL LIBERTIES PROGRAM

The DoD Privacy and Civil Liberties Program was established to ensure compliance with the federal statutes governing privacy and civil liberties, as well as the guidelines of Office of Management and Budget (OMB). On behalf of the PCLO, the Directorate for Oversight and Compliance (DO&C) affects DoD policy, and directs and oversees the compliance of the DoD component privacy and civil liberties programs.

The DoD Privacy and Civil Liberties Program began with the establishment of the Defense Privacy Office in 1975, after the passage of Section 552a of Title 5, United States Code (U.S.C.), also known as “The Privacy Act of 1974, as amended”.<sup>3</sup> When the Implementing Recommendations of the 9/11 Commission Act of 2007, Section 803 was enacted, the Department expanded the mission of the office, and it became the Defense Privacy and Civil Liberties Office. As the capabilities in information technology and information management become increasingly sophisticated and diverse, the DoD privacy and civil liberties programs work to ensure the ongoing protection of individual rights, consistent with the Department’s missions. The DoD privacy and civil liberties policies and procedural requirements protecting privacy and civil liberties are established in DoD Directive (DoDD) 5400.11, “DoD Privacy Program,” October 29, 2014;<sup>4</sup> DoD 5400.11-R, “Department of Defense Privacy Program,” May 14, 2007;<sup>5</sup> and DoD Instruction (DoDI) 1000.29, “DoD Civil Liberties Program,” December 14, 2014.<sup>6</sup>

Partly as a result of changes in guidance by the OMB since 2016, the DoD issuances cited above are undergoing substantial revision in a coordinated and deliberate fashion. In addition, the DoD privacy regulation (32 C.F.R. Part 310) is being rewritten as a single DoD-wide rule, and will result in the rescission of 21 separate DoD component regulations to promote uniformity across the Department.

Because of its size and the diversity of its functions, the Department employs a decentralized structure for implementing privacy and civil liberties programs. This approach enables the DoD to comply with federal agency requirements and ensure that privacy and civil liberties are appropriately

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<sup>3</sup> The Privacy Act of 1974, 5 U.S.C. § 552a (2012) took effect on September 27, 1975, and can generally be characterized as an omnibus “code of fair information practices” that attempts to regulate the collection, maintenance, use, and dissemination of personal information of individual by federal executive branch agencies.

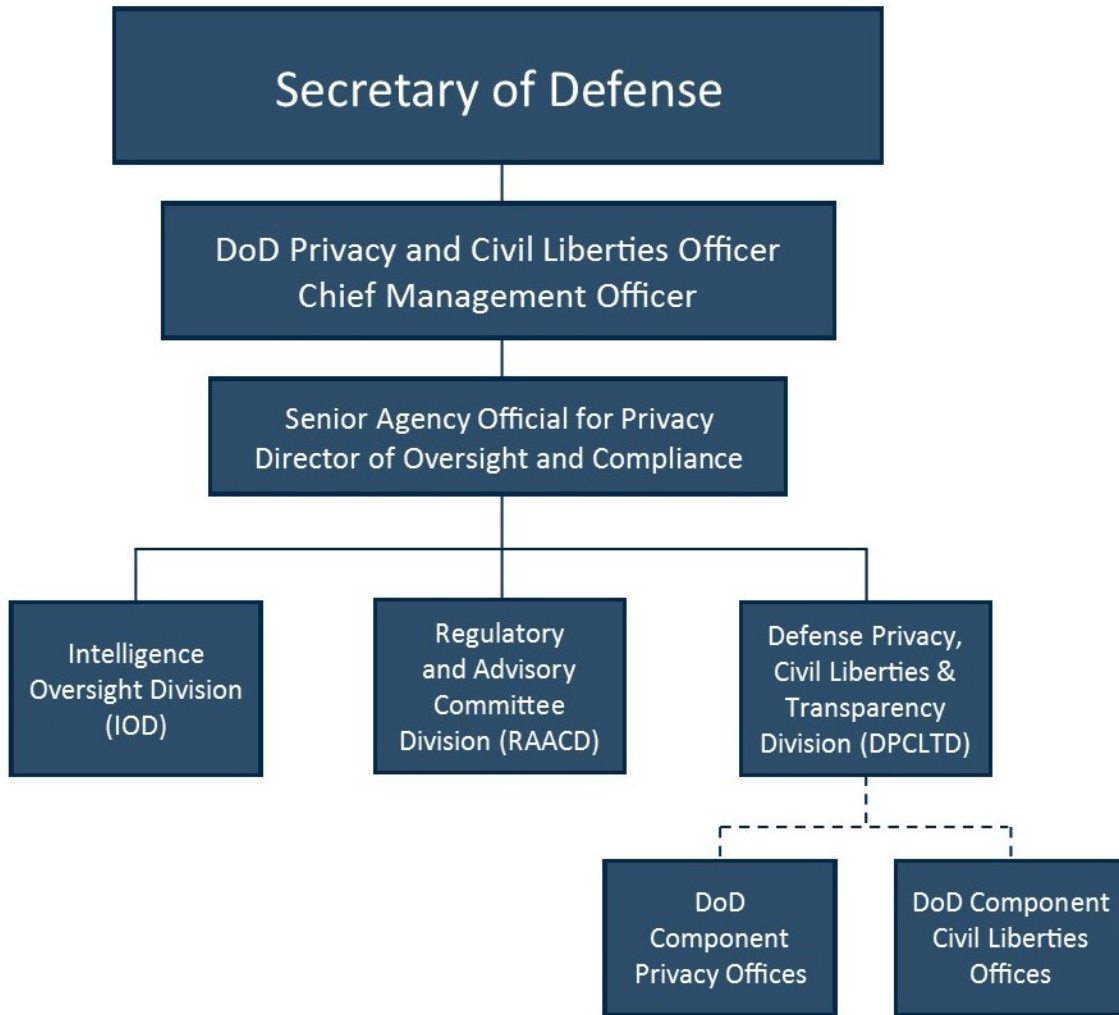
<sup>4</sup> Available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/540011p.pdf>

<sup>5</sup> Available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/540011r.pdf>

<sup>6</sup> Available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/100029p.pdf>

considered in all Department activities. Figure 1 provides the structure and responsibilities of the DoD Privacy and Civil Liberties Program.

**Figure 1: DoD Privacy and Civil Liberties Program Structure**



### **A. The Office of the Chief Management Officer (OCMO)**

The Chief Management Officer (CMO) serves as the DoD PCLO and reports to and advises the Deputy Secretary of Defense and the Secretary of Defense. Other CMO responsibilities include advising the Secretary and Deputy Secretary on business transformation and leading the Department’s efforts to streamline business processes and improve efficiencies in headquarters structure. The CMO coordinates the business operations of the Department and, in a broad capacity exercises oversight authority throughout the Department. As the PCLO, the CMO is responsible for

ensuring that the privacy and civil liberties of individuals are appropriately protected.

## **B. The Directorate for Oversight and Compliance (DO&C)**

The DO&C within the Office of the Chief Management Officer comprises three divisions: the Intelligence Oversight Division (IOD), the Defense Privacy, Civil Liberties, and Transparency Division (DPCLTD), and the Regulatory and Advisory Committee Division. The Director of O&C reports to the CMO, apprising him of privacy and civil liberties concerns within the Department. The Director is also charged with implementing the Department's privacy and civil liberties programs, ensuring compliance with the Privacy Act and that appropriate processes are in place to protect the privacy and civil liberties of individuals in accordance with the law. This includes implementation of agency guidance and oversight on privacy and civil liberties from the OMB and the Privacy and Civil Liberties Oversight Board.

The Director of O&C has also been designated as the DoD Senior Agency Official for Privacy (SAOP). The SAOP has Department-wide responsibility for privacy, including protection of personal information of individuals, compliance with Federal privacy-related laws, regulations, and policies, and reviewing and providing comment on legislative, regulatory, and other policy initiatives that implicate Privacy Act compliance and information risk management. The SAOP sets the parameters of DoD Privacy and Civil Liberties programs for the Department. The SAOP also relies on the IOD and interfaces with intelligence colleagues to ensure that matters sensitive to national security are scrutinized appropriately. Finally, the SAOP routinely provides information and recommendations directly to the PCLO.

## **C. The Intelligence Oversight Division**

The IOD is responsible to the Secretary of Defense for the independent oversight of all intelligence, counterintelligence, and intelligence-related activities of the Department. The IOD inspects all intelligence or intelligence-related activities conducted by any of the DoD Components to ensure that these activities comply with federal law, Executive Orders, Presidential Directives, Intelligence Community Directives, and DoD issuances. Due to the importance of protecting privacy and civil liberties when conducting intelligence activities, the IOD is an integral part of the DoD Privacy and Civil Liberties Programs. The Chief, IOD, also serves as the DoD Senior Intelligence Oversight Official (SIOO), reporting directly to the Secretary of Defense, and serves as the Deputy Director, DO&C.

## **D. The Defense Privacy, Civil Liberties, and Transparency Division (DPCLTD)**

As a division of the DO&C, the DPCLTD assists the PCLO and SAOP in implementing the DoD Privacy and Civil Liberties Programs by providing guidance to Component officials, reviewing publications and legislative activities, facilitating official reporting, and providing training in both privacy and civil liberties content and program administration.

The DPCLTD communicates routinely on a wide range of activities with privacy and civil liberties officials at each DoD Component, the OMB, the PCLOB, and other Federal departments and agencies, to facilitate the Department-wide execution of Federal privacy and civil liberties program requirements, and to exchange ideas on the development and business practices for privacy and civil liberties. The DPCLTD also promulgates the reporting processes of the privacy and civil liberties programs, including the annual Federal Information Security Modernization Act (FISMA) report, reports of significant breaches of personal information in the agency, and assessments of the Defense Industrial Base Cybersecurity/Information Assurance, as well as this semi-annual PCLO report.

## **E. DoD Office of General Counsel (OGC)**

The DoD OGC provides legal advice to senior DoD officials, the DO&C, the DPCLTD, and assists legal advisors to the DoD Components directly in support of the DoD privacy and civil liberties program. In addition to the many attorneys throughout the Department who work on privacy and civil liberties matters, including complaints, DoD OGC assigned legal advisors work directly with the DO&C and the DPCLTD to provide legal reviews for privacy and civil liberties issues and to ensure that the development of privacy and civil liberties policy is consistent with the law.

## **F. DoD Component Privacy and Civil Liberties Officials**

The DoD Components are responsible for administering privacy and civil liberties programs, including the establishment and implementation of Component-level privacy and civil liberties policies, procedures, and training coincident with DoD issuances and guidelines. The Director of O&C and the Chief, DPCLTD, communicate regularly with privacy and civil liberties officials in their respective capacities within DoD Components to ensure compliance with law and policy.

### **1. Senior Component Officials for Privacy (SCOPs) and Component Privacy Officers (CPOs)**

To enhance the strength and implementation of the privacy and civil liberties program, the DoD requires the designation of Senior Component Officials for Privacy (SCOPs). Each SCOP must be a general/flag officer or Senior Level employee and oversee existing or potential compliance issues requiring executive level intervention to identify issues or recommend actions for matters needing the attention of the appropriate Component leadership. In addition, SCOPs work closely with the CPO to understand existing or potential compliance issues requiring executive level intervention, and to identify issues and recommend action for matters needing the attention of the appropriate Component leadership. DoD CPOs and support staff throughout the Department assist the SCOPs. In addition, the SCOPs provide information and policy advice to the Director, DO&C/SAOP to assist in decision-making at the Departmental level.

## 2. Component Chief Civil Liberties Officers (CCLOs) and Points of Contact (POCs)

DoD Components are also responsible for designating a senior service member or civilian employee to serve as the CCLO, and another service member or civilian employee to serve as the Component's civil liberties POC. Generally, the CCLO has authority to act on behalf of the Component Head to direct the Component's compliance with Section 803 and the DoD Civil Liberties Program. The civil liberties POC is responsible for fulfilling the day-to-day and reporting requirements of the DoD Civil Liberties Program within the Component, under the direction of the CCLO.

### III. REVIEWS

The DoD considers privacy and civil liberties concerns when proposing, developing, and implementing laws, regulations, policies, procedures, and guidelines.<sup>7</sup> On behalf of the CMO and the Director of O&C, the DPCLTD performs privacy and civil liberties reviews for all Department-level issuances, as well as proposed federal legislation, testimony, and reports. In doing so, the DPCLTD analyzes language and activities for impacts on privacy and civil liberties. The division provides comment and may recommend changes to such documents in order to protect privacy and civil liberties. When requested, the DPCLTD reviews and comments on documents promulgated by other DoD Components which have the potential to affect the Department's operations. The total number of documents reviewed by the DPCLTD during this review period is identified in Table 1.

Privacy and civil liberties reviews are conducted in accordance with the Privacy Act of 1974,

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<sup>7</sup> See 42 U.S.C. § 2000ee-1.



as amended, the Bill of Rights of the United States Constitution, and OMB and PCLOB executive guidance. The Department also ensures compliance and alignment with the Federal Information Security Modernization Act of 2014 and the E-Government Act of 2002 (44 U.S.C. § 3501) with respect to information management requirements. For the purposes of this report, privacy compliance reviews are enumerated as follows and are summarized in Table 1:

### **A. System of Records Notice (SORN) Reviews**

A SORN is a public notice published in the *Federal Register* that describes the existence, and character of a system of records.<sup>8</sup> DoD Components must submit their SORNs for their respective systems of records to DPCLTD for review and agency approval. The number listed in this report represents the SORNs that DPCLTD has reviewed, approved, forwarded to OMB and Congress, and sent to the Office of the Federal Register for publication during this review period. The number of SORNs reviewed is provided in Table 1.

### **B. Exemption Rule Reviews**

A Privacy Act exemption rule is promulgated when a system of records is exempted from certain provisions of the Privacy Act of 1974, as amended.<sup>9</sup> For the purposes of this report, the number reported represents new exemption rules reviewed by DPCLTD and the DoD OGC and published as a final rule during the reporting period. The number of Privacy Act exemption rules published as final rules is provided at Table 1.

### **C. Matching Agreement Reviews**

A Matching Agreement is a written agreement between a source agency and a recipient agency (federal or non-federal agency) when automated systems of records data is matched between the agencies, typically to determine the eligibility of individuals for a specific federal benefit.<sup>10</sup> For the purposes of this report, the number reported represents Matching Agreements reviewed and completed during this period, in which DoD is either the source agency or the recipient agency. The number of Matching Agreements reviewed and completed is provided at Table 1.

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<sup>8</sup> See 5 U.S.C. § 552a(a)(5).

<sup>9</sup> See 5 U.S.C. § 552a (j), (k).

<sup>10</sup> See 5 U.S.C. § 552a(8) and (o).

## **D. Privacy Breach Reviews**

A breach is defined as the loss of control, unauthorized disclosure, unauthorized acquisition or any similar occurrence where (1) a person other than an authorized user accesses or potentially accesses personally identifiable information or (2) an unauthorized user accesses personally identifiable information for an other than authorized purpose.<sup>11</sup> DoD Components report privacy breaches to the DPCLTD, which compiles the breach reports to identify and analyze trends, and to inform the Department's senior leadership. The number reported herein is the total number of privacy breaches across all Components that were reported to DPCLTD. The number of privacy breach reviews is provided at Table 1.

## **E. Social Security Number (SSN) Justification Reviews**

An SSN Justification Memorandum is required from a DoD Component to DPCLTD for use of social security numbers. The justification must be in accordance with departmental direction<sup>12</sup> and approval of the justification by DPCLTD is required for each record system or form that collects SSNs. This effort is directed at reducing the use of SSNs in DoD information collections, and to ensure greater protection of PII throughout the Department. The number reported in Table 1 is the total number of SSN justification memoranda approved by DPCLTD during the reporting period.

## **F. DoD Issuances, Federal Legislation, Testimony, and Reports**

DPCLTD reviews DoD-wide issuances for privacy and civil liberties issues and provides feedback as appropriate. In addition, DPCLTD reviews proposed legislation and testimony for privacy and civil liberties concerns on behalf of the DO&C and reviews other federal agency documents when requested upon requested. Table 1 includes privacy and civil liberties reviews of DoD and other federal agency documents.

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<sup>11</sup> OMB M-17-12, "Preparing for and Responding to a Breach of Personally Identifiable Information," January 3, 2017.

<sup>12</sup> DoDI 1000.30, "Reduction of Social Security Number (SSN) Use Within DoD," August 1, 2012.

**Table 1: Privacy and Civil Liberties Reviews**

<b>PRIVACY AND CIVIL LIBERTIES REVIEWS</b>	
<b>Type of Review</b>	<b>Number of Reviews</b>
System of Records Notices (SORNs)	
➤ New:	1
➤ Modified:	2
➤ Rescinded	0
Exemption Rules	0
Matching Agreements	3
Privacy Breach Reviews	536
SSN Justification Memoranda	2
DoD Issuances, Federal Legislation, Testimony, and Reports	147

#### **IV. MATTERS OF ADVICE AND RESPONSE**

The CMO provides advice and documents responses to advice on privacy and civil liberties matters for all DoD Components. This advice and response to advice serves as important guidance for DoD Component privacy and civil liberties program implementation.

##### **A. Advice**

For the purpose of this report, advice encompasses the written issuance of DoD policies, procedures, or guidance pertaining to privacy and civil liberties by the CMO or SAOP. The SAOP issued formal privacy guidance in its Breach Response Plan, published in September 2017 and distributed on October 31, 2017. The DoD is actively updating its foundation documents to reflect advances in knowledge, technology, and guidance. Issuances under review and revision include DoD Directive 5400.11, “DoD Privacy Program;” DoD Regulation 5400.11, “Department of Defense Privacy Program;” and DoD Instruction 1000.29, “DoD Civil Liberties Program.”

##### **B. Programmatic Achievements**

The following activities highlight key DO&C and DPCLTD programmatic efforts during this period:

- Public Law No. 115 -59 requires all federal agencies subject to the Chief Financial Officers Act of 1990 (Public Law No. 101 -576) to cease including Social Security numbers (SSNs) in

mailed correspondence by September 15, 2022 unless approved by the head of the agency, and to provide annual reports for the next five years on the agency's progress in curtailing the practice. The DO&C assumed responsibility for the Department's policy implementation and all reporting requirements.

- DoD implemented its overarching breach response plan. The DoD Breach Response Plan was executed upon the occurrence of DoD's first major breach since the plan's inception. The breach procedures implemented in the plan successfully guided the Department through the risk assessment and reporting procedures required in accordance with OMB M-17-12 and OMB 18-02.
- The Department continues its revisions to DoD privacy and civil liberties rules and regulations. 32 CFR § 310 is being updated and will consolidate 21 existing component privacy rules to establish and promote uniformity in the DoD Privacy Program, creating a single privacy rule for the Department. The updates to the Department's privacy regulations will implement changes in accordance with OMB A-108 and OMB A-130 and will provide overarching privacy guidance throughout the Department. The existing civil liberties program guidance is being incorporated with the Department's privacy policy and guidance to effectively convey the inter-relationship of these two programs.
- In December 2017, DPCLTD released the SORN Reference Guide to assist DoD Components with SORN submissions. The guide will be updated periodically as additional information and practices are clarified and refined. The guide is not a replacement of OMB Circular A-108, but is intended to be used in conjunction with it.
- The Department completed its review and modification of the Department of Defense (DoD) Insider Threat Management and Analysis Center (DITMAC) and DoD Component Insider Threat Records System SORN, published in the *Federal Register* on March 21, 2018. This system of records assists in the management of the DoD Component Insider Threat Programs and the DITMAC. The system supports DoD Component insider threat programs, enables the identification of systemic insider threat issues and challenges, and provides a basis for the development and recommendation of solutions to deter, detect, and/or mitigate potential insider threats.
- The DoD Senior Agency Official for Privacy (SAOP) met with the Senior Component Officials for Privacy (SCOPs) on February 15, 2018 to discuss the SCOP roles and responsibilities and the talking topics where; OMB OIRA Role and Federal Privacy Council,

SSN Fraud Prevention and the DoD Breach Response Plan.

- The DoD SAOP convened a meeting with members of the Defense Data Integrity Board (DDIB) on March 9, 2018 to discuss the role and responsibilities of the DDIB concerning computer matching agreements.

## V. COMPLAINTS

DoD policy requires the DoD Components to have established procedures for processing complaints from individuals who allege that the DoD violated their privacy or civil liberties.<sup>13</sup> Complaints received directly by DPCLTD are forwarded to the appropriate DoD Component for further processing. Generally, complaints are reviewed by the receiving Component privacy and civil liberties program office and reported to the Component command or appropriate official. The command may initiate an investigation and, as necessary, direct corrective action. The complaints counted in this report were received in accordance with these procedures. For the purposes of this report, a complaint is an allegation of a violation of an individual's privacy rights or civil liberties. Privacy or civil liberties complaints arising out of non-judicial punishments, military courts-martial, and administrative separations or falling under the Health Insurance Portability and Accountability Act (HIPAA) are not included in this report.

Table 2 reflects the number of complaints received by DoD Components during the reporting period for which (1) responsive action was taken, or (2) action is pending. "Responsive action taken" means the complaint was reviewed and resolved. It also includes any action taken to remediate the violation and prevent recurrence. "Pending" indicates the complaint is under review to determine what actions may be required to resolve the complaint.

A privacy complaint is an allegation of a violation of privacy protections in the administration of the programs and operations of the Department. Privacy complaints are separated into three categories in Table 2:

- Procedural Issues (such as appropriate consent, collection, and/or notice);
- Redress Issues (non-Privacy Act inquiries seeking resolution of difficulties about privacy matters); and
- Operational Issues (Privacy Act complaints not including requests for access, disclosure, or amendment).

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<sup>13</sup> See DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007; DoDI 1000.29, "DoD Civil Liberties Program," December 14, 2014.

For examples of DoD Privacy Complaints, please refer to the Appendix of this report.

A civil liberties complaint is an allegation of a violation of civil liberties in the administration of the programs and operations of the Department. For this report, civil liberties complaints involve the assertion of a violation of the rights and freedoms guaranteed by the first 10 amendments to the U.S. Constitution, the Bill of Rights, as well as the Fourteenth Amendment. Types of civil liberties complaints include, but are not limited to:

- First Amendment (e.g. freedom of speech, religion, assembly, and association);
- Second Amendment (right to keep and bear arms);
- Fourth Amendment (protection against unreasonable search and seizure);
- Fifth Amendment (due process);
- Sixth Amendment (speedy and fair trial);
- Eighth Amendment (no cruel/unusual punishment)
- Ninth Amendment (“unenumerated” rights) and
- Fourteenth Amendment (“equal protection”).

Examples of DoD civil liberties complaints, provided for illustrative purposes, are also included in the Appendix of this report.

**Table 2: Privacy and Civil Liberties Complaints**

Nature of Privacy Complaints	Number Received	Disposition of Complaint	
		Responsive Action Taken	Pending
Procedural	2	0	2
Redress	0	0	0
Operational	6	6	0
<i>Sub Total for Privacy Complaints:</i>	8	6	2
<b>Nature of Civil Liberties Complaints</b>			
First Amendment	10	4	6
Second Amendment	0	0	0
Fourth Amendment	4	4	0
Fifth Amendment	11	10	1
Sixth Amendment	1	1	0
Eighth Amendment	0	0	0
Ninth Amendment	0	0	0
Fourteenth Amendment	30	20	10
Fifth and Fourteenth Amendment	1	1	0
<i>Sub Total for Civil Liberties Complaints:</i>	57	40	17
<b>TOTAL 1st &amp; 2nd Qtr FY18</b>	<b>65</b>	<b>46</b>	<b>19</b>

## CONCLUSION

In accordance with Section 803, this report summarizes the semiannual activities of the DoD Privacy and Civil Liberties Officer from October 1, 2017 through March 31, 2018. DoD will continue to work with Congress, the OMB, the PCLOB, and other federal agencies to ensure that it appropriately protects privacy and civil liberties. Program activities and accomplishments continually assure that privacy and civil liberties are considered in each of the functions and missions of this Department.



## APPENDIX: Samples of Privacy and Civil Liberties Complaints

### Sample DoD Privacy Complaints

#### *Sample Complaint #1:*

**Description of Complaint:** A complainant alleged that a co-worker released PII and other sensitive information about complainant to personnel who did not have a need-to-know.

**Findings:** Unsubstantiated. It was confirmed that the co-worker did have a need-to-know of the PII. There was no substantial evidence that the PII and other sensitive information was released or shared with other personnel in the office. The complainant was notified. Privacy Act training was conducted to ensure everyone within the directorate understood how to properly handle PII and sensitive information.

**Disposition:** Responsive Action Taken.

#### *Sample Complaint #2:*

**Description of Complaint:** A complainant alleged that an application form that was used for applying for access was not compliant with the Privacy Act.

**Findings:** After review of the form, it was found that a Privacy Act statement was required. The information on the form is “For Official Use Only/Freedom of Information Act” (FOUO/FOIA) exempt information and contained PII. The form should be encrypted when sent electronically and safeguarded when stored with limited access by those with a need-to-know, and then destroyed (shredded). In accordance with the reviewing officer’s findings and recommendations, the form in question was revised to make it compliant with the Privacy Act.

**Disposition:** Responsive Action Taken.

### Sample DoD Civil Liberties Complaints

#### *Sample Complaint #1:*

**Description of Complaint:** Alleged Second Amendment violation. The complainant, a soldier, alleged that his unit commander unlawfully confiscated his personally owned weapons.

**Findings:** Inquiry indicated that the unit had improperly confiscated these weapons. The unit’s confiscation rationale, that the complainant was suspended from duty and under investigation for an inappropriate relationship, was not justified under Section 1062 of the National Defense

Authorization Act of FY 2011 and Army policy. The unit returned the personally owned weapons to the soldier.

**Disposition:** Responsive Action Taken.

*Sample Complaint #2:*

**Description of Complaint:** Alleged Fourth Amendment violation. The complainant, a civilian, alleged that security forces violated the complainant's rights against unlawful search and seizure.

**Findings:** An internal investigation was conducted and appropriate training was provided.

**Disposition:** Responsive Action Taken.