

**Letter Report: Privacy Rights
Should Be Given Greater Consideration
During Background Investigation
Personal Subject Interviews**

June 2000

Reference Number: 2000-10-090

This report has cleared the Treasury Inspector General for Tax Administration disclosure review process and information determined to be restricted from public release has been redacted from this document.



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

INSPECTOR GENERAL
for TAX
ADMINISTRATION

June 8, 2000

MEMORANDUM FOR COMMISSIONER ROSSOTTI

A handwritten signature in cursive script that reads "Pamela J. Gardiner".

FROM: Pamela J. Gardiner
Deputy Inspector General for Audit

SUBJECT: Final Letter Report - Privacy Rights Should Be Given Greater
Consideration During Background Investigation Personal Subject
Interviews

This Letter Report presents our findings and recommendations resulting from our review of security clearance investigations conducted by National Background Investigation Center (NBIC) personnel.

We found that potentially inappropriate questions were being asked during subject interview investigations. After we brought this condition to their attention, NBIC managers revised the questions to eliminate all but two potentially inappropriate questions. We recommended that the remaining two questions also be eliminated, and that steps be included in the background investigation review process to identify and remove any documented responses to the potentially inappropriate questions. IRS management disagreed with our recommendations; the IRS' written comments on a draft of this report are included as Appendix IV.

Based on our review and our Counsel's opinion, we believe that the remaining two questions are too broadly stated and should either be eliminated or be narrowed to correlate with the stated government interests. In addition, the IRS misinterpreted our second recommendation, which was intended to address future management reviews of background investigations, not to review historical files of completed investigations. Our responses to IRS' comments are included in the attached report where appropriate.

Please contact me at (202) 622-6510 if you have questions, or your staff may call Maurice Moody, Associate Inspector General for Audit (Headquarters Operations and Exempt Organizations Programs), at (202) 622-8500.

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Objective and Scope

Our objective was to determine whether management had established adequate controls over personal subject interviews.

The objective of this review was to determine whether the Internal Revenue Service (IRS) had established adequate controls to protect the privacy rights of applicants and employees who are interviewed during background investigations. We discussed background investigation interview procedures with managers in the Department of the Treasury, the National Background Investigation Center (NBIC), the Personnel Security Branch; the Office of Personnel Management (OPM), the Oversight and Technical Assistance Office; and IRS, Personnel Security Office. We initiated this review based on concerns raised by Treasury Inspector General for Tax Administration (TIGTA) employees about the propriety of questions asked by NBIC investigators during personal subject interviews.

We reviewed a judgmental sample of 29 of the 96 reports of personal subject interviews and supporting documentation for single scope background investigations (SSBIs) that were initiated between January 5 and December 10, 1999. The individuals interviewed were applicants for positions with the IRS or IRS employees requiring top secret security clearances. NBIC investigators conducted the 29 personal subject interviews between February 11 and December 8, 1999. Our review was limited to analysis of documentation maintained in the official background investigation files at NBIC in Florence, Kentucky.

This limited-scope review was performed between January 3 and February 25, 2000 and, except for the scope limitation described above, in accordance with *Government Auditing Standards*. Major contributors to this report are listed in Appendix I. Appendix II contains the Report Distribution List.

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Background

Individuals selected for certain sensitive positions in the IRS require security clearances for access to top secret information. The NBIC conducts SSBI on these individuals to obtain information that is used to determine whether the individuals meet the standards established for access to top secret information.

The SSBI include the completion of a Questionnaire for National Security Positions (Standard Form 86) by applicants and employees. Persons completing the Standard Form 86 provide information on areas such as residences, educational experiences, employment activities, relatives and associates, foreign activities, mental health, criminal activities, and use of illegal drugs and alcohol. Personal subject interviews with applicants and employees are one method used by NBIC investigators to confirm the accuracy of the information provided on the Standard Form 86.

Results

The privacy rights of applicants, employees and third parties may have been violated.

NBIC investigators may have violated the privacy rights of applicants, employees and third parties by asking questions that were not relevant to accomplish legitimate agency activities and/or purposes. During our review, Personnel Security management implemented corrective action to address this problem. Personnel Security management revised training materials to eliminate questions that were not relevant, and they provided this training to NBIC investigators.

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**The National Background Investigation Center
Did Not Follow Established Office of Personnel
Management and Department of the Treasury
Guidelines During Interviews**

The Privacy Act¹ requires agencies to maintain, collect, use or disseminate only such information about an individual that is relevant and necessary to accomplish an authorized purpose of the agency. OPM guidelines expressly limit the scope of the personal subject interview to the questions listed on the Standard Form 86. The OPM allows extra coverage for certain positions, including law enforcement positions. For example, individuals in law enforcement positions can be asked about their physical health. The Department of the Treasury directs bureaus to establish formal, uniform procedures for conducting subject interviews, which conform with OPM guidelines. All questions should be limited to the scope and nature of the questions on the security forms. National Security Directive 63 established a 10-year time frame for certain questions, including questions involving education.

Based on the documentation in the reports of interviews, we determined that NBIC investigators routinely asked 11 potentially inappropriate questions. These questions did not specifically correlate to information listed on the Standard Form 86, were for periods outside the 10-year time frame, or were only relevant for law enforcement positions.

For example, applicants and employees are required to provide basic information on post high school education within the last 10 years, last education above high school, and all degrees obtained. NBIC investigators asked for more detailed information about educational activities, including information about academic and disciplinary problems even when the post high school education occurred more than 30 years ago.

¹ Privacy Act of 1974, 5 U.S.C. § 552a (1994)

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NBIC interview guidelines contained potentially inappropriate questions.

Except for a question on participation in protest marches, the questions came from an interview guide developed for NBIC investigators when the NBIC was part of the former Inspection Service in the IRS.² NBIC investigators were using this interview guide in 1999. The interview guide included a relevant question on whether the person had ever been involved in riots or unlawful civil disorders. This question was expanded in a background investigation basic training instructor guide to include any involvement in protest marches. (Appendix III lists the potentially inappropriate questions and the number of times each question was asked.)

While we were performing our field work, Personnel Security management revised the interview guide to eliminate the potentially inappropriate questions, except for:

- Medical assistance received while in a foreign country.
- Appearance of the person's name in any police files for any reason for individuals applying for or in law enforcement positions.

Personnel Security management also provided training on the revised interview guide to NBIC investigators on February 8, 2000.

Recommendations

In addition to the corrective actions already implemented, we recommend that Personnel Security management:

1. Remove the two remaining potentially inappropriate questions from the revised interview guide.

² Effective January 18, 1999, all the powers and responsibilities of the IRS Inspection Service, except background investigations and physical security of IRS employees, were transferred to the TIGTA.

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2. Include steps in the background investigation review process to ensure any documented responses to potentially inappropriate questions are identified and removed.

Management's Response: IRS management disagreed with our recommendations for the following reasons.

1. Personnel Security management opposed eliminating the question concerning medical assistance received while in a foreign country because the ability to safeguard classified information is critical to national security. The purpose of this inquiry is to determine if an individual being considered for a national security clearance was at any time provided medical treatment where he/she may have come to the attention of a hostile foreign intelligence service, particularly if the person was not in complete control of his/her medical facilities. Such incapacitation could result in one's inability to control the disclosure of information. IRS management also opposed eliminating the question concerning law enforcement personnel names appearing in police files, since an employee's credibility as a government witness is mission-critical.
2. IRS management responded that they will not review previously closed investigations for the purpose of deleting information because it is closely protected and subject to review prior to any authorized release.

Appendix IV contains the IRS' complete response to the findings and recommendations presented in a draft of this report.

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Office of Audit Comments:

1. We believe that, for the stated purpose, the question of medical assistance received while in a foreign country is both too broad and underinclusive. For example, the question would require employees to disclose medical assistance received from an American physician abroad, but not assistance provided in the United States by a physician who is a citizen of another country (hostile or otherwise).

We also believe that the question of an employee's name appearing in police files **for any reason** is also too broad. IRS management contends this information is necessary to satisfy its disclosure responsibilities under Treasury Order 105-13 (*Giglio* Policy). However, in our opinion, this blanket inquiry is inappropriate because it asks for information that does not reflect on the employees' truthfulness or bias and, therefore, is not within the scope of *Giglio*. For example, charges that were unsubstantiated or resulted in exoneration generally are not considered impeachment information and thus do not reflect upon employees' truthfulness or bias, according to the Treasury Order.

While we understand the underlying rationale for these two questions, as currently written we believe they extend beyond the stated government interests. Personnel Security management should reconsider its position. A reasonable alternative would be to narrow the scope of the questions to address the IRS' specific interests, thus protecting employees' legitimate privacy rights.

2. We believe IRS management misinterpreted our recommendation to include steps in their review process to identify and remove any documented responses to potentially inappropriate statements. This recommendation was intended for future background investigations, not a review of previously completed investigations. Implementing this recommendation will strengthen adherence to

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the *Standards for Internal Control in the Federal Government*, and provide greater assurance that inappropriate questions and documentation are not being asked by investigators or retained in case files.

Conclusion

NBIC investigators asked potentially inappropriate questions during personal subject interviews based on an interview guide. These questions may have violated the privacy rights of applicants, employees and third parties. The corrective actions already taken by management to address this problem, together with management's reconsideration of our recommendations in this report, will improve adherence to applicable laws and regulations, and the focus and quality of personal subject interviews.

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Appendix I

Major Contributors to This Report

Maurice S. Moody, Associate Inspector General for Audit (Headquarters Operations and Tax Exempt Programs)

John Wright, Director

Daniel Cappiello, Audit Manager

Albert Sleeva, Senior Auditor

Carole Connolly, Auditor

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Appendix II

Report Distribution List

Deputy Commissioner Operations C:DO
Chief, Agency-Wide Shared Services A
Chief, Personnel Security Office A:PSO
National Director for Legislative Affairs CL:LA
Management Controls Coordinator A:W
Office of the Chief Counsel CC
Office of the National Taxpayer Advocate C:TA
Director, Office of Program Evaluation and Risk Analysis M:O
Office of Management Controls M:CFO:A:M

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Appendix III

**Chart of Potentially Inappropriate Questions
Asked By NBIC Investigators**

Questions	Documented Responses	Percent
Personal identifying information (facial hair, scars or tattoos)	26	90%
Educational performance and activities during any period of post high school education including whether the person had any academic and disciplinary problems (25 individuals with educational activities more than ten years prior)	16	64%
Ability to speak a foreign language or subscription to foreign publications	28	97%
Medical assistance received while in a foreign country	20	69%
Place and type of employment of relatives	24	83%
Appearance of the person's name in any police files for any reason	14	48%
Incarceration of relatives or friends	21	72%
Participation in protest marches	8	28%
General health of the person (*nine non-law enforcement individuals)	7	78%
Professional assistance received by family members from a psychiatrist, psychologist, or mental health counselor	21	72%
Drug or alcohol problems of family members	18	62%

*Note: Total cases for each category is 29 unless otherwise stated.

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Appendix IV

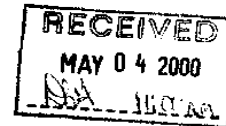
Management's Response to the Draft Report



COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

May 3, 2000



MEMORANDUM FOR PAMELA J. GARDINER
DEPUTY INSPECTOR GENERAL FOR AUDIT

FROM: Charles O. Rossotti 
Commissioner of Internal Revenue

SUBJECT: Response to Draft TIGTA Audit Letter Report:
Privacy Rights Should Be Given Greater
Consideration During Background Investigation
Personal Subject Interviews
(Audit No. 200010013)

We appreciate the opportunity to respond to the above draft letter report. The report is a review of background investigations, which are conducted by the National Background Investigations Center (NBIC), to determine whether management had established adequate controls over personal subject interviews.

We agree that the privacy rights of applicants and employees are of utmost importance to the Service, as reflected by Article 5, section 4.K, of the NORD V national agreement, which states, "As prescribed by the Privacy Act (and only in non-criminal matters), the Employer shall collect information to the greatest extent practical directly from the subject individual." Our commitment to privacy principles is evidenced, in part, by investigators providing oral and written notifications of the Privacy Act when gathering information, by the stringent measures we take to protect investigative data and reports, and by our full and proper compliance with disclosure regulations. We also believe that information provided voluntarily by the subject during a personal interview must be accurately recorded, fully reported, and properly protected.

As was noted in the report, the Subject Interview guidance used by NBIC for the conduct of personal subject interviews was developed and approved for use by the former Inspection organization, now the Office of the Treasury Inspector General for Tax Administration (TIGTA). In fact, both "Subject Interviews" and "the Privacy Act" were training modules in the Basic and Advanced Investigator training courses that were approved by Inspection's Internal Security staff and conducted at the Federal Law Enforcement Training Center.

Because a subject's ability to safeguard classified information is critical to national security, we are opposed to eliminating the question from the personal interview guide

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concerning medical assistance received while in a foreign country. Because one's credibility as a government witness is mission-critical, we are opposed to eliminating the question concerning the appearance of potential law enforcement personnel names in police files. Our reasons are fully explained in the attached documentation.

In addition, we do not intend to review previously closed investigations for the purpose of deleting information, since all information is closely protected and would be subject to review prior to any authorized release of the information. Moreover, investigations conducted by the Inspection organization prior to January 18, 1999, technically are TIGTA's records, and could only be changed by your Disclosure function under the direction of your Records Custodian. However, we will consider any individual's formal Privacy Act request for an amendment of the record for any investigation dated January 18, 1999, or thereafter.

Please call Coby Stohrer, Personnel Security Officer, at (202) 622-7708 if you have any questions concerning our response. Your staff may also contact Andy Cook of Agency-Wide Shared Services at (202) 622-3702 for additional information.

Attachment

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Management Response to Draft TIGTA Audit Report – Audit No. 200010013: Privacy Rights Should Be Given Greater Consideration During Background Investigation Subject Interviews

Recommendation No. 1:

Remove the two remaining potentially inappropriate questions from the revised interview guide:

- Medical assistance received while in a foreign country.
- Appearance of the person's name in any police files for any reason for individuals applying for, or in law enforcement positions

Assessment of Cause:

- Medical assistance received while in a foreign country.

A subject's ability to safeguard classified information is critical to national security. The purpose of this inquiry is to determine if an individual being considered for a national security clearance was at any time provided medical treatment where he/she may have come to the attention of a hostile foreign intelligence service, particularly if the person was not in complete control of his/her mental or physical faculties. Such incapacitation could result in one's inability to control the disclosure of information, or may have placed the individual in a position where he/she may be vulnerable to coercion, exploitation, or pressure.

Treasury Directive Publication (TD P) 71-10, The Office of Security Manual, Chapter 1, Section 4, Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Guideline B, Foreign Influence, states that "contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Conditions that could raise a security concern and may be disqualifying include: unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service; conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government; and indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion, or pressure."

Concerning medical conditions, other investigative agencies ask similar questions to achieve the same end result. For example, National Security Agency (NSA) investigators ask, "Has there been any medical condition (physiological) that would impact ability to safeguard classified information?" and "Any medications that may impair your ability to safeguard classified

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information?" The Central Intelligence Agency (CIA) asks, "Since your last investigation, have you experienced any physical health conditions that have affected your judgment, reliability, stability, or ability to safeguard classified information?" and "Have you been prescribed any medications which may have affected your judgment, reliability, stability, or ability to safeguard classified information?"

- Appearance of a person's name in any police file for any reason for individuals applying for, or serving in, law enforcement positions.

Treasury Order 105-13, Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Department of Treasury Witnesses ("Giglio Policy"), is established for all individuals who will be providing a sworn statement or testifying as a witness for the Government in a federal criminal proceeding. Potential impeachment information is defined as impeaching information which is material to the defense. This information may include, but it is not limited to, (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

Law enforcement officials, by virtue of their assignments, may be called upon to serve as government witnesses. In this regard, the subject interview provides opportunity to determine information so it can become a matter of record to be available to be shared with a prosecutor, instead of being discovered by the defense counsel resulting in impeachment of a Government witness.

Corrective Action No. 1:

Not applicable.

Implementation Date:

Not applicable.

Responsible Official:

Not applicable.

Corrective Action Monitoring Plan:

Not applicable.

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Recommendation No. 2

Include steps in the background investigation review process to ensure any documented responses to potentially inappropriate questions are removed.

Assessment of Cause:

The review identified and charted (Appendix III) 11 statements or questions from the former training material developed by Inspection which were judged as potentially inappropriate. Revised training materials were modified to streamline the interview and reduce the resource time expended on conducting and reporting them and all but the two stated items were modified. The draft letter recommendations focus on those two items that were not modified in the revised training materials.

The recommendation assumes that the questions or lead interview statements were potentially inappropriate, and as such, calls for the review of cases to ensure that responses to those potentially inappropriate questions are removed. It has not been established that the questions or lead statements were inappropriate and changes to the majority of those questions were initiated prior to the review. Although moot based upon the revision of the training materials, examples which supported the use of those questions or lead statements include:

- Item #1 - The Federal Bureau of Investigation also requires this information of all fingerprint cards.
- Item #2 - Investigations are conducted under delegated authority from OPM; the OPM Investigator's Handbook, dated April 1996 (the available reference during the course of the investigations reviewed), Chapter V-10, stated, "the investigator should discuss all periods of education at the High School level and above."
- Item #3 - Referenced in Defense Investigative Service guidance, Department of Defense Security Institute, Sections Security and Hostage.
- Items #5 and #7 – Lead-in statements to determine the possibility of undeclared relatives, particularly children, and to be alert to the possibility of incarcerated relatives as referenced in the above-cited OPM Investigator's Handbook, Chapter V-11.
- Item #11 - The known use, manufacture, or distribution of illegal drugs by persons known to the subject could have an impact of one's ability to be a credible government witness.

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Prior training materials were developed by, and were subject to the approval of Inspection's investigative, Disclosure, and legal expertise. Responses to questions or lead statements are provided voluntarily by the subjects. Investigators are fact-finders and are obligated to accurately and thoroughly report information or testimony that is provided in the course of investigation. Reports of closed investigations should not be altered, except in compelling situations. There is only **one** known objection to the questioning during a 10-year experience of conducting Subject Interviews, a fact which suggests that privacy was not perceived as being violated or infringed upon.

We view the recommended action as unnecessary. It is not practical to amend investigations which were conducted in accordance with one standard when another standard is implemented. Moreover, investigations conducted by the Inspection organization (prior to January 18, 1999) technically are TIGTA's records and could only be changed by your Disclosure function under the direction of your Records Custodian. However, we will respond to any subject's formal Privacy Act request for an amendment of the record for any investigation dated January 18, 1999, or thereafter.

Corrective Action No. 2

Not applicable.

Implementation Date:

Not applicable.

Responsible Official:

Not applicable.

Corrective Action Monitoring Plan:

Not applicable.