

August 2010

## **Advice to Employees Facing Interviews as Part of the Background Investigation Process**

This advice is being provided to employees who have been summoned to an interview, as part of their background investigation. Employees are subject to background investigations when they are first hired or when they move to a position of greater sensitivity or higher risk level. In addition, employees in certain sensitive positions are subject to periodic reinvestigation, usually every five years. Finally, a background investigation must be completed as a prerequisite to the issuance of the new government-wide identification card if no record can be found in the employee's file of a completed investigation.

### **1. What is the purpose of the background investigation?**

The background investigation is designed to determine whether the employee is "suitable" for federal employment and/or "eligible" to hold the public trust or sensitive position. It is also part of the identification process for the new government-wide ID card. Agencies are entitled to use information obtained in the course of the background investigation as the basis of disciplinary action against you, although that is not the primary purpose of the investigation.

### **2. What does the background investigation include?**

An employee undergoing a background investigation is required to complete some forms. In addition, there is a check of databases maintained by other agencies. For many employees, the background investigation process includes an interview of the employee and interviews of people that the employee knows, such as neighbors, friends, and coworkers.

The forms that you will be required to complete depend on the sensitivity level of your position. There are three basic forms: the SF 85 (for nonsensitive positions), the SF 85P (for public trust positions), and the SF 86 (for national security positions). Each includes an Authorization for Release of Information. Additional forms currently being used include the SF 87 (Fingerprint Chart); OF 612 (if not completed prior to appointment); and an authorization for release of credit reports. Investigators will also ask for a current photo ID.

The Authorization for Release of Medical Information and the SF 85P-S (Supplement to the SF 85P), which has more questions about drug and alcohol use and mental health treatments, are only rarely approved for use, although sometimes employees are asked to complete them in error. Agencies must obtain OPM approval before requiring employees to complete these forms, and approval is based on a showing that the information is job-related and justified by business necessity.

Finally, some investigators have tried to require employees who have experienced financial problems to sign authorizations to specified financial institutions for disclosure of broad information related to financial transactions. Some chapter representatives have succeeded in obtaining the investigator's agreement to ask the employee questions on these matters, instead.

### **3. Who conducts the investigation?**

The Office of Personnel Management (OPM) has the statutory authority for the conduct of investigations of employees in the competitive service. It also asserts authority over employees in the excepted service who are subject to conversion to the competitive service, such as employees hired under the Federal Career Intern Program. In some cases, it has delegated authority to individual agencies to conduct investigations. While some agencies employ their own investigators, agencies usually rely on investigators employed by OPM or under contract to OPM to do the actual investigation and interviews.

### **4. What is the personal interview?**

Your background investigation will include a personal interview unless you are in a "nonsensitive" position. The investigator will schedule the interview. Its purpose is to go over the forms that you completed. This will give you a chance to update information provided and to explain any apparent inconsistencies or negative information. In general, the investigator will explore the subject matters raised by the forms. The investigator will also ask you for the names of other people who might have information about your suitability for your job.

### **5. Do I have a right to union representation in this interview?**

In a memorandum dated January 26, 2010, to its investigative staff, OPM took the position that there is no

right to third party representation in background investigation interviews. NTEU is challenging that view in a national grievance against the IRS, arguing that the investigators are representatives of the employing agency. Until that issue is resolved, we expect that most, if not all, investigators will exclude union representatives from the interview room. Other ways the union can help you are discussed below.

NTEU strongly recommends that despite OPM's position you make a formal request for union representation to put that request on the record, if you have a "reasonable belief" that the subject matters under discussion could potentially lead to a finding of unsuitability or to disciplinary action against you. There is a statutory right to union representation in any examination of an employee by a "representative of the agency" if the "employee reasonably believes the examination may result in disciplinary action" and the employee requests representation. NTEU is attempting to establish that OPM investigators are acting as "representatives of the agency" in this context.

#### **6. Where can the interview be held?**

OPM has stated that under normal circumstances the interviews should be held at the workplace, on work time, unless both you and the investigator agree otherwise. You are under no obligation to agree to an interview at your home or anywhere else away from the workplace. Make it clear to the investigator that you are not refusing to cooperate but that you simply do not want to meet outside the workplace.

#### **7. How should I answer the questions in the interview?**

You should remain calm, remembering that the purpose of the interview is simply to verify general information about your background and suitability. You should project a professional attitude at all times. The most important thing is to be truthful. Employees who make material false statements or engage in deception are in far greater trouble than employees who truthfully acknowledge a mistake in their past. You should answer questions directly. You should not volunteer information that has not been requested. If you can't recall something, you should say that. Never speculate. If you do not understand a question, ask the investigator to clarify or rephrase it. Finally, you should ask for the investigator's name and write it down. If possible, get the investigator's business card.

## **8. What if I need an interpreter?**

You are entitled to an interpreter if you do not understand English well or if you have a hearing impairment.

## **9. Are there limits on what the investigator may ask?**

The investigator is trying to determine whether your employment will "protect the integrity or promote the efficiency of the service." The focus is on developing information to determine whether you are reliable, trustworthy, of good conduct and character, and (for public trust and national security positions) loyal to the United States. While there are no bright lines on what can and cannot be asked, the basic principle is that the questions must be relevant to the purpose for the investigation. Normally, the investigator should limit the questions to the scope and nature of the questions on the forms that you completed.

On occasion, chapter officials have observed investigators using Department of Defense manuals, by mistake, to guide them in their questioning. If this happens, it could lead the investigator to ask questions relevant only to employees in national security positions, rather than to employees in nonsensitive or public trust positions. If you observe that happening, you should object (as discussed below in paragraph 10).

Unless relevance is established, the investigator should not be questioning you on the following topics:

- religious matters;
- racial matters;
- disabilities;
- sexual orientation or preference;
- questions concerning personal, domestic, or political matters, such as contributions to political, religious, charitable or civic organizations; union affiliation; "fishing questions" about marital or domestic problems; questions about your political beliefs and activities, voting practices, party membership, or correspondence with members of Congress;
- oral or written statements by you that are protected by the First Amendment; or
- threatening questions of a personal, abstract nature, such as "Is there anything in your past life that you would not want your spouse to know?"

## **10. What should I do if I object to a line of questions?**

If you believe that a question is inappropriate or that the investigator is acting unprofessionally, the first thing to do is to ask the investigator why he or she needs the information. It is possible that the investigator will stop that line of questions or explain the need to your satisfaction. If you continue to object because you believe the information is private and irrelevant to the suitability determination, you could ask the investigator to put the question in writing. If he or she refuses, you should write down the question yourself, preferably right then but, if not, immediately after the interview. You could also consider requesting permission to tape the interview, or at least the objectionable questions. Be sure to get the investigator's name. This information will be necessary should you choose to file a complaint about the investigation.

You should refuse to answer only in truly exceptional circumstances. It is far better to answer under protest and file a complaint. There are risks if you refuse to answer. Your employing agency requires you to cooperate in investigations. In addition, if the interviewer terminates the interview because you have refused to answer a question, he or she may not be able to complete the investigation. If that happens, your agency may not be able to let you keep your position or accept the appointment. It may have to transfer you to a position that does not require a background investigation, if one is available.

## **11. How should complaints be handled?**

You should bring any complaints about the conduct of the investigation to the attention of your chapter as soon as possible. Your chapter representative can help you assess whether your concerns are well-founded. The chapter can also advise you on how you can file a complaint. The chapter can file a complaint on your behalf, if you prefer, but OPM will only respond to you, not to the chapter.

Your options include reporting the incident to your manager, to your agency's personnel security office, and/or to OPM directly. If you work for IRS, you can submit your complaint, with as many supporting details as possible, to [Craig.S.Holtkamp@irs.gov](mailto:Craig.S.Holtkamp@irs.gov), and he will forward it to OPM. To contact OPM directly, mail your complaint to OPM/Federal Investigative Services Division, Attn: Integrity Assurance, 1900 E Street, NW, Room 2H31, Washington, DC 20415. Be sure to

include complete information about the incident, including your contact information.

**12. Why are others contacted as part of the investigation?**

"Third party sources"--meaning neighbors, coworkers, references, managers--are contacted to verify the information you have provided and to provide other information about your suitability. They will be told that they are being contacted in connection with a routine background investigation required of all employees in your position. They will be asked how long they have known you and then asked questions regarding your character and reputation; your honesty and integrity; any use of illegal drugs or abuse of alcohol; negative involvement with law enforcement; your emotional or mental health as it affects the public trust and safety of the workplace; your susceptibility to blackmail or coercion; and whether they can recommend you for a position involving the public trust.

**13. Will I be able to answer any derogatory charges made against me?**

Yes, you will be given the chance to respond to, clarify, refute, or explain questionable information about you that was uncovered during the investigation. In any re-interview, if you have a reasonable basis to believe that the derogatory information could lead to discipline or a finding of unsuitability, you should renew your request for union representation.

**14. How can I get a copy of the investigative file?**

You have a right, under the Privacy Act, to a copy of all material gathered on you (with the exception of information provided under a pledge of confidentiality). You have to submit a request to OPM, in writing, with your signature, social security number, date and place of birth, and current home address. The request should be faxed to (724) 794-4590 or mailed to Federal Investigative Services Division, OPM, P.O. Box 618, 1137 Branchton Road, Boyers, PA 16018-0168.

**15. What happens if the investigation turns up unfavorable information about me?**

The background investigation is not intended to be an investigation of suspected criminal activity. If evidence is uncovered regarding potential criminal activity, the

investigation will be referred to the Treasury Inspector General for Tax Administration, for IRS employees, or to other criminal investigators at other agencies.

Information relating to the following is considered relevant to a suitability determination of an employee in the first year of his or her employment: misconduct or negligence in employment; criminal or dishonest conduct; material, intentional false statements or deception or fraud in examination or appointment; refusal to furnish required testimony; alcohol abuse of a nature or duration that suggests the employee would be prevented from performing his duties or be a direct threat to property or safety; illegal use of drugs without evidence of substantial rehabilitation; knowing acts to overthrow the U.S. government; or a statutory or regulatory bar to employment. See 5 C.F.R. 731.202(b). After the employee has been working for the agency for more than a year, the employee can be found unsuitable only for material, intentional false statements or deception or fraud in examination or appointment; refusal to furnish required testimony; or a statutory or regulatory bar to employment.

Even if unfavorable information is uncovered, it is not necessarily fatal to your continued employment. In making a suitability determination, the following considerations are weighed: the nature of the position; the nature and seriousness of the conduct; the circumstances surrounding the conduct; how recent it was; your age at the time of the conduct; contributing societal conditions; and the presence or absence of rehabilitation or efforts towards rehabilitation. See 5 C.F.R. 731.202(c).

If your agency or OPM does decide that you are "unsuitable" for employment, it must give you written notice of the proposed action. You would have an opportunity to answer the charges in writing. The agency's final decision is appealable to the Merit Systems Protection Board.

Your agency also has the right to take disciplinary action against you, or terminate you if you are a probationary employee, based on information uncovered during the investigation. You would be entitled to all of the procedural safeguards that accompany proposed adverse actions.

#### **16. How can NTEU help me?**

Your chapter officials are experienced in background investigation issues and can provide you with valuable advice

about the process and specific issues that you may face. You should consult with them before your background interview. If they feel it necessary, they will consult with your National Field Representative. If you anticipate that the interview will touch on sensitive matters that might cause you difficulty and the investigator will not permit union representation in the room, you can ask the chapter to send someone to sit outside the room. During the interview, you can request a break and seek the union representative's advice before answering a difficult question.

If you believe your investigator has acted unprofessionally, you should report it immediately to the chapter. As discussed above, the chapter can assist you in filing a complaint with the agency and/or OPM. Finally, NTEU can represent you in any administrative proceedings that might be taken against you based on information uncovered in the background investigation process.