



United States
General Accounting Office
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General Government Division

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August 22, 1996

The Honorable Richard C. Shelby
Chairman

The Honorable J. Robert Kerrey
Ranking Minority Member
Subcommittee on Treasury,
Postal Service, and General Government
Committee on Appropriations
United States Senate

The Honorable Paul Simon
United States Senate

The Honorable Jim Lightfoot
Chairman

The Honorable Steny H. Hoyer
Ranking Minority Member
Subcommittee on Treasury,
Postal Service, and General Government
Committee on Appropriations
House of Representatives

The Honorable John L. Mica
Chairman, Subcommittee on Civil Service
Committee on Government Reform and Oversight
House of Representatives

In June 1995, we testified before the Subcommittee on Civil Service, House Committee on Government Reform and Oversight, on issues pertaining to the Office of Personnel Management's (OPM) plan to privatize its Investigations Service. The Investigations Service performed, at the request of federal agencies, background investigations of federal employees, contractors, and applicants to provide a basis for determining (1) an individual's suitability for federal employment and (2) whether an individual should be granted a clearance for access to national security information.

OPM's plan was to privatize this function through the establishment of a private corporation to be known as the US Investigations Service, Inc. (USIS). Former Investigations Service employees would own USIS by means of an Employee Stock Ownership Plan. OPM has contracted with USIS to conduct background investigations as OPM previously had done.¹ In doing so, USIS is to use OPM's existing database. OPM envisions that USIS also will do background investigations—outside the contract with OPM—for state and local governments and private organizations.

Following the June 1995 hearings, you asked us to determine

- whether the Federal Privacy Act of 1974 could affect USIS access to federal records and whether law enforcement agencies were likely to grant USIS access to criminal history records; and
- what steps OPM was taking to ensure that (1) the background investigations USIS performs for federal agencies remain of the highest quality and (2) any national security considerations were addressed.

This letter responds to your requests with information that we had obtained as of August 1, 1996.²

RESULTS IN BRIEF

The Privacy Act of 1974 provides that individual records contained in a system of records are to be used only for the purposes for which they were originally obtained and may not be disclosed to any person or agency unless the subject of the record agrees or the disclosure is specifically permitted by the act. OPM's disclosure of its records to USIS for purposes of performing investigations would be permissible under the exception to the Privacy Act allowing for disclosures that are considered a routine use of the record. The Privacy Act requires that a notice of each routine use of an agency's system of records be published in the Federal Register. OPM published such a notice in the Federal Register on April 12, 1993,³ providing that disclosures of records may be made to contractors, covering any disclosure to USIS in its role as OPM's contractor.

OPM's 1995 Privatization Feasibility Study pointed out that it was not clear whether USIS could use federal records under the Privacy Act, as amended (5 U.S.C. 552a), to provide services to nonfederal customers. OPM officials told us that they planned to create a

¹On April 12, 1996, OPM signed a contract with USIS. USIS began operations on July 8, 1996.

²We also were requested to review OPM's cost-benefit study of its proposed privatization. See Cost Analysis: Privatizing OPM Investigations (GAO/GGD-96-121R, July 5, 1996).

³Federal Register(Vol. 58, No. 68, Apr. 12, 1993), p. 19185.

"firewall"—through the use of computer software—to prevent such use of federal records. We have not reviewed the feasibility of OPM's firewall. However, even assuming that such technology-based barriers are adopted, the contract also states that USIS may request OPM to obtain federal, state, or local law enforcement records and, to the extent permitted by the source agency, USIS may use the material for both its "U.S. government and other work." This provision suggests that USIS may use government-furnished information for the purpose of performing nonfederal work that is outside the scope of the contract. We questioned whether this would be consistent with the intent of the firewall or, in the absence of the expressed consent of the individual being investigated, in accord with the Privacy Act. In commenting on a draft of this letter, OPM agreed that the explicit consent of the subject of the investigation would be needed for the release of such information, regardless of the aforementioned contract provision. (See encl. I.)

OPM officials said they fully discussed all of the steps they had taken and planned to take with officials of other agencies in March 1996. We subsequently contacted the Federal Bureau of Investigation (FBI) to determine its reactions to OPM's steps. The FBI manages the National Crime Information Center (NCIC), including the Interstate Identification Index (III)—a cooperative federal-state program that includes a criminal subject's state and federal offenses, arrests, and dispositions—and the Fingerprint Identification Records System (FIRS).

FBI officials informed us that to facilitate the conducting of background investigations pursuant to the contract, the FBI would continue to provide criminal history information to OPM. This would be done with the understanding that OPM would provide this information to USIS under the authority of the Privacy Act. Prior to furnishing this information to USIS, OPM would obtain a waiver from the individual being investigated. FBI officials said that they plan to rely on OPM to provide the necessary oversight and safeguards of the information given to OPM's contractor personnel, and that the FBI does not plan to review specific waivers before releasing the criminal history information to OPM. The FBI officials also stated that the FBI has not consented to the use of criminal history information for purposes other than federal background investigations.

FBI officials told us that in early July 1996 they specified to OPM that USIS employees should not be permitted direct computer terminal access to the NCIC system, since it includes state-controlled criminal history information. An FBI official said that the overall issue of the extent of USIS access to NCIC data is currently under review by the Department of Justice's (DOJ) Office of Legal Counsel. The FBI official told us that the FBI expects an opinion to be issued shortly.

We discussed these developments with the Chairman of the Criminal Justice Information Services (CJIS) Advisory Policy Board, an organization composed of representatives of state and local NCIC participants that advises the Director of the FBI on operational policies. The Chairman said that he was advised by the FBI in July 1996 of its decision that USIS could not directly access NCIC records. The Chairman said that the CJIS Advisory Policy Board would need to review the Office of Legal Counsel's opinion on this matter once it was issued.

FBI officials indicated that OPM's and its contractor's use of FBI records is subject to the biennial audits that are required of all users. Such audits are aimed at evaluating the effectiveness of system controls, measuring compliance with NCIC policies, and preventing and detecting NCIC misuse. Because of workload and resource constraints, the FBI officials did not know when an audit would be conducted.

In addition to the federal records check component of background investigations, OPM's Investigations Service also conducted checks of state and local government records, such as those records that pertain to vital statistics (e.g., birth and marriage records) and law enforcement. OPM officials told us that OPM had formal agreements with 12 states to facilitate access to state law enforcement records.

We contacted officials from these 12 states to determine whether they would provide USIS with access to their state criminal history records. Officials from seven states said that they could allow access to USIS contractor personnel if USIS obtained the written consent of the subject of the investigation. However, officials from the five other states said that they did not believe they could provide access to USIS or other private contractors, even with the written consent of the subject of the investigation. None of the officials we spoke with was aware of OPM's privatization plans.

After we brought this situation to OPM's attention, OPM contacted officials from the aforementioned five states to explain the privatization effort and the security arrangements that OPM had made. OPM notified us on June 19 that officials from one of the states had agreed to provide USIS employees with access to its records and that OPM was confident that the other four states would also agree. (See encl. II.)

Under the contract, USIS is to establish a program to ensure that investigations done by its employees are of high quality. The contract also indicates that OPM is to maintain some responsibility for overseeing the quality of USIS investigations. However, OPM has not yet determined the extent to which it will conduct quality checks of USIS investigations.

After the privatization was completed and implementation of the contract began on July 8, 1996, the Department of Energy (DOE) notified USIS and OPM that it would have to revoke the clearances of former OPM investigators for unlimited access to DOE facilities. DOE officials said that they took this step because they determined that OPM's contract with USIS was subject to the National Industrial Security Program (NISP). NISP was established in 1993 to provide safeguards to protect classified information released by executive branch agencies to their contractors. DOE officials further believed that access to DOE facilities could not be provided to USIS employees until the contract was brought into compliance with NISP.

The Department of Defense (DOD), which serves as the executive agent for NISP, concurred with DOE's determination regarding the contract and worked with OPM and USIS to grant USIS an interim secret facility clearance under NISP guidelines. DOD issued an interim clearance on July 23.

In summary, a number of these issues that have arisen in connection with implementation of this contract have not yet been fully resolved, although OPM has stated that it is in the process of addressing them.

APPROACH

In doing our work, we examined OPM's privatization plans, including (1) its 1995 study on the feasibility of privatization, (2) its contract with USIS, and (3) other related documents. We interviewed (1) officials of OPM responsible for the privatization initiative, (2) officials from 12 state police authorities that had agreements with OPM to provide OPM personnel with access to their records, and (3) officials from federal law enforcement agencies that provide OPM with access to their systems of records. We also reviewed the Privacy Act, as amended, and discussed selected Privacy Act issues with officials from the Office of Management and Budget (OMB). We discussed the application of NISP to OPM's contract with USIS with officials from DOD and DOE. We did our work in Washington, D.C., from September 1995 to August 1996 in accordance with generally accepted government auditing standards.

In April 1996, OPM provided written comments on a March 1996 draft of this letter. After receiving these comments, we developed additional information that we incorporated into this letter and shared with OPM officials. OPM provided a second set of written comments in June 1996. In each instance, OPM stated that it either had resolved or was in the process of resolving the issues we had raised. OPM's comments are presented and evaluated in the appropriate sections of this letter and are reprinted in enclosures I and II.

We also shared draft excerpts of this letter with officials from the FBI, OMB, DOE, and DOD to verify that our draft had accurately represented the results of our discussions with them. We made clarifications to the letter as appropriate.

PRIVACY ACT AND ACCESS TO RECORDS ISSUES

The OPM Investigations Service's procedures for conducting background investigations required checks of various federal, state, and local records to enable OPM to develop a background profile of the federal job applicant or employee. Under the contract, USIS will need to use these same types of records to develop background profiles. In previous congressional testimony on OPM's planned privatization, we and others raised questions on Privacy Act and access-to-records issues. OPM, to our knowledge, has not totally resolved these questions.

Privacy Act Issues

The Privacy Act set standards for how federal agencies are to collect, maintain, use, and disseminate personal information obtained on individuals. In general, individual records contained in a system of records are to be used only for the purposes for which they were originally obtained. The records may not be disclosed to another person or agency unless the subject of the records agrees or the disclosure is specifically permitted under one of the

authorizing statutory exemptions. The Privacy Act provides that when an agency contracts for the operation of a system of records to accomplish an agency function, the agency must ensure that the requirements of the act are applied to the system.

OPM's contract with USIS provides that USIS is to comply with the Privacy Act in designing, developing, and operating any system of records on individuals intended to accomplish a federal agency function. However, because USIS is a nongovernmental entity and may be performing services that are outside the scope of those previously performed by the Investigations Service, some Privacy Act-related questions remain unanswered regarding circumstances under which USIS will be allowed to use federal records.

OPM informed us that it has authorized disclosure of records to USIS for purposes of USIS' performing investigations for federal agencies under the provision of the Privacy Act that allows for disclosures that are considered a routine use of the record. A routine use of a record is defined by the act as a use for a purpose that is compatible with the purpose for which the record was collected. In addition, the Privacy Act requires that upon establishment or revision of a system of records, an agency is to publish a notice of the existence and character of the system of records. The notice is to include such information as (1) each routine use, including the categories of users and the purpose of such use and (2) the policies and practices of the agency regarding such items as storage, access controls, and disposal of records. The purpose of the public notice provision is to foster agency accountability through a system of public scrutiny.

OPM's disclosure of its records to USIS for purposes of performing investigations for federal agencies is considered to be a routine use. OPM published a notice in the Federal Register on April 12, 1993, permitting disclosure to contractors. The notice provides that personnel investigations records may be used to "disclose information to contractors or volunteers performing or working on a contract, service, or job for the Federal Government." (See encl. I.)

Although this notice states that disclosures may be made to contractors, it does not present the fact that USIS will be the principal organization performing these investigations. We asked OMB to comment on whether privatization itself required a new notice or would make one advisable, since a primary purpose of the requirement to publish Privacy Act notices in the Federal Register, including each routine use of the system of records, is to provide adequate notice to individuals as to whom and for what purposes information concerning them may be disclosed. An OMB official said that he did not believe that a new system's notice would be required under the Privacy Act since the OPM system of records would not be modified significantly. However, the official recognized that given a combination of changes, such as the planned reliance on contractor personnel to operate the system and the creation of a firewall to safeguard federal data (which is discussed below), publication of a new system's notice might be advisable from a policy standpoint to ensure that all affected stakeholders were notified. The official said that OMB had not taken a position on the desirability of doing so, however.

Concerning USIS' potential use of federal records for purposes outside the scope of the contract (e.g., for nonfederal purposes), OPM's April 1995 Privatization Feasibility Study pointed out that, since the Privacy Act allows for contracts for the operation of a system of records to accomplish a federal agency function, it was not clear that USIS could use federal records obtained under the Privacy Act to provide services to nonfederal customers. We were told by OPM officials that OPM planned to create a firewall that, in theory, would prevent USIS from using federal data for nonfederal purposes. According to OPM officials, the database OPM maintained to do investigations would be partitioned to give USIS full access to do federal work and truncated access to do nonfederal work. We have not reviewed the feasibility of OPM's planned firewall.

However, the contract suggests that, even if an effective firewall were developed, USIS might be able to use federal records for purposes outside of the contract, that is, in the conduct of nonfederal investigations. The contract provides that

"to the extent necessary to perform its obligations under this contract, the Contractor may request that OPM obtain from any federal, state, or local law enforcement agency investigative reports or other law enforcement records To the extent permitted by the law enforcement agency that was the source of the information, the Contractor may use any material obtained by OPM for both its U.S. Government and other work." (Underlining added.)

This language suggests that the contract may permit USIS to use government-furnished information for the purpose of performing nonfederal work that is outside the scope of the contract. We questioned whether the contractor's use of material obtained from law enforcement agencies to perform work outside the scope of the contract would (1) be consistent with the intent of the firewall or (2) in the absence of the expressed consent of the individual being investigated, be authorized under the Privacy Act. In commenting on a draft of this letter, OPM agreed that an explicit consent by the subject of the investigation would be needed for the release of such information to USIS for its nonfederal work, regardless of the aforementioned contract clause. (See encl. I.)

OPM's feasibility study suggested that it might be possible for USIS to perform investigative services for state and local governments under the contract if such entities were to contract with OPM under the Intergovernmental Cooperation Act (ICA). OPM, in turn, would contract with USIS to provide these services. As a result, USIS would be using OPM's systems of records to accomplish an agency function. The contract states that OPM is to seek permission from OMB to perform investigative services for state and local governments. If this strategy were successful, the contract states that these new investigation services would be considered within the scope of USIS' contract. OPM's plan would permit state and local governments to use USIS services on a noncompetitive basis, a feature that could be attractive to those governments.

According to OPM officials, they had not yet requested such authorization from OMB and did not know how OMB would respond to such a request. However, OPM requested similar authorization from OMB in 1994, before the privatization decision, as part of its own internal

effort to make its investigative function more efficient and profitable. OMB denied OPM's request, noting that:

"In accordance with the Intergovernmental Cooperation Act (31 U.S.C. Section 6505) and OMB Circular A-97, background investigative services do not meet the criteria of 'specialized or technical services.' The Intergovernmental Cooperation Act was intended to encourage intergovernmental cooperation but not upset ordinary business channels. We believe background investigative services could be provided by the private sector."

It seems to us that OMB's rationale for denying OPM's 1994 request may still apply, since such investigations for state and local governments would not meet the criteria of specialized and technical services. It also appears to us that such authorization, if granted, could affect "ordinary business channels," since it could limit the opportunity of other firms to compete for the potential new business from state and local governments. In a recent discussion, OMB officials told us that OMB would not make a decision on this matter until they receive a request from OPM.

Access to Federal, State, and Local Law Enforcement Records Issues

Whether all federal, state, and local law enforcement agencies are willing to provide USIS with direct access to sensitive records is unclear. After OPM announced its plans to privatize the Investigations Service, at least one major federal agency (the Department of the Treasury) raised a concern about whether USIS would be given access to federal data sources in view of the sensitivity or classification of investigative files and potential national security problems.

To address this issue, OPM is to (1) maintain responsibility for ensuring proper use of the data and (2) provide safeguards to protect the data. For example, OPM is to maintain a staff to oversee and monitor the operations of USIS. OPM officials told us that OPM had established, or was in the process of establishing, physical and procedural safeguards to protect the information obtained by USIS investigators conducting federal background investigations. As previously mentioned, OPM planned to establish a firewall—through the use of computer software—to prevent USIS employees from gaining unauthorized access to data collected to do federal background investigations.

OPM officials said they fully discussed all of the steps they had taken and planned to take with officials of other agencies in March 1996. We subsequently contacted the FBI to determine its reactions to OPM's steps. The FBI manages the NCIC, including the III (a cooperative federal-state program that includes a criminal subject's state and federal offenses, arrests, and dispositions) and FIRS.

FBI officials informed us that to facilitate the conducting of background investigations pursuant to the contract, the FBI would continue to provide criminal history information to OPM. This would be done with the understanding that OPM would provide this information

to USIS under the authority of the Privacy Act. Prior to furnishing this information to USIS, OPM would obtain a waiver from the individual being investigated. FBI officials said that they plan to rely on OPM to provide the necessary oversight and safeguards of the information given to OPM's contractor personnel and that the FBI does not plan to review specific waivers before releasing the criminal history information to OPM. The FBI officials also stated that the FBI has not consented to the use of criminal history information for purposes other than federal background investigations.

FBI officials told us that in early July 1996, they specified to OPM that USIS employees should not be permitted direct computer terminal access to the NCIC system, since it includes state-controlled criminal history information. An FBI official said that the overall issue of the extent of USIS access to NCIC data is currently under review by DOJ's Office of Legal Counsel. The FBI official told us that the FBI expects an opinion to be issued shortly.

We discussed these developments with the Chairman of the CJIS Advisory Policy Board, an organization composed of representatives of state and local NCIC participants that advises the Director of the FBI on operational policies. The Chairman said that he was advised by the FBI in July 1996 of its decision that USIS could not access NCIC records. The Chairman said that the CJIS Advisory Policy Board would need to review the Office of Legal Counsel's opinion on this matter once it was issued.

FBI officials indicated that OPM's and its contractor's use of FBI records is subject to the biennial audits that are required of all users. Such audits are aimed at evaluating the effectiveness of system controls, measuring compliance with NCIC policies, and preventing and detecting NCIC misuse. Because of workload and resource constraints, the FBI officials did not know when an audit would be conducted.

In addition to the federal records check component of background investigations, OPM's Investigations Service also conducted checks of state and local government records, such as those records that pertain to vital statistics (e.g., birth and marriage records) and law enforcement. OPM officials told us that OPM had formal agreements with 12 states to facilitate access to state law enforcement records.

We contacted officials of the 12 states that had agreements to facilitate OPM's access to records to determine whether those states would provide private contractors, such as USIS, access to state criminal history records.⁴ The officials we contacted controlled access to these records. Officials from seven states said that their state laws and/or regulations would allow access by contractor personnel under certain conditions. These conditions generally included obtaining the written consent of the subject of the investigation. Officials from the other five states said that, under current conditions, they did not believe they could provide USIS or other private contractors access to criminal history records, even with the written

⁴We did not have points of contact in the remaining 38 states. Therefore, we were unable to determine the extent to which these states would provide a private contractor access to law enforcement records.

consent of the subject of the investigation. None of the 12 officials was aware that OPM was planning to privatize its Investigations Service.

In commenting on a draft of this letter, OPM noted that we did not identify the states or the level of officials whom we contacted regarding the access to records issue. (See encl. I.) We have since provided OPM with the identities of the five states and the officials with whom we spoke. In each instance, the official we spoke with (1) was the person whom OPM identified as being the appropriate point of contact, (2) was in charge of the systems of records, and (3) was the signatory to a written agreement with OPM regarding access to records. The 12 states we contacted were identified by OPM as having agreements or memorandums of understanding with OPM for access to criminal history and other records.

OPM also expressed its belief that our concerns about the willingness of state governments to share their criminal history information with USIS may have been based on erroneous assumptions. OPM pointed out that, under 5 U.S.C. 9101(b)(1), state and local criminal justice agencies are obligated to make criminal history record information available to OPM for the purpose of determining an individual's eligibility for access to classified information or assignment to or retention in sensitive national security positions. OPM officials said that USIS would not be requesting such records, but OPM would do so through USIS. According to OPM, state and local criminal justice agencies would be legally obligated to comply, since the request would be made by OPM. OPM also said that for investigations involving non-national security positions, which are not subject to 5 U.S.C. 9101, contract investigators had not experienced major problems with access to records, although some state and local criminal justice agencies had denied OPM investigators access from time to time.

We recognize that 5 U.S.C. 9101(b)(1) requires state and local criminal justice agencies to make criminal records available to OPM in certain circumstances. However, the statute does not specifically address OPM's interpretation that state and local agencies would have to honor a request for information made by OPM through its contractor. The interpretation of the state and local agencies from whom records are requested is critical. If some state and local officials continue to believe that they are precluded from providing a contractor with the criminal history information, as appears to be the case, OPM would need to resolve this issue with the appropriate state officials.

Subsequent to our bringing this situation to OPM's attention, OPM contacted officials from the aforementioned five states to explain the privatization effort and the security arrangements that OPM had made. In its June 19, 1996, comments on this letter, OPM notified us that officials from one of the states had agreed to provide USIS employees with access to its criminal history records and that OPM was confident that the other four states would also agree. (See encl. II.)

We believe that OPM's efforts illustrate the importance of coordinating the privatization effort with OPM's customers and information sources. The importance of coordinating the privatization effort with state information sources was also illustrated by the position taken recently by another state—not one of the five discussed above—regarding USIS' access to records. This state had taken the position that USIS employees could not have direct access

to its computerized criminal information network because USIS would not meet the access requirement of being an authorized criminal justice agency. A state official with whom we spoke did not accept OPM's position that since USIS would be retained by an authorized user, it would meet this requirement. According to an OPM official, OPM probably would have to assign an employee to directly access this state's criminal information data network to retain its access rights.

QUALITY ASSURANCE AND RELATED NATIONAL SECURITY ISSUES

The quality of employee background investigations is important regardless of the position being filled. However, background investigations take on added importance in cases where the prospective employees will have access to national security-related information. In these situations, it is imperative that the background investigation be of high quality.

Provisions in the contract with USIS discuss the issue of quality assurance. The contract indicates that OPM is to maintain some responsibility for ensuring that USIS does quality investigations for federal agencies. However, the contract is unclear on the extent to which OPM's plans would ensure that investigations met a sufficiently high-quality level.

Subsequent to completing the privatization effort in July 1996, DOE determined that OPM's contract with USIS was subject to NISP. This program provides safeguards over classified national security information released by executive branch agencies to their contractors. According to DOD officials responsible for NISP, DOD concurred with DOE's determination and worked with OPM and USIS to grant USIS an interim secret facility clearance under NISP guidelines. DOD issued an interim clearance to USIS on July 23.

OPM's Past Quality Assurance Program

Historically, OPM operated a comprehensive program to review the quality of background investigations conducted by the Investigations Service. Until December 1994, the Investigations Service employed a quality assurance staff of about 80 employees to review 100 percent of its investigative cases. According to OPM officials, OPM discontinued the 100-percent review in December 1994 because of the need to downsize and cut expenses.

After December 1994, OPM's quality assurance staff consisted of about 30 employees who were expected to do a more limited number of reviews. Essentially, they were to review

- OPM-conducted investigations that had identified significant and/or derogatory issues about the subject (historically, about 15 percent of all investigations each year) and
- a random sample of approximately 10 percent of all cases completed by OPM each year.

In addition, OPM supervisors were to review 10 percent of all the fieldwork done on investigations by their staff.

Several federal agencies have received authority from OPM to perform employee background investigations on their own. OPM is also to perform detailed reviews of some of these investigations to ensure quality.

Quality Assurance for Federal Investigations Under the Contract

Under the contract, USIS is to establish a quality assurance function that would review (1) selected cases before release to customer agencies and (2) an additional representative sample of cases from those ready to be closed at the end of each workday. For purposes of clarification, guidance, and requirements, provisions of the OPM Investigator's Handbook that were in effect on the date the contract was awarded are to be followed.

The size of quality assurance samples and the sampling methodology are not specified in the contract but are to be approved by OPM. In its comments on a draft of this letter, OPM said that it expected that USIS would do a case review of approximately 35 percent of all investigations. According to an OPM official whom we interviewed regarding OPM's written comments, OPM's reinterview/recontact program is to continue. (See encl. I.) Under this program, selected individuals from among those interviewed during the course of an investigation are to be asked to complete an OPM form and provide such information as the relative professionalism of the investigator and the nature of information provided by the person interviewed. These forms are to be mailed directly to OPM.

Several provisions of the contract indicate that OPM will continue to have some responsibility for ensuring that USIS does quality investigations for federal agencies. For example, contract provisions indicate that OPM is to (1) determine for purposes of payment whether the contractor's performance is acceptable with respect to content, quality of services, and materials and (2) return to USIS investigative reports that do not meet standards. Independently of the contract, OPM plans to continue to review the investigations done by those agencies that have the authority to do their own investigations.

However, the contract is unclear on the extent of OPM's direct involvement in ensuring that USIS produces quality investigations for federal agencies. According to OPM's comments on a draft of this letter and a subsequent interview with an OPM representative, the agency anticipated that USIS-completed investigations would be subject to the same level of OPM review as those performed on investigations conducted by agencies that have authority to conduct or contract out their own investigations. (See encl. I.) However, the OPM official said that the specific level of review (percentage of investigations to be reviewed) had not yet been determined. This official said that the level of review would be based on the number of available OPM employees.

In its comments, OPM also said that customer feedback is an important quality barometer, and that the agency expects that customer agencies will bring deficient investigations, if any, to OPM's attention. (See encl. I.)

OPM's Contract Falls Under
the National Industrial Security Program

After the privatization was completed on July 8, 1996, DOE notified USIS and OPM that it was terminating the access authorizations of former OPM investigators. These access authorizations had allowed the OPM investigators to have unescorted access to DOE sites. DOE officials said that they administratively terminated the authorizations because the basis for them had changed: The investigators no longer were employed by a federal agency but by a private concern. DOE officials said that OPM's contract with USIS was subject to NISP. NISP was established by Executive Order 12829 on January 6, 1993, to provide for safeguards necessary to prevent unauthorized disclosure of classified information and to control authorized disclosure of classified information by executive branch agencies to their contractors.

DOD, which serves as the executive agent for NISP, determined that USIS was subject to NISP standards and, during the week of July 22, issued USIS necessary facility and personnel security clearances at the interim secret level.⁵ Upon DOD's issuance of an interim secret facility clearance on July 23, DOE granted general visitor site access rights to USIS employees visiting DOE facilities.

According to DOD officials, the following steps were taken to provide USIS with an interim clearance under NISP:

- DOD performed a facility clearance survey on the USIS primary facility located in Boyers, PA. Under NISP, a facility clearance is an administrative determination certifying that a facility is eligible for access to classified information. This effort included a preliminary analysis of whether USIS could be affected by foreign ownership, control, or influence to the detriment of the national interest.
- DOD granted security clearances to approximately 500 of the 700 USIS employees. DOD granted the security clearances on the basis of the background investigations the employees had when they were OPM employees.
- DOD entered into a signed security agreement with USIS. Among other things, this agreement is to require the contractor to maintain security controls in accordance with DOD requirements.
- DOD has initiated action to enter into a signed agreement with OPM whereby OPM would authorize DOD to act for that agency in matters concerning NISP.

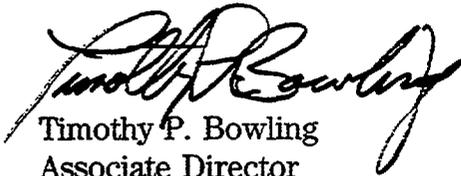
⁵The NISP Operating Manual provides for granting an interim facility clearance. DOD officials said that a final facility clearance would be issued after they completed an analysis of the potential effect of foreign ownership, control, or influence on USIS. According to these officials, DOD's preliminary work indicates that this should not pose a problem.

According to DOD officials, although an interim clearance has been granted, certain provisions of OPM's existing contract with USIS may have to be amended to bring the contract into full compliance with NISP guidelines. For example, the contract calls for future security clearance investigations on USIS employees to be conducted by USIS and reviewed by OPM before determinations are made on whether to provide the employees with clearances. According to DOD officials, DOD will have to both conduct the security clearance investigations and determine whether to provide clearances.

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As agreed with your offices, we will send copies of this letter to the Directors of OPM and OMB. We will also send copies to other interested parties and make copies available to others upon request.

Major contributors to this letter are listed in enclosure III. Please contact me at (202) 512-7680 or Richard Caradine at (202) 512-8109 if you have any questions or require more information.



Timothy P. Bowling
Associate Director
Federal Management and Workforce
Issues

Enclosures - 3

COMMENTS FROM OPM DATED APRIL 8, 1996

OFFICE OF THE DIRECTOR

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT

WASHINGTON, D.C. 20415

APR 8 1996

Mr. Timothy P. Bowling
Associate Director, Federal Workforce
and Management Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Bowling:

Thank you for your letter of March 26, 1996, with which you forwarded a draft version of your proposed correspondence to congressional requesters on selected aspects of OPM's planned privatization of its Investigations Service. We appreciate the opportunity to comment, and believe the information we are providing resolves the open issues you identified.

Your letter draft identifies two areas you were asked to consider with respect to the operations of the private company, US Investigations Services, Inc. (USIS):

-- whether the Privacy Act could affect USIS access to federal records and whether law enforcement agencies are likely to grant USIS access to criminal history records; and

-- what steps OPM was taking to ensure that the background investigations USIS performs for federal agencies remain of the highest quality.

Following is our response to the issues you raised. We expect we will have an opportunity to review your analysis of the cost-benefit study commissioned by OPM when you have completed that work.

PRIVACY ACT ISSUES

Now on
p. 6.

On page 7 of the letter draft, you concluded that OPM's disclosure of its investigative records to USIS for purposes of performing investigations for federal agencies "could be considered a routine use" under OPM's published Privacy Act routine uses. OPM believes that our routine use not only can "be considered" a routine use, but that our routine use very clearly and distinctly covers any disclosure to USIS in its role as OPM's contractor. OPM's Notices of Systems of Records, OPM/Central 9, Personnel Investigations Records, specifically states that "These records and information in these records may be used: q. To disclose information to contractors...performing or working on a contract, service, or job for the Federal Government."

CON 131-64-4
July 1968

(2)

The draft states that OPM's routine use notice does not appear to cover the situation where USIS will be the "principal organization performing these investigations." You add that you plan to ask the Office of Management and Budget (OMB) to comment separately on whether "privatization itself requires a new notice or would make one advisable." OPM sees nothing in its routine use, nor in the Privacy Act, that speaks to the need for a separate routine use notice merely because one contractor is performing the work. Our current routine use clearly covers release to contractors working on a Federal Government contract, and is not limited by the fact that only one contractor is involved.

Now on pp. 3
and 7.

On pages 9 and 10, you raise a concern that the contract will allow USIS to use government-furnished information for the purpose of performing non-federal work that is outside the scope of the contract. The language at issue is set forth in the proposed contract at Section H.12(b), which states:

To the extent necessary to perform its obligations under this contract, the Contractor may request that OPM obtain from any Federal, state, or local law enforcement agency investigative reports or other law enforcement records. Any access fee charged by these agencies for requests made by OPM shall be borne by OPM. To the extent permitted by the law enforcement agency that was the source of the information, the Contractor may use any material obtained by OPM for both its U.S. Government and other work. (Emphasis added)

OPM recognizes that the future viability of USIS may be due, in some measure, to its ability to perform services for organizations other than those already covered by the proposed contract. This benefits OPM in having a strong and secure contractor and benefits OPM employees who will become owners of USIS. The ability of USIS to use source information in an expeditious and cost effective manner is consistent with these goals. For that reason, the proposed contract allows USIS to use material obtained by OPM in its non-federal work, but within strict guidelines.

Plainly stated, no information will be made available to USIS unless OPM is assured that release of that information is consistent with our internal security requirements and Privacy Act constraints. The contract language in Section H.12(b) simply acknowledges that if information received from a law enforcement agency is releasable, either because the subject of the investigation has specifically authorized such release, or because the information is otherwise subject to public distribution, then USIS can use that information, rather than duplicate the cost and effort to obtain such information.

(3)

It is difficult to imagine a situation where information obtained from a law enforcement agency would not be subject to an explicit consent by the subject of the investigation to the release of such information. To the extent that such consent is not clearly applicable to a release to USIS for its non-contract work, the information will not be released by OPM. You acknowledge that if explicit consent is obtained from the subject of a non-federal investigation, disclosure to USIS would be authorized. We fully agree with that position.

This is confirmed by the "firewall" being developed by OPM and discussed briefly in your draft, and also in other sections of the proposed contract. For example, Section H.18, Disclosure of Information, makes it very clear that the contractor will be held to a strict standard of safeguarding protected information, and that OPM will not make a release of any information that it does not fully believe is consistent with legal requirements.

Now on p. 7.

The last sentence in the second paragraph on page 10 states the proposed contract shows that OPM intends to seek permission from OMB to perform investigative services for state and local governments which, if granted, could be done by USIS under the proposed contract with OPM. Although a previous request was turned down by OMB, USIS asked OPM to again make the request.

While we can envision circumstances under which OPM could currently and appropriately provide services to state and local governments within the guidelines of the Intergovernmental Cooperation Act, such as the channeling of FBI criminal history check requests -- a function which could not be performed by the private sector -- OPM and USIS recognize that USIS will not be prevented from seeking more substantial business from state and local clients on its own. This work would certainly not be considered as part of the proposed contract with OPM.

ACCESS ISSUES

Now on p. 9.

Your letter draft states, in the last paragraph on page 4, that "officials from...five...states said they could not provide access to USIS or other private contractors, even with the written consent of the subject of the investigation." The first full paragraph on page 13 says the same officials "did not believe" they could provide the information.

The draft is silent as to the identity of the five states, and we are uncertain as to what agreements are being referenced, or what level of official was contacted to discuss the issue. We believe your concerns may be based on erroneous assumptions.

(4)

Federal law clearly requires state and local law enforcement agencies to make criminal records available to OPM in certain circumstances. Section 9101(b)(1) of Title 5 of the United States Code states:

Upon request by...the Office of Personnel Management,... [Federal, State, and local] criminal justice agencies shall make available criminal history record information regarding individuals under investigation by such department...for the purpose of determining eligibility for (A) access to classified information or (B) assignment to or retention in sensitive national security duties."

Further, Section 9101(c) of Title 5 of the United States Code specifies that OPM cannot obtain such information unless the individual under investigation gives OPM a written consent, which is part of the routine procedure for background investigations. It is important to note that it is not the contractor who will be requesting the records, but OPM through its contractor. The request is from OPM and thus state and local criminal justice agencies are legally obligated to comply, as long as consent has been given by the subject of the investigation.

OPM does have some agreements with states to electronically obtain records from state data banks, but those agreements are for the manner in which the data is made available. Those agreements do not impact on the basic statutory authority of OPM to seek and obtain information from any and all state criminal justice agencies. Indeed, if these "agreements" with 12 states were its entire authority for obtaining information, OPM would currently be unable to access records in some 38 states, which is not the case.

OPM has some agreements with state agencies pursuant to Section 9101(3)(A) of Title 5 of the United States Code dealing with indemnification of state officials who release such information to OPM and then are subject to suit under state disclosure laws. Again, those agreements do not in any way impact on the authority and obligation of OPM to obtain records, either directly or through a contractor. In addition, OPM is in the process of arranging with all 50 states the methodology for conducting state-level criminal history checks as mandated by the Child Care Protection Act.

Experience tells us that OPM's contract investigators, and those retained by or otherwise acting as agents for other agencies conducting investigations under delegated authority have not had and are not having access problems of any note. From time to time and for various reasons, OPM Investigators have been refused access involving non-national security positions by entities such as the City of Los Angeles, the District of Columbia, and the Commonwealth of Massachusetts. In such cases, if the matter

(5)

cannot be ultimately resolved in a timely manner by contacting supervisors, we substitute searches of court records for local law enforcement checks.

QUALITY ASSURANCE ISSUES

- Now on p. 11. Your draft, in the first full paragraph on page 14, states: "the proposed contract is unclear on the extent to which OPM's plans would ensure that investigations meet a sufficiently high quality level." Also, the first sentence on page 17 says "the proposed contract is unclear on the extent of OPM's direct involvement in ensuring that USIS produces quality investigations for federal agencies."
- Now on p. 12.

The historical case rework rate for OPM's investigations program has been one-half of one percent. This was true when we performed 100% case review, and has been true since we reduced that level of review. Given that the same people will continue to do the work under the same requirements, we have no reason to believe this figure will change significantly.

The contract requires USIS to use current OPM criteria for case review: review of all serious issue cases, cases with protected sources, etc.; and an additional sampling representative of case types. These requirements currently generate a case review rate of about 35%.

Cases without issues rarely result in customer complaints about quality, but OPM's reinterview/recontact program will help ensure that even "no issue" cases are what they purport to be. Under this program, OPM will receive written feedback from individuals interviewed by USIS employees. This feedback will encompass such things as the professionalism of the Investigator and the nature and extent of the information provided by the source.

OPM is requiring USIS to adopt OPM's quality standards and to establish a quality assurance program approved by OPM. While it is not intended that OPM will go back into the business of case review -- the contract requires delivery of a product meeting OPM's standards -- completed USIS cases will be subject to a level of the detailed review we perform on investigations conducted by other agency personnel or contractors under delegated authority.

If faulty USIS cases were being submitted to OPM's customers, OPM would hear about it. Customer feedback is an important quality barometer, but there is no "anticipated reliance" upon customer agencies to bring deficiencies to OPM's attention -- they have and will let us know if they are not satisfied.

(6)

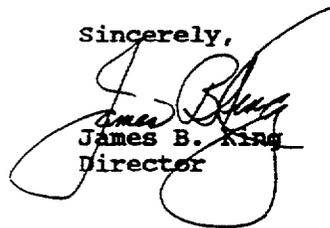
Your report repeatedly notes that OPM's customers and information sources have not been consulted concerning the privatization initiative and its ultimate impact on OPM's ability to obtain certain records. OPM's customers, in fact, have been kept informed since I presented this issue to the President's Management Council more than one year ago.

This group, which includes high-level officials from most of OPM's major customers, established essential groundrules for a seamless transition to privatization. One of these called for OPM to maintain a cadre of federal employees for policy, oversight, contract management, and to maintain the information-exchange liaison role. This was affirmed by the contractor which subsequently conducted the feasibility study. We have also kept the Security Officers of our major customer agencies up to date on the privatization process through periodic briefings, the most recent of which occurred on March 24.

Since OPM's role (founded in Executive Order and statute) was to continue, and since there are hundreds, if not thousands, of credentialed contractors doing similar work, we saw no need to contact every information source. The appropriate use standards, handling controls, and privacy constraints will not change as a result of OPM's use of contractors instead of federal staff for collecting information.

We are proceeding with the privatization effort, confident that we have adequately resolved all key issues. We look forward to receiving your analysis of the cost benefit study.

Sincerely,



James B. King
Director

COMMENTS FROM OPM DATED JUNE 19, 1996

OFFICE OF THE DIRECTOR

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

JUN 19 1996

Mr. Timothy P. Bowling
Associate Director, Federal Workforce
and Management Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Bowling:

By letter dated March 26, 1996, you forwarded a draft version of your proposed report to congressional requestors on selected aspects of the Office of Personnel Management's (OPM) planned privatization of its Investigations Service. By letter dated April 8, 1996, I responded on behalf of OPM to that draft report. On June 13, 1996, we received an updated draft of your proposed report, which expanded on the issue of access to law enforcement records by personnel of OPM's contractor, the US Investigations Services, Inc. (USIS, Inc.). We appreciate the opportunity to comment on this additional analysis.

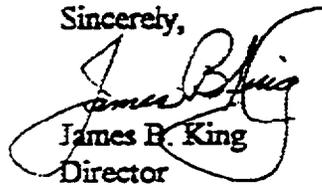
As we stated in our earlier comments, OPM will maintain responsibility for ensuring the proper use of Federal, state and local law enforcement data and will provide adequate safeguards to protect that data. Your draft report describes your discussions with the Federal Bureau of Investigation (FBI), the manager of the National Crime Information Center (NCIC), to determine the FBI's reaction to OPM's proposals. Further, your draft report notes the FBI's conclusions that OPM's contractor employees will be allowed to obtain FBI criminal history information under the authority of the Privacy and Freedom of Information Acts. This is consistent with OPM's earlier letter in which I stated that no information would be made available to USIS, Inc. employees unless OPM was assured that release of the information was consistent with the Privacy Act and our own internal security requirements. We are very pleased that the FBI concurs in our views and that the FBI will rely on OPM to provide the necessary oversight and safeguards. We remain confident that OPM will continue to manage the collection of data and records in a manner that allows no compromise to our standards of excellence.

We also commented in our earlier letter on your draft report's concerns that officials from five states had advised that those states could not provide access to state law enforcement records to contractor personnel, although officials from seven other states indicated that they would allow such access by USIS, Inc. personnel. Recently, OPM was made aware of the identity of those five states. OPM has communicated with law enforcement officials of those five states, which include Pennsylvania, South Carolina, New Jersey, Maine and Massachusetts. Officials of

Pennsylvania have already advised OPM officials that they are satisfied with the security arrangements that will be in place. Further, Pennsylvania officials have advised OPM that USIS, Inc. employees will have access to their state records under the same arrangements that are currently in effect with OPM, including access to the current computer link to those records. While we have yet to hear back from officials of the other four states, we are confident that our efforts to explain OPM's security procedures to appropriate officials in those states will result in similar expressions of approval.

We appreciate the opportunity to comment on this latest draft report. We look forward to proceeding with our privatization efforts, confident that we have adequately resolved all key issues.

Sincerely,

A handwritten signature in black ink, appearing to read "James B. King", is written over a printed name and title. The signature is stylized and somewhat cursive.

James B. King
Director

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