April 4, 2000
L-2000-10

TO: John L. Thoresdale
Director of Administration

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Applicability of the Privacy Act to Disciplinary Investigations

This is in response to your request for guidance concerning the applicability of the Privacy Act to employee disciplinary investigations. The Privacy Act contains a provision restricting the gathering of information in disciplinary matters. Specifically, section 552a(e)(2) of the Privacy Act (5 U.S.C. § 552a(e)(2)) provides that agency will

> collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. Thus, as a general rule, the agency should first seek clarification from the subject individual directly involved in disciplinary investigation. If another course of action is taken, i.e. seeking third party information, there must exist a good reason, such as those articulated below.

The leading cases regarding section 552a(e)(2) are Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989) and Brune v. IRS, 861 F.2d 1284 (D.C. Cir. 1988). Waters involved an employee of the Department of Justice whose supervisor became aware of information which raised suspicions regarding the employee's use of approved leave. Without first approaching the employee to seek a clarification, the supervisor sought and received verification of the employee's attendance at the state bar examination. The Court of Appeals for the District of Columbia Circuit held that

> [I]n the context of an investigation that is seeking objective, unalterable information, reasonable questions about a subject's credibility cannot relieve an agency from its responsibility to collect that information first from the subject. Waters, at 873.

In Brune, the Court permitted the agency to first obtain information from a third party, since the employee involved, an IRS employee, had a unique ability to impede or compromise an investigation through the ability to pressure the potential witnesses, which were companies subject to tax review by the IRS employee.

Exceptions from the general rule contained in the statute are set forth in the OMB Guidelines on implementing the Privacy Act. See 40 Fed. Reg 28,948 and 28,961. Those guidelines stress that the statute provides "to the greatest extent practicable" information should be obtained from the subject individual. However, practical considerations, including cost, may dictate that a third party source may be used before the subject individual is contacted. In addition, an agency may contact a third party first where there exists a risk that the information sought might be lost, e.g. through the potential intimidation of other witnesses. Further, in an investigation where the credibility of the subject individual involved is questionable, the agency may seek the input of third parties before questioning the employee.

Recovery of damages under the Privacy Act can only arise if the violation is " intentional or willful." 5 U.S.C. § 552a(g)(4). The Courts have interpreted this standard as being somewhat "greater than gross negligence" Hill v. U.S. Air Force, 795 F.2d 1067,1070 (D.C. Cir. 1986) or an act committed "without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act." Albright v. United States, 732 F.2d 181,189 (D.C. Cir. 1984).

I am available to discuss any questions you might have on this issue.