



SECURITY CLEARANCES

WHAT COUNSEL SHOULD KNOW

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A security clearance grants an individual the eligibility for access to national security classified information and activities. Obtaining and maintaining a security clearance has its own unique eligibility standards, investigatory processes, renewal procedures and adjudication structure. Individuals who possess a clearance are subjected to periodic security investigations and, in some cases, security interviews with the use of a polygraph.

There are three categories of polygraphs, (1) counter-intelligence; (2) life-style; and (3) a full scope polygraph which is a combination of the two. Sometimes admissions that are made during polygraph sessions give rise to security concerns. For these reasons, it is incumbent on counsel to be mindful of client's prior conduct history and statements made to investigators or during polygraph sessions that may alert and negatively impact the obtaining or retaining his or her security clearance or special access.

Generally, routine periodic security investigations are conducted as frequently as every 5 years, and can develop information that threatens the continuation of the coveted security clearance. It is generally accepted that a person possessing a security clearance receives a pay premium in the range of 15 -20% above the rate for an equivalent uncleared employee. Consequently, in addition to a higher degree of job security and mobility afforded by an individual holding a security clearance, it has direct, tangible and substantial economic value. Although difficult, a contractor who has his or her security clearance revoked may find continued employment in the unclassified sector, sometimes with their current employer. However, some federal government employees, especially those of Maryland's National Security Agency (NSA), are in the excepted service, where maintenance of a Top Secret security clearance with Sensitive Compartmented Information (SCI) access is a mandatory condition of employment. The revocation of an NSA employee's security clearance *automatically* terminates

employment. Consequently, a security clearance is at the same time highly valuable as well as extremely fragile. It requires the continuous adherence to strict behavioral and conduct-based standards. Maryland practitioners should be alert to situations where legal representation interact, knowingly and frequently unknowingly with those standards of conduct. The purpose of this article is to heighten counsel's awareness.

The Legal Landscape

The grant, administration and denial/revocation processes for security clearances have created a nontraditional legal landscape. The United States Supreme Court, in a case commonly referred to as *Egan*¹, prohibited judicial review of security clearance adjudication decision. Justice Blackmun delivering the opinion of the Court provides perspective:

The President, after all, is the “Commander in Chief of the Army and Navy of the United States.” U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. *See Cafeteria Workers v. McElroy*, 367 U.S. 886, 890, 81 S.Ct. 1743, 1746, 6 L.Ed.2d 1230 (1961). This Court has recognized the Government’s “compelling interest” in withholding national security information from unauthorized persons in the course of executive business. *Snepp v. United States*, 444 U.S. 507, 509, n. 3, 100 S.Ct. 763, 765, n. 3, 62 L.Ed.2d 704 (1980). *See also United States v. Robel*, 389 U.S. 258, 267, 88 S.Ct. 419, 425, 19 L.Ed.2d 508 (1967); *United States v. Reynolds*, 345 U.S. 1, 10, 73 S.Ct. 528, 533, 97 L.Ed. 727 (1953); *Totten v. United States*, 92 U.S. (2 Otto) 105, 106, 23 L.Ed. 605 (1876). The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

The Court went on to state:

A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information.

Until Congress specifically provides otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.

¹*Department of the Navy v. Egan*, 484 U.S. 518 (1988)

NO JUDICIAL REVIEW

The processes which have evolved to investigate and adjudicate national security clearances are wholly administrative. Law school teaches the usual evidentiary standards of *preponderance of the evidence*, *clear and convincing* and the criminal standard of *beyond a reasonable doubt*. The President, by Executive Order², set forth the government's national security standard for weighing the relevant factors for security clearance adjudications.

A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.

DOUBT IS RESOLVED IN FAVOR OF THE NATIONAL SECURITY

Although we expect that given the gravity of the determinations being made, the evidentiary process would be formal, rigorous and only permitting highly credible and authenticated evidence, it is just the opposite. The administrative process is primarily based upon documentary evidence and admissions which frequently are the underpinnings of the government's case. There is no swearing of witnesses although false statements would be a violation of 18 U.S.C. 1001. Hearsay is regularly accepted in the interest of creating a complete record.

HEARSAY IS READILY PERMITTED

Unfortunately, an individual possessing a security clearance who becomes the subject of a security investigation that develops derogatory information or engages in conduct which raises security concerns, often fails to recognize and appreciate the full gravity of their circumstance. Far too many clients come to counsel too late to effectively manage and mitigate security clearance issues. Since many clients have had benign experience or minimal interactions with the government's security arm over years, they do not fully comprehend the perilous and potentially catastrophic outcome that could result when the government suspends access or initiates revocation proceedings. Too little, too late, unfortunately, has become a common and costly theme.

² Presidential Executive Order 12,968 (August 2, 1995)

The government has taken as much time and resources as it needs to develop their security investigation and once the decision is made to propose denial or revocation of a security clearance or a special access, a tight defense time line begins. Prompt and effective containment of the issues raising security concerns and effective mitigation efforts should be initiated very early in the process, perhaps when the client first learns of allegations of misconduct for which a security investigation is initiated, or before the government issues its initial determination. Early involvement provides experienced defense counsel with the time to initiate the most appropriate strategies to develop the variety of mitigations and independent fact finding. Early involvement also permits the employment of consultants, medical professionals and counselors to fully access the client's situation and initiate, where appropriate, treatment or other corrective measures.

Regulatory Framework

Candidates who apply for a security clearance, special access or subject to clearance renewal are evaluated under a system of 13 Guidelines which provides a balanced assessment of affirmative or positive qualities as well as potentially disqualifying behaviors. These two approaches come together in the "whole person concept", (discussed more fully later), which is incorporated into the government's adjudicative process. All information, both favorable and unfavorable, is weighed. A person's strengths are evaluated to assess whether the strengths outweigh the weaknesses. Mitigation carries significant weight in the adjudication process. Generally, the greater the mitigation beginning as soon as possible is best. The passage of time is also mitigating provided treatment has begun or the misconduct has not recurred. The adjudicative standard is that granting or retaining a security clearance is clearly consistent with the national security and doubt is resolved in favor of national security and against your client. Credible mitigation becomes that much more critical since frequently, most factual allegations which tend to be very narrow drawn, are usually true. At best, counsel can put these allegations into a more understandable, human and less culpable context and integrate the available mitigation.

Three positive qualities, among others, are associated with trustworthiness, reliability, and being an overall good security risk: 1) a strong sense of social responsibility; 2) self-control, or the ability to exercise responsible and rational control over one's impulses; and 3) the ability to maintain personal or job commitments over time. These positive qualities may outweigh some unfavorable information.

A socially responsible person has appropriate respect for authority, readily accepts customary and usual rules and regulations, and deals fairly. This is in sharp contrast to the antisocial personality who ignores or resists rules and regulations, fails to conform to society's expectations, and exploit and manipulate. Protecting classified information requires a heightened level of self-control and the exercise of sound judgment. Cleared individuals must have conscious control of their behavior, think before acting, take their responsibilities seriously, and delay immediate gratification to achieve a longer-term goal. They are not impulsive. These individuals are self-disciplined which is demonstrated by success

in the academic or career sectors. Obligations that accompany a security clearance involve a lifetime commitment to maintain secrecy. Demonstration of the ability to maintain long-term commitments with individuals or organizations as well as the employee-employer relationship. Perhaps it's inevitable for an individual, from time to time, to be subjected to life's many challenges. The individual displays true character through the choices made and the reasonableness and responsibility of the actions taken in response to those challenges. Past behavior is used as a predictor of future behavior to assess an individual's trustworthiness, dependability, and ability to maintain a commitment to protect classified information under all circumstances.

IT'S ALL ABOUT DEROGATORY INFORMATION

Paramount in the security clearance adjudication process are two government regulations. For defense security clearance, commonly referred to as "collateral security clearance" which are at the levels of Confidential, Secret and Top Secret, the controlling substantive regulation is **DOD Directive 5220.6**³. For Special Access Programs (SAP) and Sensitive Compartmented Information (SCI) the operative substantive regulation is **Intelligence Community Policy Guidance 704.2**⁴. Both regulations contain the nearly identical 13 security adjudication guidelines addressing:

- Allegiance to the United States
- Foreign Influence
- Foreign Preference
- Sexual Behavior
- Personal Conduct
- Financial Considerations
- Alcohol Consumption
- Drug Involvement
- Psychological Conditions
- Criminal Conduct
- Handling Protected Information
- Outside Activities
- Use of Information Technology Systems

³ DOD Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program

⁴ Intelligence Community Policy Guidance 704.2, Personnel Security Adjudicative Guidelines for Determining Eligibility for Access to Sensitive Compartmented Information And Other Controlled Access Program Information

Each guideline is organized with a brief introduction then a segment addressing conditions that could raise security concerns and may be disqualifying and a segment addressing conditions that could mitigate security concerns. Alleged misconduct can potentially violate more than one guideline. Cleared individuals have an obligation to self-report a security-related event and the failure to do so may constitute a security violation that compounds the original security concerns and increases the risk of clearance suspension and/or revocation. Within the federal government there is a melange of self-reporting requirements for cleared personnel. Prompt self-reporting may also give counsel the opportunity to get in front of the issues at an early stage.

Both regulatory adjudication processes previously cited formally embrace the “*whole person concept*”, which require the adjudicator to consider the following factors:

- The nature, extent, and seriousness of the conduct
- The circumstances surrounding the conduct, to include knowledgeable participation
- The frequency and recency of the conduct
- The individual’s age and maturity at the time of the conduct
- The extent to which participation is voluntary
- The presence or absence of rehabilitation and other permanent behavioral changes
- The motivation for the conduct
- The potential for pressure, coercion, exploitation, or duress
- The likelihood of continuation or recurrence

IT’S ABOUT THE CONDUCT NOT THE CONSEQUENCES

The Procedural Process

The regulatory procedural processes are different for the granting agencies. Although they are not uniform, there is commonality. The Defense Office of Hearings and Appeals (DOHA) performs the adjudication processes for the Department of Defense, and, by agreement, for almost two dozen other federal agencies. Agencies who perform their own adjudications have adopted rules and processes very similar to DOHA but each agency can have their differences. DOHA Administrative Judge and Appeal Board decisions are written and a sanitized opinion is available at the DOHA website under the Industrial Security Clearances Decisions tab⁵. Unfortunately, each government agency which adjudicates security clearances and special accesses has its own history, culture, sensitivities, and tolerances causing a lack of uniformity of decisions for nearly identical factual circumstances.

⁵ www.dod.mil/dodgc/doha/

ADJUDICATION PROCESSES ARE SIMILAR BUT NOT IDENTICAL

The operative regulation for Military members and DOD employees for security clearances and Special Access Programs is **DOD Regulation 5200.2-R**⁶. The operative regulation for contractors for collateral security clearances remains DOD Directive 5220.6 with the first preliminary decisions made by the Defense Industrial Security Clearance Office (DISCO), DOHA and the appropriate Central Adjudication Facility (CAF) for military members and DOD civilians. The security clearance is either granted or results in a decision to deny or revoke. The factual basis for the negative determination is embodied in the Statement of Reasons (SOR) for contractors, and in a Letter of Denial (LOD) for military members and civilians. At that stage the individual has the right of formal appeal.

The contractor appeals with either a personal appearance and hearing before a DOHA Administrative Judge, or through a written appeal. There is no subpoena right for records or to compel testimony in a DOHA proceeding so any testimony and records acquisition are purely voluntary. The government's case is usually only documents with the right to examine the individual. The hearing is wholly unclassified. A hearing transcript is prepared and the Administrative Judge will issue a written decision granting, denying or revoking the clearance. If denied or revoked, the contractor has a right to the final level appeal which is a more traditional appeal brief to a 3-member DOHA Appeal Panel. For military members and civilians, the same choice exists for personal appearance and hearing or a written appeal. However, in his case the Administrative Judge will issue a written recommendation and send it to a 3-member Personnel Security Appeal Board (PSAB) for final decision.

THERE IS NO RIGHT OF SUBPOENA NOR TO COMPEL TESTIMONY

Where more than one granting agency is involved, there is another layer of complexity. SAP and SCI access are governed and administered by the respective government agency granting access. A frequent scenario is that a contractor who already possesses a collateral security clearance is sponsored for eligibility for SCI access to support an intelligence agency, such as NSA. Issues raising security concerns arise, most frequently, from disclosures made during security interviews using a polygraph, becoming the government's primary proof and basis for a proposal to deny or revoke SCI access. ICPG 704.2 provides for two levels of appeal. This first appeal is the submission of a comprehensive written appeal which is decided by a senior security professional. The second level appeal is brought before an Access Appeal Panel including a personal appearance with counsel. Since the NSA security process may

⁶ DOD Regulation 5200.2-R, DOD Personnel Security Program

develop potentially disqualifying information, and because ICPG 704.2 and DOD Directive 5220.6 contain basically identical guidelines, an SCI denial or revocation forms the substantive basis to initiate a DOHA proceeding revoking the existing collateral clearance. Reciprocity and improved interagency communications make that event more likely. Significant derogatory information developed in separate security processing may also result in suspension of an individual's collateral security clearance. This will most likely have immediate and serious employment ramifications. Simply stated, it's all or nothing.

IT'S ALL OR NOTHING

It is crucial that your client give the security clearance and Special Access Program/SCI investigation and adjudication processes the reverence and attention it deserves. The government takes the adjudicative process very seriously, and a negative result can be devastating to a client's career and earning potential. It is imperative that cleared individual considering being sponsored for NSA SCI carefully vet, assess and thoroughly evaluate their personal situation to determine if a life style or full scope polygraph, and the disclosures it may reveal, are in their interests.

CLIENT MUST TAKE THE PROCESS SERIOUSLY ■

Biography:

Dennis Sysko's legal practice is focused on national security and business law generally related to the Intelligence and Defense sectors. He is a founding and senior partner at Henault & Sysko, Chartered who retired from the National Security Agency after a quarter century career. His practice addresses issues involving intelligence and defense community clients including security clearance defenses, internal investigations, disciplinary matters, federal contract issues, development of corporate infrastructure, and related litigation. He served as an Adjunct Professor at the University of Baltimore School of Law, and the former President of the Anne Arundel Tech Council, now the Chesapeake Regional Tech Council. He holds a Bachelor of Science in Electrical Engineering, a Juris Doctor, and is a member of the Maryland and District of Columbia bars.