COMPUTERS, PERSONNEL ADMINISTRATION, AND CITIZEN RIGHTS

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COMPUTER SCIENCE & TECHNOLOGY:

COMPUTERS, PERSONNEL ADMINISTRATION, AND CITIZEN RIGHTS

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FINAL REPORT

Members of the project staff contributed background memoranda and site visit reports that were used by the Director to assemble the first draft of this Report, which was completed in March of 1977. This was reviewed at a conference of experts at the National Bureau of Standards in June of 1977. The report was then completely rewritten by the Director, with editorial and writing assistance from Ms. Isbell. Final revisions were made during the summer of 1978.

In several places, as noted, this report drew on staff memoranda or incorporated drafts primarily written by staff members. Since the final draft was done without staff consultation, responsibility for its organization, development, analysis, and recommendations is solely that of the Director.

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EXECUTIVE SUMMARY

Background

This study of computer use and privacy issues in personnel administration follows an earlier NBS-sponsored study, Computers, Health Records, and Citizen Rights, directed by the same author and published by NBS in December of 1976. The current study was jointly sponsored by the Institute for Computer Sciences and Technology of NBS and the U.S. Privacy Protection Study Commission. It was conducted between 1975 and 1977, with final revisions in 1978.

Objectives

The study's objectives were (1) to examine pre-computer patterns of employer information collection and record-keeping about job applicants, employees, and former employees, and to note the prevailing rules of organizational policy and law that governed the use of such data before computerization began; (2) to examine where and how EDP systems have been used during the past two decades for personnel administration in government, business, and the nonprofit sector; (3) to identify the impact of EDP uses on employee rights of privacy, confidentiality, and individual access; (4) to analyze current policy issues involving use of employee data, especially in automated systems; and (5) to present alternative policy options to the organizational leaders, computer managers, regulatory bodies, legislators, judges, and public interest groups concerned with this field.

Methodology

The study's methodology was a multi-faceted research effort. It included analyses of published literature and reports; interviews with a wide range of organizational managers, specialists in personnel, computer software and systems developers, public-interest and civil liberties groups, regulatory-agency officials, labor union representatives, and others; detailed on-site examinations of three major organizations (the U.S. Civil Service Commission, U.S. Air Force, and Bank of America); and a draft-review conference with representative academic experts, organization managers, technologists, and public interest groups.

PART ONE: EMPLOYMENT AND INDIVIDUAL RIGHTS

The Changing Status of the Employment Relationship

The report opens by outlining the central importance of work in the lives of most adult Americans, ranging from work's direct effects on income and social status to indirect effects such as providing access to health insurance and affecting psychological well-being.

The report describes the changing character and complex mosaic of occupations in contemporary America, and thus the need to recognize the diversity of employment settings and occupational specialties when considering personnel policy and employee rights. As for the legal setting,

the report notes that while American law still gives employers very broad rights to hire, manage, discipline, and discharge employees, a growing body of employee-protection laws over the past half century, and especially the past decade, have set important limits on employer prerogatives. These interventions range from Federal and state statutes guaranteeing employees the right to organize unions, bargain collectively, and have formal grievance procedures under labor contracts to laws protecting equal employment opportunity, occupational safety and health, and employee pension rights. The report also traces a major shift in American employer oversight of employee lives, from the moral-censor and paternalistic role that prevailed from the rise of modern corporate and government employment in the post-Civil War decades through the late 1950s to the new atmosphere of the 1960s and '70s, in which both private and government employers have been led by various social trends to sharply curtail inquiries and judgments based upon matters of religion, race, sex, political ideology, off-the-job life style, and sexual behavior.

Current Employer Practices in Personnel Work

Drawing on several recent surveys into personnel selection and employment record-keeping procedures, the report documents major changes taking place in the current era. These have been generated primarily by equal employment opportunity (EEO) laws and regulations, but other government record-keeping regulations imposed by law have also contributed. These include regulations on occupational safety and health (OSHA), pension rights (ERISA), and new privacy-protection laws (for Federal agencies, in the Privacy Act of 1974; for state agencies, in similar acts passed by 9 states as of 1978 ; and, for private employers, in state laws such as those giving employees a right of access to their personnel files, as four states now do). Summarizing the current situation, the report finds that while most large employers no longer collect as negative data the kinds of religious, racial, political, life-style, and similar personal information once widely used, new developments such as government record-keeping requirements, medical and health-insurance programs, occupational health surveillance monitoring, alcohol and drug rehabilitation programs for employees, use of employee-appraisal systems and other aspects of personnel administration have generated the collection and storage of much sensitive personal data today in employee files. Surveys conducted while the study was in progress show that a substantial number of government and private employers are engaged in reviewing their policies on privacy of personnel data but, except for Federal or state agencies under new privacy acts, only a small minority of employers in the country have installed comprehensive policies governing privacy, confidentiality and employee access rights in their personnel files.

PART TWO: PATTERNS OF COMPUTER USE IN THE PERSONNEL AREA

The report traces the main phases that computer uses have followed in personnel administration since the middle 1950s, when EDP (electronic data processing) first moved into organizational affairs. Between 1955 and 1965, EDP was used in personnel primarily to process payroll files and to produce statistical reports. Between 1966 and 1970, leaders in the use of EDP in personnel developed more specialized applications (such as benefits management, manpower planning, personnel profiles, and labor relations) as well as experiments with integrated personnel data bases. The period from 1971 until 1978 has seen more sophisticated EDP applications for government reporting duties and internal personnel administration (absentee controls, skills inventories, etc.), as well as development of the database-oriented approach generally known as Human Resources Information Systems. In the current period, companies are sometimes developing customized personnel data systems themselves, sometimes having these developed for them by software firms specializing in the personnel field, and sometimes buying "off-the-shelf" packages of personnel applications.

Analyses of these three phases show that both the mainstream uses and the leading-edge developments in each period have responded to factors such as changes in EDP technological capabilities (successive "generations" of computer systems, the arrival of mini-computers, etc.); government regulatory duties that create major demands for complex, individualized informational reporting; and changing organizational needs and opportunities in the personnel field.

On the whole, automation in the personnel area developed more slowly and was until recently less extensive than automation in large organizations for customer or client service functions. However, with the growing potential liabilities and personnel costs generated by Equal Employment Opportunity programs, employee pension rights laws such as ERISA, occupational health and safety programs such as OSHA, and handicapped-worker protection programs, the personnel function has grown much more important within organizations, personnel budgets are up, and personnel EDP systems are experiencing a major growth.

Just how cost-effective the new personnel data systems are to organizations and what the real effects of these systems are on the nature and techniques of personnel administration are issues that this report found have not been systematically analyzed or empirically studied as yet. Basically, the report found that EDP in personnel has become so critical in meeting government reporting duties and trying to control heavy employee benefits costs (as in health programs) that pure cost-benefit considerations have not been controlling.

As for privacy considerations in personnel EDP operations, these surfaced for the first time lightly during the 1965-70 period, then became part of the general social debate over record-keeping and citizen rights in the 1970s. While many software firms and organizational EDP specialists stress the privacy-protection measures that their systems

supply, privacy considerations were not found by the study to have had a significant impact as yet on the design or general formats of personnel data systems. (More specific privacy effects are treated in Part Four.)

PART THREE: COMPUTERIZING ORGANIZATIONS IN PRACTICE

To examine concretely how organizational policies, computerization efforts, and socio-legal trends have affected citizen rights in the personnel area, the report presents detailed studies of three organizations, as well as shorter sketches of other representative business, governmental, and non-profit organizations.

A. The U.S. Civil Service Commission, the chief personnel agency of the Federal Government, has been struggling for over a decade to standardize and automate a central personnel file of federal employees to improve the operations of Federal personnel administration. However, because of the Commission's limited powers over Federal personnel decisions and its essentially shared authority in personnel management with the individual agencies and departments (which have their own automated files, often quite extensive and sophisticated), the Commission's Federal Personnel Management Information System project (FPMIS) has been recast from its ambitious, central-data-base design of the late 1960s into a more modest, gradual, and modular set of plans, to be developed through tests of data standardization and exchange with several Federal agencies during 1977-1980 and then, hopefully, implemented gradually in the Federal establishment during 1980-1983. Otherwise, the Commission now has only limited automated files containing personal data on Federal employees, with most of the sensitive information either still in manual files or only partially automated.

In terms of citizen rights issues, the Commission has been deeply involved in reshaping its part in the application, investigation, and appeals processes of Federal employment from the social consensus and legal rules about employee loyalty and suitability and concepts of fair procedure that prevailed in the 1950s and early 1960s to the new social and legal climate of the Seventies. In addition to its own notions of good practice, the Commission has been strongly affected by three forces: protests by minority, union, and civil liberties groups that it liberalize what is acceptable personal, social and political conduct on the part of Federal employees; Federal court rulings applying expanded constitutional rights of privacy and due process to Commission rules and procedures; and new rules set by the Federal Privacy Act of 1974 and the Freedom of Information Act Amendments of 1974.

The primary effects of the Privacy Act on the Commission have been to expand applicant and employee access to their own files, especially suitability investigation records, and also to set First Amendment limitations on what files can be maintained by the Commission, what areas of personal and political affairs can be investigated, and what information is used by the Commission or passed on to individual agencies to make suitability determinations. The study found that considerable changes have taken place since 1974 in the questions asked by the

Commission on Federal application forms, the way suitability inquiries are conducted, the way existing files are examined for First Amendment limitations before information is supplied from them, and how personnel information is released to third parties. Overall, the Commission itself believes that the requirements of the Privacy Act have not significantly impaired the suitability investigation process, have not placed unreasonable costs on the Commission, and have had important positive effects on the morale and satisfaction of Federal employees. Looking at the use of the Privacy Act by Federal employees to obtain access to their own records and bring court suits if they feel the Commission has violated Privacy Act standards, the report concludes that Federal employees enjoy more effective rights of fair information practice today than most state or local government employees or most employees of private organizations.

B. The U.S. Air Force was selected for investigation because it is the most advanced military user of EDP for personnel administration; it also offers an opportunity to examine the effects of the Federal Privacy Act on a military service. The study found that advanced automation was adopted by the Air Force to facilitate its top-level policy decision to achieve greater centralization of personnel administration. In terms of EDP impact, the centralized data base, over 200 field terminals, and over 25 personnel subsystems that have been created were found to be having more effect on personnel decisions and the ways that Air Force personnel perceived them than we could observe in most other government organizations with advanced computer systems in the personnel field.

Among the personnel processes strongly affected by EDP were job-matching in recruitment, assignment decisions, promotions, discharge and separation processing, and record reviews and appeals. For example, several personnel subsystems gave Air Force people printouts of their own records for review, correction and/or appeal before key decisions were made in reliance on such records, producing a procedure that was more open and visible than previously, and increasing personnel morale. However, factors such as limited promotion opportunities and limited desirable job assignments still mean that some decisions will be made more or less arbitrarily, or on the basis of criteria that do not always seem relevant or reasonable to persons passed over. Thus the automated systems do not (and probably cannot be expected to) transcend the structural problems of personnel administration in a military-service environment, or the "whole person" approach that considers as relevant for personnel judgments many aspects of personal life that are no longer considered in civilian employment.

Overall, the Air Force's computerized personnel system seems to be producing more complete and up-to-date records on its people, "richer" management reports, faster personnel actions relying on record preparation, better monitoring of how informational items are actually being used, and more effective compliance with Privacy Act requirements to log disclosures from files and assure service-wide correction of personnel records.

As for Air Force experience with the Federal Privacy Act, there has been little change in terms of individual access (since this was permitted previously under DOD regulations), in the definitions of "relevant" data, or in the patterns of data-sharing and release within the Federal establishment. There has been some tightening up of procedures for releasing personal data outside the Federal Government, and some more careful destruction of discarded records. Overall, we found dutiful acceptance but little genuine enthusiasm for the Federal Privacy Act among Air Force officials. This was not only a matter of the substantial costs and effort involved but also because few real benefits to Air Force personnel were believed by officials we interviewed to arise from the Act's requirements.

C. The Bank of America represents a large employer (65,000 employees) with many employment locations (1200 branches and offices in California and worldwide) which has been an advanced user of EDP systems for customer services and personnel administration as well as a pioneer in creating new employee privacy policies.

In terms of computerization, the Bank developed a Personnel Data System between 1969-71 that automated basic employee data collection and update and set up an expanded Career Profile for about a fourth of its employees, basically its management personnel. In 1974, the Bank installed a Personnel Information Center, with local files but administered by a central department; this expanded the Bank's capacities to do complex and timely reporting of employee data for both external and internal purposes. A Skills Inventory subsystem was developed which is used extensively for promotion and assignment decisions. The main positive effects of EDP for personnel functions have been the ease and speed of updating employee files and in the use of the Skills Inventory for candidate searches in management. The Bank is still expanding its EDP personnel applications, in areas such as medical claims and unemployment claims payments and its pension system.

As for its employee privacy policies, the initiative for innovation here did not come from employee demands, or from any union pressures (since the Bank is entirely nonunionized), or from any enacted state or Federal legislation. Rather, the changes were management-initiated, reflecting a leadership style that seeks to anticipate changing social values and innovate desirable policy changes ahead of regulatory measures. Beginning in 1968 with the decision to open most personnel records to inspection by the employee, the Bank has steadily pursued new privacy-oriented policies during the past decade: cutting back substantially on irrelevant personal information in its employment application forms; limiting its rules for outside conduct and liberalizing its dress code; strengthening rules of confidentiality for circulation of personnel data within the Bank; curtailing releases to outside sources; and enlarging the scope of employee access to his or her own file. Extensive Bank-wide reviews of policies and practices were made throughout the 1970s, and are still going on today. Bank officials note that the filing of broad Federal and state bills that would set detailed privacy rules for the private sector strengthened the Bank's decision to spend substantial time and money to make its own major privacy-policy changes. This was

not only to keep the Bank ahead on desirable privacy-policy changes but also to test out how costly in efficiency and dollars various proposed laws would be for the Bank, and thus to enable the Bank to take better informed legislative positions on the proposed laws.

In terms of both EDP uses for corporate personnel administration and voluntary privacy policies, the Bank of America ranks as a front-runner with a handful of other major corporations. That its innovations have proved feasible in cost, efficient for personnel management, and valuable for the Bank's public image provide a powerful example of the consistency of citizen rights policies with effective corporate personnel management.

Beyond these three organizations studied in detail, the report presents sketches of five additional business firms in diverse industries -- J. C. Penney, Rockwell International, Manufacturers Hanover Bank, Cummins Engine, and IBM. While there are significant variations in the substance of their employee privacy policies, the five firms exemplify companies that have undertaken extensive management privacy reviews, initiated new policies of employee access and confidentiality of data handling, and are continuing to reshape their personnel data systems in response to these issues.

The report also presents an analysis of EDP uses and privacy policies in 37 state governments surveyed by the project, with a detailed description of one state personnel system advanced on both fronts, the California Personnel Information Management System. Turning to county and city governments, these were found by the study, on the whole, to have less well formulated privacy policies for their personnel systems than either Federal or state governments. A project survey of non-profit organizations found these to have the least developed policies of all the types of organizations studied.

PART FOUR: THE INTERPLAY OF TECHNOLOGY AND POLICY

Effects of Personnel Data Systems on Individual Rights

The report looked at the overall effects of using EDP in personnel administration on four key dimensions of employee rights. As for the scope of data collection, we found that automated files generally selected items from more extensive manual personnel files and were not therefore increasing the kinds or amounts of personal information collected about employees. The one exception is in those personnel data systems that have developed elaborate Skills Inventories or Career Profiles for their management ranks. As for employee access, there has been a general trend toward giving employees a periodic printout of their automated record, primarily to insure accuracy and obtain updated information. However, it remains a matter of organization or legal policy rather than technological imperative whether any specific item of management evaluation is excluded from such employee review in automated files. As for protecting the confidentiality of data within the

organization, EDP systems can accommodate whatever rules organizations have about sharing or compartmentalizing employee data within the organization (e.g., medical records, pension beneficiaries, etc.). When it comes to releasing employee data to third parties, EDP has had far less impact than the legal rules governing regulatory program reporting duties to government, public-record access under freedom of information laws, new organizational privacy policies, and similar factors. However, the availability of automated employee files has stimulated some government demands for matching corporate and government-agency job rosters against files of persons on welfare or in other government benefit programs, to detect fraud. Since this matching would not have been feasible with manual files, this trend has drawn criticism from some sectors on the ground that it compromises the assumptions of confidentiality under which the employment data were originally collected, and threatens the willingness of employees to give detailed personal data voluntarily.

In terms of EDP effects on personnel administration itself, the study found that the pre-employment or hiring process has been only marginally affected by EDP. It is essentially the record-keeping and decision-making on current employees on which EDP has had some discernible effects, primarily on assignments, promotions, benefits administration, regulatory reporting, labor negotiations, and manpower planning. The impact of EDP on discharge or third-party release of employee data has been slight (with the exception of welfare-employment file matching already noted). Overall, compared to EDP effects on customer services or program management in fields such as banking, credit-reporting, or law enforcement, EDP impact on the quality of personnel administration in organizations was found still to be weak, essentially because of the weak linkage that exists between recordable indicators or predictors and actual job success, as well as the gap that exists between professed "merit" objectives in personnel administration and the structural and political realities of personnel decision-making in all kinds of organizations. This suggests that EDP in personnel may be cost-justifiable in terms of meeting reporting and legal duties and improving certain kinds of personnel decisions but that EDP is not likely to have in the near future the kind of major effect on the quality or character of personnel work that some EDP enthusiasts have believed it could and will have.

Impact of the Federal Privacy Act on Federal Personnel Practices

The study also made an assessment of the impact that the Federal Privacy Act of 1974 has had on employee citizen rights interests and Federal personnel administration since the Act went into effect in September of 1975. Our observations were based on responses to a project survey of 64 Federal bureaus and agencies; reports about Privacy Act experience by the Office of Management and Budget (OMB); interviews with union, minority rights, civil liberties, and similar groups; the

report of the Privacy Protection Study Commission in 1977; and our on-site visits to two Federal agencies.

We concluded that Federal employees have been the most active class of users of the access rights provided by the Act and its guarantees have strengthened both their rights to inspect and correct Federal personnel records, especially investigatory files and medical records. Overall, employee satisfaction with their privacy rights has been increased somewhat; the amount and frankness of adverse information supplied in suitability investigations has declined somewhat but not to the point that it has materially impaired investigations; and there has been a useful purging of biased or inappropriate information from files in some agencies but not yet in others, for reasons of cost and time.

We noted that automated personnel systems in some Federal agencies have made it easier, as with the Air Force's Privacy Act Tracking System, to keep an accounting of non-routine uses of information from individual personnel records, and to make this rapidly available to employees who ask to know about such uses.

The report summed up experience with the Privacy Act in these words:

"Given the fact that the Act was a pioneering first venture in defining principles of fair information practice for the entire Federal establishment, and has been in operation for only three years, experience to date seems to us to represent a promising start. If not quite enough to justify cheers of final victory over the dark forces of Big Brother, neither is the record a sound basis for despair over the ability to have the Federal Government operate in conformity with the Bill of Rights. As employees claim their rights under the Act, guardian-groups support them where necessary, the Federal courts apply Privacy Act standards to disputed matters, and Congress has the opportunity to consider and enact perfecting amendments. The Federal Privacy Act should develop into a highly effective set of principles and procedures for assuring adherence to basic citizen rights in the conduct of Federal personnel affairs."

PART FIVE: POLICY PERSPECTIVES

Attitudes of Employees and Executives Toward Job Privacy Issues

As an aid to the consideration of policy measures, and on the assumption that what people think are significant problems is a relevant inquiry for policy makers in a democratic society, the project director conducted a pilot survey of employee and executive attitudes toward workplace privacy issues. Though not a scientific national survey, the nationally-distributed sample of 240 respondents was roughly equivalent to the American work force in key features such as sex, occupation, type of organizational employer, union membership, etc. The responses were also consistent with recent professional surveys of national opinion on general privacy matters.

The main findings of the pilot survey were as follows:

1. Half of these workers and executives consider the personal records kept by their employers to be "very important" in terms of privacy, and almost 60% regard a general right to see their personnel records as very important.

2. Almost a third of these workers don't know whether they could see their personnel records or not, or whether they could see their performance appraisal.

3. Almost a quarter of these people feel their employer's current policies on confidentiality or employee access are poor or could be improved; over a third feel their employer does not generally hire, promote, or fire people "in a fair way."

4. By overwhelming majorities, these respondents favor enacting laws to give employees a right of access to their personnel records and to written "promotability" ratings, and a right to notification before their personal information is given up in answer to subpoena.

5. Majorities favor passage of laws to forbid employers to require polygraph tests for job applicants, inquire about arrest records that have not led to convictions, and inquire about a job applicant's homosexuality.

6. Almost half the respondents are more worried about the confidentiality of employee records because these are computerized.

7. Though they favor the creation of employee privacy rights, almost two-thirds of the respondents are opposed to establishing a government supervisory agency to enforce such privacy rights against their employers.

Policy Analysis and Recommendations

The report opens its policy analysis with the judgment that measures do need to be taken to assure that citizen rights are effectively provided in the use of personal data in the employment process. While this is true for both manual and automated record systems, it is especially important where automated data systems contain substantial amounts of sensitive information that are capable of rapid access and extensive dissemination.

Drawing on public discussions, organizational policies, and legal enactments during the past decade, the report identifies six principles that have been widely accepted as goals for organizations that collect and use personal information. These principles are then analyzed in terms of how they apply in the employment context, and what the empirical results of the study suggest might be their application to employers in the governmental, business, and non-profit settings.

The six principles are:

1. Decisions about an individual's rights, benefits, and opportunities in society should not be made by organizations on the basis of secret files, or of record-based procedures about which individuals are not informed.

2. Only information relevant to the organization's legitimate purposes should be collected and stored, and the definition of relevance must respect both guarantees of privacy and legislative prohibitions against making improper racial, sexual, cultural, and similar discriminatory decisions.

3. Managers of a data system should take reasonable steps to insure that the records they keep are accurate, timely, and complete, as measured by the kinds of uses made of the data and the social impact of their use.

4. Detailed rules of confidentiality should govern who within the organization maintaining the data system has access to a record, and this should be based on a need-to-know principle.

5. Disclosure of personal data outside the organization that collected it should be made only with the informed and voluntary consent of the individual, obtained at the time of collection or by subsequent query, or under a constitutionally-valid legal order.

6. An individual should have a right to see his or her record, and have an effective procedure for contesting the accuracy, timeliness, and pertinency of the information in it. There may be some exceptions to this right of inspection, as in the interests of protecting confidential law enforcement sources, but these should be rare.

Assuming that these are sound principles that ought to be applied in personnel administration (and are already in operation in Federal employment), the report notes that there are three main positions today as to what, if anything, needs to be done about such issues in the private sector and in state and local government.

The first position, that nothing is required, assumes that employee privacy is not really a pressing issue in these organizations, that these employers are already under enough legal controls to protect various employee rights, and that organizational managers should be left alone to improve records administration as they think best in their own enterprises.

The second position is that private employers and state and local government agencies should be encouraged to take voluntary action. The assumption here is that employment and occupational settings are so diverse, the difficulties of enforcing employee privacy rights would be so great, and government regulatory programs would be so costly and cumbersome that legal regulation should be rejected. The best approach

today is to encourage employers to follow the examples of those leading corporations and innovative state and local governments that have voluntarily instituted new privacy policies. If not enough employers do this in the next few years, it would be time enough then to consider legal interventions.

The third position is that some legislation is needed to insure momentum and distribute costs. This view holds that some kind of statutory definition of rights and some kinds of employee-centered remedies, whether by state or Federal law, are necessary to bring more than the small minority of progressive corporate managements and state and local governments into compliance with fair employee information practice principles. Otherwise, the pace of reform will be excessively slow, policies inadequate, and the employers that voluntarily adopt such policies may be put at a cost disadvantage compared to organizations that choose to ignore this matter.

The report of the Privacy Protection Study Commission, issued in July of 1977, adopted essentially the second position above, with a few recommendations for legal intervention in special areas, such as use of polygraphs by employers and strengthening of the Fair Credit Reporting Act's provisions dealing with pre-employment investigations. The Commission's 34 specific recommendations in the employment field (most of these calling for voluntary employer action) are summarized in our report, as well as reproduced in full in Appendix One.

While recognizing the care and thoughtfulness with which the Privacy Commission reached its conclusions, our report adopts the third position as the one that seems best suited to continuing progress toward general observance of fair employee information practices. It calls for enactment of "first-stage" legislation that would cover maintenance of personnel information (especially rights of employee access and limitation on the collection of irrelevant private data) and release of employee data to outsiders. State legislation covering private and public employers is recommended as the ideal instrument, with the Michigan Employee Right to Know Act of 1978 as a good example of what might be generally adopted. That Act gives employees of private and public agencies in Michigan not only a right to inspect and copy their personnel records but also a right to put their version of disputed items into the file and have this disseminated to anyone who gets the personnel record. The Act creates eight exceptions to employee access that were felt to protect legitimate confidentiality interests of other employees, references, and managements. The Act forbids collecting and keeping information about any employee's political activities, associations, publications, or communications in matters of "non-employment activities" unless the employee gives written authorization for their recording. Special procedures are set for notification about and access to security investigation reports. Enforcement of the Act is by the employee through suit in state court, with penalties of actual damages, $200 in penalty, court costs, and attorney's fees. No state agency is designated to oversee or enforce the Act.

While some states may prefer the briefer, more declaratory approach taken in three other states (California, Oregon, and Maine), the report predicts that many more states in the next few years, especially sister industrial states, will adopt the Michigan law, and that this would provide the momentum for adoption of new privacy policies by almost any employer operating on a nationwide basis. It would also help produce the development of Model Legislation, so that requirements for interstate employers would be as uniform as possible.

As for possible Federal legislation, the report notes that the Carter Administration's response to the Privacy Commission's recommendations had not been issued when this report was completed. However, if there were to be Federal legislation, the report suggests that employee access rights and third-party disclosure rules for companies doing business in interstate commerce represent the kind of Federal law that would be most suitable.

The report also observes that software and systems consultants involved in marketing Human Resources Information Systems and prepackaged personnel data modules could be a significant force for enhancing citizen rights in personnel EDP systems in the next decade. This is because they have built up considerable experience with the kinds of privacy and confidentiality problems that arise in personnel work, the costs of various kinds of privacy measures, and the ways to install such protections with the least possible disruption to ongoing personnel affairs.

In its closing section the report states:

"This report has ranged widely across the landscape of American employment. It has documented the increased recording by employers of personal employee data - for reporting duties in equal employment, pension rights, handicapped opportunities, and occupational safety and health; for current programs in human resource utilization and employee fair-hearing procedures; and for very wide-ranging employee benefit and education programs. Employers have not always sought to collect such data, but they now have it in their files, and increasingly, it is going into automated data systems. More and more, employees have been shown to be concerned about the uses of their data, not so much because they hate or fear the employer but because of our era's general awareness that sensitive personal information needs to be safeguarded from potential abuse.

"In this situation, it is not employer motives or good intentions that matter but the implementation of sound principles and practices of fair information handling. Employers who do this have much to gain and little to lose in their personnel relations, as the examples of IBM, Bank of America, Ford and many other progressive companies indicate, as well as that of innovative state and local civil service systems.

"The key issue is probably one of convincing employers that this is a genuine issue, and one that can be dealt with in a progressive way. Creating such an awareness in managements, by advocacy, publicity, and

the kind of first-stage legislation recommended here, is a major task of all those who wish to see personnel data systems function not only efficiently but also with fairness to employees and responsivenes to social concerns about privacy in a high-technology age. Pursuing such an objective is a major way in which societies with regard for individual rights can shape the future uses of computer technology by powerful organizations, rather than to allow machine and bureaucratic efficiencies to misshape organizational life along non-democratic pathways. Much is at stake for the quality of life in our electronic civilization."

The report also contains a 52-page Selected Bibliography, two Appendices, and an Acknowledgements section mentioning persons who gave valuable aid to the project.

FOREWORD

The increasing use of modern information technology for processing personal records has stimulated national concerns for protecting individual privacy. Computers are vital resources for improving efficiency and productivity, and for making information readily available. However, use of that information for unintended purposes, or the maintenance of incorrect information about individuals, can seriously threaten personal privacy.

One area where personal recordkeeping affects almost every adult American is the maintenance of employment records. Information needs have increased as employee benefits such as medical, pension and insurance plans have become an integral part of employment. Additionally, the collection of personal information is required for assessing progress toward national goals--assuring equal employment opportunities and improving occupational health and safety.

Employment records are particularly sensitive because they bring together information about many aspects of an employee's life--medical history, educational background, credit rating, involvement in legal proceedings.

The National Bureau of Standards and the Privacy Protection Study Commission co-sponsored this study of privacy issues in employment recordkeeping to evaluate present policies, to identify problem areas and to suggest changes to bring into balance society's needs to use information technology and the individual's right to personal privacy.

Dr. Alan F. Westin, Professor of Public Law and Government at Columbia University, is an internationally recognized expert on privacy and individual rights and coauthor of Databanks in a Free Society. He is also the author of a companion report entitled Computers, Health Records, and Citizen Rights, published by NBS in December 1976. This study focused national attention on privacy issues related to medical recordkeeping.

The results of this study were made available to The Privacy Protection Study Commission to assist them in preparing their report, "Personal Privacy in an Information Society," that was transmitted to the President and to Congress.

We offer Dr. Westin's evaluation of employment recordkeeping and individual privacy for review and consideration by all who are concerned about this sensitive area.

M. Zane Thornton
Acting Director
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ABSTRACT

This report investigates the impact of computers on citizen rights in the field of personnel record-keeping. Part one traces the changing patterns of employment and personnel administration in America from the 19th Century to the present. Part two examines the trends in computer use in personnel administration starting with payroll processing in the mid '50s to the present day Human Resources Information Systems. The effect of organizational policies, computerization efforts, and socio-legal trends on citizen rights are highlighted in eight profiles (3 in-depth) of Federal Government and business organizations and a discussion of non-Federal Government and non-profit organizations in Part three. Part four compares the overall effects of computer technology against the effects of current personnel administration policies (organizational and legislative) on the four key dimensions of employee rights: relevance of data collected, employee access to records, confidentiality of data collected, and disclosure of data to third parties. Part five discusses policy alternatives for observing fair employee information practices. An extensive bibliography (52 pages) of material compiled and used by the project in preparing this report is appended.

Key Words: Citizen rights; computer utilization; computers; confidentiality; data systems; personnel administration; personnel practices; personnel records; privacy; record-keeping practices; relevant information; security

INTRODUCTION

Chapter One. BACKGROUND AND OBJECTIVES OF THE STUDY

THE NBS-ACM WORKSHOP OF 1973

This report has its origins in a Workshop on Privacy that met in Gaithersburg, Maryland, on February 8-9, 1973. Sponsored by the National Bureau of Standards and the Association for Computing Machinery, the group included experts from the computer community, law, the social sciences, public interest and civil liberties groups, federal executive agencies, and state legislatures.

Looking at the computers-and-privacy issue in early 1973, the Workshop concluded that the United States was entering a new phase of this problem. In the mid-1960s, there had been early alarms about the potential impact of computer technology on citizens' rights.This was followed between 1968 and 1972 by a period of empirical studies and legislative inquiries, probing just what the effect of computer use by organizations had been so far. Now, the Workshop concluded, having perceived the threats and mapped the issues, the nation was moving into a period of policy definition and regulatory action.

This new period would not be a short one. The Workshop was agreed that no legal or technological "fixes" could be applied quickly and comprehensively to automated personal data systems. The basic issues included in organizational record keeping about people involved fundamental debates for American society over changing social values, new definitions of civil liberties, controversial government programs and business services, and shifting conceptions of proper and improper organizational authority. In addition, computer and communication technologies were highly dynamic; their continually changing capacities, problems, and opportunities would require very sensitive and flexible policy mechanisms, continually reviewed.

The Workshop saw the middle and late 1970s as a critical period in the development of sound public policies. The empirical reports and hearings of the 1969-1972 phase had alerted the media, the public, and national policy-makers to the need for action, and a wide variety of standards-setting proposals had been presented to legislatures, regulatory agencies, and organizational managers. Because many of these would involve far-reaching and expensive changes in the operations of major business and government functions in American society, they required a careful assessment: Were they responsive to the real problems of citizens rights in a given situation? What was their potential impact on the informational needs of organizations and society? Did they have the right blend of guiding principles, specific rules, realistic procedures, and enforceable remedies?

Most important of all, the Workshop was concerned that the public's clear desire for new privacy protections be channeled into policy in time to catch the wave of large-scale systems building and adoption of fourth-generation computer-system technology that was expected to unfold in the middle and late 1970s. The participants at the Workshop were agreed

that many of the proposed protections for individual rights would be "affordable" in dollar costs if these were spelled out as requirements as the new systems were being designed, or as existing systems were undergoing major expansion. What would be painful or even unbearable, in terms of cost, would be to wait so long to formulate broadly-acceptable standards that information systems, as Dr. Ruth Davis put it, would have to be "retro-fitted" to conform to the new rules. The Workshop speculated that new legislative policies in the middle and late Seventies would be likely to follow two main lines. One would be the enactment of broad "fair information practices" laws directed at the record-keeping of all agencies at a particular level of government, and covering both manual and automated data systems. (This approach would soon be crystallized in the report of the HEW Advisory Committee on Automated Personal Data Systems, published later in 1973.*) The second line of legislation would involve the passage of laws to deal with particular fields of record-keeping, where detailed codes would be enacted to define citizens' rights, work out balances among conflicting social values, and set specific mechanisms of supervision and enforcement. Beyond legislative action, there would be a wide variety of regulatory-agency rules, managerial initiatives, and industry codes.

To help both policy makers and systems developers evolve a set of basic standards during this regulatory phase, the Workshop felt it would be valuable to conduct a series of interdisciplinary studies, following the approach of the National Academy of Sciences' Project on Computer Databanks.** That project had produced, for each field of organizational activity: (1) a description of the pre-computer baseline of record-keeping practices and citizens' rights rules; (2) an empirical study of how computers were being used there and the effects this was having on the operations of personnel record-keeping; and (3) an analysis of policy alternatives available to insure that society's current expectations about citizens' rights in that field were carried out, in both automated and manual data systems.

Looking over the main fields of organizational record-keeping about people, the Workshop identified a group of these that seemed to merit priority attention, based on factors such as the number of persons affected by these activities, the extensiveness of computer use, and the readiness of law and public opinion to take up regulatory alternatives. The fields selected were: banking and finance; credit bureaus and commercial reporting agencies; education; personnel practices; social and evaluative research; law enforcement and criminal justice; welfare; and health care.

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*Records, Computers, and the Rights of Citizens, Report of the Secretary's Advisory Committee on Automated Personal Data Systems. U.S. Department of Health, Education, and Welfare, July, 1973, DHEW Publication No. (OS) 73-74.

**Alan F. Westin and Michael A. Baker, Databanks in a Free Society (New York, Quadrangle, 1972).

THE HEALTH-CARE STUDY OF 1974-76

The Workshop decided to select one such field for intensive analysis. Once this study was conducted and published, its technique could be evaluated and, where it proved relevant, used by other researchers, organizational managers, and government study commissions. Health care was selected as the first field to be treated, and the Institute for Computer Sciences and Technology of the National Bureau of Standards was able to provide funds to carry out the research during 1974-75.

The report of the health-care project was completed in March, 1976. It was issued in December, 1976, under the title, Computers, Health Records, and Citizen Rights, Monograph 157, National Bureau of Standards.

The report found that by the middle 1970s, as a result of many developments in the national health care system, Americans had effectively lost control over the circulation of their medical records. Laying out the extensive circulation of personal medical information that now moves from primary health-care settings into files for payment and quality-care assurance and then into a wide range of social uses, from employment, life insurance and licensing to law enforcement, welfare programs, and research, the report showed that computer use was already extensive in the collection, processing, and circulation of such medical information. It documented that existing state and Federal law was inadequate in giving patients rights of notice about record-keeping practices, access to their own records, and rights of consent to the circulation of their medical records beyond the health-care setting.

The report concluded that it would take a "mosaic of policy actions, over time" to install the set of basic individual rights that were needed in the organizational sectors described in the report. While various legislative, judicial and regulatory-agency actions were discussed and recommendations offered, the report felt that organizations building health data systems -- hospitals, clinics, state health agencies, etc. -- should move on their own initiatives to install such basic citizens' rights protection in their operations. To help identify what protections were needed, the report formulated and discussed twelve principles to be applied to health data systems.

"1. There should be a procedure for issuing a public notice and privacy-impact statement whenever an automated data system is created in the health field, filed with an appropriate outside authority and communicated to any continuing population of individuals whose records will be affected.

"2. Socially-acceptable standards of relevance and propriety in the collection of personal data should be worked out for data systems in each of the three zones of health-data use, through public discussion and appropriate policy-setting mechanisms.

"3. Individuals should be given a clearly-written account of how their personal information will be used whenever they are asked to supply personal information to a health data system, along with the

procedures to be followed before any uses are made of their data other than those originally specified.

"4. Forms used to release personal information from a health data system should be for a specific purpose, describe the information to be released, and should be limited in time, and the individual's consent to such releases should be informed as well as voluntary.

"5. As a general matter, patients should have a right to full information about their health conditions. Where health data is to be used to make judgments about service payment and claims, or in any non-medical social and governmental programs, the individual should have an absolute right to inspect what is to be released from his/her record. In chronic and acute care, patients should also have a right to see any part of the medical records, including the medical professional's working notes, if the patient insists upon this after the medical professional has had a chance to explain directly to the patient why he or she feels that such disclosure would not be in the patient's best medical interest. A special procedure is suggested for patient-access problems in psychiatric care.

"6. Managers of health data systems must take steps to see that personal records are as accurate, timely, and complete as the uses to which they are being put require for protection of individual rights.

"7. Data security measures must be taken to control access according to the policies set by law or by management, and the adequacy of those measures will be measured by the previous history of threats to data confidentiality in that type of organization.

"8. Health data systems should conduct special orientation and training programs to inculcate respect for citizen rights among their staffs and to deal with problems that may arise.

"9. Each health data system should prepare and distribute a patient's rights handbook, and install a readily-available and independent patient rights representative in the organization.

"10. Because new issues are posed whenever health data systems adopt new file applications, there should be provision for periodic independent review of each system.

"11. Special efforts should be made so that confidentiality rules do not interfere with the public's right to know what is being done by government agencies or by private recipients of government funds, and to carry out critical oversight functions in the public interest.

"12. The importance of health-care evaluation and medical research calls for developing special procedures so that these activities can be carried on without jeopardizing citizen rights."

The report received extensive national publicity during January and February of 1977, and a condensed version of its analysis and recommendations was sent by NBS to every hospital in the United States and to leading organizations in the health-care field.

SELECTION OF EMPLOYMENT FOR THE SECOND STUDY

The first study having been finished, the field of employment and personnel was chosen by NBS as a second inquiry, to be undertaken during 1976-77.

Work obviously affects most Americans, not only almost 100 million Americans currently in the labor force but also the millions of young people who will enter it year by year. Most working people today are employed by others, and generally by organizations of medium to large size. Finding a job today almost invariably means filling out applications for such employers about one's background, education, prior employment, and the like, having checks made of these facts, and often undergoing various tests and interviews, all of which generate an extensive applicant record. Once hired, employees are under day-to-day observation and supervision, and extensive records are compiled about them by employers for measuring work performance, paying taxes and Social Security, administering health and retirement benefits, and complying with government employee-protection programs. Finally, employment records are one of the main sources of data about people sought by other organizations -- credit bureaus, banks, other employers, tax investigators, police, welfare agencies, insurance companies, researchers, and civil and criminal courts. In short, if one makes up a list of the formal record systems that most directly affect the opportunities and benefits of Americans today, employment records would have to be among the top three or four areas selected.

Apart from its intrinsic importance, employment was also one of the areas that was to be considered by the Privacy Protection Study Commission between 1975 and 1977. The Commission had been created by Congress under the Privacy Act of 1974 to undertake a two-year study into the information practices of governmental and private organizations, to see whether the principles of the Federal Privacy Act should be applied beyond the Federal agencies covered by that legislation. An agreement was worked out that the Privacy Protection Study Commission would give financial support to the NBS project and the project's research efforts would be available to assist the Commission's work on personnel record-keeping and privacy.

SPECIAL ASPECTS OF EMPLOYMENT AND OF THE PERIOD IN WHICH THIS STUDY HAS BEEN CONDUCTED

Selecting employment as our second field of inquiry and conducting our study during 1976-77 meant that several very important factors distinguished our work here from the National Academy of Sciences' study in 1969-72 or the first NBS project in 1974-75.

1. The New Ethos of Legislative Regulation and Organizational Responses

Between 1974 and the present, there have been a series of extremely important legal developments affecting employers and their record-keeping practices. Passage of the Federal Privacy Act of 1974 meant that all Federal agencies and almost five million Federal civilian workers and members of the armed forces now had rights of fair information practice as to their personnel records governed by that Act. As for Federal personnel officials, their policies and practices had to comply with extensive requirements as to publishing notices about record systems; setting rules for confidentiality and data-sharing; providing rights of access to employees; taking reasonable measures to insure accuracy, completeness, and timeliness of records; and observing other requirements of the Privacy Act. Since seven states enacted laws between 1974 and 1977 similar to the Federal Privacy Act, this put hundreds of state agencies and hundreds of thousands of government employees in those states under similar privacy-act provisions.

During this same time, other more specific Federal and state laws were enacted that also affected employer data practices. These ranged from the major 1974 amendments to the Federal Freedom of Information Act (which liberalized public access to government records) and the Federal Family Educational Rights and Privacy Act of 1974 (which affected employer access to school and college records) to state laws such as California's statute giving employees in the private sector a right to inspect their personnel records. There was also a growing number of Federal and state court decisions dealing with privacy and access rights by employees, in government employment. These dealt with matters such as the use of homosexuality in suitability investigations by the Federal Government; the right of Federal employees to have out-of-date and stale derogatory information purged from their personnel files; and the right of public-interest groups or private associations to obtain identified personal information from government personnel records without obtaining the consent of individual employees.

By themselves, these major new pieces of legislation and assertive court rulings would have had significant radiative effects on most large employers in the country, not just those covered under the legislation. But a key feature of the 1975-77 period was the introduction in Congress and in most of the 50 state legislatures of bills that would have applied the fair information practices approach, or similar privacy-protecting regulations, to all substantial private employers and to all state and

local government personnel. One such proposal that received widespread attention -- indeed it is more accurate to say alarm -- from the private sector was H.R. 1984, the bill with the Orwellian number introduced by Representative Edward Koch, a liberal Democrat from New York City, and Representative Barry Goldwater, a conservative Republican from the Orange County area of Los Angeles. With enactment of the Federal Privacy Act and its seven state counterparts as proof that privacy legislation now commanded broad support among legislators, public-interest groups, the media, and public opinion, many businesses and state governments looked at such far-reaching further proposals and responded by conducting reassessments of their data practices, considering the potential impact upon them of such proposed legislation (especially its costs in dollars and efficiency), and entering the public arena to express their concern that bills such as H.R. 1984 were both unwise and unnecessary.

A final major force that prompted widespread employer attention to records and privacy was the work of the Privacy Protection Study Commission. The Commission's mandate covered just about all major areas of private record-keeping: medical; insurance; education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing. It also was mandated to look into such matters as mailing list practices and use of the Social Security number. Since the Commission would be holding hearings on these areas, calling companies and government agencies to testify about their own practices and seeking comments from leaders in each industry or government activity about what ought to be recommended by the Commission to Congress to insure proper safeguards for privacy in that area, the work of the Commission -- and the attention that it would be drawing in the media -- provided still another major impetus for organizational self-examination.

The result of these new legal requirements and anticipatory responses was that 1975-77 became a period of considerable policy revision in the world of personnel record-keeping, whether in computerized or manual systems. One of the consequences of this trend was that when we examined the documentary record about organizations and then had interviews with their managers about particular practices they were reported to be following, we were often greeted with comments such as: "We don't do that any more," or "That has just been changed by the company," or "That policy is now under review and we will probably change it." In the sense that this marked organizational change aimed at eliminating past abuses or problems and installing more privacy-regarding policies, such changes were socially responsive and it was obviously satisfying to hear about them. But in our capacities as researchers -- trying to check out documented instances of allegedly unfair or intrusive information practices and depict just what employers are now doing -- it created a situation not unlike that of a photographer with a standard-lens camera trying to capture a very rapidly moving target. Where the prime conclusion reached by the NAS study in 1969-72 and even the NBS study in 1974-76 had been rapid technological change but not equally rapid legal and policy responses, the environment

in which we conducted this study of employment was one of quite rapid legal and policy change. (Indeed, to anticipate one of our main findings, legal and policy changes have been more extensive in their impact on individual employees and employers than EDP technology has been.)

2. The Special Character of Employment Records

Another important factor to note at the outset is that employment records have very distinctive aspects in terms of privacy issues. While the collection of information about applicants for jobs is rather similar to what takes place in credit, insurance, licensing, welfare, and other "one-time-benefit" decisions about people, record-keeping about employees takes place in a very different environment. It is basically a continuing, face-to-face relationship between employee and manager, marked by a well-accepted right of the employer to set standards of work performance and on-the-job behavior as well as a right to record extensive personal details about the employee's life for various supervisory purposes, benefit-program administration and government-reporting duties. In these characteristics, employment resembles education and health-care in many of its records-and-privacy contexts. It resembles them also in the fact that American law has, until quite recently, regarded employees, students, and patients as having few legal rights in relation to the judgments and authority of employers, educators, and doctors.

The field of employment is also marked by the absence of a substantial, empirically-based literature on how employers actually use information to make personnel decisions. There is, of course, an abundance of writing in personnel books and magazines about how such decisions ought to be made for hiring, promotion, and disciplinary purposes, and there are constant debates among the advocates of various organizational philosophies as to how the personnel function should be conducted. We also have a small number of organizational case-studies, of the business-school-training variety, that purport to tell how some real managers made personnel decisions. But when it comes to knowing how various types of employers in industry or government actually use the personal data they collect to arrive at personnel decisions, we lack the necessary data for judgments.

In fact, the few studies by good social scientists that have addressed this question provide solid warnings against taking the existing prescriptive or descriptive literature at face value. In The Great Training Robbery,[1] Ivar Berg shows that employers do not really make use of the information about educational level that they collect and formally declare to be a qualification for employment or promotion. In Melville Dalton's, Men Who Manage,[2] a shrewd sociologist who became a participant-observer in several industrial plants in the mid-West showed that many important personnel decisions, some as general policy but also some individual determinations, were made not on the basis of textbook rationality or declared company policies but through "off-the-record" bargains struck at the local level between managers and union officials, and managements and local political leaders. And, in Personnel Policy

in the City: The Politics of Jobs in Oakland,[3] political scientist Frank J. Thompson showed that most of the prevailing "standards" and "procedures" of merit employment in Oakland, California did not describe the way that city officials really made their personnel decisions, why they did so, and what it was reasonable, in the context of real-world politics, to expect them to do in the future. In short, leading studies suggest that the formal world of rules and procedures is often far from the operative reality in personnel administration, and in its uses of information as well.

The point of noting the paucity of trustworthy empirical literature in the personnel field is not to explain why we tried to do this in our study, since we had neither the mandate nor the resources to attempt such a task. Our point is that we approached the investigation of how computerization has affected personnel practices and individual rights with the conviction that there might well be a similar gap between reported effects and actual effects here as well. Thus we tried, as far as possible, to ask questions and collect available documentation to expand what is known about the way that personnel decisions are really being made in those areas where managerial discretion rather than automatic decisions are the rule, and to use what we learned to assess computer impact.

SOME KEY DEFINITIONS, ASSUMPTIONS AND METHODOLOGIES

Before moving into the report, there are some definitions, assumptions, and choices of research strategy that ought to be provided. Throughout, when we talk about "citizens' rights" or "individual rights" in the use of personal information by employers, we have in mind three elements that were also used in the earlier NAS and NBS studies:

A. PRIVACY -- the question of what personal information it is relevant and proper for an organization to collect or store at all.

B. CONFIDENTIALITY -- the question of how information about individuals should be distributed within the organization and when it should be released to outsiders.

C. INDIVIDUAL-ACCESS -- the question of whether individuals should be able to learn what information about them is being maintained in the data system, and have the opportunity to inspect, correct, or contest such data.

We also assume, as did the report of the Privacy Protection Study Commission, that there is one additional consideration: THE BALANCE OF POWER between individuals and organizations in a democratic society and how this may be affected by the uses of personal information.

On the other hand, our definition -- and the scope of our study -- does not take in some other issues of individual rights in the world of employment. We will not be discussing equality rights and anti-

discrimination measures, except as this may raise questions about what personal information should be collected and recorded by employers. We will not treat employee free speech and protection of "whistle-blowers" in corporate or government employment, except to the extent that employers seek to investigate off-the-job expression or activity to make judgments about employees at work. Finally, we will not consider employee-participation issues, again except to the extent that access to one's own record and making visible the real bases of employer decisions may be involved.

Another explanation concerns our assumptions as to the relation between information technology and organizational policies. One contemporary judgment is that information technology -- being very costly -- has developed mostly as a monopoly of already powerful organizations and institutions in American society; it is further assumed that such organizations will use computers, inevitably, to augment the bureaucratic and person-manipulating tendencies of such organizations. An opposite judgment is that computer technology, for all its awesome technical capacities, is still capable of being used for whatever purposes American society wishes to mandate; this view assumes that public policy, through legislation, regulation, court decisions, and public opinion, can control the way that banks, police departments, taxing agencies, or employers use EDP, by controlling what information is collected, how it is used, what rights of access and control the individual has in his or her records, and what independent investigative or regulatory instruments supervise compliance with such rules. Our position -- as already expressed in the earlier NAS and NBS reports -- follows the second judgment, though with the powerful caveat that there is nothing which guarantees that American society will have the understanding or the will to impose such democratic controls on the technology. Indeed, our assumption is that unless social understanding of the need to exert such public policy influence is developed and unless the political effort to enforce such an understanding is mobilized, the natural tendency will be for large organizations to use information technology to serve their own interests. In that event, consideration of individual rights would take place only to the extent that customer, client, employee, or citizen resistance might be encountered by managers and have to be pacified.

Somewhat related to this assumption is the question of whose concerns a study such as this will take as primary. One can look at personnel policies and EDP developments primarily in terms of the needs and efficiency of employer organizations, out of the conviction that our society depends for much of its material progress on the capacities of productive organizations to improve goods and services, and for its public weal on the capacities of government agencies to excel in administering benefits programs and defending the public interest. The other perspective sees the interests of individual employees as paramount in a constitutional society, especially given the increasing control over daily life-choices now determined by large organizations, including employers. The typical American answer is to say that both sets of interests have to be considered and balanced according to their merits

in a given situation. We adopt this pragmatic answer here, but again with a special twist. Throughout our research, we have tried to consider not only the informational needs of personnel officials and organizational managers but also the kinds of concerns that confront the individual today who seeks to know how his or her personal information is being used:

A. For the applicant for employment, this means knowing what aspects of his life will be looked into, who will do the investigations, and from what sources. It means knowing what information will be used to make the hiring decision, and whether the result can be challenged if he or she believes it was made on the basis of either improper or inaccurate information.

B. For the employee, the key privacy concerns are whether employees can see everything that is recorded in their personnel files; who else within the organization sees the information that is collected for purposes such as payroll, health claims, etc.; what personal information is disclosed to outsiders either with or without their consent; and what activities of employees off the job are looked into and used for employment decisions.

C. For the ex-employee, the central issue is what is done with personnel records after the employee leaves that employer, and does an ex-employee have any rights of notice or consent in that process.

While much of our presentation in Parts Two and Three will deal with what organizations have been doing and what personnel officials have hoped to accomplish, we will treat the applicant, employee, and ex-employee interests directly in Parts Four and Five.

OUR RESEARCH METHODOLOGY

To examine the effects that computer use is having on individual rights in any sector of governmental or private record-keeping, the analyst has to develop a careful methodology for comparing pre and post computer situations, and for taking into account changing legal and social conditions during the course of automation. This involves examination of the following areas:

A. The functions assigned by society to that area of organizational activity, including the degree of social consensus over the legitimacy of that activity or how it is being carried out.

B. The purposes and uses of record-keeping by such organizations, and how their operations have been conducted under manual and EAM (Electric Accounting Machinery) procedures.

C. The legal, regulatory-agency, and management rules as to citizens' rights that governed such record-keeping and information uses in the pre-computer era, including

on-going debates over the adequacy of such rules in light of changing social values.

D. The motives for initiating computer use in this field, and how computer developments have proceeded from first use to the present, including a description of just which records are now automated and which remain in manual form.

E. Changes in the organization's policies and procedures as to citizens' rights that have been made since automation began, either as self-initiated measures (and why) or to comply with new legal controls.

F. The issues of citizens' rights that still remain unresolved, either as problems identified by citizens' rights groups or by technical experts, or by the organizational managers themselves.

G. The policy choices and alternative mechanisms involved in resolving these citizens' rights concerns, with special attention to EDP systems.

These are the areas that we have explored in this study. Thus it has been necessary to consider what rights as data subjects employees and executives had before computers were introduced, and our descriptive net has been cast quite widely in the opening discussions of work in America and the pre-computer baseline of employer practices. We also treat in our policy analysis section a wide range of new organizational and public policies that may be needed to deal with abusive data practices involving applicants for jobs, current employees, and former employees. However, this is still, in its basic focus, a study of how computer use affects citizens' rights issues in employment, and it is to that particular topic that we return in our final section on policy alternatives and recommendations.

THE INTENDED AUDIENCE FOR THE REPORT

The audience we hope to reach with this report is unusually broad, and this has dictated much of our report style. Because we want to reach personnel specialists, organizational managers, labor union officials, public-interest groups dealing with civil liberties and minority-rights interests, data processing experts and systems managers, journalists covering these issues, and all the government policy-makers, from regulatory-agency members to legislators and judges, we have tried to go into enough explanatory detail on any topic, whether of technology, law, organizational practice, or civil liberties, to allow a non-expert in that area to know what is involved. Hopefully, this will create a level of general discourse that serves all those with common interests in this area, without treating any topic in a simplistic fashion.

A large number of persons helped the project with documentary materials and interviews, participated in our organizational surveys, or reviewed drafts of this report. We acknowledge them gratefully in the Appendix. For their special roles in sponsoring and encouraging this project from start to finish, a special debt is owed to Dr. Ruth M. Davis and Seymour Jeffery of the National Bureau of Standards; Walter M. Carlson of the I.B.M. Corporation and advisor to the Institute for Computer Sciences and Technology of NBS; and David F. Linowes, Chairman, and Carole W. Parsons, Executive Director, of the Privacy Protection Study Commission. Their patronage, and especially their defense of the project's scholarly independence, itself represents a standard of excellence for national policy that deserves to be noted.

For help during final revision of the report, I owe a special debt of gratitude to two NBS staff members: to John L. Berg, especially for his wise counsel on matters of both technology and social policy, and to Gloria R. Bolotsky, for her editorial work on the manuscript and her strong support of it within the final evaluative processes.

It is customary to announce that an author holds all of those who assisted him blameless for any mistakes of fact or defects of wisdom in the final product. It is an urbane custom, and I adopt it here.

Alan F. Westin
January, 1979

FOOTNOTES

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PART ONE:

EMPLOYMENT AND INDIVIDUAL RIGHTS

Chapter Two. THE WORLD OF WORK AND PERSONNEL ADMINISTRATION

OVERVIEW

In this section, we note the central significance that work plays in the life of individuals and society, especially the fact that the rules and procedures applied at work represent the most continuous exercise of authority over people's daily lives. We also note that work relationships have changed markedly in the past few decades; most people today work for others, in large organizations, under professional managements and bureaucratic procedures; many aspects of their lives (health insurance, pension plans, etc.) are now provided through the employer; there is more direct government regulation of the employer-employee relationship in the private sector and in public employment than ever before; and employee attitudes toward work today call for more worker autonomy, less authoritarian supervision, and the provision of various benefits as a matter of employee rights.

The section notes that American law does not recognize either a right to have a job or the right to keep a job once hired. However, a growing body of union contract rules, anti-discrimination laws, health and safety laws, and fair labor practice laws now limit most employers' freedom of action, and form the backdrop for consideration of proposed privacy safeguards to govern the personnel data practices of both public and private employers.

After a general discussion of the size, character, and components of the American labor force in the late 1970s, there is an explanation of why the study will divide employment into three sectors for discussion purposes -- business firms, non-profit organizations, and government agencies.

The section then presents a brief description of the rise of personnel departments and the record-keeping function in organizations, noting the difficulties in assessing how employee records are actually used in the making of certain personnel decisions and what this means for deciding some key issues of privacy and employee access.

THE CENTRAL IMPORTANCE OF WORK

Work is probably the most important single activity that shapes the lives of adults in modern society, so much so that we sometimes take for granted the enormous effects that work has on our total being. To cite some of these:

- Work is the adult's longest waking activity of the day. Since most people work forty years or more, it is also the longest single activity of their lifetimes.

- Despite the supposed decline in the work ethic in the United States, work is still the most "self-defining" aspect of most

people's lives. When individuals are asked the simple question, "Who are you?" most respond with their occupation or work group: "I'm a businessman, a farmer, a steelworker, a professor, a lawyer, a computer programmer, etc." Work gives identity.

- Work, and payment for it, is the way individuals not only obtain food, clothing, and shelter, and support families, but also pursue material rewards in a highly materialistic "have-things" oriented society. Work is thus "the ticket to the good life."

- To have work is to be considered a "productive" member of society. To be "out of work" is to be in a troubled and usually frightening state. To be "unemployable" or "on welfare" is to occupy the lowest-status position in American society. Work is thus closely tied to the maintenance of self-esteem and to winning social esteem.

- Satisfaction or discontent at work is a major factor in mental health. Unhappy work relationships (whether in the factory or the executive suite) are a major cause of drinking problems, family conflicts, and nervous breakdowns.

- The rules under which people work -- the standards of behavior, evaluation of performance, awarding of promotions and good assignments, and administration of discipline and discharge-- represent rules and procedures that affect more people than most regulations of government, religious bodies, or other institutions. Employers are the most pervasive authorities in most people's daily lives.

- Work has traditionally been the route by which new immigrants (both foreigners and farm-to-city migrants) obtain the resources with which to achieve social mobility for their offspring; their children move up the ladder of occupations from lower to higher status work. At the same time, "socializing" such immigrants to the dominant culture's language, dress, customs, politics, and life-style has been substantially aided by the working place.

- The higher or more desirable the occupation, the more employers impose standards of qualification and disqualification on those who apply. Thus access to good or higher-status jobs defines those types of people the society values and also those it disfavors. The fight over hiring standards is a fight for access first to the mainstream and then to the privileged enclaves of a society. Groups "arrive" in social status -- whether they are foreign-born, Catholics, blacks, women, cultural or political dissenters, or homosexuals -- when their political pressures open high-status work opportunities to them.

- The work force today divides into a very complex mosaic of different occupations with different social statuses and very dif-

ferent legal treatments. By type of occupation, for example, there are activities that are licensed by the state and for which special personal and professional standards are imposed, purportedly to protect the public; such jobs range from professionals such as lawyers and doctors to bartenders, beauticians, jockeys, dock workers, casino dealers, and taxi drivers. In government employment, public expectations and court decisions have traditionally supported the setting of special standards of behavior and personal disclosure for policemen, firefighters, and other groups. Thus there is no simple set of qualifications or disqualifications that operates (or could be sensibly prescribed to operate) for every type of job in the American work force.

- In addition, very different concepts of rights and procedures for providing appeal mechanisms operate at different levels in the business and private-associational sectors. In general, the most formal rules and grievance mechanisms operate at the base of the organizational pyramid, where production and clerical workers are found. The least formalized rules of conduct and use of formal hearings take place at the upper levels of management. (We will return to a more detailed discussion of this point later in this report, especially its implications for privacy and due process interests in the corporate world.)

CHANGING ASPECTS OF WORK IN AMERICA

These are only some of the factors that make work central to individual lives and social culture. What is equally important as a backdrop to our study is that occupational patterns, worker attitudes, and management of the working place have been undergoing highly significant changes during the past few decades. Again, to highlight some of these briefly:

- Because of the continuing shift away from agricultural work, the move to larger business units, the expansion of government functions, and similar trends, most people today (over 90% of the labor force) are not self-employed but work for others, generally in large organizations. As a result, most people today work under the direction of professional managers, in bureaucratically organized settings.

- Much work in America has been shifting during the past decades from essentially manual and menial jobs to mental or information-handling activities, partly as a result of automation and partly the growth of the service-sector in the national economy. However, a great many jobs in factories and in "service" occupations such as health-care remain routinized, unpleasant activity, including some occupations that remain quite dangerous.

- Increasingly, health care and retirement benefits beyond minimums provided by government, are now administered for individuals through the work place. This makes having a job and

holding it more important for people in our society than in nations where services such as health care are provided for everyone. This also involves employers in handling record-keeping on what was once the employee's personal or family affairs.

- o The role of government in regulating the internal affairs of business managers has increased sharply in the past decade, well beyond the supervision of labor management relations that was the key government intervention of 1930-1950. The major force has been equal employment opportunity programs, but there have also been significant government interventions in private work-force affairs dealing with occupational health and safety, employee retirement and pension programs, hiring the handicapped, pre-employment investigation of job applicants, and other areas of personnel activity.

- o Employee attitudes toward the job, particularly among younger workers and professionals but not limited to them, have undergone major changes in the past decade. Study after study shows that workers want more satisfaction in work (usually defined in terms of autonomy to accomplish significant work); demand less authoritarian behavior by supervisors and managers; and expect benefits such as health-insurance, pensions, paid vacations, and other "perks" once thought to be only for managers.

THE LEGAL STATUS OF WORK

Reflecting these broad social trends, the legal status of work has also undergone important changes in recent years. It is still true in the United States that there is no legal right to have a job, as most socialist nations promise in their constitutions and fulfill in practice through assignment to state-directed employment. It is also true in American law that once a person obtains employment, whether in government or a private organization, there is no legal right to keep that job if the employer decides to dismiss the person. Legally, the employer is free to hire, direct, and fire employees at his discretion. Furthermore, there is no legal requirement that work be conducted as a democratic or participatory activity, apart from union representational rights.

While employment at the employer's will describes the still prevailing legal maxim, this hardly describes the reality of the employment relationship as it has developed over the past three or four decades. It is far more accurate to say that employers today operate under a complex web of legal, regulatory, and union limitations that substantially affect "employers' rights." To cite the most important:

- o In terms of hiring, laws and/or judicial rulings forbid discriminating against applicants on the basis of race, sex, nationality, religion, age, and handicap or using criteria or tests that produce such discrimination;

provide special opportunities to war veterans; forbid rejecting applicants because of union activity or membership; limit the use of loyalty oaths or general loyalty standards in public employment or defense industries; and -- in some jurisdictions -- control rejections of persons with arrest records, homosexuals, or persons having certain mental or physical health conditions. Techniques such as personality testing and polygraphing of applicants are also limited or forbidden in various jurisdictions or for some types of employment. If a pre-employment report is used to deny someone a job, the Federal Fair Credit Reporting Act provides that the individual must be notified that a report was used, have an opportunity to learn what was in it, to require reinvestigation of contested information, and to enter an explanation in the record.

- In terms of administering and supervising, employees covered by union contracts have rules of work and supervisory techniques, grievance and appeals procedures, and conditions for discharge spelled out in collective bargaining agreements, enforced by public labor-relations boards and the courts. In terms of statutory and judicial controls, the principles of equal opportunity are supposed to apply to promotions, assignments and discharge also. In government, civil service laws usually provide employees with hearings to protest discharge without cause, as well as general rights of inspection of their personnel folders. Federal agencies and state agencies in nine states are covered by recently-enacted privacy acts that give employees expanded rights of access to their personnel records, and put officials under a legal duty to follow "fair information practices" in collecting and using personal information about employees. Four states now give employees a right of access to their personnel records in private employment.

- In terms of discharge, the employer's right to fire is limited when it infringes anti-discrimination standards, is in punishment of union-organizing activities, or violates the terms and conditions of collective bargaining agreements or civil service rules as to just cause.

Even if they were enforced uniformly, these limitations on employer freedom of action still leave very considerable discretion in the hands of managers, in both public and private employment. Courts, labor-management relations agencies, and most legal commentaries support such remaining discretion on the theory that selecting good employees, seeing that work is properly and well done, and making promotion and firing decisions in the overall interests of the organization embody the concept of employer prerogative and responsibility that our society approves.

Legal limitations deal basically with areas in which society wants to control employer bias or abuse of power, and the public supports legal interventions because it became satisfied that self-regulation by private or public employers would not be sufficient to correct existing deficiencies. This suggests that the American public has a rather pragmatic approach to regulating the employment relationship: when a particular abuse is documented and is not corrected, the public supports laws to define rights and various mechanisms of enforcement -- ranging from individual rights to sue for damages and invocation of injunctive orders from courts to creation of investigatory and supervisory agencies to regulate employer conduct on a continuing basis.

THE CURRENT WORK FORCE AND THREE ZONES OF EMPLOYMENT

Some broad perspectives on the work force and how to characterize it are essential to give focus to our approach in this study. We will be dealing with people in what is called the "labor force." There were almost 97 million persons in the American labor force during 1976, 94.6 million of them in civilian employment and the remainder in the military.

Of those at work, slightly over a third are women, representing a steady rise over the past decade. A little more than one in ten (11.4%) workers are non-whites. Several million workers are non-citizens; most are here legally but anywhere from half a million to several million are illegal aliens, working in violation of law. (700,000 illegal aliens were expelled from the U.S. in 1974, for example.)

Viewed very broadly, about 3% of American workers do manual work on farms; 46% work with their hands in manufacturing and service industries; and 51% have various kinds of "white collar" jobs, from clerk to executive.

Roughly one quarter of U.S. jobs are what the Census Bureau calls "Professional, Technical or Managerial," up from about 18% in the 1920s. Americans typically define these jobs as the most desirable. Today, occupants of these positions are still disproportionately male and white (and, at the very highest levels, Protestant).

Federal, state and municipal governments employ more than 16% of American workers. The growth in government employment has meant that an increasing number of workers come under some kind of civil service rules and protections. Together with the 17 million workers in the private sphere who are union members, more than a third of the work force

has some kind of union and/or civil service protection. In both public and private employment, unionization varies considerably by type of work and region of the country. Overall, about 27% of American workers are union members.

Most people in America work for someone else -- with less than 15% classed as "self-employed" in either agricultural or non-agricultural pursuits. Even in law and medicine, a large proportion of professionals do most of their work in the context of organizations. The proportion of workers who are in relatively large firms or agencies has increased steadily over the century. Almost 60% of manufacturing employees work in settings with more than 250 workers. In fact, the 200 largest manufacturing firms (about 1/10 of one percent of all such firms) employ about one third of the workers in manufacturing.

Unemployment is a permanent feature of the U.S. economy. By Department of Labor definitions, 1976 levels nationwide stood at about 8.5% -- with considerable variation by region, type of work, etc. Young people and blacks have traditionally had higher rates -- ranging beyond 40% in central-city ghetto areas. For the last twenty years at least, black unemployment rates have been roughly twice the rates for whites. If one uses definitions which include those who are part-time but need full-time work, and those who have grown tired of looking for work, unemployment rates are much higher than the monthly Federal estimates would indicate.

Directly or indirectly, most of the American population secure their income and much of their insurance through past or present employment. Even for the retired and the unemployed, social security benefits, disability, health and unemployment insurance, and pension programs are linked in some way with the actions of past employers. In contrast to the popular image of the "permanent" welfare recipient, recent studies show that most people who receive welfare at any time move into and out of the labor force over their lifetimes. Most of their lifetime income is from wages.

For most Americans below retirement age, continuous employment is necessary if they are to keep their heads above water financially. Only a small percentage of families receive a major portion of their income from sources other than employment -- such as inheritance, investments, etc. In 1970, the Census Bureau reported that 80% of American families had less than $5,000 in liquid assets. Further, consumer credit debts (excluding mortgages) has reached the $190 billion level, and most families owning homes carry substantial mortgage debts.

About 50% of American families have more than one worker, and in more than 70% of young families, both husband and wife work.

For our purposes, we will divide employers into three sectors. The great majority of workers, about 70 million, work for private employers, whom we will divide into two of our categories: business firms and non-profit organizations. Sixteen million work in government as civilians, and over two million serve in the military.

In many ways that affect our interests, the three types of employers are quite similar in policies and practices. Many types of jobs -- typists, filing clerks, janitors, guards, accountants and lawyers, middle managers, and top executives -- are found in all three types of organizations. The rules and procedures of bureaucratic organization mark all three sectors. Each has personnel departments which perform highly similar functions -- hiring new employees, administering benefits programs, keeping personnel records, handling employee grievances, etc. Many of the problems of employee morale, job dissatisfaction, theft-prevention, and the like are common to all three.

Yet there are also differences among the three that lead us to treat them separately at various points. The government agencies are under public-record and freedom of information laws as to the information they collect and maintain, including many aspects of the personnel policies they pursue. This opens government action to media and public interest group access much further than private organizations. Government as an employer is bound by rules of constitutional law as to employment standards and procedures. These do not apply -- as constitutional limitations -- to the private sector, though they can be imposed by state or Federal legislation (such as equality, health, etc.). Government does not have profit as its "bottom line," though its need for legislative approval and funding of its programs supplies a similar discipline to organizational ambitions.

Business organizations are private and profit-oriented. Though business has come under extensive reporting duties to government, and often feels the need to respond with information to the media and public-interest groups who demand it, the information in business files -- including employee data -- starts out being private and closed unless the law requires disclosure. This is just the opposite situation from government, whose records are required to be open to the public unless expressly exempted in the interests of personal privacy, trade secrets, and other special categories. Private employers also have more freedom of action in firing workers than government officials typically do, except in times of clear economic distress when government layoffs can be accomplished despite civil service rules and politically influential public-employee unions.

Non-profit organizations are both private and non-commercial. Their good purposes have traditionally given them considerable freedom from legal controls and government supervision of their employment practices. However, as the size of the work force in fraternal, charitable, educational, medical, civic, religious, and similar organizations has grown, some legal rules have been applied to them (such as equal employment)

and the growth of unions in this sector testifies to the needs of people working even for worthy non-profit organizations to pay their bills and support their families.

We will observe this division into government, business, and non-profit organizations in several of the discussions that follow, particularly when we consider patterns of computerization in the personnel sector.

THE ROLE OF THE PERSONNEL DEPARTMENT

Separate personnel departments staffed by "personnel specialists" are a relatively recent addition to the organizational world, primarily an early 20th century phenomenon. From World War I until the close of World War II, the dominant philosophy was one of scientific management, centered on productivity techniques, work conditions, response to union demands, etc. After World War II, leading firms shifted to a human relations approach, with emphasis on fitting job criteria to applicant backgrounds and tendencies and applying notions of good interpersonal relations and communications-theory to the work setting. Since the labor shortages of the 1960s, at least in selected segments of the organizational force, plus the equal opportunity thrust of the period, the emphasis now is one of human resources development, with heavy stress on identifying talents, promoting from within, building strong incentives to keep employees and executives in the organization permanently (benefits programs, stock plans, etc.), and enhancing work environments.

In terms of basic responsibilities, personnel work encompasses six major functions, however these may be distributed in different kinds of organizations:

A. Personnel Planning -- forecasting manpower needs, studying local and national labor-supply trends, projecting retirement patterns, etc.

B. Recruitment and Hiring -- seeking, interviewing, testing, and hiring new employees.

C. Personnel Records -- maintaining the "central" personnel files, at local and/or central record facilities.

D. Compensation and Benefits -- setting wage and salary scales for each job position, determining periodic increases and bonuses, and administering various benefit and pension programs.

E. General Personnel Administration -- formulating and administering basic personnel standards and rules; supervising appraisal and promotion procedures; coordinating health and safety programs; managing equal opportunity programs; handling grievance, complaint, and communications programs; supervising education, training and employee-recreation activities; conducting attitude and morale surveys among employees; and administering discipline, discharge, and retirement procedures.

F. Industrial and Labor Relations -- either alone or in conjunction with an industrial relations unit, dealing with matters of collective bargaining and general employee-management relations.

Considering these personnel functions in terms of data-collection and record-keeping, the personnel unit does the following:

A. Defines the personal characteristics that are required and will be inquired into for general employment with that organization, and for particular jobs.

B. Creates the package of application forms, tests, interviews, and medical examinations that applicants must complete, and determines how applicant and reference information is to be verified.

C. Takes completed applications and the forms filled out by newly-hired employees and creates the official personnel record, often called the "personnel jacket" or "personnel folder."

D. Updates the personnel record regularly with information as to salary and job title, benefits, appraisals, promotions, discipline, training, commendations, medical limitations, safety incidents, security investigations, and a wide range of other on-going personnel developments.

E. Uses the personnel record and any additional data required from the employee's supervisor to prepare reports for various governmental regulatory bodies, such as equal employment, pension programs, occupational health and safety, etc. Though usually statistical, some of these reports include identified data about employees.

F. Uses personnel records to prepare statistical reports to management on various employment trends and problems, to do efficiency studies, and to analyze short and long-term manpower needs.

G. Handles requests from outside the organization for personally-identified information about employees and former employees. This typically involves requests by credit bureaus, banks, educational institutions, other employers, law enforcement officials, tax authorities, civil and criminal courts, etc.

The elaboration of these functions in organizations meant that extensive bureaucratic rules and procedures existed in personnel administrations long before computers arrived. However, the personnel function and its managers have been -- until very recently -- second-class citizens in the status world of American organizations. The perception of them by top organization executives was as a "cost" rather than a "productive" element. They were seen as preoccupied with fussy record-keeping affairs, and only rarely helpful with the tough management decisions facing business firms or government agencies. As a result, the career path to top management was usually from sales, production, or finance in the business world, or from line operations or law in government, and not very often from personnel.

However, the importance and role of personnel managers have grown significantly during the past twenty years, as labor-supply problems, equal-opportunity and affirmative action requirements, benefit and medical-program costs, worker satisfaction, and executive-development needs have become increasingly important to organizations. Where only 50,000 persons were employed in personnel departments in 1960, this had risen to 240,000 by 1972 and 320,000 by 1974. Vice Presidents for Human Resources in many large corporations were receiving salaries of $50,000 to $100,000 and more in 1977. As for career prospects, the current presidents of several large corporations have come up from the personnel route.

In all of these enhanced roles of personnel executives, information collection and data analysis play a central part. As a result, personnel executives increasingly take courses in computing and EDP analysis, and are expected to handle computer-oriented management reports and do various predictive personnel studies as a regular part of their work.

RECORD-KEEPING IN EMPLOYMENT

As of the 1950s, before computers were used in personnel work, organizations already collected and stored in various offices a very wide range of personal information about their employees and executives. These typically included:

A. Personal characteristics -- name, age, sex, race, citizenship, social security number, address, telephone, birth date, marital status, spouse's name, childrens' names, other dependents, height, weight, hair and eye color, and others.

B. Recruiting and Hiring Data -- all the data collected on job applications (including arrest and/or conviction records, educational history, employment history, medical history, military service record and discharge status, skills, languages, travel, interests, etc.), plus data from tests, interviews, medical examinations, and personal references.

C. Work History -- chronological records of jobs held in this organization, salaries paid, transfers, promotions, maternity leaves, commendations, warnings, discipline, absentee record, performance appraisals, special assignments, special contributions by the employee.

D. Benefits -- data on medical and dental coverage and use by the employee and his family, including psychiatric services; retirement and pension program data; stock option program use; special payments for emergency loans, foreign assignment subsidies, etc.

E. Education and Training -- data on the employee's attendance and performance at courses and training programs conducted by the organization; similar data on work done at outside educational institutions and programs paid for by the employer.

F. Skills -- periodically updated information on foreign language skills, hobbies, sports, civic and political activities, travel, and occupational licenses held, patents obtained, and various other outside activities, collected to help managements make promotion and transfer decisions.

G. Health and Safety - data on medical limitations at work, results of periodic medical checks, special screening programs, accidents, exposures to dangerous materials, etc.

Though the personnel department has the primary responsibility for collecting and maintaining such employee data, information about employees and executives is held by many different officials and at many different locations in the average organization. Within a local plant or office in a medium to large sized, multi-unit organization, personal data will be maintained by the employee's immediate supervisor, the head of his

department, specialized staff units other than personnel, employee associations and clubs, a security unit, and the plant or office manager. In addition to such locally-held records, organizations will maintain some personal data on all their employees and executives in the regional or divisional office and in various units at national headquarters. An individual's data may be stored in half a dozen to a dozen different places in a typical company.

Keeping such employee records is a function not only of the growth of large, bureaucratic organizations and the disappearance of face-to-face relations, but also of the need by organizations to document the bases of their personnel decisions, prove compliance with legal regulations, evaluate supervisory performance, and support improvement in their personnel standards and procedures. In most organizations, personnel records are divided into three categories: records on unsuccessful applicants (usually kept in some kind of dead or infrequently-used storage); records on current employees; and records on former employees (also in some kind of infrequent-access storage). How files on current employees are kept will vary with the size of the employer (large, multi-facility organization or small, one-office firm); the type of employee (assembly-line worker,assistant professor, research chemist, senior vice president for sales, typist, general counsel of Federal agency, etc.); and the type of record involved (payroll, medical claim form, security investigation result, commendation for exceeding sales quota, etc.).

Generally, there will be a central employee record maintained by the personnel department; specific records in various functional offices (benefits department, payroll, medical office, labor relations); perhaps a core computerized record at a national office; and some kind of supervisor's log or manager's desk record with informal notes on very current matters. It has been traditional in personnel work for a wide variety of records, letters, and other items to accumulate in the central employee folder; for the employee's data to be duplicated and separately updated in a considerable number of different departments and locations in a large organization; and for there to be significant problems of outdated or obsolete information stored in such records. (As we will see in Part Two, this has been one of the strong incentives for automation of employee records.)

As we noted already in Chapter One, how personal records are actually used in the selection, management, and termination of employees is a complicated issue on which there has not been much broad empirical work. There have been studies of what information organizations collect and maintain; how these records are passed around in organizations; and who actually makes various kinds of personnel decisions in particular kinds of organizations. But there are several realities involved in the use of personnel records that work against the textbook descriptions of how the records are supposed to be used. For example:

- Many decisions as to hiring are made not by assessing record-facts but on the basis of unspoken value judgments of the hiring official, through interviews that evoke personality and ideological impressions, through off-the-record telephone calls and old-network contacts, etc. There are thus informal unwritten information systems that operate widely in personnel work. Affirmative-action requirements and quota-like goals have somewhat reduced such practices, at least where they result in discrimination against minorities and women. But subjective factors unreflective of "merit criteria" and "accepted disqualifications" are still widespread.

- Promotions that are not made strictly by seniority are usually made through assembling documentation on positive and negative qualities for the job open -- performance appraisals, inventories of skills and special talents, employment and salary histories, etc. Yet a variety of organizational factors are often more critical than the employee records -- promoting from within a particular unit, advancing the protege of a powerful executive sponsor, cutting back on advancement because of business losses or government program cuts. There are also subtle factors of personality "fit" both upward and downward from the post to be filled that enter into these decisions.

- Sometimes, local managements and unions settle the grievances of individual workers not on the basis of "the record" of an action by the company but to serve goals of stability, accommodation, and quid pro quo between the two "parties" in industrial self-government. While passage of Federal and state laws requiring unions to press the grievances of their members in good faith have helped somewhat, the alliance between company and union "managers" sometimes prevails.

The point of these observations is not that record-keeping is a false or phony activity, or that most personnel decisions ignore the information these records contain. Many decisions do take employee history and performance into account to some extent for hiring, promotions, discipline, etc. The point is that how much weight particular items of information in these records have in many such decisions has not been studied. The implication of this for our inquiry is that this often makes it difficult to examine the true relevance of certain data for the employer's "needs." It also makes it hard at times to know just how critical it may be for employees to have a right of access to see certain information recorded about them, such as promotability codes. We will return to these issues at various points throughout the study.

Chapter Three. FROM MORAL CENSOR TO HUMAN RESOURCES MANAGER: A HISTORY OF EMPLOYER PRACTICES*

SELECTING AND SUPERVISING "WORTHY" EMPLOYEES IN 19TH CENTURY AMERICA

To understand the privacy concerns raised by current personnel record-keeping practices, we need to trace the changing social attitudes out of which our record-keeping patterns have emerged. From the time of our nation's beginnings, as an agricultural and small-town society, decisions about the individual's eligibility to receive societal benefits -- including employment -- were based on moral, political, religious, racial and sexual "worthiness" as much, or in some instances, more than on merit or technical accomplishments.

Although the superior role assigned to white Protestant men was a dominant factor in American life at the beginning of the 18th Century -- and was to remain so for 150 years -- the strictures imposed by that dominance were not as confining in an agricultural society as they were to become with the Industrial Revolution for several reasons. First, 90% of the people were self-employed, either as farmers or small tradespeople.[1] The Protestant work ethic might instill compulsive attitudes about their work product, but at least this discipline was self-created, not forcibly imposed from above. Second, in small-town America there was no need to record formal, permanent judgments that would disqualify individuals from eligibility for societal benefits. In this earlier America, people knew one another; formal record-keeping is a device that must be employed when impersonality is the social fact. Finally, those who felt confined by the prevailing attitudes of small towns had the escape hatch of moving to cities like Philadelphia, Boston, and New York, or to the western frontier.

The Beginning of Industrialization: Pre Civil War

With the closing of the near frontier and the first small stirrings of industrialization, attitudes of the dominant society began to be transferred to the work place, creating a closed system in which employers could impose their values on their workers 24 hours a day. The existence of three-quarters of a million slaves, and the steady, increasing flow of impoverished immigrants willing to accept any work or any wages, both assured an oversupply of cheap labor and created a standard of comparison that forced the new industrial worker to accept his or her lot or go hungry.

Workers in the New England mills were expected to observe the Sabbath, attend Sunday School classes, refrain from taking dancing lessons or smoking, and avoid any immoral conduct.[2] In Southern mill villages

*The writing of this chapter was greatly helped by historical memoranda from project research assistant Eric Matusewitch.

before the Civil War, "Demon Rum" was outlawed and any worker caught drinking, at any time of day or night, was subject to dismissal.

The 24-hour a day supervision of employees by employers in the new factories was made easier by the establishment of employer-owned boarding houses where factory workers were forced to live (the forerunners of the company town). Strict and elaborate rules governing conduct in the houses were imposed.

The Lowell (Massachusetts) Manufacturing Company's Rules and Regulations (circa 1830) provided the following:[3]

"The Company will not employ any one who is habitually absent from public worship on the Sabbath.

"The Company will not continue to employ any person who shall be wanting in proper respect to the females employed by the Company, or who shall smoke within the Company's premises, or be guilty of inebriety or other improper conduct.

"They (boarding house managers) will be considered answerable for any improper conduct in their Houses and are not to permit their boarders to have company at unreasonable hours."

The rules of the Lawrence Company, another cotton mill in Lowell, took on a more hortatory tone:[4]

"They (employees) must on all occasions, both in their words and their actions, show that they are penetrated by a laudable love of temperance and virtue, and animated by a sense of their moral and social obligations...Every individual who shall be notoriously dissolute, idle, dishonest or intemperate, who shall be in the practice of absenting himself from divine service or shall violate the Sabbath, or shall be addicted to gaming, shall be dismissed from the service of the company...All games of hazard and cards are prohibited within (Company) limits and in the boarding houses."

The presence of many children in the factories apparently called for disciplinary action. To keep the children awake, or to punish them for carelessness, corporal punishment was freely employed. "In Rhode Island it was said in 1833 that the 'whipping room' was an 'indispensable appendage to a cotton mill'...Sometimes the discipline took more inhumane forms."[5]

The Growth of Organized Labor After the Civil War

During the Civil War the factory system, once confined to the towns of New England, spread over the industrial heartland of America. About this time, many craftsmen found that their traditional skills were becoming obsolete and that they were therefore economically dependent on employers. They began to experience seasonal and cyclical unemployment,

and lost control over working conditions. Wages, hours and the physical environment were all determined by the employer. Free to pick and choose, employers added age as another barrier to employment. The 'survival of the fittest,' said a Chicago editorial, 'means the fittest up to 39 years old.'" Indeed, the Philadelphia and Reading Railway barred hiring employees past 35.[6]

Employer domination extended to the Ballot Box, as this testimony by a union official in 1885, suggested:

> "...there has been intimidation of employees practiced by corporations, and the Amoskeag Company is not an exception to that rule. I do not say that it is direct intimidation - coming to a man and saying, 'You must do this or else be discharged.' The system of intimidation is so wily and subtle that a man hardly feels it, but still he is made conscious of it. He is told that his boss or his overseer is going to vote such and such a ticket. He is told that more than once probably, more than once a week perhaps, until election day comes, and then his ticket is watched very closely to see how he votes. Then, if discharges are to be made, a great many of them will occur among those who had not voted the ticket that their overseers desired."[7]

The harshness and restrictiveness of the industrial worker's life inevitably led to the growth of industrial unions. Even before the Civil War, strikes by workers protesting low wages, long hours, lockouts, and blacklisting were fairly common. In 1886, these sporadic strikes and isolated union drives suddenly coalesced into a national movement. In that year, membership in the Knights of Labor soared from 100,000 to 700,000; the American Federation of Labor was born, and organized labor staged a wide-spread strike for the eight hour day.

The reaction of employers was swift and harsh. To the moral, religious and social proscriptions imposed on workers, a clear new commandment was added: Thou shalt not join a labor union. Every available means was employed to enforce this new requirement. Violence, blacklisting, lockouts, and labor spies were the everyday tools of repression. In their crusade against unionization, employers had the full support of the courts and of law enforcement. The courts invoked two doctrines to bolster union-busting activities. The first was the application of the Sherman Antitrust Act of 1890 -- originally designed to restrain business monopolies -- to unions whose activities were deemed a restraint of trade. From 1890 to 1928, the courts held that labor activities violated the Antitrust Act 51 times.[8]

The second legal doctrine was that a corporation was a person before the law, entitled to the 14th Amendment rights and privileges of an individual, with legal sanction to deal with his "property" in any manner. From 1890 to 1911, the Supreme Court intervened in 55 cases in which the 14th Amendment was invoked. In 39 of these cases, private corporations were the principal parties and beneficiaries.[9] The legal attitudes of the day were epitomized in an opinion of the Supreme Court in a

case striking down a law forbidding an interstate carrier from extracting a pledge from its workers not to join a labor union and from discharging a worker who did join one. The court's laissez-faire reasoning was that: "The right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee... In all such particulars the employer and the employee have equality of right."[10]

The state courts followed suit. A California court asserted that the "arbitrary right of the employer to employ or discharge labor, with or without regard to actuating motives...is settled beyond peradventure."[11]

The police could almost always be counted on to be enlisted on the side of employers. For example, "In Duquesne, in 1919, the minute any labor organizers stepped into the town, they were clapped into jail. The mayor there boasted that no union could hold a meeting in Duquesne, even if Jesus Christ were the organizer."[12]

Some employers turned to paternalism as an antidote to union organization. In the late 19th century, George Pullman, the railroad car magnate, built an idyllic, planned community with attractive houses and parks. He believed that paternalism, wisely administered, would calm the workers and create permanent labor peace. But he ran his town like a feudal fiefdom, banning saloons and trade unions and agitation for the eight hour day because idleness would promote mischief. One employee remarked bitterly: "We are born in a Pullman house, fed from the Pullman shop, taught in the Pullman school, catechized in the Pullman church, and when we die, we shall be buried in the Pullman cemetery and go to the Pullman hell."[13]

However high-minded the motives behind some forms of paternalism were, the grim conditions and deprivations that characterized life in Southern company milltowns and company mining towns anywhere supported organized labor's view that paternalism was merely another form of economic exploitation combined with union-busting.

Henry Ford's brand of paternalism was not viewed as economic exploitation when he startled the industrial world with the announcement in 1914 that he would voluntarily raise the pay of his men from $2.30 to the then unheard of sum of $5 a day. But his abiding obsession was anti-unionism, and his pay policies, employment of an army of strikebreakers, and his attempt to control his employee's private lives, served that obsession.

"Afraid that such easy money might seduce his employees into evil ways, Ford established...a 'Sociological Department' which was staffed with...one hundred 'investigators'...These, supplied with car, chauffeur and interpreter, were empowered to go into the worker's home to make sure that no one was drinking too much, that everyone's sex life was without blemish, that leisure time was profitably spent, that no boarders

were taken in, that houses were clean and neat, and so on. An employee who did not measure up to the standards set by Ford lost his claim to the five-dollar day..."[14]

THE ERA OF HIGH PATERNALISM AND EMPLOYER PREROGATIVE: 1900-1950

The first two decades of the 20th Century saw a pre-occupation with efficiency and modern business management. Business schools were organized, books on business management were published, management associations were formed, industrial engineers introduced methods to eliminate superfluous or wasteful job motions and thus increase productivity. The modern personnel department was about to be born.

An important component of this new emphasis on efficiency was the contribution of the new science of industrial psychology. Its goal was to weed out from the labor force those who it predicted would be unproductive workers, and to create the psychological conditions in the work place that would secure the greatest productivity from employees. The first systematic outline of an industrial psychology was formulated by the German-trained psychologist, Hugo Munsterberg, in 1913. By 1920, about 25 of almost 400 members of the American Psychological Association reported that they were devoting themselves to the problems of industry.[15]

The combination of industrial psychology with the incipient professional personnel movement produced radical changes in the hiring, supervision and discipline practices of American industry. Before 1900, these and other labor relations were handled largely by foremen or plant managers on a one-to-one basis. By 1912, several modern personnel departments, with centralized jurisdiction over wage administration, working conditions, employment, and record-keeping appeared on the scene.[16] One of the tools employed by such departments was psychological testing of applicants.

The first instance of a company using psychological tests for the selection of factory workers occurred in 1915. In the Clothcraft shops of the Joseph and Feiss Company, Cleveland, Walter Dill Scott developed tests of intelligence, dexterity, and general ability.[17] At a conference of the Employment Managers' Association at Boston, held May 10, 1916, H.L. Gardner of Cheney Brothers volunteered that his firm adminstered 8-hour psychological exams to certain job applicants. The test allegedly measured nine separate attributes: "General intelligence, speed, accuracy, quickness of perception, imagination, general 'well-readness', mathematical ability, mechanical ability, [and] inventive genius."[18]

Alas, much of the advice given to employers by psychologists and personnel consultants was nonsense. One such consultant, Dr. Katherine Blackford, warned employers not to hire blond applicants: "Prison statistics show that the blond is most frequently guilty of crimes of passion...arising from his gambling propensities and ill-considered promotion schemes..." On the other hand, those with high, prominent noses were considered a good employment risk: "It (the high nose) was evolved

in the midst of environments necessitating great activity and aggressiveness. It is therefore always associated with positive energy."[19]

Another personnel specialist also placed great emphasis on physical traits: "In its natural state of boyhood or that of a vacant-minded, beautiful woman, the mouth forms a perfectly relaxed Cupid's bow. Such a state indicates an absence of character.."[20]

Still another psychologist was certain, in 1919, that ethnic origin was the key to hiring loyal employees:

> "The laborer's attitude toward industrial relations is determined by his nationality more than any other single factor. The Jew, for instance, demands an arrangement in which he can bargain. He is continually thinking of how much he is receiving for his labor. He is really more conscious of his labor organization and its methods than he is of his creative labor faculties. As a thinker, he is usually of the radical stamp. The Italian's highly emotional nature lends itself readily to directions by the organizers. It is the testimony of the executives that he cannot be trusted without reservations, and that he is apt to be sullen and moody. The German workman is of placid disposition, loves detail, is particularly effective on precision work. The Pole and Croat usually do the dirty work in the plant."[21]

Questionnaires devised by personnel departments and psychological consultants in the 1920's merely carried over the practices that the earlier employers had begun almost 75 years before. Applicants were asked whether they smoked, gambled, used slang, had been divorced, or swore. "Who is your political leader?" was one typical question.[22]

Personnel specialists believed that thorough investigations of applicants' backgrounds would sift out the best potential employees. In 1915 a group of employment experts advised:

> Detailed records of the applicants' past employment must be obtained from him...Much can be determined...by consulting the merchants from whom the man buys his necessary supplies. Inquiry of his landlord or his boardinghouse keeper, and an inspection of his home and family also will go far toward determining the man's reliability.[23]

Furthermore, "It is in order...to make a personal investigation of the man's life, by inquiry...of his priest or minister...of the policeman covering the beat where he lives and of his neighbors, friends and associates.[24]

Federal Government Intervention

By the early 1930s, with the country deep in the Depression and unemployment at 10 million, industrial warfare had become an everyday fact of life. Strikes, sit-downs, beatings, shootings, bombings, sabotage and other forms of violence swept the country. It was time for the Federal Government to intervene. In 1935, Congress passed the National Labor Relations Act which guaranteed to employees "the right to self-organization, to form, join, or assist labor organizations...to bargain collectively through representatives of their own choosing..." Section 8 made it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of their rights. With the enactment of the NLRA, the "absolute power of employer over employee could no longer be justified; the scales of liberty were adjusted accordingly."[25]

There had, of course, been Federal intervention in labor relations prior to the Wagner (NLRA) Act, including the LaFollette Seaman's Act (1915) the Child Labor Act (1916), and the Adamson Eight Hour Act (1916). The difference between these laws and other protective labor statutes on the one hand, and the Wagner Act on the other, was that the former did not curtail the employer's power to fire or to refuse to hire individuals on grounds not related to their ability to perform their jobs. Thus, although the Wagner Act's original purpose was to achieve industrial peace, its broader effect was to pave the way for the government to set standards of fairness and relevance not only for union members but for a broad spectrum of groups previously denied access to the job market.

Loyalty-Security

The World War II years were a time of relative labor peace. The Wagner Act, although bitterly resented by employers and routinely violated in the years following its passage, had spurred the rapid growth of labor unions, and with the sides more evenly balanced, labor disputes moved from the streets to the bargaining table and the courts. More important, the acute labor shortage caused by the induction of 10 million men into the armed services forced employers to become far less selective in their hiring practices. For the first time, women and blacks in significant numbers entered the industrial work force.

The decades following World War II were marked by an American preoccupation with conformity. The 1950's for white Americans were years of "getting ahead." The generation of war veterans had no time for causes or social reform; they were busy making up for lost time, building careers, stocking up on consumer goods, starting families. At the corporate level, it was the era of the man in the gray flannel suit, whose goal was to marry the "right" wife-- one who would pass muster with his employer and thus help his career; belong to the "right" club; live in the "right" neighborhood; and ultimately achieve the ultimate goal of all right-thinking Americans: security. The same yearning for security permeated workers on the assembly line as well. Once union members had bitterly

rejected fringe benefits offers by employers as a ruse to deny them higher wages, and as a despised form of corporate paternalism. In the 1950s, however, union negotiators put aside their old prejudices and began to recognize that medical insurance, life insurance, pension plans, and profit sharing might be worth more in the long run than hourly wage increases. Thus, the prevailing mood at all levels was "Play it safe; don't make waves; get ahead." This personal attitude was both paralleled and influenced by a national movement to enforce political conformity. The late 1940s and early 1950s were the years of McCarthyism. While the greatest effects of the drive to use political loyalty as a criterion for employment were felt in the Federal and state governments, loyalty programs also reverberated through private business.

Starting with the Truman Executive Order of 1947, which was subsequently replaced by the Eisenhower Executive Order of 1953, the Federal Government created a large apparatus for examining the political orthodoxy of employees and applicants. It queried individuals about their political beliefs on application forms; they were required to list their organizational memberships; suspected employees were required to appear before local and regional Loyalty Review Boards. The Civil Service Commission conducted intensive investigations into the political activities of employees and applicants, including checking their names against a file of ten million individuals who had engaged in various kinds of protest activity (including activity specifically protected by the First Amendment). It also checked individuals against the undocumented files of local police "red squads" and the House Un-American Activities Committee, as well as the FBI.

In the private sector, some businesses, like General Electric and A.T. and T., employed their own loyalty questionnaires. Some, like R.C.A., refused to hire applicants or discharged employees who declined to testify before legislative committees investigating subversion.[25] Other businesses announced a general policy of not hiring Communists or other subversives. There were also many more discharges for suspicion of disloyalty than appeared on the surface. If an employer wanted to avoid the controversy of dismissing alleged subversives, he could usually find other grounds for discharging the employee.

A major case which challenged discharge for political beliefs in private industry arose because the employee was covered by a collective bargaining agreement which pledged that discharge could only be upon "just cause." In Black v. Cutter Laboratories in 1955 the employer discharged an employee on the ground that she was a Communist.[26] An arbitration board found that the real reason was her union activity and ordered her reinstated. The California Supreme Court reversed, stating that her reinstatement violated public policy because her "active support of Communist principles and practices stands proved..." The Supreme Court refused to review on the ground that the term "just cause" could be construed to embrace membership in the Communist Party, and since this was then a question of construction of a local contract under local

law, no Federal question was presented.

"Generally speaking," according to Emerson and Haber, "private (loyalty) programs (were) characterized by a lack of clarity as to standards, the absence of formal procedures for making decisions, the lack of judicial supervision, and the active participation of private pressure groups in the process."[27]

CHANGING TRENDS: 1950-1970

The 1960s saw the civil rights movement at its zenith, which culminated in the passage of the Civil Rights Act of 1964 and its amendment in 1972 to broaden its application and enforcement. The purpose of the Act is to end discrimination on grounds of race, color, religion, sex or national origin in all employment practices, among all public and private employers of fifteen or more people. Passage of the Act has not only changed employment practices, but has also caused many employers to re-examine all their employment criteria, not just for groups covered by the Act. Following passage of the Civil Rights Act, Congress in 1967 passed the Age Discrimination Employment Act, which prohibits employers from discriminating on the basis of age (limited to those between 40 and 65) in regard to hiring, promotion, discharge, compensation and other terms of employment. In 1973, the Rehabilitation Act was passed, prohibiting discrimination against the handicapped in Federal employment, by Federal contractors and subcontractors, and by any welfare, educational, medical or other entity that is a recipient of Federal funds.

While the Federal Government was intervening in the employment process to assure fairness for racial, ethnic and religious minorities, for women, for the aged and the handicapped, changing social mores were intervening to challenge the long-time insistence that exemplary private lives, a clean-cut appearance, and conservative dress are valid criteria for employment. It became very difficult for employers to bar divorcees from employment when one out of three marriages now ends in divorce. It is hard to insist that men and women who violate convention by living out of wedlock be disqualified from employment when this is becoming an increasingly common pattern that is gaining casual acceptance. It is not easy to insist that men wear their hair short when the Chief Justice of the United States wears his over his collar, or to insist that women wear skirts to the office when the first lady greets foreign dignitaries wearing a pants suit.

The historical stages of employer practices that we have been summarizing were similarly depicted (with his customary satirical touch) by John Kenneth Galbraith in his new book, The Age of Uncertainty.[28] (This formed the basis for Galbraith's recent television series for the British Broadcasting Company shown here on American public television.) To illustrate his main themes about the contemporary big corporation, Galbraith described a hypothetical company named Unified Global Enterprises -- UGE ("the H is silent") -- whose history typifies the progress of large corporate enterprises in the United States between the 1870s and 1970s.

In Phase one, James B. Glow came to Chicago from Scotland in 1871, opened a butcher shop, and built it by the end of the century into Glow Packing Company, one of the Big Five packers along with Swift, Armour, Wilson, and Cudahy. In managing their enterprise, Galbraith writes, "James Glow and his two sons...knew many of their men by their first names; they watched over their families' lives. Their rules were firm and implacable. No single worker could board with a married employee. With husbands away on the night shift, that was temptation. All employees were visited regularly by the company social and religious advisor, who was paid a modest salary by the company itself...Along with their weekly pay, Glow employees received, all at no expense, Bible lessons and tracts warning against alcohol, tobacco, spendthrift living, and immorality...." The firm had a strong blacklist against union organizers, and it knew how to get rid of any "troublemakers" who might have slipped into the workforce.

Glow Packing expanded in the early 20th century into a multi-line, family-run firm, buying Uni-Cola in 1922 and becoming Glow Food and Beverage in 1929. After steady expansion through World War II, the acquisition of a wide variety of subsidiaries, and the final disappearance of any Glow heirs in the active management of the company, the firm became Unified Global Enterprises in 1955. UGE was "big in pharmaceuticals, electronics, missile guidance systems, computer software, modular dwellings, along with its insurance company, UGEAIR, and UGEHOTEL." By the 1970s, UGE was seventh on Fortune's list of 500 top industrial firms, with sales operations in 62 countries and substantial manufacturing operations in 24.

Run now by professional managers rather than family members, UGE's table of organization, Galbraith says, is really a circle, not a hierarchy. At the center is central top management: the president, his various vice-presidents, treasurer, and counsel. The next circle features the heads of the UGE subsidiaries and their top executive staffs. The next circle is made up of specialized knowledge experts -- engineers, scientists, advertising experts, lawyers, etc. "Next beyond are secretaries, clerks, typists -- the white collar workers. Next are the men

who supervise production on the floor, get out the goods. In the final outer ring are the blue-collar workers."

How does the UGE management deal with the private lives and manners of its executives and employees? As Galbraith put it:

"James Glow's concern for the chastity of his workers and their wives is remembered around Chicago only as a minor manifestation of a dirty mind. [President] Howie Small's mind turns to his working force only when they want a wage increase or threaten a strike. He then calls for a firm stand on principle by those responsible and later accepts a compromise."

There has also been, in the new UGE, an end to direct employer involvement in the worker's off-the-job life. "Once the company housed its workers, saw to their health, was concerned with their education. Those tasks have now gone or are going to the city or the state. Once the company instructed the workers as to its wishes. Now it asks the union. In talking of the power of the modern corporation, an important distinction must be made. Its public power increases. Its parental power steadily diminishes." And with good reason, Galbraith observes. "No modern worker...would tolerate even for a day Glow's intrusive and prurient interest in his religious, alcoholic, and sexual preoccupations."

And for its part, Galbraith's prototype corporation has learned that in today's social climate, the old interventionist methods don't serve any helpful business purpose: the company doesn't need to disqualify potentially union-minded applicants or screen out the culturally diverse in order to get good blue collar and white collar workers. As for the specialized professionals and management ranks, the techniques of financial reward, rich benefit programs, and pleasant work environments do the job more effectively than coercion.

In short, Galbraith says, the modern corporation has found far better tools for managing "human resources" than either the harsh anti-union and moral-watching style of founders like James Glow or the patrioteering outlook of their immediate successors.

THE NEW CLIMATE OF THE LATE SEVENTIES

Whether one accepts Galbraith's sardonic portrait of the new corporations or sees business leaders as responding creatively to the new social mores of our times, the fact is that the early 1970s marked the end of a century-long era. What took place was a dramatic redefinition of what are "private matters" in the employment relationship. Throughout the 1950s, as we saw, managements in government, business, and most non-profit organizations set highly restrictive standards of acceptability and morality. It was the era of white button-down shirts, grey flannel suits, decorous-skirt codes for women, company-approved executive wives, and highly conformist rules for off-duty conduct and associations. Then came the social revolution of the 1960s, a period of new assertions of individuality by millions of Americans, from assembly line to executive suite. Beyond the demands for ending employment decisions that used racially and sexually discriminatory standards came demands that hair styles, divergent dress, social-protest activities, arrests without convictions, and many other personal aspects should no longer be disqualifications for employment of otherwise talented and efficient employees. On the job, the new individualism demanded greater freedom in dress and less intrusive supervision. Off the job, employees demanded the right to engage in political and civic activities of their own choice and to pursue dissenting sexual and cultural life styles without the employing organization's interference or reprisal.

With a few exceptions for extreme forms of dress and behavior, these new employee conceptions of privacy have been accepted by most organizations in the 1970s. The American public as a whole has demonstrated that it does not insist that such assertions of individualism be punished, and when clients and customers do not withhold their patronage if clerks or computer salespersons dress differently or wear their hair longer, pragmatic managements conclude that there is no business need to impose a stricter code on their "good performers." The same holds true in the public service. At the point when the public fails to rise in anger when persons who once belonged to allegedly subversive organizations work for government, or if homosexuals are employed, and when the courts hand down decisions rejecting such traditional 1950s rules as irrelevant to proper government standards, executive agencies also conclude that they need not fight to retain the old ways. The result of these major shifts in social norms and public mood is that many organizations in the three employment sectors have significantly redefined their rules as to what is the employer's proper business to know and what is the employee's private affair.

This redefinition of employee privacy has had fundamental effects on employee attitudes toward the three dimensions of citizens' rights in employment record-keeping. In an era when deference toward organizational authority is not high, many employees regard a right to know what is in their records as a safeguard for their newly won privacy rights, and an assurance that organizations are following their professed rules of fair treatment. As for the confidentiality dimensions, there has been a growing feeling among employees that their consent should be

secured before releasing their data to outsiders, and that release without such consent should be limited to extraordinary situations, under proper safeguards.

Having emphasized the role that new statutes -- from the Wagner Act to the Civil Rights Act, from the Fair Credit Reporting Act to the Privacy Act -- have played in shaping employment criteria and modifying verification techniques, it should be noted that this legislation and supporting court decisions are basically reflections of a larger social perception that employers should no longer have the power to exercise control over their employee's lives, or to penalize them for their personal views, or to disqualify them because of their physical characteristics or origins. While employers still have considerable discretion to make decisions about whom they will employ, the balance of power between employer and employee has been shifting dramatically, and the employee "privacy" issue is one aspect of that changing relationship.

CURRENT PRIVACY ISSUES

Though the personnel practices of many employers have changed profoundly during the past decade, it would be quite wrong to assume that all -- or even most -- employers now behave in exemplary fashion. Except where anti-discrimination laws limit their freedom or court rulings curtail the invocation of moral suitability standards, some employers still operate in the mode of the 1950s and early 60s. And even where employers have made the major changes in their hiring and personnel administration practices described above, there is still an important group of privacy issues remaining, about which employers and employees differ and on which American society will have to set lines of policy in the coming decade.

1. Undoing the Legacy of the Past

Since the data-collection practices of most employers in the 1950s and 60s followed patterns of extensive personal investigation of applicants, recording of wide-ranging personal details in personnel files, and inclusion of much supervisory commentary that would not be permitted today, the first problem employers face today is how to bring their usually cumulative personnel record systems in line with their current policies. Since destruction of files is generally impractical, review and purging of improper or undesirable data from personnel records is the logical step. Where some employers have extensive personnel records, in the hundreds of thousands, for example, an alternative procedure is to place all files or file material prior to a cutoff date in "dead storage" and require personnel-department review before such files are used in making any current personnel decisions.

Such purge or destruction policies are obviously the only way for managements to be sure that personal information about race, religion, lifestyle, political activity, arrest records, and similar matters do not exert an influence on current decisions from the file-graveyard.

But how do managements convince their employees that this is in fact being done, and done properly? Should unions or employee-representative committees participate in this purging or retirement program? And how can employees in our era of arms-length attitudes toward authority be sure that their files no longer contain historically-damning information unless they have a right of access to such files?

2. Setting Proper Standards for the Present

What kinds of personal information is it appropriate for an employer to collect or require to be disclosed today of job applicants? For example, what information about physical health conditions or prior psychiatric treatment may employers require, for the average job or even for jobs requiring special qualities and stresses? Should any question about prior arrest record or convictions not related to this employment be included on application forms? How far should any employer look into credit standing and lifestyle when jobs do not involve such occupations as bank teller or CIA employee?

Once a person is hired, what attention should employers pay to off-the-job activities of their employees, as when a corporate employee engages in community action for some cause that is highly unpopular or a government employee criticizes the policy of his agency in public speeches or articles prepared on "his own time"? Must the employer provide special days or hours of work to employees with religious affiliations that do not allow them to work on certain days other than Sundays, to accommodate the employee's private religious convictions? How much must an employee in various types of employment reveal about his or her personal and family finances, on a regular basis, in order to retain the job? What kind of performance appraisals should be done about employees, and what aspects of personality and behavior should be included in such reviews? Does it violate employee privacy to use sensitivity training or other self-revealing training techniques? What information about an employee's performance, medical history, benefits rights, or work history should an employer release outside the company, if anything, without the employee's consent or a legal order?

3. Defining Proper Procedures for the Present

Equally important in privacy terms as what personal information is collected are the techniques for doing this. Should personality tests, polygraphs, stress-interviews, neighborhood checks, and similar "verification" techniques ever be used in non-government-security employment? If so, in what situations are any of these justified? What physical surveillance of employees, especially as a "general preventive," should employers be allowed to conduct, as with hidden listening devices, closed-circuit TV monitoring, use of planted agents in work forces, etc.? Should an employee be allowed to see his or her personnel records, either on asking to do so or as a regular "file-review" procedure? If so, are there any parts of the employee's file that would not be open to such access, such as performance evaluations, promotability codes, etc.?

These are a sampling of the kinds of privacy issues that represent the current focus of employee privacy concerns. A moment's reflection shows that most of them have a record-keeping aspect -- either the information is collected because a form or procedure requires that it be obtained and recorded or a manager records it as an observation or judgment about the employee's actions. It is this record-keeping aspect that is our prime focus in this report, and to move to the next phase of our inquiry, we turn to an examination of just what employers are collecting and/or recording today for hiring and personnel administration.

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Chapter Four. CURRENT EMPLOYER DATA PRACTICES

OVERVIEW

No study has been done of current personnel data practices by a cross-sectional sample of American employers, or even a representative sample of practices in one of the three major sectors of employment -- business, government, and non-profit organizations. However, there have been studies of specific types of employers and this chapter presents highlights from the most useful of these for our area of inquiry.

The first study was a 1976 survey on selection procedures and use of personnel records conducted by the Bureau of National Affairs, Inc., with responses by personnel executives from 196 organizations participating in its Personnel Practices Forum for 1975-76. The great majority of these were business firms, but there were some government agencies and non-profit organizations among the respondents.

The second study was an in-depth analysis of employee record-keeping practices by nine large national corporations, conducted by the business consulting firm of McCaffrey, Seligman, and von Simpson in 1976.

Finally, a variety of sources were used to report some major trends in government personnel practices, and to give examples of the scope of data collection and testing procedures used in special occupations, such as police officers.

Overall, these reports confirm our observation in the preceding chapter that the past decade, and especially the past three years, has been a time of significant policy revision for many employers, in all three sectors. For various reasons noted in these reports, the scope of information collection in many organizations has been decreased in some areas but increased in a few others; more extensive rules of internal confidentiality and data release to outsiders have been promulgated; and some employees in many firms have been given a right of access to at least some of their personnel records where no such rights had been recognized (or communicated to employees) previously. In addition, data-security policies of a rather general kind have been strenghtened for both manual and automated files by many employers.

THE 1976 BUREAU OF NATIONAL AFFAIRS SURVEY

One useful picture of organizational practices comes from the report of a survey done in 1976 by the Bureau of National Affairs, Inc., Washington, D.C., a private research organization in the management field.* BNA maintains a Personnel Policies Forum of personnel executives from about 300 corporations, government agencies, and nonprofit organizations. About 65% of these (196) responded to a BNA questionnaire in 1976 on "Selection Procedures and Personnel Records." Of the 196, 54% are manufacturing companies, 27% nonmanufacturing, and 19 percent nonbusiness enterprises (educational institutions, hospitals, and government agencies). 51% of the respondents reported on organizational locations with 1,000 employees or more, and 49% with less than 1,000 employees. The organizations were well distributed by region, 23% in the Northeastern states, 34% in the South, 24% in the Northcentral region, and 19% in the West.

Several limitations about the BNA survey should be noted at the outset. The BNA respondents did not represent a cross-section of industrial employers, government agencies, and nonprofit organizations. Rather, they probably represent the more "progressive" and "innovative" managements, the kinds that belong to such research-oriented and policy-developing groups as the BNA, the Conference Board, the American Management Associations, and similar groups.

The survey also produced self-reporting by personnel executives as to what their policies and practices were, without any independent verification of how accurately such reports captured the situation in these organizations. Furthermore, the survey did not assess how valuable these data were to the respondents, and how they were actually used. As a result, the survey is most valuable as an indication of what kinds of personal data "enlightened" employers collect today in the course of making hiring and personnel administration decisions. Finally, the BNA survey did not deal with internal confidentiality of information or policies on release of current or ex-employee data to outsiders other than prospective employers; this means that the survey covers about 60% of the privacy and record-keeping practices of its respondents, not the entire spectrum with which this report is concerned.

Noting these limitations in the BNA survey does not mean that it is of low value, but only that its limitations must be noted and some of its seeming "trends" viewed with caution. So used, it offers a useful snapshot of current employer practices among firms probably representative of "leading managements" in their field.

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* Selection Procedures and Personnel Records, PPF Survey No. 144, The Bureau of National Affairs, Inc., Washington, D.C., September, 1976.

The survey covered five main areas of organizational activities: (A) application forms; (B) verification of application information; (C) pre-employment tests; (D) interviewing procedures; and (E) record-keeping on applicants, employees, and former employees.

1. Application Forms

TABLE 1 -- Application Forms for Nonmanagement Jobs

	% of Companies					
	By Industry			By Size		All
	Mfg.	Nonmfg.	Nonbus.	Large	Small	Companies
n =	106	53	37	100	96	196
Type of information included on application forms --						
Previous employment record	100	100	100	100	100	100
Education record	99	100	100	99	100	99
Military service record	89	88	86	93	81	87
Personal references	60	71	65	56	72	64
Medical history	54	52	41	53	49	51
Police/arrest record	36	29	59	43	34	39
(Convictions only)	(8)	(19)	(8)	(12)	(10)	(11)
Credit record	9	25	5	14	11	13
Other verifiable items (see discussion)	9	19	19	19	8	14
Same application form used for all nonmanagement jobs	80	88	95	84	85	85
Have conducted validation studies of application blank items	11	12	22	13	13	13
Have used biographical inventories or weighted application blanks	3	4	8	6	2	4

The BNA report commented in explanation of Table 1:

"It should be noted that the types of information listed in the survey questionnaire do not include the basic personal information such as name, address, age, sex, and so forth that is common to most application forms since these items usually are not investigated or used as the basis for rejection. Under government regulations, it is now unlawful to select employees on the basis of certain characteristics such as age or sex and many employers have changed their application procedures as a result."

Government pressures have played an important role in shaping current applications. Two respondents commented on this as follows:

> "Our applications conform to Federal standards. The preliminary application is for job-related information only. After selection has been made, additional information is requested in relation to an individual's family history and personal status." (Large central manufacturing company)

> "Because of EEOC and the Pennsylvania Human Relations Commission, I have been considering eliminating the time-honored questions from the application, i.e., height, weight, marital status, number of children, own your home, rent, etc. I must agree that whether or not I am divorced is none of my employer's business. In today's world that type of information is only fodder for gossip." (Small eastern hospital)

BNA noted that there were significant differences in the application forms for certain groups of employees:

- Clerical application asks about outside activities and interests. Production application asks about shift work, weekend work, and overtime. (Small central manufacturing company)

- Professional: more space allowed for work experience and education. Also, personal references requested (not requested on non-professional form). (Small eastern manufacturing company)

- Different forms used for sales applicants -- additional items for evaluating sales potential. (Large southern insurance company)

- Factory application is a shortened version of office. (Large central manufacturing company)

- On professional applications, medical history, professional references, professional society memberships, patents, books and articles, and previous security clearance. (Large eastern manufacturing company)

BNA notes that validation studies of application blank items have been conducted in 13 percent of the responding companies, more frequently by nonbusiness organizations than by either manufacturing or nonmanufacturing businesses. As a result of the studies, "some respondents indicated that certain questions had been eliminated from the application form without specifying what questions. In some companies, the form was revised to eliminate questions on financial information, marital and family information, date and place of birth, and so forth."

"Biographical inventories or weighted application blanks are used in very few PPF companies--4 percent of the total sample--and in nearly all these companies they are used only for higher level or professional positions. Although one company has discontinued using weighted applications for professional employees, other companies report they have been 'very effective,' and one respondent says they have reduced turnover."

A. Verification of Application Information

The BNA report notes that all the information included on the application form is not regularly verified by the prospective employer:

> "Often whether or not the information is verified depends on the type of work involved or the level of the job. One PPF member notes, for example, that 'information is verified by phone or mail when deemed necessary on higher level of non-management positions.' The method used for verification also may depend on the type or level of the job; frequently two or all three methods--phone, mail, or outside investigative agency--are used. At a large eastern hospital, for example, phone or mail is used to verify information for most applicants, but a 'complete background check' is made by an outside agency for positions in Security, Cashiers, and those management positions that will report to CEO [Chief Executive Officer] or a department head."

The BNA report summarized the main points of the verification data as follows:

- Previous employment--This information is verified in more than nine out of ten companies. One respondent notes that verification with previous employers includes "attendance and information if ever injured on the job." At one PPF company where the policy is not to verify this information, it would be verified "in extreme situations warranting." Another respondent says that the Personnel Office will seek information on previous employment "only if requested by a hiring department."

- Education record--Slightly more than one half (53 percent) of the responding companies verify applicants' education records. Manufacturing companies are less likely to verify this information than nonmanufacturing or nonbusiness organizations, and one PPF member says that the education record is verified only for applicants with no previous work experience.

- Military service record--This information is verified by 13 percent of the PPF companies. A much higher percentage of nonbusiness organizations verify military service than do either manufacturing or nonmanufacturing. One reason for this is that many government agencies are required to give

extra points on entrance requirements to veterans. The personnel executive at a large western city government explains that "for the purpose of determining eligibility for veterans preference points an applicant must bring proof of service to the final employment interview. Proof would be DD Form 214 or VA letter concerning disability."

- Medical history--About one sixth of the companies verify the applicant's medical history. Sometimes this is done only where a medical problem exists and the applicant is requested to provide details for verification. In most companies, prospective employees are required to have physical exams (see below) which would include verification of past medical problems; therefore, outside verification would not be necessary.

- Police/arrest record--This information is verified by 17 percent of the responding companies; as noted above, only convictions are investigated in many firms. Comments by PPF members indicate practices in this regard:

  > Require information in convictions only, not arrests; verify by phone if job related, recent, or other than minor crime. (Large western county government)
  >
  > Because Federal Equal Employment Opportunity agencies state arrest records discriminate against minorities, our application form has been modified to include only convictions or sentences for violation of the law, other than minor traffic violations. (Large southern state university system)
  >
  > Because we are a hospital, we require a waiver to do a police check from the employee. We do hire people with prior police records provided the record is not one which, if a repeat incident happened, is something we could not live with. Each case is looked at individually and we have gone as far as to talk with parole officers, etc. (Large eastern hospital)

- Credit record--Applicants' credit records are investigated by 10 percent of the PPF companies. This practice is far more common in nonmanufacturing (23 percent) than manufacturing (7 percent), and is not found in any of the nonbusiness organizations responding to the survey.

Nine out of ten respondents answered that if their verification showed "any negative or false information" given in response to the questions asked on the application form, this would be cause for rejecting "an otherwise qualified applicant." Discovery of "deliberate" or "willful" falsification would in a fourth of the organizations be cause

for "a flat rejection of the applicant or discharge if the falsification is discovered after hiring." Many employers put a statement to this effect on the application form.

- In about one fifth of the PPF companies, false or negative information with regard to previous employment or that is directly related to the job being applied for would be a cause for rejection of the applicant. For example, "the reason for leaving previous employer must check," and "if employment reference checks reveal established pattern of absenteeism or poor work performance, these could result in rejection."

- In more than one fourth of the responding companies, it depends on the nature of the information and the circumstances surrounding the situation whether false information is considered a cause for rejection. At one company, false information is a cause for rejection if it is "blatant," at another company if "provable and significant," and several employers emphasize that they consider each case individually. For example, "Depends on the falsification of the record. Obviously, if an applicant stated he had a degree and in fact did not, this may disqualify him. Each case would be judged independently."

(These figures square with the investigations of arrest record and military discharge uses by employers, which is that most employers do not inquire into the surrounding circumstances of such records but use them to screen out "less desirable" applicants when the labor supply offers a surplus of potential employees.)

B. Pre-Employment Tests

The BNA survey looked at three main types of pre-employment tests: physical (health) examinations, lie-detector tests, and psychological tests.

1. Physical Examinations

On physical examinations, the BNA report notes:

"Nearly three fourths of the PPF companies give pre-employment physical examinations to prospective employees. Manufacturing companies (85 percent) are more likely to give physicals than nonmanufacturing (54 percent) or nonbusiness organizations (73 percent) and more large companies (79 percent) give them than smaller ones (70 percent). Applicants for production jobs are somewhat more likely to be given a physical exam than applicants for office jobs. In a number of companies it depends on the location and type of job whether employees are given physical exams. At a small western manufacturing company, a physical examination is required only if the applicant does not "satisfy questions on the medical history statement form," and at a large eastern manufac-

turing company the industrial nurse conducts an initial screening and "may recommend examination."

"In 70 percent of the companies that give physicals, the same examination is given to all applicants. In the companies where the examinations differ, the most common difference is that back X-rays are required for production employees but not office employees. One PPF member says that all applicants have the same examination "but standards vary by occupational class." The exam for office employees at a large central manufacturing company is limited to "urine, ears, eyes," while production employees have a complete "physician's physical."

2. Polygraph Tests

Only 4 percent of the BNA respondents require lie-detector, or polygraph tests of any prospective employees. In those companies that do require it, the tests are usually given only for certain jobs, such as the following:

- o A large airline company -- cargo agents at JFK airport in New York only.
- o A southeastern trucking firm -- all positions in some localities and bargaining unit personnel only in some localities.
- o A large eastern bank -- high security positions in Coin and Currency (cash handling) and Securities Processing.
- o A large central city government -- police and firemen.
- o A large western city government -- law enforcement and closely related positions.

3. Psychological Testing

The BNA survey defined psychological tests to cover measurement of "skills, ability, intelligence, or personality," and found that 42% of their respondents used one or more such tests.

The BNA report noted:

- o Job categories for which tests are used are most likely to be office/clerical; in more than four fifths of the companies using tests, they are used for office positions. In one fifth of the companies using tests, they are used for production jobs, in one sixth they are used for data processing jobs, and in less than one tenth they are used for sales or service jobs. Other types of jobs for which tests are used include actuarial trainees, truck drivers, police and firemen, and various professional positions. Although management selection procedures were not specifically covered by this survey, several respondents note that tests are used for management trainees and to select candidates for supervisory or foreman jobs.

- o Validity studies of the tests used have been conducted by slightly more than one half the companies using tests; such studies have been conducted by a larger percentage of large companies using tests than small ones and by seven out of 10 nonbusiness organizations using tests compared to one half of the business firms, both manufacturing and nonmanufacturing.

- o Tests used by the PPF companies include a large number of skill tests for typing, spelling, shorthand, math, and so forth developed by the companies themselves. About one half of the specific tests listed by the respondents are of this variety. In a few companies that are subsidiaries of large organizations, the tests used have been developed for use within the specific organization and are not available for use elsewhere. This is true, for example, of the Bell System Qualification Test (BSQT) battery of tests for which validation studies have been conducted in a number of telephone companies.

Several personality tests were listed among those used. For example, under "production/apprentices" and "police/fire" there is a listing for the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory. Under "supervisory selection" were listed the "Cleaver Self-Description Profile" and the Science Research Associates (SRA) "Adaptability Test."

C. Interviewing Procedures

The BNA report noted that "interviewing of job applicants is considered the most important aspect of the selection process in a majority of the companies responding to the survey."

Most applicants are interviewed more than once; the personnel department, the immediate supervisor, and the department manager all may be involved in the pre-employment interviews. However, the final decision to hire is made by the immediate supervisor in about one half of the companies.

The BNA report made the following observations about interviewing procedures:

"In nearly nine out of ten PPF companies, job applicants are given an initial interview in the company employment office and, in 87 percent of the companies, applicants are interviewed by the immediate supervisor of the unit where the job opening exists. A representative of the personnel department conducts an in-depth interview of applicants in 71 percent of the companies. In 60 percent of the companies, applicants have all three of these interviews.

"A standard interview format to ensure that interviewers elicit the same information from all job applicants is used in about one fourth (26 percent) of the responding companies. This procedure is found slightly more frequently in small firms (28 percent) than in large ones (23 percent) and is more common in nonbusiness organizations (36 percent) than in either manufacturing (24 percent) or nonmanufacturing (21 percent). One PPF member notes that in his company a standard format is used by interviewers in the personnel office but not by supervisors or others who also may interview job applicants.

"A written (or printed) interview form is used to record information on the job applicant in about one fifth (19 percent) of the PPF companies. There are relatively small differences in this practice between large and small companies and among the industry groups.

"Interview procedures have been validated by 2 percent of the total sample of PPF companies, with nonbusiness organizations accounting for three out of the four respondents that have conducted such studies. As the personnel officer of a large state university notes, 'Until guidelines are issued, interview procedures at this time would be difficult to validate in order to meet future federal requirements.'"

In 56% of these responding organizations, interviews are regarded as "the most important aspect of the selection procedure." This importance is reported as slightly greater in manufacturing companies than the other organizations covered. The importance assigned to interviewing is up from a 44% report of "most important" factor in a 1963 survey done by BNA, leading the report to speculate that this may be compensation for decline in the use of pre-employment tests.

The final decision to hire is made by the immediate supervisor in 52% of the organizations, and by the department or division head in 37%.

In 19%, a personnel officer participates in the decision, either alone or with the supervisor or department head. Sometimes, who makes the final decision depends on the job for which the applicant is being considered, with several people having to concur or one of several people having a veto power in certain personnel categories.

D. Applicant and Employment Records

The importance of keeping good records on the hiring process and on employees once hired has been affected significantly by government reporting duties and regulatory programs in areas such as equal employment.

1. Applicants Not Hired

Looking first at record-keeping on applicants not hired, the BNA study reported:

"Records on job applicants who are not hired are kept for one year or less in the majority of PPF companies. Very few of the responding companies keep applicant records for more than three years. Several PPF members note that they keep applications on file for the 'legal length of time,' and two respondents point out that while they keep most applications for six months or one year, those for applicants over 40 years of age are kept for three years. Respondents were not asked specifically whether they recently had changed their policies on applicant files, but one PPF member says, 'We recently extended the period from one to five years' for keeping applications on file.

"A distinction between active and inactive applicant files is indicated by several respondents. For example, at one PPF company, applications are kept in the active file for 45 days and inactive for one year; at another firm it is one year active and two years inactive; and a third company has a 90-day active file and seven years inactive. Several companies that keep applications indefinitely note that they are kept in the active file in the employment office for one to two years and then are put in storage.

"Items kept in applicant files vary considerably, although in more than one fourth (28 percent) of the companies only the application form and/or resume are kept on file. Information obtained from checking references is kept in one fifth of the companies; results of any pre-employment tests are kept in 18 percent of the companies; and notes or evaluations of interviews are kept in 16 percent. Other items that are kept in applicant files in some companies include medical records, credit checks, police checks, or 'any background information collected.' More than one tenth of the personnel executives report that they keep everything on file, for example, 'anything attached to the applicant's original application, such as test results, reference checks, etc.' and 'all papers generated during his tenure as an applicant.' One PPF organization keeps the application records 'plus whatever else the applicants would like placed with their application.'"

As to the impact of government regulatory programs, the following were examples of company policies designed to satisfy retention needs for applicant records:

- Records kept include tests, application, separate EEOC record which includes disposition and interview analysis. (Large western food service company)

- For affirmative action program--race, sex, job applied for and reason not hiring. (Small central manufacturing company)

- Card file (3x5) kept indicating outcome of interview and reason for rejection. (Small eastern manufacturing company)

- Scores and rating results for each applicant are recorded in permanent exam file and ultimately microfilmed. (Large western county government)

- Date, name, race, sex, action taken put into computer system. (Large southern utility)

2. Current Employee Records

The following is the BNA summary of current employee file practices:

"In response to the question 'What types of records are kept in the personnel files of present employees?' two fifths of the respondents said 'all' or 'everything pertinent' to the employee's pre-employment record and work history with the company. Of the separate types of records listed by the remaining 60 percent of the personnel executives, those mentioned most frequently were application forms or resumés, performance evaluation forms or records, payroll information and/or salary history, personal job history, medical information and any disciplinary records. Items listed by 5 to 15 percent of the respondents as being included in personnel files are reports of reference checks or other pre-employment tests, education records, training records, attendance records, and any awards, commendation letters, or 'laudatory memos' received by the employee. Another 20 or more items, such as copies of ID pictures, counseling reports, and news articles about the employee, are listed by one or two respondents. In some cases the items are directly related to the type of business the company is in, as for example, bonding forms in banks and patent agreements in research labs."

Here are a few examples of the records kept in personnel files:

- Application, performance reviews, absenteeism, salary changes. (Small central insurance company)

- Salary, application, training, insurance and pension benefits, status changes. (Small western bank)

- Application and/or resume, personnel history update sheets, copies of diplomas and/or degrees, change of classifications and/or rates, employment verifications made by company and/or requested by outside parties, award letters, moving agreements made with the company, employee evaluation information, disciplinary information. (Small southern manufacturing company)

- Employment application , training records, DD Form 214, medical reports, accident reports, appraisals, attendance record, commendatory letters, etc., and complaint letters if they can be substantiated. (Large southern utility)

- Employment application, withholding statement, status changes, and counseling forms. (Large central hospital)

- Salary changes, deduction authorization, appraisals, letters of commendation. (Large central utility)

- Application form, merit and promotion increase recommendations, benefits forms. (Large eastern manufacturing company)

Turning to employee access, nearly two thirds (64%) of the respondents said employees had "the right to inspect their personnel records." "Not surprisingly," the report noted, "this policy is more common in nonbusiness organizations (86 percent) because of the public nature of their operations."

TABLE 8 -- Present Employees' Personnel Files

	% of Companies					
	By Industry			By Size		All
	Mfg.	Nonmfg.	Nonbus.	Large	Small	Companies
n =	106	53	37	100	96	196
Employees have right to inspect their personnel files	60	57	86	67	62	64
Employees may protest information in their files	35	33	57	44	32	38
Company has procedures for safeguarding personnel files	89	87	97	93	87	90
Recent changes have been made with regard to personnel files	30	35	41	35	30	33

The report added some specific situations of interest.

"One respondent whose company has facilities in several states notes that their policy is not to permit employees to see their personnel files except in California where it is now required by law. In some companies, employees are permitted to see only certain items in the files. For example, at one small manufacturing company, employees 'can see their per-

sonnel history card, also attendance record,' and at a large eastern hospital, employees are not permitted to see 'references from other employers, good or bad.' A number of respondents note that employees may inspect their personnel files only with the supervisor present."

Turning to procedures for challenging or protesting information in personnel files, this was policy in 38% of the responding organizations, again more often in the public sectors. "The most frequent procedure is for the employee to make a written or verbal protest directly to the personnel manager; this is the approach used in about two fifths of the companies with such procedures. In more than one fourth of these companies, protests can be handled through the regular grievance procedure, and in the remaining companies protests are handled by a variety of persons from the immediate supervisor to the company president." Examples of procedures for protesting information in personnel files include the following:

- Direct interview with personnel and/or plant manager. (Small southern manufacturing company)
- Written request to review with Director of Personnel. (Small southern manufacturing company)
- May protest to President in writing. (Small eastern college)
- File grievance; appeal to Civil Service Commission or Employee Relations Panel; or lawsuit. (Large western county government)
- File protest with IR [Industrial Relations] Vice President -- reviewed with legal department. (Large western manufacturing company)

Ninety percent of the organizations have procedures for safeguarding personnel information. "The safeguards noted generally are of two varieties--limited access and files locked outside working hours or when no one is in attendance. In most of the PPF companies, the files are controlled by the personnel department and access to them is limited to certain authorized persons; in one large food service firm 'only one individual can release files.'"

Among the report's comments on safeguard procedures were the following:

- Active files are kept in secure area, locked at all times. Employees, supervisors, and department heads may review records only in this room. Only the Chief Executive Officer (CEO), the Administrator, and the Director of Employee Relations are permitted to remove a record, with a signature. (Large eastern hospital)
- These procedures vary by department but personnel practices state that personnel files are confidential and guidelines are given for maintenance and transfer. Access to these

files is granted to specified people on a need to know basis. (Large southern utility)

- o They are kept in locked cabinets and only authorized personnel are allowed to use them or give out information contained in the files. (Large southern manufacturing company)

- o Records stored in vault with 24-hour guard plus burglar alarm. (Large southern manufacturing company)

- o Limited access of individuals within personnel; files are not allowed to leave personnel department; managers and supervisors are permitted access on a need to know basis. (Large southern manufacturing company)

"A third of the respondents said their practices for handling employee files had 'changed in recent years.' Several PPF members say it is only recently they have permitted employees to have access to the files. Some companies say they are being more careful about what goes into the files--more documentation is required for information placed in personnel files, and a few companies now require employees to sign any items that are put into their files. In some cases, companies have gone through their personnel files and eliminated 'extraneous' or 'miscellaneous' items 'to comply with current laws.' While many companies have tightened security for their personnel files in recent years and made access to them more limited, employers in the public sector have had to do the opposite. As one PPF member from a large county government reports, 'Access has been expanded to include more persons with personnel functions and employee access.' Changes with regard to specific items in personnel files are mentioned by several respondents. For example: 'No tests in file, written warnings destroyed after one year,' 'no longer get reference reports,' 'don't file applications.' The situation is summed up by one PPF member, who says his company is taking 'more care as to what information is placed in the files.'"

E. Records on Former Employees

More than half the respondents (53%) keep the records of former employees permanently. Table 7 shows retention policies, how responses to requests are handled, and whether policies have changed recently in this matter.

TABLE 7 -- Former Employees' Records and References

	% of Companies					
	By Industry			By Size		All
	Mfg.	Nonmfg.	Nonbus.	Large	Small	Compan
A. Employment records are kept on file n =	106	53	37	100	96	196
Indefinitely/forever	53	58	43	51	54	53
One to three years	10	12	19	9	15	13
Five to eight years	20	14	32	19	22	21
Nine to ten years	8	12	3	12	4	8
Other	4	4	0	4	1	3
(No response)	(6)	(2)	(3)	(4)	(4)	(4)
B. Procedures followed for requests for information on former employees						
Company will --						
Confirm dates of employment	100	98	95	97	98	97
Answer written requests	90	94	95	90	94	92
Give information over telephone	58	67	78	59	70	64
Indicate whether would rehire	60	62	65	52	71	61
Provide wage and salary information	46	40	65	44	52	48
Permit contact with former supervisor	18	13	35	13	27	20
C. Recent changes have been made in practices with regard to former employees' records and references	34	38	22	34	31	33

Percentages may add to more than 100 because of rounding.

The BNA report notes:

"In three fourths of the responding companies, all records in the personnel files of former employees are kept, for example, 'everything ever developed; from selection process through entire employment history.' At a large utility company only 'basic' records are kept with 'nonessential' items cleared out of the files. Among specific items kept in the records of former employees at some PPF companies, the following are included (in addition to application information and employment history): salary or payroll records, disciplinary actions, performance evaluations, health records, safety records, attendance records, benefit or insurance claims, training and educational accomplishments, commendations, legal actions, reason for termination, and rehire status.'"

"Many respondents indicate that, after a period of time, the records of former employees are put on microfilm and at this point the records may be culled. In some firms, only medical records of former employees are kept permanently and in others only earnings records are kept forever."

In the matter of furnishing information about former employees to prospective employers, the following were the observations made in the BNA report:

"Several respondents indicate that they do not provide any information unless the request is accompanied by a statement signed by the former employee authorizing the release of the information, and many employers specify that all requests for information on former employees must be handled through the personnel department...

"Nearly all companies will confirm or verify dates of employment, and 92 percent will answer written requests for information on former employees. About two thirds (64 percent) of the companies will give information over the phone, although a number of respondents say they do this only 'rarely,' 'selectively,' or 'as little as possible.' In 61 percent of the companies, the question whether the former employee would be rehired is answered, although one respondent says only 'if the answer is yes.' Small companies (71 percent) are more likely to give this information than large ones (52 percent).

"Wage and salary information is provided by slightly less than one half (48 percent) of the PPF companies, and nonbusiness organizations (where such information frequently is a matter of public record) are more likely to provide this information than business firms. Many companies specify that they will only verify salary information and often only with a written authorization from the former employee. One PPF company notes that it will provide only the figure for the former employee's salary at the time of termination.

"Contact with the former employee's supervisor is permitted by only one fifth of the responding companies; this policy is more common in small organizations than in large ones and in nonbusiness compared to business firms. Two PPF members say contact with the former supervisor usually is not permitted but may be 'under special circumstances.'"

A third of the organizations report recent changes in procedures for handling such requests and some have such re-evaluations pending. The study notes:

"In a few companies the changes involve keeping former employee records for a longer period of time; some companies will no longer give information over the phone; and some companies now insist that all inquiries be handled through the personnel department. In most of the companies reporting changes, they now are more selective or restrictive in the information they will provide." One PPF member reports: "We are very careful in giving out information." Examples of comments on recent changes in this area include the following:

- On June 12, 1975, we published a new policy titled "References." Prior to this time anyone and everyone was giving references. (Large eastern hospital)

- No contact with employees other than personnel is allowed; no negative or judgmental information can be released. (Large eastern manufacturing company)

- More careful in discussing individual's poor work record and reasons for discharge. (Small central manufacturing company)

- No longer answer "rehire" questions. (Large western manufacturing company)

"For nonbusiness employers in the public sector, more, not less, information may have to be provided on former employees. This is true for Federal Government agencies subject to the Freedom of Information Act and for state and local agencies with similar statutes. The Personnel Director of a large state institution notes that now "certain information must be made available in compliance with the Texas 'Open Records Act.'"

Limitations of the BNA Survey

In addition to the points noted before the presentation of the BNA survey report, there are several other limitations to the survey that deserve noting. As Dr. Jesse Orlansky put these at the review conference on the first draft of our report:

"The BNA survey is perhaps useful in suggesting the type of data sought by employers. It says virtually nothing about the worth of these data to the employer, i.e., whether he has any good reason to collect it in the first place. For example, less than 15 percent of the companies have conducted validation studies for items on their application forms; less than 5 percent use biographical inventories or weighted application blanks; less than 10 percent of the companies have indicated validation studies of the tests they use; only 60 percent of the interviewers receive special training; only 2 percent of the companies have conducted validation studies of the interviews. The notion that 90 percent of the companies have procedures for safeguarding personnel files is probably irrelevant if not misleading; this protects files from the char force. It says nothing about the informal exchange of personnel data by personnel managers, which is very widespread and of great significance to potential employees."

We concur with these observations, and if all that was available to assess employer data practices was the BNA survey, we would be able to make very limited judgments about what current practices are. However, read alongside the reports of other studies presented in this chapter, and our own on-site studies of organizational practices, we believe the BNA survey offers a useful perspective on what personnel executives say their policies are, how they report they have changed, and what forces they see as having prompted such changes.

THE SELIGMAN STUDY OF NINE LARGE BUSINESS FIRMS

In 1976, a Study Team from the consulting firm of McCaffery, Seligman, and von Simson, New York City, conducted on-site studies of the employee record-keeping policies of nine large national corporations.* The purpose of the study was to learn about the personnel data practices of each firm, analyze their privacy implications, and make recommendations to the firm's corporate clients not only about any remaining privacy issues in personnel record-keeping but also to guide corporate responses to the inquiries of the Privacy Protection Study Commission. The director of the study was Naomi Seligman, and the companies studied were:

Inland Steel Company	Ford Motor Company
Equitable Life Assurance Company	J.C. Penney
Aluminum Company of America	Atlantic Richfield Company
The Aetna Company	and "Company Y"
Nabisco	

Apart from the profiles that our own project conducted, we believe that the Seligman study is the only other inquiry that has published such detailed accounts of the policies and practices of individual employers. While they obviously reflect the views of a business consulting firm, the assessment of employer motives, social and legal trends, and current issues written by the Seligman Study Team provides an excellent analysis of the experiences and current situations of such large business firms. Also, the report's conclusions provide a valuable qualitative supplement to the generalized (and self-reported) data of the BNA survey, at least as far as the behavior of very large, policy-innovative corporations is concerned.

*Employee Records and Personal Privacy: Corporate Policies and Procedures, McCaffery, Seligman and von Simson, Inc., New York, N.Y., November, 1976.

The Seligman study reached several of the same conclusions about change in the world of personnel data practices presented in Chapters 1 and 2 of this report.

> "Employment and personnel information practices have been significantly altered in the past decade by two quite profound catalysts. One is the Government's regulation of private sector practices concerning hiring, promotion and termination (EEOC), employee health (OSHA) and employee benefits (ERISA). The other is the longer term uncoupling of the relationship between employee and employer, between the worker and his job. A job is no longer indistinguishable from a career and the employer's social perceptions are no longer synonymous with the employee's life style."

In terms of what is collected, the Seligman report commented:

> "Corporate information practices are quite different for applicants and employees, and vary considerably between the managerial levels and the remainder of the organization.
>
> "Ninety percent of all factual information held about an employee is gathered at hiring (although it may be subsequently updated), and ninety five percent of that ninety percent is acquired, with consent, directly from the applicant. Thereafter, the most significant factual information accumulated about employees is their payroll, tax and benefits accounting, and their work and salary history within the company. The remainder is either evaluative or predictive, and here one encounters the second key distinction. The level of evaluative and predictive procedures increases directly - even exponentially - with position and salary. Hourly, bargaining-unit personnel receive little evaluation or career planning. Salaried, non-exempt (i.e. clerical, sub-technical, etc.) personnel are sometimes evaluated by their supervisors, but this is relatively limited, and usually there is no formal career planning. Almost all formal evaluation and career planning procedures apply to only the (approximately) five percent of all employees at the top of the organization. Whatever the merits of the approach, this population is hardly the most defenseless."

Looking at pre-employment, the report noted:

> "The quantity and quality of pre-employment information collected has been significantly reduced as a result of the factors (or catalysts) cited earlier. The key items used in evaluating a candidate for employment are his resume, or application, and interviews with prospective supervisors.
>
> "Reference checking has been so discouraged by local laws and lawsuits that more and more companies are taking the formal

position that they will provide only verification of dates of employment, last position, occasionally, wage rates and, in a few cases, a statement of whether a former employee is eligible for rehire. Aptitude tests have been discontinued except when they can be validated as having a predictive relationship with subsequent success on the job. Medical examinations are given to prevent placing disabled persons in jobs which endanger either the individual or his colleagues but they are not used to disqualify anyone from positions which have no particular physical requirements. As a result, few companies give medical exams to applicants for sedentary positions, although they may ask the applicant to complete a medical questionnaire.

"Educational transcripts are not released by schools without the applicant's signed authorization and are seldom required when there is a previous work history. Fewer entry level applicants today have any sort of military background. Computerized employee records typically carry only codes which relate to an individual's eligibility for veteran-related affirmative action programs, and personnel jackets (for older employees) may contain military discharge papers, but these are not considered in promotions or evaluations.

"Credit checks have been discouraged by affirmative action programs, the Fair Credit Reporting Act, and the general view that such reports are not worth the fee. A few companies do require some sort of background check on candidates for sensitive positions, typically defined as those processing cash, or in the Security Department, the Computer Department and senior management. Otherwise, there are no attempts (other than in the application or the interview) to determine if the candidate has a criminal record or anything else about his life style. We did not encounter any instance in which polygraphs were used for any purpose among either applicants or employees."

Turning to the promotion and termination process, the Seligman report commented as follows:

"The role of data collection in the promotion and termination process is determined by the employee's work category. Bargaining-unit personnel are generally promoted on the basis of seniority, and terminated as the result of formal disciplinary action and, in many cases, only after a grievance procedure between management and the union.

"Salaried, non-exempt personnel may be evaluated by their supervisors, but appraisal forms seldom find their way into the corporate decision process on promotions, transfer or even salary increases. Verbal judgment and discussion are often the keys to these events, although affirmative action programs are having an effect here.

"Terminations are more and more often preceded by counseling sessions at which the employee is given a written statement of the problems and a time schedule in which they must be corrected. This process has been developed by employers and fostered by affirmative action programs so that employees understand that terminations are not simply capricious - as they may have thought in the past. It is also intended to encourage the maintenance of employee morale and develop a sense of security.

"Performance evaluation and career planning procedures are considerably more formal for those in management - ranging from college recruits to vice presidents. In most cases, the employee has access to the evaluation form completed by his supervisor and has a chance to add a formal reservation or rebuttal. In fact, a structured employee-supervisor dialogue is often the express purpose of the procedure.

"Employees do not, however, usually receive access to future career potential assessments and plans. The general view is that the dissemination of such information would reduce the incentives of the 'crown princes' and destroy the morale of everyone else. All of this is articulately argued by directors of personnel, but it should be added that, in the final analysis, most promotions at this level are the result of judgment and discussion rather than a review of employee records.

"Promotion plans and succession lists may provide a useful management perspective technique for gauging the strengths and solidity of an organization; but there are a great many instances in which they serve no further purpose."

The report noted also that:

"Most corporations maintain a number of files on their employees. A few which are considered particularly sensitive (specifically medical, security and succession) are held separately from corporate employee records. All are treated with a high degree of technical and procedural security, a practice which predates the national interest in personal privacy, and relates strongly to the corporate objectives of maintaining positive interpersonal work relationships and, above all, of avoiding internal dissension.

"Computerized files are usually limited to:

- payroll systems, which process and accumulate pay, taxes and deductions

- personnel systems, which contain information supplied voluntarily by the employee concerning his work history, educational background, skills, languages, job preferences and the like. A few personnel systems include job history and prior performance reviews.

"These systems are used to identify candidates for open positions, although, not surprisingly, most transfers result from management deliberation rather than from any sort of computer listing."

Turning to the way that personnel folders and files are kept in the nine companies studied, the report wrote:

"Employee jackets contain the data acquired prior to employment and records of promotions, salary adjustments, commendations, disciplines, performance evaluations, leaves of absence, educational courses and, in more cases than not, a wide variety of administrative trailings and bureaucratic trash. Almost none of it could affect an employee's career adversely, since personnel records are seldom referred to in the assessment process. But some of it might be embarrassing, not only to an employee, but to the supervisory personnel responsible for this petty squirrelling.

"As it happens, a number of companies have recently launched task forces to study the record retention problem and to recommend standards for what should be filed and when it should be discarded. Efficient use of file space is one motive, and a growing sensitivity to personal privacy is another. However, government regulations concerning equal opportunity, benefits (ERISA) and health (OSHA) are exerting an opposing pressure by requiring information to be held for lengthy periods of time, and encouraging the collection of new information which may (or may not) become important at some later date.

"Benefits files generally contain only the employee's determination of his plans, signed authorization for deductions and his signed designation of beneficiaries. More plans now permit (and encourage) an employee to submit claims directly to the insurance carrier, thereby avoiding the internal disclosure of information which might occasionally be embarrassing. However, one respondent to our inquiry expressed the view that ERISA regulations soon might have the unintended side effect of discouraging carriers from taking on the claim review responsibility (particularly for disallowed claims), thereby reintroducing this activity within the corporation.

"Medical files contain pre-employment medical questionnaires and records of examinations and treatments. Medical directors express a high level of professional concern about the confidentiality of the patient-physician relationship and its asso-

ciated record-keeping. None disclose any information on medical disabilities (even internally) except in terms of specifying the nature of any work restrictions mandated by that disability. All believe that the corporation has an interest in a preventative medical program which encourages employee health, although few offer routine periodic examinations except to those employed in physically demanding and dangerous occupations (i.e. truck drivers and crane operators) and to middle and upper management.

"In fact, a year or two ago one might have concluded that corporate medical data collection was merely the vestigial remnant of an earlier, more 'paternalistic' era. More recently, however, the trend toward gathering less medical information has been significantly reversed by the Department of Labor's OSHA regulations - particularly as these relate to the employer's responsibilities for monitoring the effects of toxic substances and other unfavorable conditions (i.e., noise) on the health of the employee. This certainly suggests the use of medical examinations to establish a health base line. Further, a number of companies have been encouraged to develop computerized medical-monitoring systems to permit the type of epidemiological research on the effects of industrial substances apparently promoted by this agency....

"Security department files are a somewhat cloudy area in most corporations. In the first place, security and medical files are the only records not under the organizational control of the employee relations department. Secondly, information from these records is disclosed to an operating area only if an investigation has uncovered a possible instance of employee theft, sabotage, or other direct action against the corporation. Life styles are not a subject for investigation in the companies visited.

"However, our inquiry also suggested that there might be a privacy issue in this area. One problem may be that this information is sometimes shared with local law enforcement agencies, particularly during mutual investigations. A second is that employees are seldom given access to such information unless it is about to be used as the basis for termination or criminal action. (It should be noted that most privacy legislation properly carries an exemption for records developed in the course of criminal investigations.) But the third, and perhaps most serious, problem is that there is no definition of an 'active' investigation and no limit to the amount of time a security department may retain a file, even if an employee is cleared, or an investigation is considered, but not begun. We found no instance in which the contents of these files were used frivolously, or in normal promotional deliberations, and business certainly has a

clear right to protect itself, its employees, and its properties against theft, sabotage and bodily harm. Nonetheless, their limitless retention may be a problem, and the issue should probably be resolved in the same context as the Commission's recommendations for criminal records in general."

The report also dealt with corporate disclosures of employee information outside the firms:

"Employee information is seldom disclosed to third parties except for purposes clearly anticipated or of incontrovertible benefit to the employee. However, there are countless necessary, legal and completely routine transfers of computer tapes and listings from one organization to another. Tax deduction information (on computer storage media) is sent to the government; bond deductions, automatic deposit and check reconciliation tapes go to the banks. Insurance companies receive enrollee information (which is fairly innocuous, given that group insurance is granted almost automatically upon employment). Labor unions are contractually entitled to enrollment and seniority lists of all those in a bargaining unit, union members or not. Pension actuaries receive salary data as do unemployment insurance consultants. Salary research firms and state agencies receive data on wage rates by position, not by individual.

"Creditors never receive more than verification of employment (in the companies visited) except with the consent of the employee or with a subpoena. Nor do physicians, hospitals, or prospective employers.

"The most significant single source of leakage is to government regulators and law enforcement agencies. Equal opportunity compliance auditors have access to rosters of women, minorities and everyone else in comparable positions, although some companies have attempted to mask identities by removing names. Employee accident and health records are available for OSHA inspection. FBI, Welfare, Immigration and IRS examiners often receive information on employees (although generally not the records themselves). This is particularly likely to occur in small, remote locations which may not have the sophistication or awareness to refuse even an informal request when accompanied by an official badge or the proper credentials.

"Most corporations feel that it is not their role to regulate the government but would doubtless welcome legislation which clearly specified the circumstances and procedures relating to official rights to employee information. However, legislation requiring special record-keeping for routine transfers (tax, bank, insurance) seems both unnecessary and totally counterproductive."

Finally, the Seligman report discussed employee access-to-records policy in the firms studied:

"Many companies have begun a program to give employees access to records about themselves, partially in response to the California law and partially (on a nationwide basis) out of a sense that increasing openness can have positive effects on employee morale and sense of security. However, companies exempt a number of specific items, some of which are also exempted under existing legislation for the Federal sector.

a. Medical information is generally released to an employee either through interpretation by the medical director or through his personal physician.

b. Security information is not released.

c. Information on the employee's future potential is not shared because of the adverse organizational effects noted earlier.

d. Data which relates to the position rather than the incumbent, such as potential salary ranges and job grades. It is felt by some that widespread access to this data would cause unrealistic comparisons and petty dissension.

e. Specific test scores or the corrected tests themselves. It is generally feared that the numeric scores can be misinterpreted and that release of the tests will compromise their contents for future candidates.

f. Numeric performance ratings since some think that this will tend to focus appraisal reviews on numbers rather than the issues related to performance. (Of course, the employee already has access to the text-portion of the appraisal.)

g. Rosters used for determining merit increases which contain relative rankings of many employees.

h. Succession plans, particularly those maintained by position, which are used for contingency planning and to assess the strengths of an organization rather than to promote or evaluate individuals.

i. Internal records or scratchings maintained by supervisors. Here it is felt that these are no more than memory aids which if considered in the formal performance evaluation - will then become part of the formal record. Legislation which does not exempt these notations will probably result in their

discontinuation, but it is not clear that this would be advantageous either to objective appraisals or to personal privacy."

GOVERNMENT EMPLOYMENT

So far, we have summarized reports dealing with corporate personnel practices, with only a few government agencies and nonprofit organizations included in the BNA survey. Of course many of the general aspects of personnel work in large organizations are basically the same, whether Ford Motor Company, the Illinois State Highway Department, the City of Los Angeles, the Menninger Clinic, or the University of Texas is the organization involved. Also, many of the legal and social forces affecting personnel information practices operate in almost all kinds of large organizations today, such as affirmative-action duties, pension accountability, occupational health and safety regulations, etc. Thus it would be a mistake to assume that there is very wide divergence between the practices of business firms, government agencies, and large nonprofit organizations.

Having said that, however, it is worth repeating that the government - local, state and Federal - is more limited in its discretion to hire and fire, to promote and demote than its private counterparts. The first limitation comes from the merit/civil service system which mandates hiring from lists of eligible applicants based on objective test scores, and modified by veteran's preference and frequently by geographical quotas. The merit system also dictates promotions governed by objective criteria. The constitutional requirement of due process means that government employees cannot be fired or demoted without an impartial hearing, and in some jurisdictions, the elaborate hearing mechanisms tend to discourage initiating adverse actions against government employees.

These limitations affect what is collected and how it is maintained. In addition, the Federal Government and several states have enacted Privacy Acts which mandate both employee access to personnel files and limitations on third party disclosure. Finally, some states have enacted other laws, some requiring confidentiality of records, and some requiring disclosure under "Sunshine" statutes, and these, too, require procedures of the government as employer that are not imposed on the private sector.

Part Three contains detailed profiles of the Federal Government as an employer both of civilians through the Civil Service Commission and of military forces through the Air Force. The materials that follow, therefore, are confined to a sampling of the personnel record-keeping practices of state and local governments.

1. Government Employment Applications

Most of the materials the project received from state and local governments focused on striking a balance between protecting the employee's privacy and the public's right to know; relatively little information was

required of job applicants or maintained on employees. Of the few government entities which included application forms, none seemed egregiously intrusive. (We will treat separately, and in greater detail the exceptions made for special government employees, such as police officers.) The Michigan Civil Service Application is very likely typical of state governments. It requests name, address, social security number, age, height, weight, citizenship, sex and race. These last two items are accompanied by a notation that "this information is requested for statistical reporting purposes" and elsewhere on the form there is the notation "An Equal Opportunity Employer." The form requests military status only if the applicant is applying for veterans' preference. The applicant is asked for educational background and all work experience.

2. Information Maintained on Government Employees

All of the state and local governments responding to the Project's inquiries maintain the following information in their personnel files, whether manual or computerized: name, social security number, address, job location. What is collected beyond that varies widely. Mississippi states that "Our files contain information such as current address, but very little else not related directly to the job...We carry no records pertaining to credit rating, marital status, personal habits, etc." North Carolina maintains information on sex, race, handicap (optional) test scores (optional). Oregon's Employee Personnel folder contains test scores, applicant history, educational level, ethnic codes, salary recommendations, promotions, career planning. King's County in Washington is expanding its personnel data to include dependent children's birthdates, spouse's birthdate, emergency notification name and telephone number; disabilities and handicaps. Denver County keeps performance evaluations, letters of recommendation, disciplinary letters. Dayton, Ohio has passed an ordinance prohibiting the collection of personal data by the city that does not directly relate to the operation of the city's functions. "Personal data should only be collected to the extent there is a provable need for such data for the operation and planning functions of the agencies..."

Employee Access. The access policies of state and local governments fall into three categories:

Absolute access: Alaska, California, Georgia, New Mexico, Wyoming, and New Jersey provide employees the right to see everything in their own files. New Jersey grants employees a further right -- to inspect not only their own performance evaluations, but those of other employees in the same category in their department. Among the local governments, Boston, San Diego and Toledo give employees unrestricted rights to examine their own files. Minnesota grants access on request to the Minnesota Civil Service Commission.

Limited Access: Some states and localities exempt certain categories of personal information from employee access. Several states, including Oregon, do not allow employees to see letters of reference

from previous employers. Washington gives access only to information or records obtained from the employee. Arkansas exempts information defined by its statute as "confidential" and this includes records on medical or psychiatric treatment. Virginia also exempts medical and psychiatric treatment records as well as the sources of all personal information. North Carolina allows an employee, or the representative he or she chooses to view the personnel file except for letters of reference, and medical or psychiatric disability "that a prudent physician would not divulge to a patient."

Ad Hoc Access: Some local governments will grant access to an employee under particular circumstances; others leave the decisions to administrators on a case by case basis. A typical comment is that of a Washington state county: "We have no formal written policy or procedures ...Access to any personnel data is controlled by the Personnel Division."

Public Disclosure: The public disclosure policies of most of the states included in our sampling are governed by state statutes. In general, these statutes provide that personnel records are to be divided into two categories, public and confidential. The records available to the public include name, position, agency employment dates, salary. Confidential information includes test scores, letters of reference, performance evaluations, investigative files. Several states do not spell out just what confidential information is exempted from public inspection, merely stating, to use Washington's language as an example, that personal data is exempt from public inspection to the extent "that its disclosure would be a violation of privacy rights."

Two states, Minnesota and New Jersey, allow broader public disclosure than most. Minnesota exempts only performance appraisals and test scores from public inspection; the rest of the personal file, including personal background, is publicly available on request. New Jersey permits inspection of pension benefits, educational background, and other personal data to show that "the applicant (or employee) meets a necessary (legal) qualification."

3. Disclosure of Confidential Records to Third Parties

Many states and some localities have spelled out restrictions on the dissemination of confidential, non-public personnel records to third parties. In general, such regulations start from the premise that no such dissemination shall be made without the prior, written consent of the record subject. This statement is generally followed by a list of exceptions, where dissemination may take place without such consent. Wyoming, for example, has a broad range of exceptions, including the following:

1. When compelling circumstances affecting the health or safety of the record subject is shown.

2. Where records that warrant continued preservation are sent to the state archives.

3. Where records are sent to other government agencies for civil or criminal law enforcement purposes.

4. To other agencies or organizations that have been designated as "routine uses" of the record.

5. To other agencies or employees with an established need for the record in order to carry out legal duties.

6. On court order or other legal process. Here, although consent is not required, notification of the subject is.

7. To private or public agencies for statistical research, where the subject is not identifiable.

SPECIAL OCCUPATIONS

We noted in Chapter One that the world of employment includes various occupations for which either the employer or public licensing authorities impose more extensive disclosure requirements and apply more searching verification or investigative techniques than are used -- especially today -- for the great majority of hiring decisions. In the business world, these have traditionally involved areas of financial sensitivity such as bank employees or workers in pharmaceutical firms manufacturing addictive drugs; or employees of corporations working on secret defense contracts; in the professional sector such occupations as doctor, lawyer, accountant, etc.; among licensed occupations people who drive taxis, operate bars, or work on the docks; and in the governmental world occupations such as law enforcement officials and persons in many spheres of work whose duties require them to have security clearances for access to classified government information.

We also noted in Chapter Two that many occupations once held to require special standards of personal morality or political probity have been substantially freed from such requirements, both in the hiring process and in supervision after employment. The treatment of teachers in the public school system offers perhaps the most striking example of major changes over the past two decades.

To see how far-reaching personal inquiries and personality-testing still remain in some special occupations, however, we need only look at the way police officers are selected today by the thousands of city, county, and state law enforcement departments that hire and supervise police officers in the United States.

Two good examples of the special police selection techniques are the procedures used in Berkeley, California and Portland, Maine.

The Berkeley procedures are especially instructive since the police department has supplied the project with the employment questionnaire used in the 1950s and the one currently used. The earlier questionnaire is a 16-page document which asks, among other things:

"Are you living with your wife? If no, state reasons."

"If marriage was ever dissolved, how: - Separated, Divorced, Annulled. To whom was divorce granted?"

"Have you ever been involved as defendant in a paternity proceeding?"

"List addresses since your tenth birthday."

"Have your employers always treated you fairly? If not, explain."

The questionnaire contains 15 questions on military background. In addition to type of discharge, applicants are asked for any disciplinary action, down to company punishment.

The financial questions call for amounts of life insurance, savings and checking accounts, wife's salary, dependents being supported, amount owing on car, money borrowed.

There are three questions on membership, advocacy or meeting attendance at subversive organizations; whether a member of the applicant's family has ever been arrested for a felony or treated for a nervous or mental disorder; an arrest record section, including payments of fine in excess of $25; and a requirement that the applicant list his church and name of Rabbi, Pastor or Priest.

The current questionnaire drops the paternity suit questions, the subversive questions, the questions about family mental conditions and arrests and the religious affiliation questions, but retains all the marital, financial, credit, military and criminal questions. It also adds two new personal questions: Current girl friend, if any (optional); Former girl friends (optional).

The Portland selection procedures are outlined in Law and Order Magazine for May, 1976. After completing an application form, a written examination, an oral interview and a physical agility test the applicant is then given five psychological tests: The California Psychological Inventory whose purpose is to "develop and use descriptive concepts which possess broad personal and social relevance...and to devise a brief and yet accurate set of subscales for the identification and measurement of the variables that have been chosen for inclusion in the inventory."; the Wonderlick Personnel Test which...."serves to provide some insight into an applicant's mental ability levels."; The Cornall Index, "the civilian form of a brief but very effective instrument that was developed primarily for use in screening out the neuropsychiatric personality...at Army Induction Centers."; the Rotter Incomplete Sentence Blank, which "permits the department's psychologist to classify responses into one of three basic categories: conflict or unhealthy responses, neutral responses and positive or healthy responses."; and the Strong Vocational Interest Blank which "represents an inventory of interests and preferences that serve as an aid in predicting chances of success...in a

variety of occupations."

These tests are capped off by a "thorough polygraph examination" to determine whether all the information elicited in the background investigation on the applicant's family background, educational achievements, employment record and marital status is truthful. Following this, the department psychologist conducts a psychological interview in a final assessment of the applicant's aptitude and ability.

What is important to observe about the Berkeley and Portland practices is that they are not unusual in police selection but standard procedure. Because police carry guns, exercise broad authority over their fellow citizens, and are constant targets for corrupt and criminal elements in society, society has traditionally allowed much greater scope of personal psychological inquiry, testing, and disqualifications for police selection than are accepted for the great majority of occupations.

OBSERVATIONS

Virtually all the source materials used in this chapter (as well as the hearings on employment privacy conducted by the Privacy Protection Study Commission in 1976) have several limitations that should be noted. They generally deal with large rather than medium-sized and smaller organizations. The kinds of policies enunciated and implementing procedures characteristic of such organizations are often neither the management style nor suited to the organizational realities of smaller firms. The organizations studied are also generally of the "front-runner" type, interested in being innovative, wanting to reflect new trends in personnel administration, accepting the need to be perceived as socially-responsive, and seeking to anticipate and respond to major trends in national attitudes and their effects on employment issues rather than wait until statutes put such trends into new regulations.

Since the front-runners often serve as pace-setters in their sectors, and provide early experiments that then produce increasingly general trends in their fields, it is quite appropriate to study what they are doing. It is also realistic to expect that many other employers will take up these approaches if and when employees or national opinion indicate that these policies are strongly desired. We will return in Part Five to a discussion of what employees and the public want in this area, and what policies would be responsive to such opinions.

PART TWO:

PATTERNS OF COMPUTER USE IN THE PERSONNEL AREA

Chapter Five GENERAL TRENDS IN COMPUTERIZATION OF PERSONNEL INFORMATION

OVERVIEW

Since the time electronic data processing (EDP) entered the organizational world, roughly in the middle 1950s, computer use for personnel functions has gone through three main approaches, each reflecting ongoing changes in technological capabilities, organizational needs, and external regulatory requirements.

These three phases are:

1. 1955-1965: Payroll Files and Statistical Reports
2. 1966-1970: Specialized Applications and Early Data Base Systems
3. 1971-1978: More Sophisticated Applications and Human Resources Information Systems

These are not three consecutive phases that all organizations went through between 1955 and 1978, or even all organizations having extensive computer systems, since some organizations today are still using EDP primarily for payroll and statistical reports, or only for specialized applications. The three stages represent essentially the latest state of the art in personnel EDP during the time periods described.

In this Part, we trace the motives for these EDP uses and the changes in record-keeping about employees and executives that these three approaches produced in the personnel operations of business firms, government agencies, and nonprofit organizations.

We also describe the main types of personnel data systems that are presently in use, covering both the customized data systems that computer users are developing for themselves or are having developed for them by consulting firms, as well as "off-the-shelf" packages that are being sold by software firms specializing in the personnel field.

On the whole, we will see that automation of personnel functions has proceeded at a slower pace and has been less extensive or sophisticated than computer use in other sectors of organizational life. However, with the growth of Human Resources Information Systems and regulatory-reporting applications in the 1970s, personnel data systems are catching up to other organizational applications, and now represent quite an active area of organizational EDP effort.

THREE PHASES OF EDP IN PERSONNEL: 1955-1978

Computer use in the personnel area has been shaped by a combination of factors: changes in the state of the technological art in EDP, in both hardware and software aspects; organizational needs in the personnel field, and their reflection in management priorities; and governmental regulation, especially record-keeping and reporting duties. Together, these forces produced a series of approaches to EDP use for personnel functions during the last two decades: (1) 1955-1965, payroll files and statistical reports; (2) 1966-1970, specialized applications and early data base systems; and (3) 1971-1978, more sophisticated applications and human resources information systems.

1955-1965: PAYROLL FILES AND STATISTICAL REPORTS

During most of this first decade, computers were in their first and second generation stages.* This meant that data had to be processed sequentially, passing an entire file through the central processing unit in order to extract information or make changes in records. In this batch-processing era, with high costs for data storage, computing time, and converting data to machine-readable form, organizations sought to process by computer only those data that could be easily coded or abbreviated, were used frequently in repetitive operations, and where -- it was hoped -- the machines would replace expensive clerical or manual labor to achieve cost reductions.

Payroll operations fitted these requirements nicely. As a result, it was the finance and accounting departments in most organizations, with their responsibility for handling payrolls and their experience in using electric accounting machines, who were the first departments to get a computer or to use computer service bureaus. By the end of this period, payroll was the most common computer application. An American Management Association survey in 1965 of 288 companies using computers found that 247 of them had payroll applications, far more than any other computer application listed in the survey.[1] Another 1965 survey by Charles Myers of 650 business firms found payroll the most commonly used among the six leading computer applications.[2] While computers were not as widely used in this period in local, state or Federal Government, surveys showed that "housekeeping functions" (including payroll) were the most common computer applications in both general administration and particular government agencies advanced in computer use (such as police departments).[3] The same pattern was true of nonprofit organizations, though these had far less general computer use than either business or government during this decade.[4]

*The use of "generations" in the development of computer technology is a common descriptive tool but only approximates the complex interplay of developments over the past two decades. See, for a good discussion of this problem, Peter Denning, "Third Generation Computer Systems," Vol. 3 Computing Surveys, p. 175-216 (Dec., 1971).

Computerization of personnel activities beyond payroll and statistical reporting was highly limited in this era. The Myers survey of 650 firms in 1965, which adopted a definition of personnel applications as going beyond payroll and statistical reports run off by accounting departments from payroll data, found "strictly personnel applications" to be practically nonexistent.[5] Similarly, recent surveys of automation among cities and counties found that less than 10% of these jurisdictions reported having any personnel applications that went back to 1965 or before.[6]

In one of the few studies comparing business and government in their use of EDP for personnel activities, Tomeski and Lazarus found that federal agencies (85%) and large business firms (78%) led in the use of the computer by their personnel departments. Large counties (60%) came next, with states (35%) and large cities (18%) having the least activity.[7] These were still primarily payroll operations.

What kinds of personnel applications beyond payroll were being pursued by the small minority of organizations that had them in this decade? Among municipalities and counties, these included position control (to identify vacancies), collective bargaining analysis, and employee records. Among business firms, pioneering work was done in skills inventories, recruiting, employee profiles and collective bargaining. While such activities by a few leading companies such as IBM were written up widely in business and computer magazines,[8] this did not create a stampede of followers in the business community at this time. Computer resources were still scarce and expensive. Organizations with sizeable computer systems reserved them in the early 1960s for those frequently used customer, client, and other operational files where automation promised savings in labor costs, faster profitable transactions, and substantial reduction in paperwork. Very few personnel departments were allowed to tap scarce programmer and computer time to experiment with personnel applications. In addition, the pioneers in personnel applications encountered considerable difficulties, either in making their efforts work as planned or in being cost-effective.

Computerization had little impact on basic trends in personnel administration during this decade. In his thoughtful study of 18 business firms in Boston and Philadelphia using computers between 1959 and 1965, Leonard Rico concluded: "The managerial policies that determine what an employee is paid, what hours he works, and the environmental conditions in which he works have been relatively unchanged by computerization."[9]

1966-1970: SPECIALIZED APPLICATIONS AND EARLY DATA BASE SYSTEMS

This period saw the arrival of third generation computer systems, which made possible random access to data files and on-line operations. Particular records could now be reached to extract or change information immediately (in "real time"), without having to pass an entire file through the central processing unit in a "batch mode." Users were also able to inquire into and change data through desk top terminals located away from the main computer, even at long distances. These new capabilities made it feasible to computerize large, high-volume customer and client files for quick transactions, such as airline reservations, credit checking, police wanted-person files, and welfare or health eligibility checks. Third generation systems also spurred a "data base" approach--consolidating all the information about people, things, and events that various units of an organization maintained into one central data file. The theory was that this would reduce duplication of data-collection and improve update; provide more complete and comprehensive information about customers, clients, or subjects for administering programs and services; and give departmental or central management more timely and useful reports for program-evaluation and planning. With all the formerly separate files in one data bank, the various users in an organization could obtain or change information according to rules of access set by top management (with user approval) and administered by data center managers.

Within the organizational world, 1966-1970 was a period marked by extensive writing urging personnel departments to make more and better use of EDP.[10] Most of this writing came from experts in software firms that specialized in setting up personnel applications, either existing management consulting or EDP-services firms that had expanded into this area or several new software firms founded specifically to offer personnel data system services.[11] Such writing chided personnel managers for being "behind" their organizational colleagues in making use of EDP and in failing to keep up with the growing costs and problems in personnel administration and manpower supply. The literature promised personnel managers that EDP systems could not only reduce clerical costs, cut burgeoning paperwork, and eliminate the extensive duplication in manual files but also improve the timeliness of personnel data and its accessibility for making important decisions.

This was also a period of growing government reporting requirements, especially affirmative-action programs for minority employment under the Federal equal employment opportunity act of 1964 and similar state and local civil rights laws. However, this was not yet the commanding

pressure that it was to become in the 1970s.

These developments produced two main types of EDP activity in the personnel sector, beyond continued work on computerized payroll operations: specialized file applications corresponding to the main area of personnel administration, and data base projects.

A. Specialized File Applications

Among corporations, surveys showed that from two-thirds to three-fourths of large firms in the late 1960s had developed specialized personnel applications on their computers;[12] about half of all corporations were reported as having such applications, when survey samples included medium-sized and smaller firms.[13] The number and sophistication of these corporate efforts were still found to be less than what finance, sales, inventory, and production departments had automated, but they represented a major increase for the personnel sector. The main applications were wages and salary, personnel records administration, benefit and services, staffing and manpower, and labor relations.[14] Less widely used but of growing interest were training (for managers and technicians), performance appraisal, health and safety, and recruitment. While only an estimated 15% of firms had automated skills inventories, the use of this application by leading companies was widely discussed in the personnel literature.[15] Among the companies described as advanced in such personnel applications during this period were Ford Motor Company, Eastman Kodak, Honeywell Inc., Eli Lilly, Mobil Oil, RCA, Polaroid, Standard Oil of Ohio, Xerox, McDonnell Douglas, and U.S. Plywood. Some particular industries that were leaders included life insurance, banks, and retailing.

One striking and to some, distressing, aspect of the corporate scene was the lack of uniformity in EDP personnel applications. There was no standard terminology for application types, no standard data forms, no uniform procedures. Individual styles proliferated between and within industries, according to each company's organizational format, and by management style in personnel administration.[16] The field of personnel EDP was seen by experts as still far more art than science.

Government also underwent a spurt of automation in specific personnel applications. Surveys showed that 50% of state civil service or merit employment agencies were using computers in the late 1960s, with the leading applications being payroll, personnel records, eligibility registers, and personnel statistics.[17] A few states' agencies also had exam scoring and candidate notification. Among cities, a third of the municipalities surveyed in 1970, all with populations over 25,000, reported having personnel applications.[18] For them, as for counties, the leading applications were position classification listing, employee records, position control, and collective bargaining.[19] An interesting survey in 1967 of innovation-minded public agencies across Federal, state, and local governments found states and larger cities to be making the most extensive use of EDP in personnel administration,

though it was still the finance rather than the personnel departments that were managing these.[20]

B. Data Base Projects

One problem with the multiple-applications approach was that it usually produced a set of separate, often unconnected files, with different sets of data, and different reporting capabilities and limitations. Generally, these files had to run separately on the computer. Pointing to the high costs and fragmentation this produced, some personnel specialists and EDP experts urged instead that personnel managers turn to the single data base approach being pursued in other organizational sectors in this period. A typical statement of this position, presented in 1966 by Philip Morgan of Information Science, advocated five basic steps to achieve an Integrated Personnel Information System.[21]

"1. Establish a data base that incorporates each piece of personnel information you should know about your employees.

2. Establish a single, responsible source of personnel information, and eliminate any redundancy of multiple handling and storage of data.

3. Integrate all personnel data into a useful composite record and provide a simplified method of updating.

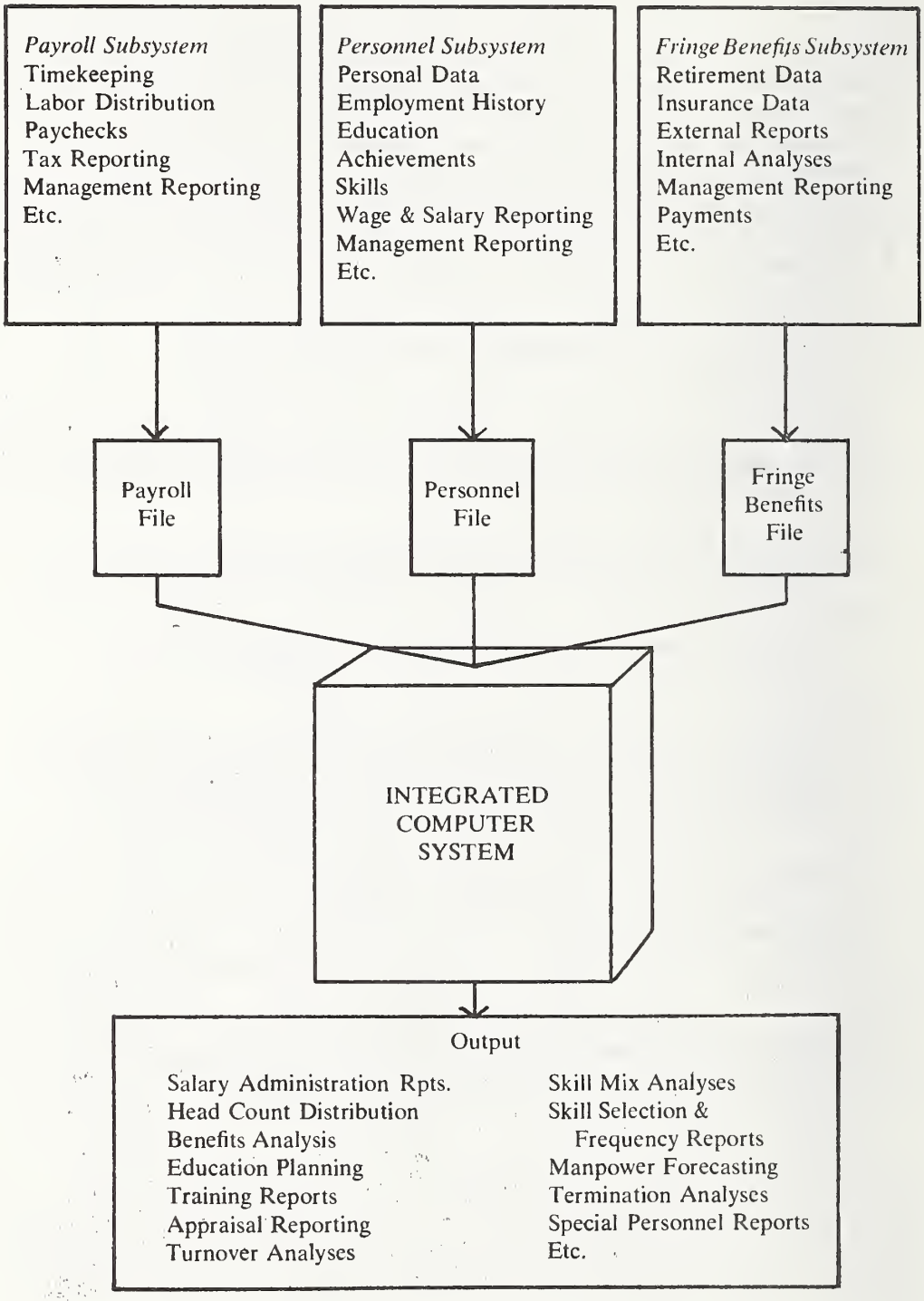
4. Establish methods of data retrieval that will allow complete accessibility to the information stored.

5. Adopt a systematic approach to personnel data handling that will convince employees that the organization's personnel policies are being applied consistently, day in and day out. Let them see what you are doing."

The heart of such an Integrated Personnel Data System was the "Profile and Chronological Work History Record." From this, Morgan noted, the system could produce a Skills Inventory, Resume-Education Record, Benefits Statement, Seniority Roster, and Employment Requisition Control.

What such a data base system would look like was portrayed in a diagram by another data system advocate, Rolf Rogers.[22]

INTEGRATED SYSTEMS CONCEPT



A good example of such data base work was Corn Products Corporation (now known as CPC International), which installed a data base system in 1969 that was designed for them by Information Sciences. CPC is a food manufacturing firm which then had 40,000 employees in 35 countries. The heart of CPC's new system was the employee's Career Profile, organized into ten sections: [23]

1. Social Security Number.

2. Present Status--name, present job title, date on job.

3. Educational Data--levels completed, degree program and major subjects.

4. Previous Employment History--name of company, when employed, job title, and primary duties.

5. Military Reserve Status--classification, reserve branch, rank, unit name, when reserve obligation complete.

6. Work Experience, Professional Licenses and Memberships, Geographical Preferences, and Foreign Languages.

7. Work Specialties--three work specialties most proficient in, highest first.

8. Work Preferences--three kinds of work would most prefer to do, whether or not experience has been had in them.

9. Training Data--course titles, subjects, and schools.

10. Other Activities, Professional and Non-Professional--"Include here such things as the number of patents and type, publications or papers and their subjects, hobbies, civic organizations, trade associations, political activity (do not name party), major achievement, academic honors, scholarships, fellowships, and any other information that would help evaluate your background and abilities."

The primary reason for CPC implementing this system was its concern about developing management talent from within, which the company called its "top priority" for 1969.[24] What the consolidation of employee information into one data base enabled CPC to do was to conduct talent searches that matched specialized and management job openings against the skills-inventory profile of its employees, printing out lists of qualified CPC employees for managers to consider.

How many data base projects of this kind were installed by corporations between 1966 and 1970 is not known. The number was probably under one hundred, though.

There were few such data base projects in government personnel administration in 1966-70. Several dozen cities and counties announced general data bank projects covering all the files maintained by city or county departments, with personnel to have one integrated data file in such systems. However, concentration on client and service priorities, problems with data base software, and high costs left the personnel module of such plans unimplemented.[25] In state and Federal Government, specialized applications were also the primary focus, and no data base projects among non-profit organizations were reported in the personnel or EDP literature.

While our main discussion of the citizens' rights effects of EDP use in personnel will be in Part Four, it should be noted here that there was almost no discussion of privacy, confidentiality, or individual-access considerations in the literature of 1955-65 or 1966-70. There was discussion of the value to managements--in increasing accuracy, timeliness, and good employee relations--in letting employees see and correct any errors in the new, automated profiles or skills inventory printouts that organizations were installing. But this recommended policy was conceived not in terms of "employee rights" but of system efficiency. In addition,the access idea was usually limited to the profile, and was not extended in these organizations to all the data that was being automated, or as a general policy for all employee records, manual as well as computerized.

1971-1978: MORE SOPHISTICATED APPLICATIONS AND HUMAN RESOURCES INFORMATION SYSTEMS

The early 1970s saw a wave of managerial disillusionment with existing EDP efforts in the personnel area.[26] There had already been some critical writing in the 1960s about overambitious data base projects, unmanageable skills inventories, and cost-increasing rather than cost-reducing data systems.[27] But it was in the 1971-73 period, when money got tighter and the romance of EDP had cooled, that the first really hard look was taken at personnel-data automation. It was also in the early 1970s that the privacy issue began to appear in personnel EDP discussions.

A leading example of such criticism was published in 1971 by Logan M. Cheek, planning manager of the Xerox Corporation's business products group, in Business Horizons magazine.[28] Cheek noted that interest and activity were high among large corporations but that "ominous signs of disillusionment are beginning to appear." Eight of the biggest EDP system users among the top 100 Fortune companies "have wholly discontinued their systems, and six have given up attempts to maintain their skills inventories." Surveys show that 79% of users report no savings in the cost of services rendered; 90% no reduction in personnel department employees; and 32% no improvement in the quality of services.

Analyzing why the disillusionment had set in, Cheek observed that the first uses of computers, to "mechanize the personnel jacket," pro-

duced a "shotgun approach" that was supposed to "somehow meet all future contingencies." Companies "failed to identify critical needs and thereby formulate clear-cut objectives for the system." As a result, "the complexity -- and costs -- skyrocketed without producing commensurate, much less tangible, benefits." Cheek believed that EDP did have significant promise in the personnel field, but he declared this could be realized only when computerization was "rifle shot." They should be aimed at "developing simple, discrete systems" with a "problem-solving focus." "Achieving improvements in corporate profit performance, through improved personnel management was the right goal, rather than merely reducing the costs of personnel paperwork."

Cheek gave two detailed case studies to illustrate his thesis -- one of a company whose EDP system had "misfired" and one whose rifle-shot approach had been highly effective. The failure turned on the organization's inadequate response to four problems: (1) "the need to focus on a clear objective, the achievement of which would make a tangible contribution to profit performance"; (2) "employees have been increasingly reluctant to cooperate with an effort they view as an unwarranted invasion of their privacy"; (3) "users, particularly the line departments, have become quite annoyed at the paperwork required for post-implementation systems support, especially when their efforts are rewarded with benefits they consider marginal"; and (4) "top management's interest and commitment to these projects has been lukewarm, at most." Cheek's conclusion was that if the potentialities of EDP were to be realized in the personnel field, this could happen only with concentrated attention to these four factors.

Looking at the three key factors (technological changes, government regulations, organizational trends) we have been noting for each period, the middle 1970s saw significant increases in the technological resources available to organizations, including personnel departments. These were not primarily the continued lowering of costs for converting, storing, and processing data, and the increases in computing speed, that came in the "fourth generation" seventies, as they had in each of the first three generational phases of computer systems. What was more significant was the increased reliability of software and systems, the increased experience with managing EDP systems that had by now been built up in many large and medium-sized organizations, and the arrival through minicomputers and data-communication advances of fundamentally new options as to how data systems could be organized. The third-generation model of one giant data center, with large central processing units connected to hundreds or thousands of terminals, was no longer the most cost-effective approach to all data processing projects. Now, files could be operated alone on minicomputers, in regional, middle-sized computers, or on large-sized machines, opening up new options as to the organization of data systems. In addition, many organizations in the mid-Seventies found themselves, often for the first time, with available time on the computer and available programming-staff time to consider those requests for EDP resources that had been rejected in the late Sixties as not high enough in potential cost savings or profit to justify access to the computer. Personnel was just such a vaguely promising but not (in the Sixties) high priority candidate.

The dominant factor in the Seventies affecting EDP in personnel was the tremendous surge in complex government reporting duties for business firms, government agencies, and some nonprofit groups. The three most important Federal programs were the affirmative action requirements involving race, sex, and age under Equal Employment Opportunity (EEO); the Employee Retirement Income Security Act (ERISA); and the Occupational Safety and Health Act (OSHA). More recent reporting duties have included those under Federal programs for handicapped workers and health maintenance organizations. What those Federal programs require are detailed, historically-based, and, often, comparative reports from organizations on sets of elaborate personal data about employees, from the hiring process to retirement or discharge. The reports required call for elaborate individual employee records to be kept, and as the standards of these programs are changed by amendment, regulatory interpretation, or court decisions, organizations must often make massive changes in their record-keeping to meet these duties. Most important of all, enforcement actions in the courts by Federal agencies and private damage suits by aggrieved workers racked up multi-million dollar fines and damage awards against corporations in the early Seventies, as well as threats to Federal aid programs for state and local governments and non-profit contractors (such as universities). Even where organizations had been making genuine efforts to comply with EEO or OSHA requirements, they often found themselves unable to provide persuasive documentation of their efforts when called before regulatory agencies or sued in court. The effect of Federal employee-protection laws of the early Seventies on our area of interest was two-fold. First, it dramatically increased the relevance and importance of the personnel

function in organizations, with a resulting increase in top management attention, top-quality management appointments, larger staffs, and increased budgets for compliance activities. Second, it changed the organizational signal on developing personnel data systems from red or orange to bright green. In one large corporation, a proposal to develop a broad data base system had been gathering dust for two years; after a huge damage verdict against that company for race and sex discrimination, in which the existing manual and automated records proved weak during the company's defense, the personnel department was told to go ahead with its data system plan, full speed and without serious cost limitations. "Don't ever let us get caught in that position again" was the only warning from top management.[29] Many universities and government agencies underwent similar experiences.

The third factor, organizational trends, reflected what has already been said about the impact of Federal employee-protection programs on the personnel function. But larger social trends also increased the importance of personnel activities. These included the need for better identification and development of scarce management talents within the organization; labor-supply problems in particular job specialties, despite the labor-surplus setting of the overall period; and demands for greater work satisfaction and respect for individualism that increased in the social climate of the Seventies, from assembly line settings up to the executive suite. Finally, the skyrocketing costs of medical insurance programs and other employee benefits made better management of these expenses a major organizational priority.

The result of these technological, regulatory, and organizational factors was a major move to develop more systematic personnel data activities. The trend was reflected in special courses by business and governmental groups on personnel data systems. A leading example is the seminar series that the American Management Association began offering in the mid-Seventies on "Developing Computer-Based Human Resources Management Systems."[30] The AMA course, a 3-day meeting costing $410 for AMA members, has been given dozens of times and has reached hundreds of company executives. The main reason for taking the course, its literature explains, is that "Management and government both want to know more about a company's human resources," an objective that today requires "planning, organizing, and implementing a total system for a company's personnel department."

These various forces have led to three main approaches.

A. "Payroll-plus" systems

All organizations must pay their employees, which also involves withholding taxes, collecting Social Security contributions, deducting amounts for pension payments, workmen's compensation, unemployment insurance, medical insurance, and other benefit programs. Payroll also registers changes in salary, job, location, and similar personnel

shifts. Since a majority of organizations by the 1970s had already automated their payroll operations, many software firms offered personnel data systems organized around payroll files, often with reporting capacities added for government regulatory programs. National directories of software vendors in 1975-76 showed payroll systems as still the most frequently offered EDP applications in the personnel area.[31] Among the software firms offering advanced payroll systems are Management Science America, Inc.; Wang Computer Services; Information Science Inc.; Software International Corp.; Integral Systems, Inc.; and many others. Several typical advertisements for these payroll systems in computer and personnel magazines appear below.

(See next page)

Some idea of the scope of such EDP payroll systems in industry can be drawn from the fact that the Wang system has, since its introduction in 1966, been adopted at some 300 sites, covering 6 million people. The MSA payroll system, advertised as the most widely used in the United States and Canada, has been bought by over 600 customers in the past five years, with clients including "manufacturers, banks, retailers, distributors, restaurants, hotel chains, airlines, hospitals, universities, and pharmaceutical, chemical, food service, insurance, and oil companies," for work forces ranging from 100 to 100,000 employees. Not all of these require large in-house EDP systems. Some of these use minicomputers for these applications, and others handle them through service bureau operations.

B. More Sophisticated Applications

To find out what applications business firms, government bodies, and nonprofit organizations were pursuing beyond payroll-plus activities, our project went through published literature on these matters, obtained several marketing surveys, and conducted interviews with computer manufacturers and software vendors. However, to get a more detailed picture, we also conducted several surveys of our own.

(1) We selected on a random basis from available lists of organizations: large-sized corporations in various fields of industry; colleges and universities; cities with over 50,000 population; large-sized counties; all the states' civil service commissions; and a random selection of labor unions, religious organizations and professional associations from voluntary-organization directories. We wrote to 215, and 101 responded, or almost 50%.

(See next page)

ORGANIZATIONS RESPONDING TO PROJECT SURVEY ON USE OF EDP IN PERSONNEL

STATE AND LOCAL GOVERNMENT

STATE CIVIL SERVICE COMMISSIONS OR PERSONNEL ADMINISTRATION DEPTS.

Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Florida
Georgia
Idaho
Illinois
Iowa
Kentucky
Maine
Maryland
Minnesota
Nebraska
New Jersey
New Mexico
New York
North Carolina
Oklahoma
Oregon
Pennsylvania
South Carolina
South Dakota
Tennessee
Virginia
Washington
Wisconsin
Wyoming

COUNTIES

Alameda County, California
Broward County, Florida
Hennepin County, Minnesota
Jefferson County, Kentucky
King County, Washington
Multnomah County, Oregon
San Bernardino County, California
San Diego County, California

CITIES

Boston, Massachusetts
Charlotte, North Carolina
Cincinnati, Ohio
Dayton, Ohio
Des Moines, Iowa
Little Rock, Arkansas
Phoenix, Arizona
Portland, Maine
Norfolk, Virginia
Salem, Oregon
San Antonio, Texas
Seattle, Washington
San Diego, California
Toledo, Ohio
Wichita, Kansas

BUSINESS FIRMS

Aetna Life & Casualty Co.
American Can Company
CPC International Inc.
Caterpillar Tractor Co.
Control Data Corp.
Corning Glass Works
Delta Airlines
Eastman Kodak Company
Eastern Air Lines
Equitable Life Assurance Society
Ford Motor Company
GTE Service Corp.
General Foods Corp.
General Motors Corp.
Honeywell
IBM Corporation
Kennecott Copper Corp.
Manufacturers Hanover Trust Co.
Mellon Bank NA
Memorex
NCR Corporation
Pittsburgh Plate Glass
Prudential Insurance Co. of America
Sears, Roebuck & Co.
Standard Oil

State Farm Mutual Automobile Insurance Co.
Texaco Inc.
Texas Instruments Inc.
The Boeing Company
Travelers Insurance Co.
Warner-Lambert
Xerox

NONPROFIT ORGANIZATIONS

American Business Women's Association
American Federation of Government Employees
Church of Jesus Christ of Latter-Day Saints
Cornell University
Episcopal Church
Louisiana State University
Lutheran Church in America
National Education Assoc.
Pennsylvania State University
Purdue University
United Auto Workers
United Brotherhood of Carpenters and Joiners
United States Catholic Conference
United Steelworkers of America
University of California at Berkeley
University of California at Los Angeles
University of Cincinnati
University of Connecticut
University of Hawaii at Manoa
University of Illinois
University of Oklahoma
Wayne State University

(2) We did a separate survey of the use of EDP by personnel offices in Federal agencies. We drew up a list of potential EDP personnel applications and mailed this to a U.S. Civil Service Commission list of personnel officers in 67 Federal bureaus, agencies, and departments. The 63 agencies that replied are listed below:

(See next page)

FEDERAL AGENCIES RESPONDING TO PROJECT QUESTIONNAIRE (63)

Action
Agency for International Development
Board of Governors of the Federal Reserve System
Bureau of Alcohol, Tobacco and Firearms
Bureau of Engraving and Printing, Department of the Treasury
Bureau of Manpower Information Systems, U.S. Civil Service Commission
Bureau of the Mint
Bureau of Naval Personnel
Bureau of the Public Debt
Central Intelligence Agency
Civil Aeronautics Board
Community Services Administration
Comptroller of the Currency
D. C. Government, Central Personnel Office
Defense Contract Audit Agency
Department of the Army
Department of Commerce
Department of Health, Education and Welfare
Department of the Interior
Department of the Navy, Office of Civilian Personnel
Department of State
Department of the Treasury, U.S. Savings Bonds Division
Department of the Treasury, Bureau of Government Financial Operations
Department of the Treasury, U.S. Customs Service
Equal Employment Opportunity Commission
Export-Import Bank of the United States
Farm Credit Administration
Federal Communications Commission
Federal Energy Administration
Federal Home Loan Bank Board
Federal Law Enforcement Training Center, Glynco, Georgia
Federal Maritime Commission
Federal Mediation and Conciliation Service
Federal Trade Commission
General Services Administration
Internal Revenue Service
Library of Congress
National Aeronautics and Space Administration
National Credit Union Administration
National Foundation on the Arts and the Humanities
National Gallery of Art
National Headquarters, Selective Service System
National Labor Relations Board
National Science Foundation
National Transportation Safety Board
Office of Management and Budget
Office of the Assistant Secretary (International Affairs)
Panama Canal Company
Securities and Exchange Commission
Small Business Administration
Tennessee Valley Authority
United States Air Force
U.S. Department of Agriculture
U.S. Department of Labor
U.S. Energy Research and Development Administration
U.S. General Accounting Office
U.S. Government Printing Office
U.S. Information Agency
U.S. Marine Corps
U.S. Nuclear Regulatory Commission
U.S. Secret Service
U.S. Tax Court
Veterans Administration

Relying on all these sources, we turn now to a description of our second category, specialized personnel applications. One major type of specialized program is the system designed to produce the detailed reports required by government employee-protection programs. These include EEO-Affirmative Action duties, ERISA pension programs, OSHA for health and safety, HMO (Health Maintenance Organizations), and new Federal employment-for-the-handicapped programs. Since federal, state, and local government agencies, and non-profit government contractors such as hospitals and universities are covered by federal EEO, ERISA and OSHA programs, work on these reporting applications cuts across the three sectors of business, government, and non-profits. For example, a Connecticut firm named NCSS offers companies a service that allows them to compare their own hiring patterns and ratios with census data and EEO statistics. This service includes comparisons by population percentages in the local area; by other companies in its own industry; and similar comparisons.[32] Another firm, Cullinane Corporation, sells an EEO-Affirmative Action Reporter, described as "a complete information retrieval and reporting system that is tailored to assist today's Personnel Department and EEO Officers in meeting Affirmative Action Program reporting and implementation requirements."[33] Advertisements for a number of such specialized reporting systems are reproduced below.

(See next page)

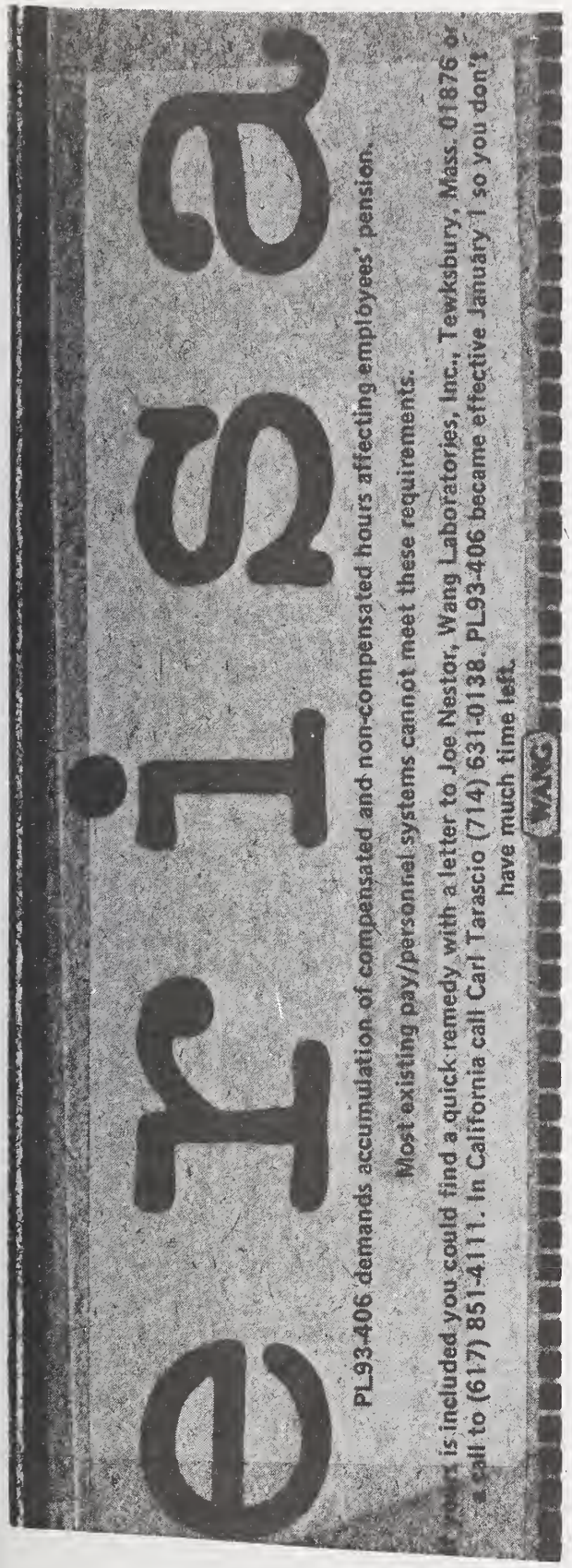
EEO-AFFIRMATIVE ACTION REPORTER

A computer system that not only prepares your EEO reports exactly as required, but also helps you establish an effective Affirmative Action program, including goals and timetables.

Cullinane Corporation

Cullinane Corporation

Wellesley Office Park, 20 William S
Wellesley, Mass. 02181 (617) 237-660



will you be sued this year for eeo discrim-ination?

The chances are good . . .

Last year, unhappy employees won $125 million from their employers, for age, race or sex discrimination . . .

There is a solution . . .

First — don't discriminate. Second — be able to prove it . . .

Wang has a human resource management system called SUPER that can help you prove it . . .

SUPER stores and retrieves all the personnel data you need to prove non-discrimination, while it calculates payroll and tracks pension benefits.

For more about SUPER call Joe Nestor at (617) 851-4111 or write Wang Laboratories, Inc. Tewksbury, MA 01876.

WANG

The impact of government reporting duties, and the costs of EDP systems designed to meet such requirements, were described in a recent survey conducted by Information Science Inc.* ISI estimated that automated personnel record-keeping in 1977 was costing businesses $1.3 billion, or $75 per employee. When ISI polled some 600 personnel executives from 300 major companies attending a human resources systems conference sponsored by ISI, more than 57% of the corporate officers reported that their record-keeping functions had tripled in cost and size as a result of Government record-keeping compliance since the early 1970s. The major impacts had been from three federal programs: OSHA, EEO, and ERISA. These now account for 50% of 1978 personnel data system costs. Privacy was reported by the respondents to be a new area of compliance that they expected to require substantial costs and effort; 60% of those surveyed believed that 1979 and 1980 would see substantial privacy reporting requirements that they will have to meet. The respondents also estimated that personnel matters now take up 20% of top management's time, and they expected this percentage to rise to 30% within five years.

The other main group of specialized applications that are being pursued in the Seventies are geared more to internal personnel-management needs than to external reporting duties. Employee profiles, salary administration, benefits, skills-inventories, absentee control, and manpower planning are typical of these in the business sector.[34] Nonprofit organizations, especially the medium and smaller sized groups, are still making the least use of EDP beyond payroll organizations. However, some of the large universities, religious bodies, and labor unions report that they have such operations under way.[35] Among state personnel agencies, a 1975 study found that position control, personnel records, eligibility registers, and exam grading are the most popular.[36] A survey of cities and counties in 1975 found position classification listing, employee records, position control, and collective bargaining as the most common.[37] Our survey of federal agencies showed that among the 64 agencies that replied, the most popular EDP applications beyond payroll and equal employment were personnel records, education and training, position control, and separation reports. The following table shows present applications by these agencies, those currently in planning, and those that will probably be installed in the next five years.

(See next page)

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* "Federal Laws Forcing Rise in Employee Record Costs," Computerworld, December 5, 1977.

SURVEY OF FEDERAL AGENCIES' EDP APPLICATIONS IN PERSONNEL

(Of 64 agencies responding, 55 had EDP applications in personnel.)

TYPE OF EDP APPLICATIONS	HAVE NOW	CURRENTLY PLANNING	WILL PROB. HAVE IN NEXT 5 YEARS
Payroll	54	6	
Equal Employment	43	9	2
Comprehensive Personnel/Profile Records	35	7	10
Education and Training	35	6	8
Position Control (turnover anal. etc.)	29	11	14
Separation Reports	28	6	4
Skills Inventory (person-job matching, etc.)	23	4	14
Benefit Programs	20	3	1
Manpower Planning	24	10	15
Attendance/Absentee Controls	21	5	8
Performance Evaluation	18	5	6
Payroll Trend Analysis	12	1	11
Attitude/Morale Surveys	8	5	6
Labor-Management Relations (contract analysis, etc.)	6	1	3
Recruiting (eligibility register, etc.)	9	6	7
Occupational Safety	10	3	2
Recalculation Through Employee History for Retroactive Actions to correct or verify data in record	1		

(Continued on next page)

TYPE OF EDP APPLICATIONS (continued from previous page)	HAVE NOW	CURRENTLY PLANNING	WILL PROB. HAVE IN NEXT 5 YEARS
Employee Parking	1		
Employee Locator (zip code)	1		
Emergency Contact	1		
Test Scoring	8	3	2
Grievance Records	3	3	2
Discipline Records	5	2	3
Personnel Transaction Process			1
Medical Records	7		2
Reduction-in-force register	1		

Putting together all of the available surveys and our own survey replies, we drew up the following chart showing the major personnel applications currently being used by business and government to support their main personnel functions. Only a small minority of organizations have them all, and even where this is the case, an application such as a skills inventory may be used only for the 5-10% of employees in the organization who are in administrative or management posts.

(See next page)

MAJOR PERSONNEL FUNCTIONS AND THE EDP APPLICATIONS RELATED TO THEM
(COMBINED GOVERNMENT AND PRIVATE)

FUNCTION	EDP APPLICATION
1. PERSONNEL PLANNING	Manpower Forecasting/Planning Retirement Projections
2. RECRUITMENT AND HIRING	Recruiting/Eligibility Register Test Administration/Scoring Applicant EEO File Testing Analysis and Studies
3. PERSONNEL RECORDS	Central File Employee Profile/History
4. COMPENSATION AND BENEFITS	Payroll Payroll Analysis/Pay Plan Surveys Benefits ERISA (Pension)
5. GENERAL PERSONNEL ADMINISTRATION	
Daily Performance	Employee Roster Attendance/Absentee
Appraisal and Promotion	Seniority Lists Performance Appraisal/Rating Skills Inventory Position Control/Turnover Analysis
Health and Safety	Medical Record Occupational Safety/Accident Anal.
Equal Employment Opportunity	EEO Handicapped
Employee Communications	Employee Relations Grievances
Discipline	Discipline Reports
Employee Education/Development	Education and Training
Employee Surveys	Morale/Attitude Surveys
Retirement and Terminations	Separation Reports
6. INDUSTRIAL/LABOR RELATIONS	Contract Analysis Labor/Management Relations

C. Human Resources Information Systems

While payroll systems plus separate specialized applications still suit the needs of most managements, an increasing number of organizations turned in the mid-Seventies to unified data base systems. After the failure of overly-ambitious data bank projects in many fields, including personnel, during the late 1960s and early 1970s, organizations began to learn how to select informational priorities more carefully, to develop reliable software, and to manage cost-effective data base systems. As an increasing number of complicated employee-protection reports were required by government, all needing to rely on the same basic data about the employee, the maintenance of separate systems began to be seen as a costly luxury. This perception has generated something of a bandwagon phenomenon in adopting data base systems variously called human resources information systems, personnel data systems, and total employee information systems.

In 1975, Dun and Bradstreet conducted a survey of 1,000 major business firms, commissioned by the consulting company of Towers, Perrin, Forster and Crosby.[38] Thirty four per cent of the businesses (343) responded. They were asked first whether they had a computerized personnel information system or HRIS (Human Resource Information System). The survey defined this as "a computer-based system for obtaining, storing, maintaining and retrieving information about employees," including data "essential to decision-making and management control of such matters as compensation administration, benefit administration, labor relations, training and development, and government reporting."

So defined, 46% of the respondents said they had such systems. An additional 14% said they were presently implementing them. Large size was not a critical factor in such adoption: 46% of firms having an HRIS had less than 10,000 employees; 26% were in the 10,000 to 25,000 class; and 27% had over 25,000 employees. Only 26% of the firms having HRIS said they have evaluated the cost-effectiveness of their system; of these, 35% find them "highly cost effective," 46% "potentially cost effective," 8% "inconclusive" or "cost not matched by usefulness," and 4% did not answer.

The basic appeal of such data base systems is that they meet the heavy reporting duties of Federal employee-protection programs while also allowing managements to pursue either a selected-applications or "total" approach to personnel administration. A steady flow of articles appeared between 1971 and 1976 in management and personnel magazines describing these benefits, often with case studies of businesses that had achieved success with such data base systems.[39] Advertisements in 1976 magazines illustrate how these appeals are presented:

ERISA. OSHA. EEOC. It's enough to make you laugh.

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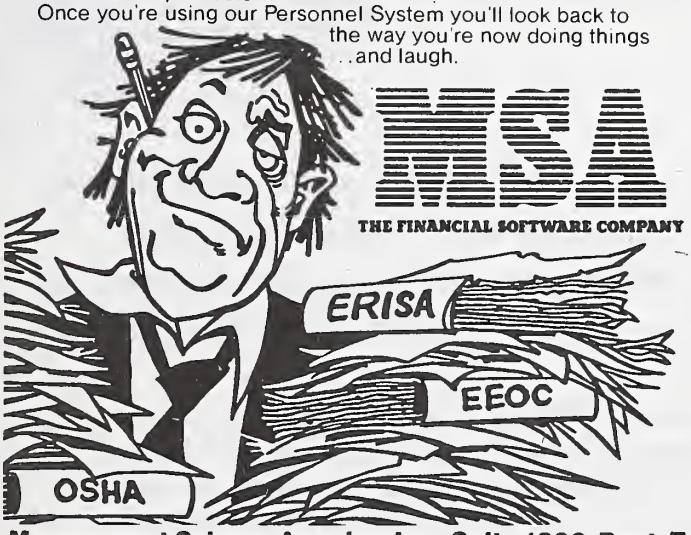

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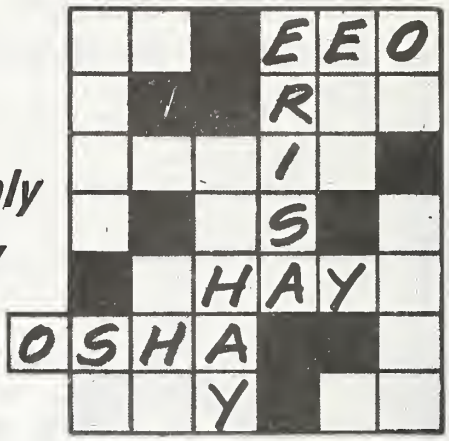

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Basically, large organizations with sizeable employee forces, multiple units, and their own computer centers are likely candidates for a custom-designed data base system. Information Science Incorporated, which has done over 200 such systems, estimates that there are over 1,000 companies with more than 2,500 employees that fit this situation.[40] Of course, such firms can choose to buy off-the-shelf packages, but they usually have need for more customized systems, and can afford them. Beyond these, ISI estimates, are some 7,000 medium-sized firms, with 500-2500 employees, which possess sufficient EDP resources to buy the HRIS packages offered by personnel consulting firms. A third block of companies, some 15,000 with 500 or less employees, do not presently have their own computers, and are candidates for off-premises personnel data systems operated in a service-bureau manner on the computers of software firms or of general computer-service bureaus. Finally, depending on whose figures one uses, there are from 100,000 to 500,000 small firms that could use simple, pre-packaged personnel reporting systems on small computers, either their own or of data service companies, though many experts feel this "market" will not develop very soon.

Since these data base systems involve the most comprehensive integration and retrievability of employee data in the EDP personnel area, it is useful to go beyond advertisements and see what is contained in some of the leading HRIS systems currently being installed. The heart of all these is the central employee record, containing all the data that are automated about each person. From it, and the payroll module, organizations produce general employee profiles, specialized profiles, and an array of reports dealing with EEO compliance, benefits, OSHA, ERISA, attendance, position control, performance evaluation, manpower planning, labor relations, and other special functions. Skills inventories, more limited and disciplined after the "put-in-everything" disasters of the 1960s, are also usually a module of current data base systems. Two representations of these systems illustrate these data-organization concepts.

(See next page)

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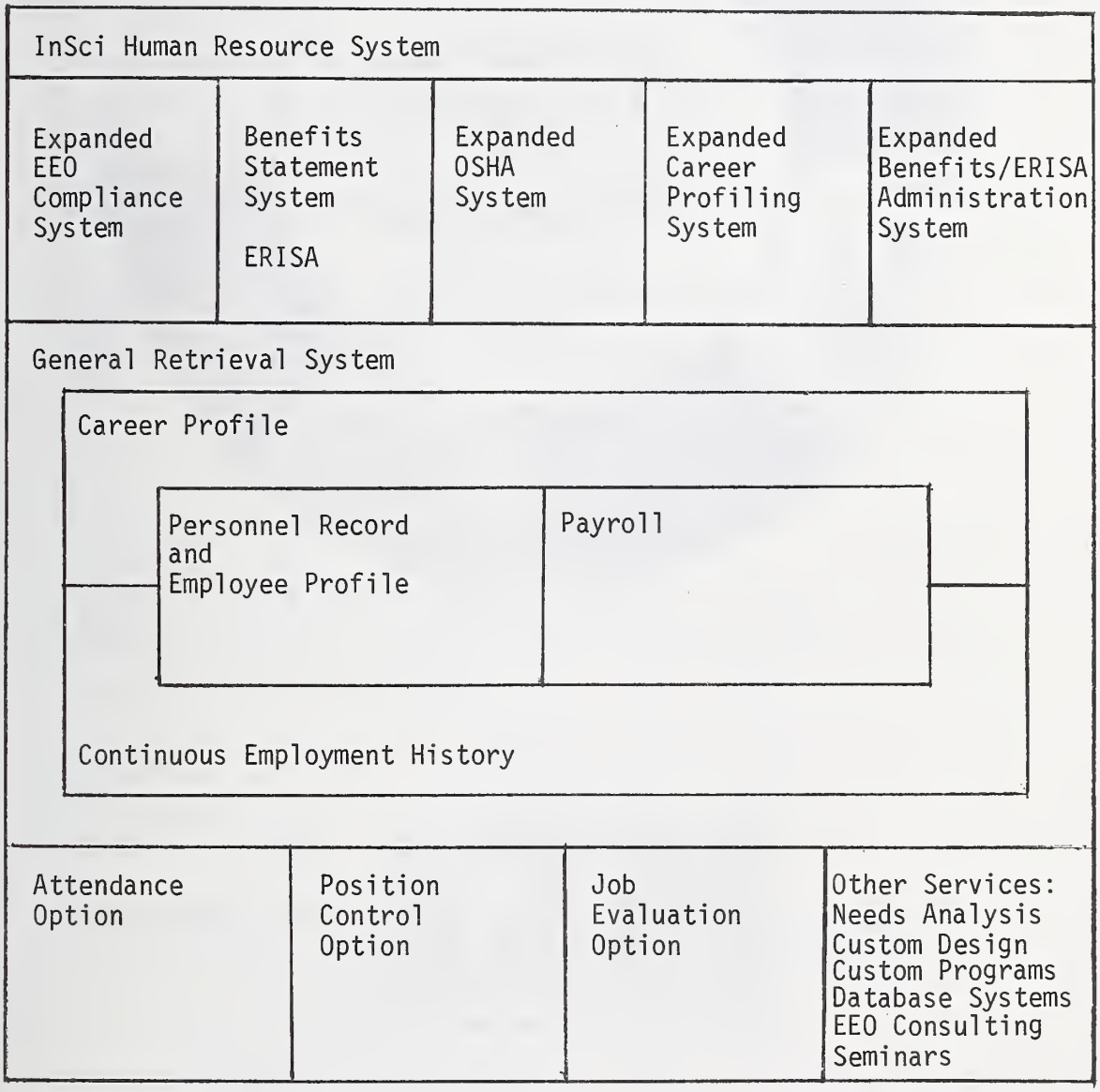

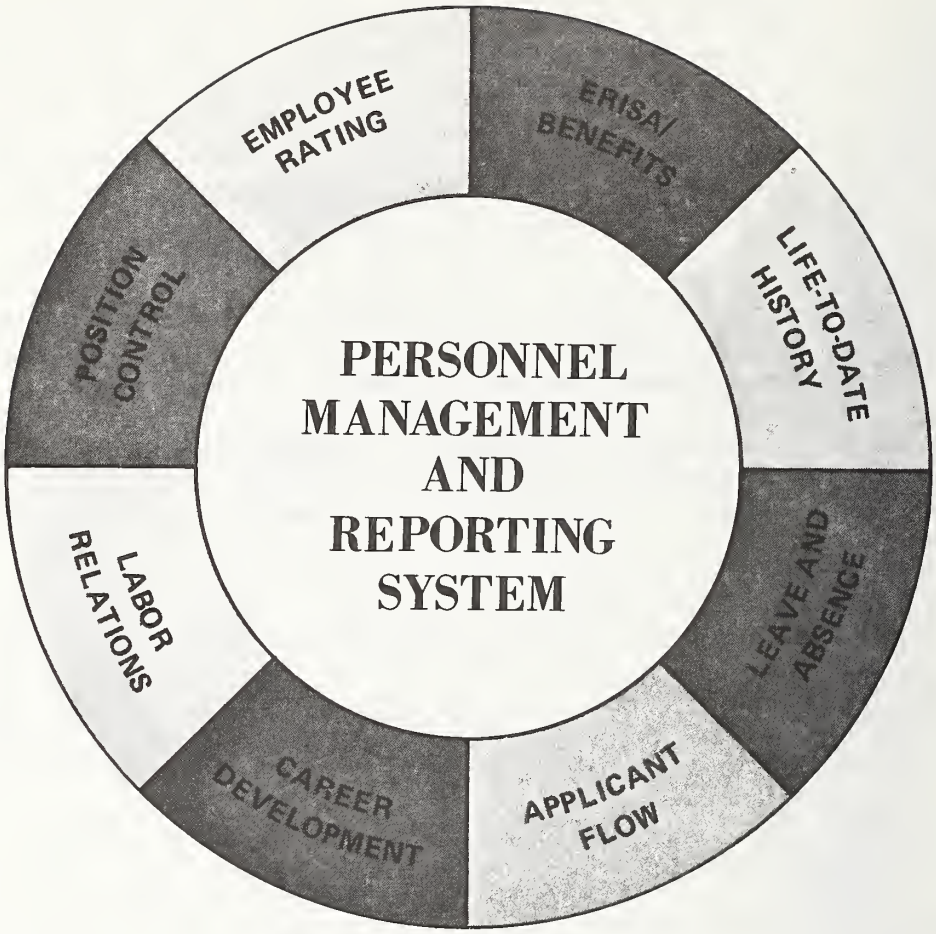

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It is also useful to look at a sample of the employee profile that such data base systems produce for organizations. While the format and specific items in such profiles vary, and such flexibility is portrayed as a valuable option for managements, the following fictional profile from a Wang Computer Services booklet illustrates what profiles typically contain:

RUN DATE 04-26-75 | PAGE 29 | EMPLOYEE KEY 001/21/WCS1/067324851 | COMPANY NAME WANG COMPUTER SERVICES

EMPLOYEE PROFILE

EMPLOYEE NAME	FIRST NAME	LOA DATE	REASON	LOA RETURN DATE	SEX	EEO	MARITAL STATUS	DEPT	STATUS	DATE CHANGE MADE
G J MCCADDEN	GEORGE				M	C	M	3.	A	

STREET ADDRESS	DATE OF HIRE	JOB CODE	WHEN IN JOB	JOB TITLE	SALY GRADE	RANGE MINIMUM
10 CAMBRIDGE ROAD	08-01-68	C5125	02-01-74	PROGRAMMER ANALYST	C1101	12000.00

APT # - PO BOX	DATE OF BIRTH	HRLY RATE	BB SALY	AN SALARY	NORMAL HOURS	RANGE MIDPOINT
APT 89	06-09-47		579.17	13900.08	86.66	13000.00

CITY	STATE	ZIP	TERMINATION DATE	REASON	REHIRE	NEXT EVAL.	SUPERVISOR	RANGE MAXIMUM
ARLINGTON	MA	02174				02-75	GUSTIN	14000.00

SALARY, JOB AND EVALUATION HISTORY CHRONOLOGICALLY

EFFECTIVE DATE	TYPE CHANGE	EVAL CODE	NEW P P SALY RATE	AMOUNT OF CHANGE	% CHANGE	JOB CODE	JOB TITLE	SUPERVISOR
02-01-74	AN	EXC	579.17	700.00	5.3%	C5125	PROGRAMMER ANALYST	GUSTIN
02-01-73	AN	EXC	550.00	1200.00	10.0%	C5126	SR. PROGRAMMER	GUSTIN
02-01-72	AN	EXC	500.00	1000.00	9.1%	C5126	SR. PROGRAMMER	WALKER
02-01-71	AN	GOO	458.34	800.00	7.8%	C5150	PROGRAMMER	BARTLETT
02-01-70	AN	EXC	425.00	900.00	9.7%	C5150	PROGRAMMER	BARTLETT
02-01-69	SM	GOO	387.50	600.00	6.9%	C5175	JR. PROGRAMMER	WALLACE
08-01-68	NP		362.50			C5200	PROGRAMMER TRAINEE	WALLACE

EMPLOYEE KEY	EMPLOYEE NAME	DATE CHANGE MADE
001/21/WCS1/067324851	G J MCCADDEN	

SPOUSE NAME	DATE OF BIRTH	HOME TELEPHONE #	WORK EXT.	EMERGENCY CONTACT NAME	RELATIONSHIP	EMERGENCY TEL #
BARBARA	10-15-47	617 648-8550	1524	BARBARA MCCADDEN	WIFE	617-648-8550

EMERGENCY ADDRESS IF DIFFERENT FROM EMPLOYEES

EDUCATION INFORMATION

	LEVEL	NAME	YR	MAJOR	SUBJECT	DATE	LENGTH	GRADE
FORMAL	111	W ON MSTRS		MATH				
	110	BS	68	MATH				
TRAINING COURSES					IBM/OS	02-71	1-WK.	NGD
					COBOL PGMNG	10-68	1-WK	NGD

BENEFITS (EMPLOYER AND EMPLOYEE CONTRIBUTIONS)

LIFE INS. CHG	EMPLOYER CONTRIBUTION	COVERAGE	BENEFICIARY	RELATIONSHIP	MEDICATIONS CHG	EMPLOYER CONTRIBUTION	COVERAGE
13.68	8.00	50,000	BARBARA MCCADDEN	WIFE	7.92	6.32	FAML

What kinds of organizations are installing such data base systems? The published client lists of major software vendors show hundreds of corporations across virtually every major field of American business. They also show government agencies such as the cities of Long Beach (California), Philadelphia and Oklahoma City; counties such as Prince George, Virginia and Orange County, California; Federal agencies such as the Equal Employment Opportunity Commission and Department of Labor; school systems such as Portland, Oregon and police departments such as Rochester, New York; and state governments in Alaska and Idaho. Among nonprofit organizations, client lists mention dozens of state Blue Cross and Blue Shield plans and nonprofit hospitals; universities such as Tufts and North Carolina; and a long list of religious bodies, including the National Council of Churches of Christ, American Baptist Church, Lutheran Church, United Methodist Church, United Presbyterian Church, Maryknoll Fathers, and others.

Our project collected information on data base systems in a wide range of such organizational settings. These include the U.S. Air Force at the Federal level (see the profile in Part III); the states of Alaska and California; Multnomah County, Oregon and San Bernadino County, California; the cities of Dayton, Ohio and Seattle, Washington; corporations such as State Farm Insurance, IBM Corporation and Bank of America; the University of Illinois and Purdue University; the Episcopal Church; and United Steelworkers of America. We will refer to these systems later in our discussion of the citizens' rights implications of computerization.

Are the new data base systems and other advanced applications cost-effective for these organizations? We did not find much published literature on this issue, other than the generally approving remarks about the value of their new systems made by organizational managers or data processing directors in articles describing their current personnel data system activities. For example, a discussion of "Managing Human Resources by Computer" was written as a "Users Report" for the June, 1977, issue of Infosystems magazine about the HRS system at Cummins Engine Company in Columbus, Indiana, with software designed by Information Science Inc. The article described the more effective matching of people to jobs that the system was making possible; the government reporting that is managed by it; the fact that the HRS "also drives our in-house payroll system"; and that "nearly every group in the company uses the system in one way or another," including "such areas as security, medical, financial, benefits, compensation and employee development." In supporting the general feeling that the system was cost-effective, the manager of the HRS system commented: "In the past, each of our ten line personnel units would take a week to literally reconstruct the previous quarter's people-movement by hand. What we're moving toward now is central EEO reporting done by the human resource system which generates both the total report for our EEO group as well as the single reports for each individual line unit. In some cases, that saves a line unit a week of someone's time to prepare this report every quarter."[41]

Apart from such broad generalizations in articles and the statements made to us by representatives of software firms along the same lines as the Cummins' Engine example, there is nothing else that we are aware of in the published literature. We did not come across any systematic studies of the cost-effectiveness of personnel data systems by government agencies, consulting firms in the EDP field, industry associations or government groups, or computer scientists in the university world. However, our sense from conversations with experts from all of these groups is that applying cost-effectiveness measures to personnel data systems has not been a major force in the decisions to adopt such systems or to expand existing systems into additional applications. The reason is that when EEO or ERISA reporting duties begin to outrun a large organization's capabilities, the order goes out to install something -- within reasonable cost parameters -- that will do that vital job effectively. With lawsuits in these areas (and in others, such as OSHA) holding potential liabilities of millions of dollars over the heads of business organizations, complying with documentation and reporting duties represents a benefit so large that it supports doing things that would not be justifiable in terms of such slippery measures as "better manpower planning" or "more effective job-person matching."

What effects are sophisticated applications and human resources information systems having on the personnel function? Between 1955 and the early 1970s, EDP had little impact, since it was only reduction of clerical and paperwork costs and satisfying simple reporting requirements that organizations were pursuing. But since the early 1970s, especially during the past two years, top personnel administrators and general managements are beginning to get, for the first time in most such organizations, detailed and timely information about their personnel conditions, practices, costs, and programs. Such a rich data condition creates problems for managers if they go on administering hiring, compensation, benefits, evaluation, promotion, and other personnel policies in ways that -- while time-honored and supported by various intra-organizational rationalities -- collide with the formal policies defined as the objectives of the data base system. We will see some of these collisions at work in our three profiles, which follow next. The point to note here is that the deeper organizational effects of data base systems in personnel are just beginning to be felt. Just how organizations will come to use their new human resources information systems to make decisions about the people whose records are in them remains to be seen. What this chapter has documented is that sophisticated EDP applications and data base systems are now expanding through the business world, have begun to spread in government, and are appearing also in many large nonprofit organizations. The time to assess their effects on citizens' rights is clearly at hand.

FOOTNOTES

1. Quoted in Leonard Rico, The Advance Against Paperwork: Computers, Systems, and Personnel (Ann Arbor, Mich.: Bureau of Industrial Relations, University of Michigan, 1967), 64-65.

2. Ibid., 63.

3. See, for example, the survey of municipal ADP use in Municipal Year Book, 1965 (Chicago: International City Managers' Association), p. 296, and the data on when police departments first automated and what applications they pursued, in Paul M. Whisenand and John D. Hodges, Jr., "Automated Police Information Systems: A Survey," Datamation (May, 1969), 91-96.

4. See the background discussions to the Profiles of non-profit organizations in Alan F. Westin and Michael A. Baker, Data Banks in a Free Society (New York: Quadrangle Books, 1972), 168-214.

5. Reported in Felician F. Foltman, Manpower Information for Effective Management: Part I, Collecting and Managing Employee Information (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, 1973), 5.

6. Kenneth L. Kraemer, et al., The Municipal Information Systems Directory and Joseph R. Matthews, et al., The County Information Systems Directory, both published by the Public Policy Research Organization, U. of Calif., Irvine, 1975. According to our project's count, only 8 of 159 cities stated their applications went back before 1966, and only 6 of 97 counties.

7. Edward A. Tomeski and Harold Lazarus, "Information Systems in Personnel," Journal of Systems Management, September, 1973, 40.

8. "Computers Move Up in Personnel Ranks," Business Week, October 23, 1965, 118 (on IBM's Recruitment Information System); W.J. Pedicord, "Advanced Data Systems for Personnel Planning and Placement," Computers and Automation, September, 1966, 20-21 (on IBM's Personnel Data System).

9. Rico, note 1 supra.

10. For example, see Philip L. Morgan, "Automatic Data Processing of Personnel Data," Personnel Journal, October, 1966, 553-557; William E. Berry, "What a Personnel EDP System Should Do," Personnel, Jan.-Feb., 1969, 18-21; John V. MacGuffie, "Computer Programs for People," Personnel Journal, April 1969, 253-258, 313; Glenn A. Bassett and Harvard Y. Weatherbee, "EDP Applications in Personnel," Personnel Journal, August, 1968, 547-550; Edward J. Morrison, Developing Computer-Based Employee Information Systems, N.Y.: American Management Association, Research Study No. 99 (1969).

11. For example, Morgan, Berry, and MacGuffie cited in note 10 were all executives with Information Science, Incorporated, a firm founded in 1965 by ex-IBM employees who had developed the IBM Personnel Data System.

12. In addition to the Bassett and Weatherbee, and Morrison articles cited in note 10, see Frederick H. Black, Jr., "The Computer in the Personnel Department," Personnel, Sept.-Oct., 1969, 65-71; Steven J. Mayer, "EDP Personnel Systems: What Areas are Being Computed?", Personnel, July-Aug., 1971, 29-36, reporting a 1970 survey; and Richard T. Bueschel, EDP and Personnel, N.Y.: American Management Association, Management Bulletin 86 (1966).

13. Bueschel, note 12 supra.

14. Black and Mayer, note 12 supra, and Morrison note 10 supra.

15. See Morrison, note 10 supra, 13.

16. Morrison, note 10 supra, 18-19, 24.

17. Survey of Automatic Data Processing in State Personnel Agencies, U.S. Department of Health, Education, and Welfare, Office of State Merit Systems, June, 1968; Loraine D. Eyde, "The Automatic Data Processing Revolution and its Implications for Public Personnel Activities in State and Local Government," Public Personnel Review July, 1970, 176-179.

18. Municipal Year Book, 1971, International City Managers Association.

19. See Kraemer and Matthews, note 6 supra.

20. Public Automated Systems Service, ADP in Public Personnel Administration, (Chicago: Public Administration Service, 1969); James E. Enright, "Automatic Data Processing in Public Personnel Administration," Public Personnel Review, April, 1969, 66-69.

21. Morgan, note 10 supra.

22. Rolf E. Rogers, "An Integrated Personnel System," Personnel Administration, March-April, 1970, 22-28.

23. "Your Career Profile," CPC International, 1969," Personnel Data System: Procedures Manual, CPC International, 1969.

24. Special Issue, Viewpoint, February, 1969, Public Relations Department, Corn Products Co., Englewood Cliffs, New Jersey.

25. See the Profiles of Santa Clara County, California and New Haven, Connecticut, in Westin and Baker, note 4 supra.

26. Glenn A. Bassett and Harvard Y. Weatherbee, Personnel Systems and Data Management (N.Y.: American Management Association. 1971), 176-177; "Automation in the Personnel Department," BNA Personnel Policy and Practice Series, Personnel Management (loose leaf), Vol. 251, 103 (1971); Felician F. Foltman, note 5 supra and Part 2: Skills Inventories and Manpower Planning, 13-17.

27. In the business area, see the Black and Mayer articles cited in note 12 supra; in government, see the Enright article in note 20 supra.

28. Logan M. Cheek, "Personnel Computer Systems: Solutions in Search of a Problem" Business Horizons, August, 1971, 69-76.

29. Interview by Westin with Manager of Data Processing for a major corporation, July, 1975, New York City.

30. Brochure, "Developing Computer-Based Human Resource Management Systems," New York: American Management Association, 1976.

31. Interface Vol. 2, Business Management, ICP Reference Series, January, 1976, "Payroll," 469-497; "Payroll and Personnel" section, Datapro Research Corporation Directory, October and November, 1975; Auerbach Computer Technology Reports, 1975.

32. "Human Resources System on Net Combines Census, EEOC Data Use," Computerworld, Aug. 30, 1976, 16.

33. Brochure, EEO-Affirmative Action Reporter, Cullinane Corporation, 1976.

34. Human Resources Information Systems Survey, March, 1976, Towers, Perrin, Forster & Crosby, question 9.

35. Responses to Project Organizational Survey.

36. Information Systems Technology in State Government, 1975-1976, National Association for State Information Systems, Lexington, Kentucky, 1976.

37. Compiled from Kraemer and Matthews Directories, note 6 supra.

38. See note 34 supra.

39. See the two Foltman monographs cited in notes 5 and 26, supra, plus Kent Granat, "After Personnel System Installation, Then What?", Personnel Journal, November, 1971, 867-871; George A. Mapp, "Planning a Personnel Information System Feasibility and Design Study," Ibid, January, 1971, 28-34; Frank Marangell, "The New Language of Skills," Ibid, April, 1971, 280-287; Dale H. Learn, "How to Get Successfully Computerized," The Personnel Administrator, June, 1974, 20-22; Robert F. Michaels, "Computerizing Personnel Data in Small Companies," Ibid, April, 1975, 52-54; Eldon Ray Patterson, "The Computer Helps in Hiring and Keeping 'Top' Personnel," Personnel Journal, February, 1971, 141-143; Lyman H. Seamans, Jr., "What's Lacking in Most Skills Inventories?", Ibid, February, 1973, 101-105; Lyman H. Seamans, Jr. and Alfred J. Walker, "Questions and Answers About Employee Information Systems," The Personnel Administrator, May-June, 1973, 48-51; John Scherba and Lyle Smith, "Computerization of Absentee Control Programs," Personnel Journal, May, 1973, 367-372; Clinton L. Packer, "Automation in the Personnel Department," Hospitals, Vol. 45, October 1, 1971, 45-48; Frank F. Tetz, "Evaluating Computer-Based Human Resources Information Systems: Costs vs Benefits," Personnel Journal, June, 1973, 451-455; Frank F. Tetz, "System for Managing Human Resources," Journal of Systems Management, October, 1974, 10-14; Alfred J. Walker, Jr., "Personnel Uses The Computer," Personnel Journal, March, 1972, 204-207.

40. Westin Interview with Dale Learn, President, Information Science Incorporated, July, 1976.

41. "Managing Human Resources by Computer," Infosystems, June, 1977, pp. 96-98.

PART THREE:

COMPUTERIZING ORGANIZATIONS IN PRACTICE

INTRODUCTION

In this Part, we present a variety of case studies, snapshots, summaries, and observations about organizations that are both computer users in the personnel field and actively involved in reviewing their policies and practices on employee privacy.

We begin with detailed profiles of three organizations. Two are Federal agencies -- the U.S. Civil Service Commission and the U.S. Air Force -- and one is a large corporation -- Bank of America. We chose two Federal agencies because of the importance of seeing how the requirements of the Federal Privacy Act of 1974 have affected Federal personnel policies. The Civil Service Commission offers a look not only at the agency that administers general standards of selection in the Federal merit system and supervises agency personnel practices but also an agency that has been working for almost a decade to create an automated Federal employee information system. The Air Force is generally regarded as the most advanced of the military services in the use of computers in personnel, as well as the model that the other services expect to follow in their computerization efforts. Bank of America is one of the most highly automated corporations in the country in its handling of customer and employee data and a leader in voluntarily adopting privacy policies for its employees.

Our examination of these organizations was done by sending them a description of our research study and asking whether a project team could make an on-site visit. Before those visits, the project obtained extensive documentation about the activities and style of these organizations, their history of record-keeping policies and practices, their computerization activities, and their ways of responding to employee privacy issues. Such advance documentation came partially from the organizational managers and partly from interviews with experts on their industry, civil liberties and other guardian groups, and similar outside sources. Several days of interviews were held at each site with organizational executives, computer specialists, personnel managers, and employees, and an examination was made of each organization's current and previous forms for collecting and using employee data.

First drafts of our profiles were read by representatives of the three organizations to identify any factual errors and supply additional information where our discussion was incomplete. The observations section of the Profiles represents our own judgments and no agreement or acceptance of ideas contained there was sought from the organizations studied.

In the remaining sections of this Part, we have provided sketches of additional business firms, government agencies, and nonprofit organizations.

Chapter Six. THE U.S. CIVIL SERVICE COMMISSION*

INTRODUCTION

Almost three million Americans work for the Federal Government, 92% of them in posts under the competitive civil service or other merit system. As the Civil Service Commission has explained, the goals of the merit system are: "obtaining the best qualified people available; giving all citizens an equal chance to compete for jobs or careers in the public service; serving the cause of good government; and raising the prestige of the public service." In addition, the merit system assures "that (the individual) may qualify for a job on the basis of ability to do the work, without discrimination with regard to race, religion, national origin, sex, politics, or any other nonmerit factor. It entitles him to consideration for promotion on the same basis, and it provides protection from arbitrary dismissal and from being obligated to render any political service or tribute..."[1]

While the great majority of Americans support these merit principles, there are sharply competing views among both experts and the public as to what working for the Federal Government means and how career employees should be chosen and supervised.

The first view is that holding a position in the Federal civil service is a privilege, with the jobs paid for by taxpayer funds. As a result, the government has the right and duty to set stringent standards of personal conduct, loyalty, efficiency and good on-the-job behavior for those who seek to enjoy this privilege. Many Americans of this persuasion believe that the Federal Government has not set high enough standards in the past nor does it do so today, with the result that the civil service is said to harbor too many workers whose character and performance are not what they should be. This contributes heavily to the historical distrust of "Federal bureaucracy" among conservatives and in "middle America," and was reflected in a 1977 Gallup poll which found that 67% of the public believe the Federal Government employs too many people and that they work less hard than employees in the private sector.[2]

A second view is that even though no one has a right to work for the Federal Government, the Federal Government should be a model employer in its observance of the constitutional rights of applicants and employees. The criticism of this group is that Civil Service Commission investigations into the backgrounds, affiliations and beliefs of applicants and employees have often violated rights of privacy, and that the use of personal data kept about employees for making promotion or firing

*Research and interviews at the Civil Service Commission were conducted by Project Director Alan Westin, Research Assistant Laura Kumin, Consultant Richard Altman, and Editor Florence Isbell, all of whom did early drafts. The final draft of the profile was written by Westin.

decisions has often denied federal employees adequate due process of law. Such practices are said to drive creative employees away from or out of Federal service, and produce a work force too often oriented toward conformity rather than excellence. This view is the one taken by Ralph Nader's investigation of the Civil Service (published in Robert G. Vaughn's book, The Spoiled System in 1975), by the American Civil Liberties Union, and other reformist groups.

A third view, often taken by students of public administration and centrist civic groups, is that -- like Goldilock's third bowl of porridge -- the Federal service is "just right," given the problems and cross-pressures under which it operates. This view stresses that federal employment must be responsive to public standards of proper behavior for Federal employees (usually enforced by Congress) yet also reflect new and changing social standards of political loyalty, personal morality, and the like. Federal agencies must balance their efforts for strong supervisory, promotion, discipline, and discharge policies against the limitations of due process hearings, union representation, minority-rights protections, and other forces. Given the competition from private industry for good workers and executives, this third view judges the quality of Federal employees and the performance of Federal personnel officials to be quite good overall, especially during the past decade.[3]

These conflicting opinions of Federal personnel policies and their effects provide the general backdrop for our study. Our concerns in this profile will be the information-handling practices and privacy policies of the U.S. Civil Service Commission. Unlike the operations of the British Civil Service and many continental systems, our Civil Service Commission does not have centralized control over manpower planning, selection, transfer, and administration of the 2.8 million Federal workers under merit systems. Rather, as President Kennedy put it in 1963, "the management of Federal personnel matters is a kind of partnership" between the Commission and the individual Federal agencies.[4] The Commission administers the applicant-examining process by which individuals are found eligible for appointment by agencies; it sets rules and regulations governing personnel administration standards and procedures in merit-service agencies; it conducts agency evaluations to examine how personnel matters are being conducted; and it operates the final administrative appeals process for employees protesting adverse actions taken against them by their employing agencies. However, the hiring of particular individuals from the eligible list; the daily administration of work; performance assessments and promotions; and initial discipline or discharge decisions are in the hands of individual Federal agencies.

Recognizing this shared-power relationship, our profile treats the Civil Service Commission as the Federal Government's chief personnel administrator rather than its internal practices as an agency with 16,000 employees (as we will do with the U.S. Air Force, in our next profile). Thus our concern is with the information-handling systems and privacy policies that the CSC uses to carry on its "personnel agency" function.

This is often a difficult assignment, since there is considerable interweaving and overlapping of Commission records with those of individual agencies. Wherever possible, however, we will distinguish between agency and Commission records.

Two additional observations belong in this Introduction. On the one hand, the sources for researching and writing this profile were unusually rich, especially compared to what is generally available in doing such in-depth studies of computerization and citizens' rights in business or government agencies. In addition to the documents we secured and the interviews we held with CSC officials, we were able to talk with highly-knowledgeable representatives from government employee unions, civil liberties groups, minority-rights organizations, and handicapped-worker groups. There is also an extensive record from litigation and Congressional-committee testimony that provides detailed complaints of individual workers and CSC or agency responses. Finally, there is a good literature by political scientists, journalists, and public-interest groups on the Commission's operations and Federal personnel practices.

Yet despite this abundance of source material, we encountered a major problem in documenting current practices and policies of the Commission. When we would present Commission officials with reports of various practices and policies dealing with citizens' rights, and ask for their comment, the replies often received were: "We don't do that anymore," or "those are not the instructions we give our investigators now," or "we just dropped those questions," or "we are in the process of changing that policy," or "we have just recommended to Congress, or to the President, that this be abolished." Such reports of changing rather than stable conditions reflect more than the general changes in employer policies discussed earlier in this report. It stems from factors such as highly directive court rulings during 1968-1975 and the arrival of the Federal Privacy Act, as well as some important initiatives of the Commission itself, reflecting efforts to deal with problems the Commission felt it could and should correct by its own organizational policies.

In the sense that these new Commission policies represent changes that are more observant of citizens' rights, they are clearly a reason for praise rather than criticism by us. However, the rapidly changing rules and practices make it very difficult to know just what the Commission is "still doing" in relation to earlier practices, and sometimes to judge the spirit in which reforms are being carried out. We will consider this problem of tracing how new policies evolved and describing current reality as we develop our profile.

(The Carter Administration's proposals to reorganize the Civil Service Commission were made public after the final draft of this profile was completed. However, a brief discussion of how these proposals relate to issues treated in this Profile has been added in the Observations section.)

COMMISSION FUNCTIONS RELATED TO PRIVACY

As every schoolchild knows, the modern Civil Service system replaced the "spoils system" instituted by Andrew Jackson. The movement to make merit, not patronage, the basis for Federal employment was formally embodied in the Pendleton Act, passed in 1883, which authorized the President to make rules which would fill federal jobs from among those scoring highest on competitive examinations and which created a three-member Commission to administer the merit program.

At the time the Pendleton Act was passed there were 14,000 civilian Federal employees. Today, there are approximately 2.8 million. Of these, 62% or 1.7 million are within the competitive system. An additional 25% are in the Postal service, which has a separate merit system, and 5% more are in other merit systems. Eight per cent are in excepted agencies or in polically appointed jobs, the latter almost always at the highest levels of executive agencies. 69% of Federal employees are men and 31% women, with 21% members of racial minorities About 58% of the federal work force is covered by labor union agreements. The payroll cost of Federal civilian employment in 1976 was $38 billion.

In the 94 years since enactment of the Pendleton Act, the functions of the Civil Service Commission have been expanded and altered beyond recognition through Executive Orders, legislation and litigation. Two of these will be concerns of our profile: determining fitness for employment and setting rules and regulations for agency personnel administration.

1. Determining Fitness for Federal Employment

The Pendleton Act charges the Commission to "fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed." The Commission draws up rules and regulations that establish the standards against which applicants are measured. Its Bureau of Recruiting and Examining and its Bureau of Executive Personnel examine applicants as to their training, education, and experience, while the Commission's Bureau of Personnel Investigations examines applicants and appointees as to their "honesty, integrity, reliability, sobriety, and loyalty."

All Federal jobs are graded according to salary scale and functions. As of mid-1977, GS 1-4 are lower level clerical jobs with a $10,809 top; GS 5-8 are the lowest level administrative jobs with a top pay scale of $16,588; GS-9 through 12 are middle level administrative jobs with a $26,571 top; GS-13 through 15 are senior level jobs with a $43,923 top; and GS-16 through 18 are the super-grades with a top pay of $47,500. Certain blue-collar workers are paid the prevailing wages in local private industry for their occupations.

In the competitive service, most applicants for grades 1 through 7 must take a written examination; the upper grades are rated under "practical and uniformly applied qualification standards" as to education, training, length and nature of experience, etc. As the Civil Service Commission explains, "When a vacancy occurs, and the appointing officer decides to make an original appointment, names on the top of the appropriate list are referred to the employing agency for consideration. The employing agency is required to make a selection on the basis of merit and without discrimination because of race, creed, color, national origin, sex or politics." There are several exceptions that keep this system from operating strictly on the basis of test performance or standard qualifications, such as veterans' preference , geographical (state) quotas for certain types of positions in agency headquarters in the Washington metropolitan area, and "name requested" jobs, where the hiring agency wishes a vacancy filled by a particular named individual and writes the job description in such a way that only a particular individual named can qualify for it. In addition, there is constant pressure from members of Congress and the Executive branch to give special preference to constituents and supporters for competitive jobs.

A. Applications for Federal Employment

In 1976, the Commission received 10.9 million inquiries about federal employment. It processed 1.6 million completed job applications, and hired 156,000 persons, or about one out of ten applicants.

An applicant for Federal employment, whether to the competitive service or the excepted service, (agencies exempted from CSC rules), must complete two forms which start the process of determining fitness for Federal employment.

The first is Standard Form 171, Personal Qualifications Statement. As of mid-1977, the following information is what an applicant must complete on Form 171: name; address; state of legal or voting residence (for job apportionment purposes); birth date; social security number; military service; previous employment, including brief job descriptions; special qualifications, such as publications, patents, memberships in professional societies, etc.; education; criminal convictions or court martials; relatives in government service; and three references not listed in the employment history.

The second form required of applicants is either Standard Form 85 (for non-sensitive or non-critical sensitive positions) or Standard Form 86 (for sensitive positions).

SF 85 calls for name; address; social security number; name of spouse (maiden name for women); place and dates of marriages; divorces;

widow(er)hood; residences back to 1937; places of employment back to 1937; and organizational affiliations "other than religious or political organizations or those which show religious or political affiliations."

Standard Form 86 -- Security Investigation Data for Sensitive Position -- calls for all of the information in SF 85, plus: height; weight; eye and hair color; citizenship; education; military service; arrest record; medical treatment for a mental condition; foreign countries visited; close relatives; close friends; and whether or not applicant has previously been investigated by any agency of the government.

SF 86 used to contain two "loyalty" questions: "Are you now, or have you ever been, a member of the Communist Party, U.S.A., or any communist or fascist organization?" "Are you now or have you ever been a member of any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, fascist, communist or subversive, or which has adopted or shows a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the constitution...or which seeks to alter the form of government of the United States by unconstitutional means?" These were deleted by the Commission in September of 1977.

Copies of the completed application form SF-171, and of the SF-85 or 86, are placed in the employee's Official Personnel Folder, which is a continuous record of his or her career in government service.

B. Employment Investigations

The forms that the applicant fills out are turned over to the Commission's Bureau of Personnel Investigations, which is one of the federal bureaus that investigates applicants for "suitability" and loyalty.* The chief authority for this investigative program is Executive Order 10450, handed down by President Eisenhower in 1953. This replaced Presiden Truman's loyalty program, embodied in his Executive Order 9835, issued in 1947.

While E.O. 10450 focuses on loyalty-security criteria, it also calls for the investigation of "any behavior, activities or associations which tend to show that the individual is not reliable or trustworthy," including "any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction or sexual perversion...any illness including any mental condition which... may cause significant defect in judgment or reliability**...and refusal by the individual upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct."

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*The other agencies that conduct investigations of federal civilians are Treasury, Justice, State, the CIA, and the Department of Defense.

**See the discussion later, under "Inquiry about Health," for the CSC's current practices on investigating the "illness" part of E.O. 10450.

Except for short term temporary appointments, all prospective appointees are investigated, either by full field investigation (about 24,000 in 1977) or by national agency checks and inquiries (about 300,000 in 1977). As the Commission explained to our project:

"Full field investigations are conducted for all positions having duties that are critical in terms of the national security.

"A full field investigation is an investigation conducted personally by investigators to obtain full facts about the background and activities of the individual under consideration. It includes three basic elements: (1) A national agency check covering the files of the major governmental investigative agencies including the files of the Federal Bureau of Investigation, the Civil Service Commission, and the military departments as appropriate; (2) personal interviews with present and former employers, supervisors, fellow workers, references, personal associates, school authorities; and (3) checks of police and other pertinent records including military service, FBI field office, and credit records when necessary. These investigations provide intensive coverage of the most recent five years plus coverage beyond that time, if necessary, to resolve materially derogatory matters.

"Positions of lesser sensitivity require national agency checks and inquiries (NACI). The NACI consist of national agency checks as described above, plus written inquiries to former employers, supervisors, references, law enforcement offices, and schools attended. The inquiries cover the most recent five years.

"If the NACI investigation develops derogatory information that appears to be disqualifying, a limited personal investigation is conducted to obtain the facts about the person's recent activities for the purpose of determining present suitability for Federal employment. The investigation is limited in scope to that necessary to resolve the issue.

"Applicant suitability investigations are conducted to resolve questions disclosed during the processing of applications for employment. Their purpose is to obtain the facts necessary to resolve the issue and make a decision as to acceptance of the application. Investigative coverage is limited accordingly.

"Whenever an investigation discloses a question of loyalty or security under the criteria given in Executive Order 10450 or Part 731.201(f) of the Civil Service Regulations, the Commission discontinues its investigation and refers the case to the Federal Bureau of Investigation for a full field loyalty investigation."

The responsibility for designating positions as "sensitive" falls to the heads of all Federal departments and agencies, though CSC regulations now allow this to be delegated to lower officials in these agencies. They decide which positions in their jurisdiction meet the above designation and, for most of them, insure that permanent occupants of those positions have security clearances. During a 15-month period in 1976-1977, the BPI did 336,321 NACIs and 26,903 full field investigations. The Commission does not have current figures for the number of jobs which are designated as critical-sensitive or non-critical-sensitive. The last available figures are from testimony given by a Commission official in 1971, at which time there were 266,275 positions designated as "critical-sensitive," and 626,312 as "non-critical-sensitive," the majority of both categories being in the Defense Department.

2. Personnel Administration

The Commission has authority to set rules and regulations for the conduct of personnel administration by Federal agencies, and its mammoth Federal Personnel Manual represents a detailed code specifying what is supposed to be done -- and not done -- by agency personnel officers.

A. Day-to-day Supervision and Administration

As in other organizations, Federal agencies administer health-benefits and retirement programs for employees; do performance appraisals and periodic ratings; make assignment and promotion decisions; conduct various training exercises; administer equal employment opportunity programs (and, more recently, opportunity programs for handicapped workers); carry out occupational safety and health programs; and provide special alcohol and drug programs for employees with such problems who elect to take part in these rehabilitation efforts. In all of these activities, sensitive personal information is collected and used.

One special activity involves the Commission's administration of the Federal Hatch Act, which forbids employees to take "any active part in political management or in political campaigns." Originally passed to prevent the coercion of Federal employees in election campaigns and protect the impartiality of Federal governmental processes, the Hatch Act has been sharply criticized in recent years by Federal employee unions and civil liberties groups as representing an unnecessarily broad limitation on off-the-job, First Amendment rights of federal employees. Though the Supreme Court has steadily sustained the constitutionality of the Hatch Act against such privacy and free speech challenges,5 a current drive in Congress by employee groups seeks to cut back the scope of such restrictions on employee political activity to allow such things as expression of political views, participation in local elections or campaigning, and to deal in a more pinpointed way with coercion of employees or abuse of governmental authority for partisan purposes.

B. Adverse Actions and Appeals

An appealable adverse action is a personnel action in which an employee in the competitive service, or one eligible for veterans preference in the excepted service, is removed, furloughed without pay, suspended for more than 30 days, or reduced in rank or pay. These do not include reductions in force.

Contesting an adverse action is a two-step process: the procedure within an agency consists of a notice of the proposed action by the agency to the employee; an opportunity for the employee to reply orally and/or in writing within a reasonable time; and the agency's decision, which may become effective 30 days after issuing the proposed notice. (The agency's decision here must be made by a higher level official within the agency rather than the official who proposed the action.) At this stage, there is no requirement for the employee to get a trial-type hearing, present witnesses, or confront or cross-examine accusers, although the agency in its discretion may grant such a hearing.

The second stage, or the appeal, is initiated by the employee, and goes to the Federal Employee Appeals Authority. After their decision, either the employee or the agency can request reconsideration by the Commission's Appeals Review Board, under established criteria for reopening cases. Finally, the three Commission members may, at their discretion, re-open a case for a further review.

There were 17,577 adverse actions taken in 1976, covering removal, suspension, and demotion. About a third of these (36.7%) were appealed. Commission statistics (compiled since Fiscal Year 1975) show for 1976 that of 2,569 adverse actions appealed and decided in that period, 545 were rejected and 2,024 were heard. Of those heard, the agency action was affirmed in 1,354 cases and reversed or modified in 670 cases. The reversals were for procedural error twice as often as on the merits of the case.

Though only 102 of the appealed adverse actions were specifically labelled for "inefficiency," the categories making up the large majority of such actions do deal with conduct related to job performance or job qualifications. These include unauthorized absence, unbecoming conduct, improper performance of duty, physical disability, false statements, criminal conduct, misuse of government moneys or property, falsification of documents, attendance record, intoxication, drugs, and insubordination.

Public interest groups have criticized the Commission's appeals system on the ground that hearing examiners and members of the Board of Appeals and Review are agency-management oriented; that the Commission serves as adviser to agency heads; and that at both the regional and national level its mission is to preserve smooth working relationships with management.

This orientation, critics of the appeals system say, results too often in the failure of the Commission to look behind formal agency charges to discover that an adverse action for insubordination, unbecoming

conduct, or even a seemingly job-performance failure may be motivated by a desire to remove individuals who might expose agency inefficiency or otherwise rock the boat; or investigate whether a Reduction in Force (RIF) might be an adverse action in disguise; or that charges of "personality difficulties" might really be euphemisms to support racially or sexually discriminatory practices. Such misuse of the RIF was at the core of the case of A. Ernest Fitzgerald, a civilian Air Force costs analyst who testified in November, 1968 before the Joint Economic Committee of Congress that there had been a $2.5 billion dollar cost overrun on the C-5A transport plane, a fact that the Pentagon had not yet revealed to Congress at that moment. In November, 1969, Mr. Fitzgerald was notified that he would be removed from his job in a RIF effective January, 1970. After three and a half years of hearings before the Civil Service Commission and an extremely expensive court suit, he was reinstated in a Pentagon job at his old salary and awarded back pay (less what he had earned in the interim three and a half years).

In Fitzgerald's case, the subterfuge of the RIF was employed because his job evaluations had been uniformly excellent, with several special commendations, and his record clearly could not have sustained dismissal on a charge of incompetence. In May 1969, the Air Force opened a file which contained "derogatory" statements about Mr. Fitzgerald voluntarily provided by several persons.[6]

In testimony before a Senate Committee considering special legislation to protect whistle-blowers, the ACLU spokesperson stated that "Not a single person disciplined for whistleblowing in the 25 cases that have come to ACLU attention in the last two years has been reinstated without penalty. Mr. Fitzgerald is the only one we know who has been reinstated at all. Not a single individual charged with engaging in retaliation, collection of false and derogatory information, or covering up agency mismanagement has ever been disciplined."[7]

The new Chairman of the Commission, Alan Campbell, indicated that the Commission wanted to insure protection of "free speech" for "whistle blowers" while still insuring efficiency of operations and coherence of agency policies. In an interview for our study during the summer of 1977, he commented that the problem was to create a remedy that does not allow "every incompetent employee who merits discipline or dismissal to wrap himself in the whistle-blower's mantle." (The Carter Administration's legislative proposals for whistle-blowing protections were pending in Congress as of late 1978.)

Notification of Personnel Actions, SF-50, is placed in the employee's Official Personnel Folder. This is a statement of the action only, without narrative comment. If the action is reversed on appeal, the notification form is removed. Otherwise, depending upon the type of action taken, it may remain for varying lengths of time and be available for scrutiny by other government agencies.

The documents about an adverse action that is appealed go into manual Commission files maintained by the Federal Employee Appeals Authority. Such files may contain investigative material, performance evaluations, appeal papers, and correspondence.

Information about adverse actions is included in two statistical computerized files maintained by the Commission. One records all personnel actions taken, while the other contains a random 10% computerized sample of such actions. These two computerized files are used for research purposes.

C. The Monitoring Function

The Civil Service Commission's Bureau of Personnel Management Evaluation (formerly the Bureau of Inspections) is responsible for monitoring periodically how Commission programs are carried out by the agencies under its jurisdiction. Evaluation teams from the Bureau examine, among other things, the operation of the Equal Employment Opportunity programs, job classification systems, merit promotions, adverse actions and labor management relations.

Part of each evaluation is devoted to the examination of personnel folders, including a review of appointments, transfers, re-assignments, promotions, suspensions, RIFs, retirements, performance ratings and removals. Compliance with Privacy Act requirements and Commission regulations involving confidentiality could be included in this review. Evaluations are conducted at agency headquarters but the majority of evaluations are made at agency field offices. They are not usually conducted more often than once a year, and frequently, several years may elapse before a particular installation is evaluated. Evaluations are not performed on a cyclical basis, but rather when the Evaluation Bureau's review of its automated information system or other information sources reveals a problem; on the basis of employee complaints; or when management of a particular agency or installation requests assistance.

Evaluations consist of questionnaires to supervisors and employees, interviews with managers, personnel officers, supervisors, union representatives and with employees who "sign up" to be interviewed by the evaluation team. Agencies must notify employees of a forthcoming visit by the evaluation team and tell them how to contact team members, whose interviews with employees are kept confidential from management. After the evaluation, the installation or agency management is briefed on the team's findings and given an opportunity to discuss and/or rebut adverse findings. Following this, the Evaluation Bureau may submit recommended changes in procedures to the installation or agency where it feels such changes would result in higher efficiency, better organization or cost effectiveness, or required changes where it feels the installation or agency is engaging in personnel practices that violate law or regulation. Such required changes mean that the agency or installation must submit a compliance statement demonstrating how and when it will change and correct its illegal or improper practices. If the compliance statement is not forthcoming, or if it is not properly implemented, the Commission will refer such violations to the Comptroller General to stop the payment of Federal funds to those employees who are benefiting from such improper or illegal personnel actions, or the Commission may temporarily suspend the appointing or classification authority of the installation. It may also move to take disciplinary action against those who perpetuate and order illegal or improper personnel activity.

Where a violation of Civil Service standards or procedures is found in a personnel action, the Bureau will request the agency to correct the problem. Up until a recent court case, Vaughn v. Rosen[8] the Bureau did not inform the employee or ex-employee affected by the violation found, and employees could not learn about such findings. As internal management memoranda, they were exempted from the Freedom of Information Act. Following the ruling in Vaughn v. Rosen that certain portions of the Evaluation Bureau's reports must be made available, the Commission developed new policy as follows:

> "A copy of all CSC evaluation reports issued since July 1, 1976, are available for review by Federal employees (or any citizen for that matter) in Commission regional offices and in the Commission's central office library. Furthermore, copies of any CSC evaluation report issued prior to July 1, 1976 are available from the issuing office on an individual request basis. Any Federal employee will be supplied upon request with information from a CSC evaluation report that pertains to that employee."

The Commission further states that although the ruling in Vaughn v. Rosen recognized that the Freedom of Information Act would permit withholding the recommendations and required actions in these reports under FOI exemption 5, the Commission believes it is essential to publish what action is being recommended to, and required of, agencies to correct systemic violations of personnel regulations. This means that employees can learn whether practices they regarded as improper have been so held by the Commission's review.

RECORD-KEEPING AND COMPUTERIZATION AT THE CIVIL SERVICE COMMISSION

In our description of Commission personnel practices, we have already mentioned three record-keeping systems:

- the employee's Official Personnel Folder, which is maintained by the employing agency;
- the Investigative files maintained by the Bureau of Personnel Investigations; and
- adverse action appeals files which are maintained by the Commission.

These three personnel record-keeping systems are the chief sources of sensitive personal information about Federal employees. They are all manual systems. As we will see below, several other small systems that contain information that could raise privacy questions are manual, too.

What follows is a brief summary of how the Commission's manual systems are maintained.

1. Manual Record Systems

A. Official Personnel Folder. As noted above, the OPF is maintained by the employee's agency, and is meant to be a record of every personnel action taken in his or her career in federal service. It is divided into a "right" side for permanent records and a "left" side for temporary records.

The right side may contain:

o application forms, including SF 171.

o employee benefits - life insurance, health insurance, retirement.

o SF-78, Certificate of Medical Examination (which is a statement of qualification and is not considered to be a medical record.) Any medical record of an examination to determine an employee's fitness for a job is part of the permanent record, but is filed separately from the OPF and is available only to authorized government doctors, to the employee, or, if agency regulations dictate, to the employee's private physician.

o statement of previous federal civilian and military service used to determine cumulative leave, competitive status or potential reduction in force status.

o SF-85 and 86 - suitability and loyalty forms, plus any statement by the employing agency or the Civil Service Commission that the employee has met these requirements.

o outstanding performance ratings, official letters of commendation and unofficial awards or commendations related to the employee's job.

o unsatisfactory performance rating (including notice of warning and any appeal decisions sustaining the rating). If a decision is later made that the unsatisfactory rating was mistaken, the warning and the unsatisfactory rating must be removed from the folder.

o records and documents having to do with separation from the service; e.g., Notification of Personnel Action covering separation; resignation; death; retirement.

What should be in the left, or temporary side of the folder, is not so clearly spelled out in Civil Service regulations: "Papers about a person which are not specified for filing on the right side ..will be considered as temporary records and filed on the left side. Because these records vary widely from agency to agency, no list of them is included in this table. Some examples are: Requests for personnel action, letters of reference, performance ratings (other than Outstanding or Unsatisfactory), debt and draft correspondence, any extra copies of reduction-in-

force notices...admonishments, letters of caution, warning, reprimand, and similar disciplinary action papers."

The left and right division is made partly to distinguish what may be disseminated to others. Private employers are entitled to these limited items on the right side: Name, Grade, Salary, Position, Title, and Duty Location. Other government agency employers are entitled to everything on the right side. The left side is meant to be kept by the original agency and to be destroyed after a period that may vary from agency to agency -- five years would be fairly typical. Both sides can be subpoenaed. There is some flexibility as to what can be given to law enforcement officers. Some agencies respond by giving only the right side; some both sides; some make individual ad hoc decisions depending upon the nature of the request and how insistent it is.

There is considerable diversity among agencies about what may go into the Official Personnel Folder. One example, given by a Civil Service Commission spokesperson, illustrates the kinds of decisions that sometimes arise.

> "An individual was arrested for shoplifting, and her agency conducted an independent investigation of the incident. It determined that although the charge had been dropped, the woman was guilty because when she was arrested, the goods were on her person. A record of this investigation was entered into her file, although no personnel action flowed from it. The agency maintained that this was the correct action because if a subsequent government employer were to consider her for a position of fiduciary trust, the circumstances of her arrest on this charge would be reasonable consideration for disqualification."

The Civil Service Commission took the position that it would be appropriate to keep this information in the temporary investigative files that an agency is permitted to maintain (which are not supposed to be shared with other agencies), but that it could not be entered in her permanent file, since it was not a personnel action.

As to these temporary investigative files, which are not related to the official personnel folder, the Commission's regulations limit how long they may be kept and what may go into them. Employees' groups, including the American Federation of Government Employees, complain that agencies often keep impermissible material and loose gossip in these files, and proof of such a practice in the Fitzgerald case was shown during the court proceedings.

B. Bureau of Personnel Investigative Files: The BPI describes its files this way:

> "We have a Security Investigations Index (SII) required by EO 10450, which is an alphabetical index of all personnel investigations conducted by the Commission on AEC contractor employees. The index also contains a record of investigations

conducted by CSC on applicants for Federal employment to resolve a question of suitability shown on the application form.

"Over half of the 6 million cards contained in this index are simply a record that the required investigation (NACI) has been conducted. The other cards (less than half) in the SII provide a lead to the location of an investigative file prepared by CSC or another Federal investigative agency. If CSC has established an investigative file on an individual, the file is given a number and that number is recorded on the SII card. CSC has approximately 1.5 million (cards) which are not retrievable, the latter in dead storage awaiting destruction in 1980. The dead storage files are searched only if an individual has made a request for his or her file under provisions of the Privacy Act."

BPI records have been maintained since 1938. The BPI has started on a destruction schedule which calls for disposal of both the cards in the SII and the accompanying investigative files which are more than 20 years old. In 1975, the SII was purged of 6 million names on cards where there had been no investigative activity since June, 1955 (leaving the SII at the current 6 million names). No personnel investigation files have yet been destroyed because the Bureau has not found a way to separate out the older files. However, in 1960, the Bureau began filing names according to a numerical system instead of an alphabetical one. By 1980, the 1-1/2 million names still in the old alphabetically arranged files will be at least 20 years old and the destruction of these investigative files will begin then.

C. Federal Executive Development Program System. This is a file of career histories for certain high-level (GS-15 or above) employees. It is maintained by the Commission and includes performance appraisal information and agency recommendations, and is used, among others, by the Executive Department in making excepted appointments.

D. Employment and Financial Interest Statements. Some high-level employees - including some presidential appointees and heads of agencies -- are required by law to file statements to satisfy conflict of interest statutes. These records cover statements of personal and family holdings, business interests, a list of creditors, outside employment, the opinion of counsel, and material on Senate confirmation. Both these and Federal Executive Development Program records are destroyed two years after the employee leaves the Federal Service.

E. Hatch Act Records. These records contain accounts of administrative and judicial proceedings, and are maintained by the Civil Service Commission.

F. CSC Appeals, Grievances and Complaints. These files, maintained by the Commission, contain accounts of appeals to the Commission against adverse action, records of complaints by employees as

to sex, race and other discrimination, or of unfair agency procedures. Such files may contain not only the transcript of the hearing and official documents and correspondence, but investigative materials and performance appraisals thought to be relevant to the subject. Both Hatch Act and Grievance Files are maintained indefinitely. Appeals files are maintained for 7 years from the date of decision.

There are also two minor record systems in manual form covering only the Commission's own employees.

2. Computerized Personnel Records With Personally Identified Information*

Of the remaining six record systems, two are hybrid systems (a combination of manual and computerized records) and four are completely automated. The hybrid systems are:

A. Recruiting, Examining and Placement Records. These contain manual employment histories, performance and potential appraisals, personal history data and rating results. When a written test is involved, the data are scored by computer. Information about an applicant's availability and test scores is put on one punched card, and the applicant's name, address and telephone number goes onto a second card. The two cards are sent to the field office in the area where the applicant wishes to work. As jobs open up, the first card is used to identify potential candidates. The field office forwards the names of the best qualified candidates and narrative qualification statements prepared by the applicants to the agency and it in turn selects from these eligibles which one it wishes to hire, in accordance with the rule of three and veteran preference statutes.

B. General Personnel Records, is a system which covers current and former federal employees. We have already described the manual aspect of that system -- the Official Personnel Folder which is maintained by the individual agencies. The computerized part is the Central Personnel Data File (CPD) which was begun in 1972 as a large automated data base of Federal employee records. By the end of 1975, it contained an estimated 7.3 million records in the following files:

o Current Status File - This is a computer record of all active federal employees and those inactive for less than a year.

o Name File - To protect employee privacy, the Current Status File does not identify employees by name but by social security number; hence this corresponding name file.

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* The Commission has a number of computer applications affecting personnel management that do not contain personally identified data. For example, LAIRS -- its Labor Agreement Information Retrieval System -- which became operational in 1975, stores and allows analytic retrieval of the texts of labor agreements negotiated between federal agencies and employee unions, as well as arbitration awards and other mediator decisions.

o Transaction File -- Record of all personnel actions for Federal employees since 1972 - Filed by Agency and SS number.

o History File -- This is the complete career history maintained since 1962 for a 10% random sample of federal employees, plus the 100% File added in 1974 and used for statistical studies.

o Minority Group Designator File -- This system is used to produce minority statistics from data provided as part of Equal Employment Opportunity programs. This File is being merged with the Current Status File under the controls of the Privacy Act of 1974.

The four personnel data systems maintained by the Commission that are completely computerized are:

A. Retirement records.

B. Executive Assignment records, a skills inventory for the supergrades ordered in 1966 by President Johnson to facilitate recruitment and placement of key government officials.

C. Pay, leave and travel records.

D. Personnel research and validation records.

The Commission's government-wide record-keeping activities are beset by two serious problems. The first is that the size and diversity of the civil service workforce require that agencies keep their own records, and be given a fair amount of flexibility under Commission Guidelines in how they keep them. This has produced a lack of uniformity not only as to content -- of which we have given some examples -- but as to form as well. For example, different agencies use different coding systems to designate the same function.

Second, personnel action procedures in the Federal Personnel Manual are a formidable barrier to consistency in record-keeping. The FPM is a looseleaf compendium of approximately several hundred pages of instructions and supplements issued periodically by the Commission. It is supposed to assist the 30,000 people in agency personnel departments in making and interpreting personnel decisions, but it is such a complicated document that Agency personnel officers complain that it would take a personnel officer two years to become proficient in one functional area of the manual. Commission officials admit that the FPM contains inconsistencies that permit the same personnel action to be treated differently by different agencies -- differences that can affect benefits such as computing the amount of leave to which an employee is entitled, or seniority status, or status resulting from transfer and the like.

The Commission states that:

"Current intensive analysis by CSC indicates that these problems are due to the fact that the subject matter is incomplete and poorly organized and, in many sections, has erroneous, vague or inappropriate narrative material. Policy statements, which properly belong in other parts of the FPM, have been incorporated in the personnel processing portions of the FPM."

The Commission is undertaking extensive revision to achieve consistency and to make the Manual more comprehensible.

Trends in Computerization at the Commission

Computer use by the Civil Service Commission began in the conventional way in payroll and statistical work, followed by applications to compute benefit claims in the Commission's Retirement and Disability Fund. In the 1960s, the Bureau of Management Services which had responsibility for the Commission's data processing, began a study of the Federal government's use of computers in personnel management. The study recommended a coordinated approach to personnel data management, including centralized record-keeping. As one result of the study, the Commission created a Management Systems Division to formulate government-wide personnel data policies. This resulted in the creation of a Data Processing Center, which undertook three new computerized programs: the 10% random sample of personnel actions, automation of applicants' test scores, and automated files of 1 million individuals eligible for annuity benefits.

A second result of the 1960 study was the initiation in 1967 of development of a Federal Personnel Management Information System (FPMIS) (originally called Federal Manpower Information System). The FPMIS plan called for standardizing personnel data so that they could be interchanged among agencies, eliminating duplicative systems, and facilitating computerization. The Official Personnel Folder was to be redesigned to be suitable for automation.

This ambitious plan, however, is still some years away from realization. In 1968, when an initial plan was drafted to implement these recommendations, it called for completion of a comprehensive standardized personnel system by 1974, at an estimated cost of $43 million, with a $1 million start-up cost. All that the then Bureau of the Budget allocated was $250,000 for a study to come up with alternatives to the proposed system. The more modest goals adopted by CSC for FPMIS call for the following activities during 1977-80:

"Preparation for and conducting a live operational test to evaluate the FPMIS design in an actual agency operating environment to assure that it is cost effective, and performs the functions required at all levels of the Government. These agencies (the Civil Service Commission, the Department of the Air Force, and the Department of Health, Education and Welfare -- representative of the more than 50 automated personnel systems

with over 500 automated data submitting points and 15 per cent of the Federal civilian work force) have been selected to work with the Commission through 1980 to operationally test and evaluate the FPMIS. Following the operational test, decisions will be made on Government-wide implementation. Plans are for FPMIS to be implemented incrementally throughout the Government during 1980 to 1983."

EFFECTS OF EDP ON PERSONNEL PRACTICES AND PRIVACY ISSUES

When asked what effects computerization at the Commission has had on individual personnel decisions in the Federal Government, R. Michael Gall, Associate Director for Information Systems in the Bureau of Manpower Information Systems, replied: "Overall, minimum." "We really have made our manual record systems machine retrievable, rather than build new data systems using the capacities of EDP. This is, in part, due to the fact that the Federal Government lacks central manpower planning and central staffing powers. In Britain, where there are only 250,000 civil servants under highly centralized control of policy and assignment, they are developing a management information system with their computer that the U.S. Civil Service Commission cannot. Some individual Federal agencies such as the Federal Aviation Agency, Air Force, and the VA are developing such advanced personnel data systems, but not the Commission."

Gall and others we interviewed in the Commission's information systems operation noted that EDP has had some impact in aggregating data for analytic purposes and to defend policies, as with EEO. As one remarked, "We just can't say, 'we don't have that data' anymore and get away with it in our relations with those supervising us." Also, some general personnel policies are made now in reliance on new data bases, such as new pay schedules. "Where once this was done by tables and intuition, now the Federal Employees Pay Council uses our Central Personnel Data File." There are some promising experiments, it was noted, as with using EDP for predicting staffing needs or drawing competitive examinations, and it was pointed out that the Commission's computers are used for handling automatic deposit of retirement checks in bank accounts. There is also a decentralizing effect in now having terminals in area offices so that personnel people there can draw on registers of eligible applications from a central or regional file. But "the dreams of far-reaching management information systems that were around in the late 1960s," Gall observed, "with their 'we will solve the problems of the world approach,' do not represent the current thinking of either EDP specialists or Commission officials."

Gall also noted the reasons why EDP had exerted such a small influence so far on individual selection and placement activity. The criteria for making such decisions are not clear and usable, he said, as in computer assisted medical diagnosis or credit scoring. Also, the short interest span of job applicants, frequently-changing qualification requirements and job needs, and variations among Federal agencies are seen as presenting special challenges to effective EDP utilization in Federal

examining and placement activities. Commission Chairman Campbell added that skills inventories aren't much help when the factors for selection of high executives are so individual and political. He felt that the Civil Service Commissions in states like New York and California were more advanced than the Federal service, because of the broader scope of their personnel authority and the EDP support that can be given to them.

Reflecting these views of where EDP has and has not been a force in the Commission's work, it also seemed clear that either defining privacy policies or carrying them out once set has not been affected in major ways by computerization at the Commission. The most sensitive personal information remains in the manual files, and is likely to for quite some time to come, given the high cost and low payoffs in automating extensive narrative records. What is automated is open to employee access and does not function as the basis for making vital decisions that are not also fully documented in manual records. This is not to say that there are not important issues of accuracy, timeliness, and completeness involved in automated records as now used, or as new files are developed, but only that the basic issues of what should be collected, with whom it should be shared, and how individual access should be afforded have not been fundamentally affected, for better or worse, by automation.

PRIVACY ISSUES AND PRIVACY ACT EXPERIENCE

So far, we have outlined current CSC policies and practices, noted the record systems used to carry out these functions, and observed that EDP efforts at the Commission have been fairly limited, with little major impact as yet either on privacy policies or monitoring of Privacy Act compliance. Now, we turn to a more extensive treatment of privacy issues. In doing so, we will try to note for each main area of CSC activity which changes of policy over the past few years were brought about by forces other than the Privacy Act, which were results of the Act's requirements or interpretive guidelines from OMB, and what questions of privacy policy are still left unresolved.

When Congress was considering the Privacy Act in 1974, the Commission lobbied for broad provisions exempting federal personnel records. It asked that its investigatory and examining records be given blanket exemption from employee scrutiny and that access to medical information be restricted. As enacted, the law exempts the Commission's investigatory records only to shield the identity of an informant who has been given an express pledge of confidentiality after the date of the Act, or was given an implied promise before that time. The only examination materials exempted are those whose disclosure "would compromise the objectivity or fairness of the testing or examination process," a standard practice in public and private organizations giving tests. There is no specific exemption for medical records, although agencies may filter records through a physician of the employee's choice if they feel direct revelation would be harmful to the employee.

1. Appointments: Standards for Fitness and Suitability

Applicants are now given a Privacy Act Notice which explains that the information provided on these forms will be used "as a basis for an investigation to determine your fitness for employment...including a security clearance and an evaluation of qualifications, suitability and loyalty to the United States." The Fingerprint Chart, required of every Federal employee "will be sent to the Federal Bureau of Investigation and may be retained there. This information and information developed through investigation may be furnished to designated officers and employees of agencies and departments of the Federal Government having authority for employment...The information may also be disclosed to any agency of the Federal government having oversight or review authority with regard to Civil Service Commission activities, to the intelligence agencies of the Federal government, or to others having reasons as published in the Federal Register."

The notice also includes a statement - Effects of Nondisclosure -- which explains that if the required information is not disclosed by the applicant or an employee being investigated for security clearance, processing of the application will be suspended. Supplying only partial information may result either in the application not being considered or cause a significant delay in its processing. Employees who fail to supply significant information may be discharged, and false answers carry criminal penalties as well.

Finally, the Privacy Act notice explains that disclosure of the individual's Social Security number is mandatory. It will be used to identify the individual's records and "in connection with lawful requests for information about you from former employers, educational institutions and financial or other organizations."

Some of the information required of Federal job applicants is required by law, such as age and residence. Most of the other information collected on Federal application forms is clearly relevant to future job performance, such as education, training, and work experience, and job applicants would expect both to furnish such information and to have it verified. However, there are some inquiries used in determining employee fitness and suitability that raise privacy issues. One set of concerns is whether the condition asked about is really relevant to making a job decision, or to put it more sharply, whether society wants certain conditions or past activities taken into account for Federal employment. Another concern is over the scope and conduct of suitability investigations: should certain sources be used in checking on applicants, and how do CSC investigators apply judgment to the reporting of various personal or political activities. The following are some of the areas about which criticisms have been raised.

A. Inquiry into Political Beliefs

Civil Service Suitability Guidelines state that "Peaceful protest and dissent are rights guaranteed by the Constitution, and, therefore, are not matters at issue in making suitability determinations." But membership in organizations, dissenting or not, and participation in peaceful protest, are sometimes made the subject of Commission inquiry.

On SF-85 and SF-86, applicants were required to list "Organizations with which affiliated (past and present) other than religious or political affiliations..." The Commission explains that some applicants, such as White House Fellows, want to have their professional organizations taken into account. However, the form of the question suggests that the political-organization-exception refers only to organizations connected with politics or political parties. Since no other explanation is given, some applicants feel required to list organizations such as the League of Women Voters, American Legion, National Rifle Association, Americans for Democratic Action, John Birch Society, etc. None of these organizations is "political" or connected with a political party, but all of them take positions on national issues and legislation. This question was a hangover from the days of the Loyalty Boards in which organizations were checked against the Attorney General's list of subversive organizations, even though that list was abolished by executive order in 1974.

Although not listed in its publications as an official source for NACI checks, the Director of the BPI told a Congressional Committee in 1976 that, in the past, the Commission had routinely relied on the "subversive, intelligence files of local police agencies in employment inquiries." Rep. Bella Abzug, Chairperson of the Subcommittee, characterized the files of these local "red squads" as "unsupported and often erroneous accusations and hearsay about citizens' ties to suspected organizations." This, says the Commission, is rarely done today. The BPI also used to check the files of the House Un-American Activities Committee and its successor, the House Internal Security Committee, though it had a "low opinion" of the value of those files. Since this committee was abolished in 1975, no such checks are made today.

In 1976, the Commission announced that Federal court rulings forbidding overly broad inquiries into political activities protected by the First Amendment had led it to drop questions about Communist Party membership from SF-171. In late 1977, the Commission announced that it now read the Privacy Act to forbid asking questions about organizational membership even of applicants for sensitive positions, and that such questions were being dropped also from SF-85 and 86. Furthermore, if a suitability investigation turned up "mere membership" by an applicant in organizations that advocate violence, without "overt acts" by the individual, such membership information would no longer be recorded in a CSC file or be forwarded to another Federal agency.

B. Inquiry into Arrests and Juvenile Records

In 1966, under pressure from government employees' unions and the ACLU, the Commission deleted from its standard application forms the question: "Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority?" Despite this deletion, arrest records not followed by convictions remain an element in suitability determinations. In its FBI check, the Commission receives all the material about an individual that appears on his or her identification records, and this includes arrests, with or without a subsequent conviction. In arrest records where no conviction has followed (approximately 35% of the cases), the FBI is not able to keep track of the disposition: whether it involved an acquittal, the case was dropped for lack of evidence, was dropped because of constitutional violations by police, etc.

As to juvenile records, CSC suitability standards note that state and local juvenile court convictions and convictions under the Federal Youth Corrections Act need not be listed in response to the question on application forms about criminal convictions. Here again, FBI files often contain juvenile records. The Commission points out that CSC Guidelines require disregarding all Juvenile Records, even when they appear in an FBI record.

C. Inquiry into Health

In 1974, the Commission dropped the question on Standard Form 171 that asked applicants about five major health conditions. At the same time, the Commission directed agencies to remove health questions from all other applications and forms used in the examining process, including "locally developed forms."

This was the result of a CSC review in 1972 on ways to improve determining the medical suitability of prospective employees. It resulted in the Commission's decision to delegate to each appointing agency the authority to reject "certified job eligibles" on medical grounds, rather than have the Commission certify applicants as medically acceptable. A July, 1974 memo by the CSC added that removal of the question will also "strengthen the Commission's safeguards against improper disclosure of medical information and will serve as a further protection against possible invasion of individual privacy."

However, the Commission takes the view that the individual agencies are justified in asking accepted applicants the same questions that used to be on the 171 Form, and this has not been affected by the Privacy Act. In a 1976 letter to a staff attorney at the Mental Health Law Project, the CSC's general counsel denied that the Commission's removal of the questions from SF 171 was based on the position that these questions were per se "an unwarranted invasion of personal privacy." Rather, he said, the Commission's position was that collection at the application stage was "premature" and "an unnecessary intrusion into the personal

affairs of the applicant when weighed against the need for the information at this juncture." That would not be true at a "more advanced stage of the selection process." The Commission is now in the process of revising its SF-177, "Statement of Physical Ability for Light Duty Work," to ask about the five conditions taken off the SF-171, in addition to the questions already there about physical limitations, physical endurance factors, and environmental endurance factors.

D. Inquiry into Mental Treatment

The question about medical treatment for a mental condition, added to SF-86 in 1963 under the authority of E.O. 10450, gave rise to a 1974 court case, Anonymous v. Kissinger.[9] This involved the State Department, an agency not under CSC authority, but the case provided the court with the opportunity to examine several aspects of the government's right to inquire into an employee's mental state.

One aspect of the case involved the employee's interpretation of the question itself. He had consulted a private psychiatrist twice, at two widely separated times. He answered the question negatively on the ground that he did not have a mental "condition" and that this was not "treatment" in the medically understood sense of the term. In this, and in the broader aspects of the case, he was supported in an amicus brief by the American Psychiatric Association, the American Psychological Association and the National Association for Mental Health. The agency charged him with answering the question "falsely" and gave his "false answer" as one of the grounds for dismissal. As to this aspect of the case, the U.S. Court of Appeals remanded the case to the District Court "so that (it) may re-enter a judgment on a basis which does not rest in part on a finding that appellant's answer was false."

However, the court found that the State Department was within its rights to dismiss the employee because during the course of the investigation the employee had refused to "cooperate" with government investigators who demanded that he consent to having them examine the confidential records of his psychiatrist, and that he answer intimate questions by investigators concerning his marital relationships.

What raises troublesome relevancy questions about this case is that neither the government nor the court disputed the fact that the employee's job performance in this non-critical sensitive position "had been entirely satisfactory, his loyalty was not questioned, and his behavior had been exemplary."

In a case currently pending in a Federal district court in Michigan,[10] a woman was denied employment in a VISTA program where she had been serving satisfactorily as a volunteer because she had been hospitalized and treated for a psychiatric condition four years earlier. Her suit alleges that it was improper to exclude her on the basis of that experience, that her current work performance is satisfactory, and that the government's position represents blanket discrimination against former mental patients.

E. Inquiry into Morals

The most controversial suitability standard employed by the Commission involves that of disqualification for "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct." Until 1975, when the CSC revised this standard, homosexuality was defined in the guidelines as a form of immoral or notoriously disgraceful conduct, and was per se grounds for dismissal even if the homosexual conduct had been confined to the employee's private life.

Today, the Commission does not apply a per se approach. The change came about because of a series of cases in the late 1960s and early 1970s. One such case, Mindel v. Civil Service Commission, decided in 1970 by a Federal district court in California,[11] involved a postal clerk who had been dismissed for living with a young woman "without benefit of marriage." The Court overturned the dismissal on the grounds that it violated his right to privacy and due process of law, noting that the employee held a nonsensitive position, had acted discreetly, had not violated local law, had not created notoriety or a scandal, and had not diminished his job performance. The most far reaching abuses were brought out by homosexuals who had been summarily dismissed because of non-job related homosexual activities, in Norton v. Macy and Scott v. Macy against the Civil Service Commission[12] and Ulrich v. Schlesinger and Gayer v. Schlesinger against the Defense Department's independent review board for industrial clearances.[13] In all of these cases, the courts ruled that the material collected about sexual behavior "must not only be relevant, but no more intrusive of the applicant's privacy than is reasonably necessary." The Court in Gayer explicitly recognized that a less stringent standard applies to non-sensitive civil service employment. In Gayer and another Defense Department case, Wentworth,[14] the court commented on "the appalling array" of materials demanded of and recorded about the employees, including such items as teen-age masturbation, the frequency of sexual relations and "pruriently" detailed questions about the techniques employed in sexual relations.

In another case, Society for Individual Rights, Inc. v. Hampton, a 1973 Federal court ruling from California,[15] the Civil Service Commission was ordered to "forthwith cease excluding or discharging from government service any homosexual person who the Commission would deem unfit for government employment" solely because it might bring the service into public contempt and reduce citizen respect. "The Commission can discharge a person for immoral behavior only if that behavior actually impairs the efficiency of the service."

Responding to the court rulings, the Commission drafted new suitability guidelines in 1974, and published a notice in the Federal Register inviting interested groups to comment on them. In its bulletin explaining its proposed regulations, the Commission made a strong argument for retaining "immorality" as a disqualification. The Commission said that it wished to keep the "immoral" standard as applied to homosexuals despite court criticism because "the potential for blackmail might jeopard-

ize the security of classified information." However, the Commission made no distinction between avowed homosexuals, where the threat of blackmail does not exist, and covert homosexuals, where it does. Nor did it raise the spectre of blackmail in connection with heterosexuals who might be engaging in clandestine sexual activities. The Commission further defended its position by stating that homosexuality might be evidence of an unstable personality. Here the CSC ran into criticism from the American Psychiatric Association, which had declared that homosexuality "like other forms of sexual behavior are not by themselves psychiatric disorders."

Once the new suitability guidelines dropping the word "immoral" were actually adopted, the Commission stated that it no longer espoused the views expressed in the bulletin quoted above; that it makes no distinctions between homosexual and heterosexual conduct; and that under the new guidelines sexual conduct of any kind must be found to be "notoriously disgraceful" to be disqualifying. In an analysis of its suitability investigative program, prepared for the Center for Governmental Responsibility, Holland Law Center, University of Florida in 1976, the Commission stated: "If we may editorialize, our observations are that types of human conduct seem to remain about the same through the years - what changes is the visibility of that conduct and society's attitudes towards it."

Even though the suitability standard has been changed, employees may continue to be damaged if derogatory reports as to suitability remain in the records. The problem involved is illustrated by Finley v. Hampton, a case adjudication in 1972-3.[16] Finley sued the Civil Service Commission for expungement of a portion of an investigative file compiled during a security investigation in which an informant had stated that two of Finley's friends had "homosexual mannerisms." The government responded by declassifying his position from "sensitive" to "non-sensitive," but he was not dismissed or demoted, and continued to do the same job at the same pay. The court ruled that since he had not been penalized, and since there was "only a speculative possibility" of future harm to his career, he had not shown "legal injury sufficient...to require expungement of material from the file." In a dissenting opinion, Judge Skelly Wright remarked acidly: "Why (the government) refuse(s) to expunge the silly statements ..from the record is a mystery to me unless, of course, it intends to use them again...If this is the reason for the apparent bureaucratic intransigence, and the Government's brief on appeal clearly so indicates, then the harm done to Finley is obvious and continuing."

According to the Director of BPI, amendments and/or deletions will be made upon request if the information being challenged does not meet the tests of accuracy, relevancy and timeliness. He pointed out, however, that the vast majority of the investigative data compiled in the last 25 years relates to the criteria contained in E.O. 10450. While he believes instances of files containing inaccurate information are extremely rare, the Privacy Act of 1974 has effectively changed the definition of "relevancy"; consequently, the files are replete with information which

was relevant in terms of the criteria under which it was collected, but would not be relevant under current suitability guidelines or under certain provisions of the Privacy Act. For example, until 1974 persons who were known to engage in homosexual acts were excluded from employment in the Federal competitive service by government policy. This policy was changed in 1975, but screening over 3-1/2 million investigative files for references to nonactionable homosexual conduct is seen by BPI as beyond its resources. However, before files are released to another agency, they are now reviewed for the purpose of deleting information describing how a person has exercised rights guaranteed by the First Amendment. And before files are released outside the Executive Branch, they are now reviewed, and deletions are made, to insure compliance with the accuracy, relevancy and timeliness provisions of the Privacy Act.

The Privacy Act has two provisions that deal with what information may be collected and stored by Federal agencies. The first, section (e)(6), says that agencies shall "make reasonable efforts to assure that... records are accurate, complete, timely, and relevant for agency purposes before they are disseminated "to any person other than an agency..."

The second provision is section (e)(7) which states that agencies shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment, unless expressly authorized by statute or by the individual about whom the record is maintained, or unless pertinent to or within the scope of authorized law enforcement activity."

These two limitations -- as to relevance and exercise of First Amendment rights -- provide the basis on which objections to the type of information collected and disseminated can be asserted under the Privacy Act. Of several lawsuits already filed, the case of Gang v. Civil Service Commission, decided on May 16, 1977, is worth examining here.[17] Robert Gang applied for employment with the Library of Congress in 1975 and was not hired. He had previously been employed by the Federal Government from 1939 to 1947, and his Civil Service Commission investigative file, begun in August, 1942, was made available by the CSC to the Library of Congress. The official interviewing Mr. Gang received a copy of its contents. The file was forwarded on October 21, 1975, 24 days after the effective date of the Privacy Act. (It should be recalled that agencies were given a year to prepare for the Act becoming operational.)

Gang's file contained, in the words of the Federal District Court that heard his case, "information concerning plantiff's alleged 'leftist' political views, his membership in left-wing organizations, his conscientious objector draft status, his religion, his medical condition, and his family history." The court noted that, between 1947 and 1975, Gang had applied unsuccessfully for employment with several other Federal agencies.

When Gang was not hired, he demanded access to his investigative file under the Privacy Act, in November of 1975, and obtained it. He then petitioned the Civil Service Commission to have the file expunged in its entirety, and this was done in April, 1976. Gang then sued the Civil Service Commission and four of its officials for various violations of the Privacy Act.

A. He claimed that the Civil Service Commission had made no effort whatever, much less "reasonable efforts" to assure that information in his file was accurate, timely, complete, and relevant. He contended that the Commission should have reviewed the file and deleted the obviously untimely and irrelevant information, including 30 year old material, and the information concerning "political associations, draft status, and religion," which he termed "patently irrelevant." The court found that the Library of Congress was not an "agency" of the executive within the meaning of the Privacy Act, being an arm of Congress. Thus the Commission's release of the file to it, though in pursuit of an agreement to furnish investigative information to the Library, was a release to a "person other than an agency" and had to meet the standards of section (e)(6). The court found that the Commission had not taken steps to meet the four review criteria by examining and purging the file before it sent it to the Library of Congress.

B. Gang also alleged that the file improperly contained information dealing with his exercise of First Amendment rights, that he had not consented to its collection and use, and that it was not maintained pursuant to any statute or a law enforcement function by CSC. The Commission replied that a Federal statute prohibits employment of an individual who advocates or is a knowing member of an organization which advocates overthrowing the government by force and violence, or asserts the right to strike against the government.

Rejecting this position, the court said that while the statute supports maintaining files relating to such organizations, "it cannot fairly be read to permit wholesale maintenance of all materials relating to political beliefs, association, and religion." The court also rejected the argument that law enforcement activity by CSC was involved.

After finding further that the plaintiff had shown "intentional" action by the defendants, and that there was an issue of fact whether the Library of Congress official who rejected Gang for employment had been affected by reading the summary of the investigative file, the court denied the Commission's motion to dismiss the complaint, partially granted the plaintiff's motion for summary judgment (on the violations of the Privacy Act), and ordered a trial on the issue of proving the file had been a factor in Gang's rejection for employment.

While some cases challenging what is collected are being brought under the Privacy Act, it should be noted that actions may also be brought under claims that First Amendment rights were directly violated by government data collection.

For example, a woman in Illinois who had been performing satisfactorily for several months as a government clerk with the General Services Administration was given Standard Form 86 to fill out. She did so, but refused to complete several of the questions that she maintained violated her constitutional rights and were not directly related to employment. These were questions as to prior arrests (which she said violated Illinois law precluding such inquiries), whether she had been treated for a past "mental condition," her past or present membership in "subversive" organizations or those advocating "force or violence," and the foreign countries she had visited. She was fired for refusing to answer these, and has now sued the GSA and the Civil Service Commission in federal district court, with ACLU support, claiming violations of her constitutional rights of privacy, free speech, and travel.[18] This case -- and others contesting questions about physical and mental conditions being tested in cases brought by the Mental Health Law Project -- promise to keep the Federal courts busy for some time to come examining which questions -- and the standards they enforce -- satisfy American notions of relevance, propriety, and respect for privacy.

It is also clear that the way in which various agencies and the Civil Service Commission interpret the connection between homosexual conduct and job performance remains a matter of dispute, and will be the subject of new test cases. For example, a New Jersey man was fired by the Internal Revenue Service from his job as an IRS investigator following his arrest by police -- a year earlier -- for allegedly engaging in a homosexual act in a county park. The charges were dropped, but the IRS maintained that he had engaged in notorious and disgraceful conduct. It said that being a legal officer adjudicating conflict situations, he could be subject to blackmail or threats of physical harm. The IRS also declared that it had not fired the man merely because he had engaged in a homosexual act but because the "act is evidence of emotional and mental instability." The former employee, arguing that "at no time was there any correlation shown between his job performance and his alleged homosexual conduct," sued the IRS and the Civil Service Commission in October of 1977 for illegally firing him.[19]

What about the general effects of the Privacy Act on the amount of personal information collected? In filing its 1975 and 1976 annual reports to the Office of Management and Budget on implementation of the Privacy Act, the Commission has stressed that while no whole systems of records have been eliminated, certain forms have been dropped and there has been a definite "reduction in the amount of information requested."[20] However, this does not seem to have involved eliminating classes or categories of information as much as thinning out the amount of detail collected within a category or eliminating duplicate collection of information. At least no classes of personal data dropped because of the Privacy Act were cited to us in our discussion with Commission officials, other than the items already discussed as having been eliminated because of non-Privacy Act causes.

In all these areas in which privacy complaints have been made about current suitability standards, the key question would seem to be: What evidence is there that persons with a particular alleged disqualification would make bad employees or work less efficiently than their fellow employees? The Commission's position is that this is not an issue that is subject to empirical verification. In reply to a recommendation by the Nadar Group that studied the Commission, calling for a study of the predictive value of investigative reports, the Commission declared:[21]

> "We are required by law to determine fitness and character of individuals for employment. Investigative information, both favorable and unfavorable, is essential to such determinations. To conduct an empirical test, trying to evaluate on some sort of statistical basis the relationship between the contents of these reports and successful job performance, would be an unnecessarily elaborate and costly way of proving what is already known."

In many ways, the Commission's view is persuasive. It is difficult to imagine how a valid test could be constructed in this sphere, especially when we appreciate the wide individual variations within any particular category of behavior being tested and the enormous difficulty of managing long-term, double-blind testing. For better or worse, this is not something on which scientific testing can be of significant help; it is basically a matter of social values, with the individual and social costs of any policy of disqualification taken into account alongside the efficiency and good name of the public service.

2. The Suitability Investigation Process

Passage of the Privacy Act led the Commission to eliminate one element of its investigative process that had been used since World War II, its Security Research and Analysis File. This consisted of 2.5 million index cards on private citizens, each of which referred back to a piece of published material denoting "subversive" activity. The published material might be a story in the radical press listing individuals who had attended a meeting; transcripts from hearings before the House UnAmerican Activities Committee or its successor, the Internal Security Committee; mastheads of suspect organizations; newspaper clippings of anybody mentioned in connection with dissident views, etc. Few of the individuals listed were federal employees or likely applicants; the index contained, for example, "dozens" of cards on Gus Hall, Secretary of the Communist Party. (A new card was made out each time an individual was mentioned, thus making for considerable duplication on many individuals.) In addition to duplication, another peculiarity marked this system. Every name in every clipping or transcript was put on an index card. Thus, both the police officer and the anti-war protester he arrested were each given an index card in the file. In 1975, the Commission "eliminated" this file. A high Bureau of Personnel Investigations official explained that although the file was useful, the Commission felt that "with Privacy (the Privacy Act) coming, we had no authority to keep it."

Since passage of the Privacy Act, investigative records are available to the employee, except for those items in which the informant has been given a promise of confidentiality. In these cases, the name of the informant is withheld as is any information that might betray the informant's name. The files are not shared with agencies outside the government, but they are, under certain circumstances, shared with the employing agency. Several pre-Privacy Act cases filed by the ACLU illustrate how this practice works.

In 1973, a young woman named Lodico, employed as a reference librarian by the Department of Interior's Natural Resources Library, was informed by the Bureau of Personnel Investigations that it was investigating her "suitability for Federal employment."[22] The BPI letter contained an attachment of 29 questions about her political activities and beliefs of the past ten years reflecting a detailed investigation into her background. She refused to answer these questions saying that she considered them irrelevant to her suitability. A month later, the Bureau wrote to Ms. Lodico stating that because more than one year had passed since the date of her appointment, the Bureau's jurisdiction to disqualify her for lack of suitability had expired and it would "take no further action other than to furnish the results of the investigation to your employing agency."

In the normal course of events, she would have received an increase in grade from GS-9 to GS-11 after the first year, and another employee in the same position and length of service was so promoted. When Ms. Lodico asked why she had not received a promotion, her supervisor told her that there was a problem with her "security clearance."

The first thing to be noted about this incident is that Ms. Lodico's position did not require a security clearance and that therefore the investigation of her political beliefs and of her membership in the Socialist Workers Party seem not to meet the job-related nexus required by the courts.

The second is the role of the BPI in forwarding the results of the investigation to the employing agency. The BPI's role is defined as conducting investigations for suitability, and it also has the power to terminate employment within the first, probationary year. In this case, the probationary period had been completed, and the ACLU charged that the dissemination of her record to the employing agency served no legitimate purpose.

The second case, Carroll v. Lynn has been completed, and the record is therefore more illuminating.[23] In 1973 Ms. Carroll had been a temporary clerical employee at the Department of Housing and Urban Development. When her temporary appointment was not renewed, as it had automatically been several times before, she was told that it was because her assignment had been completed. However, several other clerks working on the same assignment were renewed. In 1974, she sued HUD for reinstatement and back pay and the Civil Service Commission for access to her investigative record. While the case was proceeding through the

courts, the Privacy Act went into effect, and the court ordered production of her record immediately under the Act. The record showed that the Civil Service Commission had transferred to HUD, as part of its investigative record, an 80-page FBI record which contained her membership in the Socialist Workers Party, minute details of her sexual life, social activities, casual remarks to acquaintances and tradespeople, dates of visits to her home town, whom she saw and talked with -- a day by day account of her life down to the most insignificant minutes. It is evident that much of this information was gathered by the FBI in the course of its intensive campaign to infiltrate the Socialist Workers Party, an effort now being exposed in several cases brought by the Party. What is less clear is why the Commission transferred this material to HUD, and why HUD felt compelled to discharge Ms. Carroll - whose work admittedly was satisfactory - on grounds having nothing to do with her job qualifications. Another aspect of this transfer of material about her that Ms. Carroll raised in her court papers was that "everybody" in her office knew that she was being fired because she was -- as her supervisor put it -- "not as loyal as some other people."

HUD officials evidently felt uneasy about introduction of the FBI file into evidence, and testimony about office gossip about Ms. Carroll's "loyalty," and settled out of court for the $10,000 that Ms. Carroll claimed in back wages.

The Commission states that the transfer of personnel records from it to a government agency, and between government agencies, is a "routine use" under the Privacy Act and that notices so stating have been published in the Federal Register: therefore the express knowledge and consent of the employee who is the subject of such records is not required under the Act. The Commission also cites a Justice Department opinion that, for the purposes of records dissemination, all agencies of the government can be considered as one entity, and that therefore the knowledge and consent provisions of the Act that apply to third-party dissemination do not apply in inter-agency dissemination. While this is the present legal status, a compelling case could be made for the Commission to be viewed in the same light as a credit reporting agency under the Freedom of Information Act and the employing agency to be viewed as the client of the Commission. This relationship would require the subject of the investigation to be notified when his or her record was disseminated to the third-party client.

The Commission's view is that E.O. 10450 requires that an investigation be conducted to "enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of national security," and that the agency head could not determine this without being furnished with the fruits of the suitability investigations. As to giving employees notice that such reports are being furnished to the agency, the Commission believes

that its Privacy Act Notice, CSC Document 14, provided to each applicant or appointee who completes investigation data forms SF-85 and SF-86, provides ample notice to the person that investigative information developed will be provided to the employing agency. The notice reads, in part, "may be furnished to designated officers and employees of agencies and departments of the Federal Government for employment purposes" etc. The Commission disagrees with the idea that it should be viewed as a credit reporting agency with the employing agency viewed as a client. In fact, it has recently approved the delegation of broader adjudication responsibility to employing agencies.

Until recently, few statistics were kept or made available as to the outcomes of suitability investigations. The Commission has now begun collecting such data, and furnished our project with figures dealing with the number of cases and outcomes of suitability determinations involving applicant and appointee investigations from 1973 through a 15-month period covering 1976-77. For 1976-77, for example, these show 2,000 applicants investigated, 532 rated ineligible, and 142 withdrawing their application. The remainder, 1,326, were presumably hired. For appointee determinations, 1,586 cases were processed in the same period, of which 102 resulted in removals directed by the Commission and 385 in resignations by the employee or Agency terminations of employment.

While the Commission does not have these figures broken down by category of suitability involved, its memo to us remarks that experience indicates that the most frequently involved standard is "criminal, dishonest, infamous, or notoriously disgraceful conduct." Between 1968 and 1978, no applicant was rejected or appointee removed because of loyalty grounds. (Twelve such loyalty actions were taken between 1956 and 1968.)

The Commission has also developed a new capacity to report on the outcome of employee appeals of adverse decisions involving suitability before the Federal Employee Appeals Authority, the Commission's centralized mechanism for reviewing agency determinations. In Fiscal Year 1976, 157 appeals involved suitability rulings. The FEAA affirmed the Commission's finding of unsuitability in 81.5% of these (128) and reversed the finding in 6.3% (10 cases). In the remaining 12% of the cases (19), the FEAA either rejected the appeal on procedural grounds or remanded it for reconsideration.

While these figures indicate the volumes of suitability investigations, the number of adverse actions taken, and the general outcome of appeals, this does not really provide much of a basis for assessing how sensitively and well CSC investigators treat the total package of pro and con information they collect about applicants and employees. The Commission's recent guidelines for applying suitability factors and its instructions to investigators are impressively balanced and fair-minded. Yet the records in dozens of litigated cases during the past half dozen

years, and many more complaints brought to labor unions and civil liberties groups, suggest that the conception of private "misconduct" adopted in such cases seemed to be at variance with the spirit of the guidelines. Perhaps this was a feature of the transition from the old era of the 1950s and 60s to the new Privacy-Act era of the mid-70s. But unless someone conducts a qualitative review of how suitability investigations are presently conducted and how agencies actually use the reports that are given to them, there is no empirical basis for judging how well the suitability investigation system is now working.

Turning to the effects of the Privacy Act on suitability investigations, the Commission went into this topic at length in its 1977 report to OMB.[24] "The biggest impact" of the Act, it stated, "remains in the Commission's Bureau of Personnel Investigations."

> "The Commission continued to experience a decline in the productivity of written inquiries used in the National Agency Checks and Inquiry investigations. Employers, law enforcement agencies, and educational institutions often either refuse to furnish information or request a prior signed release from the data subject."

The report said that measures had been taken to minimize this problem "somewhat," such as asking for less information, adding places on the forms for the source to request confidentiality, and "a proposed inclusion" of a "release statement" by the subject on personnel forms.

The Commission added that there had not been similar problems with the personal interviews conducted with third parties, and without experiencing any substantial increase in the number of requests by such sources for confidentiality. Overall, the Commission judged that the Privacy Act's impact "has not significantly reduced the effectiveness of the (investigations) program" and difficulties have been "less than first anticipated."

We went in detail into the effect of the Act on personal interviews in our discussions with officials in the Bureau of Personnel Investigations. They explained that CSC regulations require investigators to notify witnesses at the outset that the subject of the investigation may, on request, learn the identity of the witness and get a copy of the information he provides. However, the investigator is prohibited from informing the witness that he or she may request confidentiality, because of CSC's judgment that Congress wanted this claim to be invoked sparingly, rather than become an automatic procedure.

To see what the real effects of the Privacy Act were, BPI officials made evaluation visits in May of 1977 to three CSC regions, talking individually or in small groups to over 125 investigators and supervisors. "The consensus was that the Act (specifically, the Notice) had produced the chilling effect (on witnesses) infrequently if at all."

Instead, most investigators reported that the Notice about the subject's access rights "seemed to assure the witness that the information requested was needed and valuable, and that misuse would be discouraged." Some of the witnesses' reactions noted and paraphrased by investigators were these:

> College professor: 'Good! Now I can be assured that what I tell you will be reported accurately -- he will see to that.'"
>
> Neighbor: "I hope she does see what I have to say because someone needs to tell her (not me to her face) that she discusses 'matters of state' indiscriminately."
>
> Employer" "He knows I fired him, and why -- I don't care if he sees it in writing."

In addition, the Bureau reported that it had made two informal studies, both of which confirmed that "the percentage of cases containing derogatory information has not changed appreciably..." They did notice "a considerable reduction in the amount of borderline type information -- some of which provided interesting insights, but none of which was actionable."

The conclusion Bureau officials drew for us was that "the Privacy Act has not made the personnel investigation a worthless tool. On the contrary, (it is) alive and well..."

3. Personnel Administration

Privacy issues have arisen in a host of areas that are part of federal personnel administration. We can only sample some of the most interesting ones here:

A. Supervisors' Desk Notes

It is a common practice of supervisors to keep "desk files" or "drawer records" in which they write down observations about an employee's performance (lateness, absences etc.), or problems in getting along with fellow workers, or disturbing personal behavior (drunkeness, suspected drug use, etc.). Usually, these desk files serve as anticipatory documentation for counseling the employee, making a critical rating or appraisal, or initiating an adverse action. Some employees know about the existence of such desk files, and passage of the Privacy Act -- with its guarantee of employee access to records kept about them -- gave rise to employee expectations that they could demand to inspect these records, along with supervisor concerns whether such access would be required or whether desk files would be banned by CSC regulation.

The CSC's response was to rule in mid-1976 that personal notes or records kept by a supervisor "as memory aids regarding the performance, conduct, or development of employees" that he or she supervises are not

prohibited by the Privacy Act. They are also not "agency records" subject to employee access, even though they are in the possession of supervisors and used by them to perform official functions. The reasoning was that these desk notes are not disseminated or circulated to any person or organization, the agency exercises no control over them, and they are retained or discarded at the supervisor's discretion.[25]

B. Performance Appraisals and Ratings

Almost all agencies use some system of rating the employee's performance and giving him or her some form of appraisal of progress. Sympathetic observers of public personnel systems have called the history of performance evaluations "dismal," noting the uncritically high ratings given by many supervisors and the lack of either employee or management confidence in the ratings process.[26] Nevertheless, such ratings affect assignments, promotions, demotions, and other job actions, and naturally raise the issue of whether employees are able to see all of the appraisals done about them and the ratings recorded by their agency.

When the Privacy Act was passed, two main types of appraisals were in use in the Federal service. One was the "closed appraisal," in which forms were filled out by supervisors but kept secret from the employee; the theory was that this was a confidential management assessment that the employee did not need to see, since it was for future planning only. The other type of appraisal was the "open" or "mutual" type, in which the supervisor showed the appraisal to the employee, discussed it with him or her, and the employee might even sign the form to indicate knowledge of its contents.

The major effect of the Privacy Act was to force agencies either to eliminate closed appraisals or open them to employee review. For example, the Civil Service Commission discontinued CSC Form 752, a management-only form that appraised one of the Civil Service Commission's own employee's potential and his or her "development needs" and was used in relation to promotion. Another effect, as one Commission official told us, "was to encourage the greater use in the Commission of the newer supervisory and management methods characterized by more open and improved two-way communication between supervisors and employees. There is now no rating or promotability code to which the employee cannot get access."

C. Promotion Decisions

One Commission spokesman told us emphatically, "The Privacy Act has had little effect on promotion decisions in the lower levels of the Federal service. Here, it is unionization and equality rules that determine how supervisors keep records documenting why and how they make promotion decisions. They have to avoid charges of bias, and employee access is usually through union representatives or EEO complaints." At the senior levels of the Federal service, he continued, where organizational managers traditionally make subtle evaluations of alternative candidates, off the record, there is some of the same informality as in the corporate

world but "government is generally more open in its procedures. We create boards, use written records. There's not too much of the lunch between the top guy and his three cronies to make the decision." He added that at the very top, where matters such as temperament, ability to work with outside groups and legislators, and the like must be taken into account, access to formal documents afforded by the Privacy Act really wouldn't mean much. "These are still basically matters of management prerogative."

D. Benefits Administration

With 3.2 million federal employees and annuitants in federal health programs, administration of health coverages and claims payments means that sensitive medical information about employees and their families is collected from them by the health insurance carriers used by the government. Two record systems of the Commission provide for routine disclosure to the carriers of individual employee information necessary to support a health claim benefit. To make sure that the Privacy Act's principles are followed, the Commission decided in February of 1977 to insert language in the government's next round of insurance contracts by which the carriers agreed to use the data solely for health benefit purposes.

E. Employee Access

CSC has 14 employees in a Freedom of Information/Privacy Act unit, and averaged about 30 requests per week for applicant or employee access to investigative files. The average time required to respond is 60 days. The costs for processing access requests during Fiscal Year 1977 was about $250,000. No charge is made to applicants or employees to furnish them with copies of their investigative report, since the Commission found it "was not cost effective to process bills for such small fees." When employees look at their files and seek amendment to them, "We do wind up amending reports," our project was told, "when we find errors, as where an original witness checks the investigator's writeup and says, 'I didn't mean it that way.'" Or, there may have been an expungement of a criminal record since the original investigation; with an explicit order, we remove any such notation from the record. If there has been something in the "Remarks" section of the SF 50 -- Official Notification of Personnel Action -- and the remark was not substantiated on appeal, we remove that completely, erasing all the history of the original comment and the appeal."

F. The Social Security Number

The Commission's 1977 Privacy Act report declares that "the use of Social Security Number (SSN) has received perhaps the closest scrutiny of any item of information that an individual is required to furnish to the Commission." It is redesigning forms to eliminate requests for the

number "wherever possible" and indicating that, where it is not essential, individuals can decline to provide the number without loss of rights or benefits. In one record system, the "Managerial Potential Rating System," the Commission substituted the employee number for the SSN "without any adverse effects." The Commission notes that where the SSN is still required, "there has been some reluctance on the individual's part to furnish it."

4. Third-Party Disclosure of Personnel Information

A major purpose of the Privacy Act was to limit federal agency disclosure of personal data about individuals to the uses for which it was collected or where the individual gives consent to further use. This complemented the exception from disclosure under the Freedom of Information Act of "personnel and medical files...the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Applying the Privacy Act, the Commission no longer releases information about a husband or wife to the other spouse under retirement, insurance, or occupational health records without "the consent of the data subject." The Commission notes that the effect of this rule "is largely irritation to the person denied the information," citing the example of requesters acting for a "medically incapacitated relative." Beneficiaries also cannot find out if they are listed on an employee's insurance policies, and annuitants cannot find out the money amount they will receive, unless, in either case, the employee gives consent.

Labor unions have also been denied access to certain identified personnel information as a result of the Act, including information they previously received under collective bargaining contracts. In one case brought by the American Federation of Government Employees,[27] a Federal District Court upheld in 1976 the refusal of the Defense General Supply Center under the Privacy Act to supply such items as the names of employees nominated for outstanding performance appraisals, quality-step awards, and cash bonuses for superior performance; referral lists for promotion; and the names of employees suspected of abusing sick leaves and continually being late. Certain of the Defense General Supply Center's records are classified as general personnel records under Civil Service Commission authority, and the CSC had failed to list release of the kinds of information sought here by the union under the routine uses to be made pursuant to the Act. It had published as a routine use covering labor unions only disclosures of "names of employees and identifying information." The court held, therefore, that the information could be supplied to the union only with consent of each individual involved. (In its 1977 Privacy Act report, the Commission updated its routine use notices in order to make more data available to labor unions. It has also augmented its routine use notices recently to permit disclosures to state and local tax authorities for tax levies on government personnel.)

In another court ruling in February of 1977,[28] the Disabled Officer's Association was held to be entitled to get the names and addresses of all living officers of the Armed Forces with service-connected disabilities that prevented their performance of duty. The Defense Department had invoked the Privacy Act and the "personal privacy" exemption for personnel files under the Freedom of Information Act to refuse the Association's request for this information. However, the court applied a balancing test that compared the severity of the potential loss of privacy for these officers against the public interest in the Association assisting such officers to obtain benefits and have their interests presented to Congress, and concluded that the interest in disclosure must prevail.

One important incident in May of 1977 involved information about federal employees that psychiatrists must submit to the Washington-area Blue Cross/Blue Shield organization to substantiate claims under the government's health insurance program.[29] Pressure from Congress in response to federal employee complaints and the threat of a lawsuit by the Mental Health Law Project prompted Blue Cross/Blue Shield to eliminate three questions from the outpatient claim reports: one listing a patient's degree of impairment in job, family, and social relationships; another grading the "degree of subjective distress"; and the most specific one calling for details on things such as thought disorders, manic behavior, alcohol and drug abuse, and phobias. The main reason given for "nearly 100 federal workers" having contacted the Mental Health Law Center, the Privacy Protection Study Commission, and the National Commission on Confidentiality of Health Records to protest these reporting requirements was the fear that this information would somehow find its way back into personnel files and ruin government career opportunities.

While this is not a release of personal data by the government to third parties, the basic issue involved was distrust of the government's system for handling such information and preventing it from becoming known to personnel officials. Civil Service Commission officials stressed to us that no employee health claim forms go through the agency or are seen by supervisors, and no data goes back to the agency or the Commission from the insurance carrier processing the claim. If the agency has to verify the eligibility or coverage of an employee to the carrier, it only indicates something like "high" or "low" option, self only, family coverage, and does not give personnel data to the carrier. One Commission official commented that the fear of leakage out or back "could be their anxiety at work, or that they don't know our strong confidentiality policies."

SUMMARY AND OBSERVATIONS

We have seen several developments documented in this profile:

o Both the standards and procedures involving citizens' rights matters in Federal personnel administration have undergone considerable liberalizing change in the past decade.

o This has been only in small part due to the initiative of the Civil Service Commission itself. Before the operations of the Privacy Act, it came from pressures of civil liberties, union, and minority-rights groups that were translated into legal commands by the courts. Congress has been primarily a passive force in this matter (apart from the general Privacy Act) during these years, unlike its heavy "loyalty-security" pressures on the Executive Branch in the late 1940s and 1950s.

o The Privacy Act has expanded the right of employee access that existed prior to the Act, especially into the investigative-file area but also in important phases of personnel administration, such as performance appraisals, and has opened the way for new avenues of administrative appeal or court action by employees who feel aggrieved by agency or commission actions.

o EDP activities by the Commission have not had as yet a major impact on either the standards or procedures of government personnel work that affect citizens' rights. Primarily, EDP has served as a management tool for the functions allotted to the Commission under its "partnership" relation with the individual agencies.

o Recognizing the magnitude of the task of centralizing, standardizing, and computerizing personnel records, it is a fair guess that significant changes in record-keeping practices are at least several years away. The privacy problems of accuracy, relevance, timeliness, controlled dissemination, and employee access that we have identified will continue to arise primarily in manual records, since these are the ones that contain, and will continue to contain, the most sensitive personal material. Given this fact, there has not been a significant increase in EDP data security problems at the Commission because little sensitive data is being kept in automated files.

These highlights from our profile prompt us to make some general observations about the present and future of federal personnel work under the Privacy Act.

First of all, despite the occasional discomfort that the Commission and other federal agencies experienced with some aspects of the Act, and the efforts required in 1975-76 to bring traditional personnel practices into line with the Act's registration and notice provisions, there seems to be very high satisfaction among the Commission officials we interviewed with the overall effects of the Act. This was given particularly

thoughtful expression by Robert Drummond, director of the Bureau of Personnel Investigations. "Many government employees today reflect the general social climate," he noted. "They have low trust in authority, are willing to believe that agency officials take subjective, improper criteria into account, and include inaccurate or biased information in files, especially investigative files dealing with suitability, clearances, and the like. Therefore, allowing individuals to see and correct files serves major values for the Federal Government. It allows agencies doing the right things to show that they are. It provides incentives for officials to continue doing so, because of the visibility created. And, it builds a record of action, through tests of the amendment and correction process by employees. This demonstrates what is the reality of the process, and this soon gets around to employees in the Federal service."

Second, while the Privacy Act has probably increased consciousness among employees and management about the existence of records, it has not had a profound effect as yet on the way those records are being kept. That is because access to the record by employees has always been secondary to what has been collected, an element dictated by the Cold War that legitimated recording of such non-job related criteria as associations, political views, sexual practices, and all the other vague standards incorporated into Executive Order 10450 and its Truman era predecessor. To the extent that these are being changed, the changes result not from the Privacy Act but from the previous court decisions already described -- decisions that reflect the changing national perceptions both as to "loyalty" and as to what is acceptable private conduct. As the courts continue to move away from their previous administrative "hands off" positions, it is a fair guess that judicial decisions will continue to play a more significant role in limiting the content of employee records than the Privacy Act.

Future changes in record-keeping and personnel practices may come from recommendations of the Domestic Council Committee on the Right of Privacy,* which conducted a two-year study on Personnel Investigations in Executive Agencies. Its recommendations are contained in a proposed Executive Order that would make changes in the criteria and methods used for personnel investigations and in the rights of employees to challenge adverse findings resulting from such investigations.

The proposed order, to supersede E.O. 10450, would replace existing categories with an overall heading of Positions of Special Trust: National Security and National Welfare. The first would cover jobs involving access to classified information relating to national security, foreign affairs, intelligence, military information, etc. Applicants for such positions would be subject to full field investigations, and would require security clearances.

*This Cabinet-level committee operated during the Nixon and Ford Administrations, chaired by the Vice-President of the U.S. The Civil Service Commission participated in the work, and supported the recommendations that emerged.

The second would cover policy-making jobs in domestic affairs with access to sensitive information "critical to the Nation's economic or domestic interest;" these would require a full field investigation, but no security clearance. This new distinction was presumably made, at least in part, to satisfy the Supreme Court's 1956 ruling in Cole v. Young that dismissal or other adverse actions for "national security" grounds could be applied only to activities "directly concerned with the Nation's safety." The new order would do away with the power of the agencies to dismiss anyone summarily without due process protections, even though the individual may be found to be a security risk. This provision is an important gain, even though it is largely formal recognition of what has been regular practice since Cole v. Young. National security has not been invoked as a reason for dismissal for many years because of that decision. Failure to meet suitability standards is invoked instead.

The category of Non-Sensitive position would be replaced by the General Standard Position under the proposed order. This position would still require a NACI check.

Many of the changes in the proposed order are procedural; they are meant to provide mechanisms for completing investigations more speedily, and setting more uniform procedures and definitions across all the agencies. The proposed order would retain the same suitability criteria as are used now, as well as the guidelines interpreting them.

Although it does not make many substantive changes, the tone of this new proposed order is a world apart from the language of E.O. 10450. That order was belligerent in its castigation of "disloyalty" as well as sweepingly vague as to what constituted disloyal behavior, speaking of "any behavior, activities or associations which tend to show that the individual is not reliable or trustworthy."

By contrast, the proposed order, in setting forth areas that may not be investigated, would bar "the probing of a person's thoughts or beliefs and questions about his conduct which have no suitability implications." It would also bar inquiry into "religious beliefs and affiliations or beliefs and opinions regarding racial matters, political beliefs and affiliations of a nonsubversive nature, opinions regarding the constitutionality of legislative policies and affiliation with labor unions or fraternal organizations ..(these) are not proper subjects for such inquiries, except where this information constitutes a bonafide qualification or fitness requirement for a specific employment..."

Given the fact that the suitability requirements remain the same, and that "efficiency of the service" remains the catchall cause for removal or disqualification, a cynic might conclude that the proposed order is merely a more efficient version of the old, with some privacy and civil liberties window dressing. We think not. We believe that the Commission has been slowly moving away from the punitive spirit and the obsessive concern with "loyalty" that characterized EO 10450, as

illustrated by the change in suitability standards, the dropping of loyalty questions from the application form and the removal of organizational questions from SF-85 and 86, and the elimination of its Security Research and Analysis file. By embodying this trend into formal regulations, the Commission would be provided with a vehicle to further reform its practices and policies. Much would depend upon how this proposed order was interpreted and enforced, especially whether the openness of its language would be translated into practice by the Commission and by the agencies. At the very least, the new spirit of the proposed order provides the Commission and the agencies with guidance that could lead to more relevant, accurate, and even-handed suitability decisions. As of the summer of 1978, however, a new executive order had not been promulgated by President Carter, and there were fears that its prospects were not bright in the near future.

Part of the problem lies in the fact that the Carter Administration submitted a major proposal in 1977 to reform the Civil Service Commission, declaring it the Administration's "top domestic priority" for streamlining the Federal bureaucracy. The bill would replace the CSC with two separate bodies, an Office of Personnel Management to handle Federal personnel functions and a Merit Protection Board, to hear grievances and adjudicate appeals. The proposal would also limit veterans' preferences, strengthen the ability of Federal managers to fire incompetent employees, improve Federal pay and career mobility, and install protections for "whistle blowers." With a hard fight to shepherd this major legislation through the interest-group and Congressional gauntlet, the Carter Administration probably did not want to issue a new executive order on the volatile security and suitability issues while its general CSC reform legislation was pending.

Just what position Congress might take on Federal employee privacy issues in the less-Watergate-conscious climate of 1979-80 remains to be seen. Where Congress in the 1945-1960 period was a source of pressure for broad loyalty-security standards and wide-ranging suitability investigations by CSC, Congress from 1973-78 has been primarily a force for liberalizing CSC practices, as in its treatment of Federal personnel matters in the Privacy Act. While this still seems to be the dominant mood on Capitol Hill, Senator Strom Thurmond, a Southern conservative, denounced the CSC in 1978 for its "progressive dismantling of the Federal Loyalty-Security Program," done "without the knowledge of Congress and contrary to statutory requirements."[30] He also castigated the Commission for reading the Privacy Act to forbid asking applicants for sensitive federal posts whether they belonged to groups such as "the Communist Party, the Maoists, the Ku Klux Klan, Palestine Liberation Front, Puerto Rican Nationalist Party, Jewish Defense League, and other organizations advocating violence." In deference to Senator Thurmond's objections, CSC Chairman Alan Campbell announced that he would not destroy either the Commission's Index or Source Files relating to alleged subversive and radical organizations until Congress had a chance to decide whether it wanted to authorize retention of those files or have them destroyed. He added that the Commission would also "welcome" clarification by Congress of what the "First Amendment" rights provision of the Privacy Act was intended to cover. This suggests that Congress may intervene in 1979-80

to set more specific guidelines for suitability investigations, precipitating a fresh debate over the balances to be set in this area.

We can also expect the Federal courts to play a growing role in Commission policies, as more appeals from Privacy Act personnel cases move into the Federal judicial system. In early 1978, the Commission had 27 FOI/Privacy Act cases pending in litigation. Seven of these involved refusal to amend employee records as requested, and these will probably lead the courts to deal further with employee privacy rights.

Finally, we have written much about the concerns of personnel officials and the interests of the Federal government. What about the individual - the applicant for a Federal job or the person employed in a Federal agency? As for applicants, the Privacy Act now insures that anyone either turned down for a Federal job or even not hearing from the government about a completed application after a reasonable time can have fairly effective redress: access to any investigative file that was compiled; the right to demand amendment, correction or expungement; and the capacity to bring action in the courts challenging agency compliance with Privacy Act standards and procedures. Important uncertainties still face someone who wishes to apply for Federal employment but does not know whether his or her sexual activities (anyone who has in the near past run afoul of local police for engaging in homosexual acts) or prior mental treatment will either bar their employment or make them work under a cloud of worrisome suspicion. Hopefully, these remaining grey areas will be clarified by court decisions or by regulations under a new executive order on suitability.

As for the Federal employee, it is important to distinguish the privacy issues from those involving either free speech rights of employees (the "whistle-blowing" problem that the Carter CSC reform addresses) or matters such as EEO enforcement. Hewing carefully to the privacy issues, the employee who must have security clearances or is regarded as subject to blackmail faces the same uncertainties discussed above for the applicant. We have stressed the cross-pressures that the Civil Service Commission faces in trying to bring its judgments into line with more liberal notions of personal privacy while still not going too far ahead of prevailing public opinion. But individuals also face cross-pressures -- how to plan their careers and pursue employment possibilities without subjecting themselves to painful and unsettling rejections that really do not bear on their capacities to be good employees. A democratic society ought to be very careful not to turn such people away from Federal service or limit their advancement when this is not truly necessary to protect the efficiency or security of government activities.

Beyond this standards problem, Federal employees seem to be skilled in using their access rights under the Privacy Act, and can now challenge any uses of personal information that violate moral or legal norms in American society. In terms of <u>privacy</u> rights, therefore, the situation of Federal employees is probably better than in most other sectors of American employment.

SOURCES AND FOOTNOTES

Through the Civil Service Commission, briefings and interviews were arranged for project staff members during 1975-1977. Unless otherwise indicated by a footnote, material in this profile referring to Commission policies and viewpoints comes from these briefings and original documents supplied by the Commission.

We are grateful to the following officials of the Commission for personal interviews, briefings, and provision of documents: Alan Campbell (CSC Chairman); Clayton Averitt, BPI (Investigations); Gene Bruns, BRE (Examinations); John Curnow, BMIS (Personnel Records); Robert Drummond (Dir., BPI); Raymond Eck, BRIOH (Health Records); Lew Fisher, Office of the General Counsel; Michael Gall, BMIS (Computers); Ed Gnysavage, BMIS (Personnel Records); Tony Green, FPMIS briefing; Reginald Jones, BPS (Personnel Policy); Charles Kopchik, BPME (Personnel Management); Ron Leahy, (Office of Labor-Management Relations); Paul Mahoney, FEAA (Appeals); Tom O'Connor, BRE (Examinations); Joe Ogelsby, OPA (Public Affairs); Lloyd Olden, Bureau of Recruiting and Examining; Stewart Rick, Office of the General Counsel; Phillip Schneider, Bureau of Manpower Information Systems; Nicholas Suszynski, Bureau of Manpower Information Systems; Anne Wilson, CSC.

We also had valuable interviews with Ralph Temple, Legal Director, National Capital Areas ACLU; Lawrence Smith, Assistant to Congressman Walter Fauntroy (D., D.C.); and Frank Reeder, Office of Management and Budget.

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11. 312 F. Supp. 485 (N.D. Cal. 1970).

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21. The Civil Service Commission response is in Appendix I of Robert G. Vaughn, The Spoiled System: A Call for Civil Service Reform (N.Y.: Charterhouse, 1975), 278.

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23. Carroll v. Lynn, settled, 1976; case file in National Capital Areas ACLU office, Washington, D.C.

24. See note 20 supra.

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26. See "Performance Evaluation," in Nigro and Nigro, op. cit., 197-205.

27. Local 2047, American Federation of Government Employees v. Defense General Supply Center, Civ. No. 75-0573-R (1st. Ct., Richmond, Va.), Order filed Nov. 17, 1976.

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29. "Blue Cross Stops Collecting U.S. Employees' Mental Data," Washington Post, May 20, 1977.

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Chapter Seven. THE U.S. AIR FORCE*

INTRODUCTION

We selected the U.S. Air Force to look at a "high technology" personnel system operating in a military setting. This provides a set of formal rules and customs quite different than those encountered at Bank of America, the Civil Service Commission and other non-military employers we studied. Like the other federal agencies we studied, however, the military services are subject to Privacy Act regulations, and this gave us a chance to examine the effects of that Act on military as well as civilian personnel practices.

In some respects, the Air Force is like a large multi-national corporation, with more than half a million officers and enlisted people and more than 250,000 civilian employees scattered over many countries engaged in a wide variety of work activities. With the recent movement of military pay scales toward civilian norms, changes in some standards such as hair and dress codes, and increasing pressure toward unionization of service personnel, it has become more appropriate to discuss the Air Force and other services as one might discuss non-military employers. The services share with civilian employers the problem of attracting, selecting, training and motivating a work force. With suspension of the draft, military and non-military employers share some of the same labor markets as well; the civilian labor market and the overall state of the economy now affect the Air Force's ability to attract recruits more than ever before.

Some of the civil liberties issues we have seen in civilian settings appear in the military as well: the problem of developing tests and other criteria that are fair and reliable; dealing with problems of racism and sexism; and providing sufficient career movement to keep experienced personnel where they are needed. Yet, while military and civilian employment settings are growing more similar, profound differences remain. One of these is that, at least for recruits, the Air Force provides a 24-hour-a-day living environment, not a nine-to-five one. Practices in recent years have made this somewhat less true for officers and even for enlisted people after basic training, but a good deal of social life, health care, and similar activity still is "on base." Furthermore, decisions about military personnel are made out of a "total" personnel record which covers not only work performance and work-related information but every aspect of the individual's life. Thus, when we apply the privacy standard of "relevance" to Air Force personnel record keeping, we do so in a different context from civilian employment. The fact that many of its jobs require some kind of security clearance also reinforces this concern for the total person, since almost any aspect of a person's life may be seen as relevant for a security clearance determination.

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* This profile was researched and written by Project Consultant Michael A. Baker, with final editing by Alan F. Westin.

A "Closed Environment"

Whether military services are composed of volunteers, as they are now, or of draftees, individuals may not leave their duty posts -- or the service -- without permission. To do so is a criminal offense, punishable by severe penalties. Failure to obey orders while in the service is also a serious offense. Discipline and obedience, then, are the prime requirements of military life, and breaches of them are reflected in personnel records more frequently and in more detail than in civilian records. Often, what is regarded as a serious breach in military life would be lightly regarded or not noted at all in civilian life. Officers and enlisted people are in effect not protected by the U.S. Constitution while they are in the service in the same fashion that civilian government employees come under its umbrella. While the military justice system, established by Congress, provides many of the same protections afforded to other government employees, there are some substantial differences, particularly with respect to due process.[1]

In addition to the foregoing considerations, which apply to military services generally, we need to keep in mind two characteristics of the Air Force which shape personnel issues: the quality of jobs available there and the fact that its record keeping is highly automated.

The "Attractive" Service

While it, too, has many dull jobs which provide little in the way of intrinsic satisfaction, Air Force reliance on high technology weapons and communication systems means that a larger proportion of its jobs are challenging and interesting. Many of these jobs, the Air Force maintains, have the advantage of teaching skills that are transferable to civilian employment. As a result, the Air Force claims to attract better educated, more highly motivated individuals than the other services; higher selectivity in turn means that disciplinary problems are fewer; derogatory records are less frequent; and -- the bottom line of record keeping, so to speak -- stigmatizing discharges and the privacy problems they raise throughout the veteran's subsequent civilian career are awarded less frequently.

The Automated Service

Air Force personnel records are more highly automated than those of the other services. This came about because of a conscious decision by the Air Force to centralize some of its decision-making functions to achieve a more efficient, cost-effective, and uniform personnel system. Computerization of the personnel records provided a means to accomplish this.

RECRUITMENT, ASSIGNMENTS AND PROMOTIONS

Recruitment Processing

The Air Force, in common with other military services, expands or contracts in size, and has changed character throughout its history, because of national and international factors over which it has limited control. Yet, whatever its size, an elaborate selection program operates to screen out volunteers who, the Air Force believes, might be troublesome or might perform poorly. While continuing recession and high unemployment provide a steady stream of applicants, the Air Force says that it is increasingly difficult to meet recruitment goals while maintaining high standards. In 1976, 75,000 applicants who were judged to be "unsuitable" for one reason or another were denied enlistment. Another 5,254 were discharged prior to completing basic training.

When applicants go to Air Force recruiting stations, they are given an Application for Enlistment and a Personal History form which covers personal and family background, education, travel or residence in a foreign country, employment, and previous enlistments in the service. Other questions ask about drug use, hospitalization for mental illness, homosexual behavior, political activity and juvenile or adult contact with law enforcement. It is clear that relatively few disqualifiers, such as an arrest record or admitted drug use, are automatically applied at this initial stage. Explanations are required for many of these entries -- either in writing or in an interview with recruiting personnel. Physical examinations and aptitude tests (graded in four areas: Mechanical, Administrative, Electronic and General) provide a further basis for the recruiting staff to make preliminary judgments.

Testing, medical exams and some personnel interviews are conducted centrally for all the services at Armed Services Examination and Entrance Stations. Until 1976, much of this processing was under the control of the individual services. Pressure on recruiters to meet quotas sometimes led them to help applicants with standardized tests, fudge test data or ignore derogatory information that might be disqualifying.[2] The Air Force reports that such fraud was never a problem in their recruiting programs and that the new centralized testing for all the services makes it unlikely that such problems will arise in the future.

Checking "Suitability"

As in Federal civil service, some of the information on which suitability determination rests comes from background investigations. These are conducted for the military services by the Defense Investigative Service (DIS), a separate DOD agency. Enlisted men and women are the objects of an Entrance National Agency Check for which DIS checks the Defense Central Index of Investigations and requests a "name check" through FBI files. Other Federal agencies (such as Civil Service Commission, Immigration and Naturalization Service, the Visa, Security and

Passport Divisions of the State Department, and the CIA) may be consulted as well, but the typical search does not go this far. Officer candidates are checked in essentially the same fashion except that their full NAC includes a more thorough search of FBI files -- by fingerprint identification.

More substantial investigations (which may include personal interviews with employers or references and direct contact with local police agencies) are made if derogatory information of a serious nature turns up in the Agency check or on the application forms and questionnaires which all recruits and officer candidates fill out. As Dr. Elliot Cassidy, of DOD's Security Policy Office, explained:

> "If we see a misdemeanor conviction, we want to know if the person violated some meaningless law, like a curfew, or just got drunk one night, or whether it was more serious - like getting into some mischief in a public toilet. Similarly, if an officer training candidate was active in anti-war protests in college, the field investigator would try to determine the extent of the involvement."

"Ultimately," says a former member of the Defense Security Policy staff, "we have to understand why someone with anti-war sentiments would want to be in the military in the first place."

If DIS discovers no information that it considers to be significantly derogatory, a report to that effect is forwarded to the Lackland Military Training Center. This form is filed in the field personnel record. It is destroyed (as superfluous) if the individual is granted a security clearance at a later point. If DIS decides that its investigations have turned up serious derogatory information on a new recruit, the Security Police at Lackland receive a copy of the investigative report. This office then decides whether the individual should be discharged. In some cases, the Security Police request further investigation.

No detailed information from DIS investigative checks is stored in the personnel files of the recruit. Thus, for example, the fact that a person was once arrested before coming into the service should not appear in the personnel files unless that arrest was grounds for action against the recruit, for instance, discharge. The central computer personnel files at Randolph Air Force Base contain only a note that an investigation was conducted.

As with investigations for Federal civilian jobs, most NAC's are not completed until after the recruit has been inducted. This poses the same kinds of problems we have observed in civilian employment: the recruit may be well into basic training and have made irreversible changes, such as giving up a job, relocating family, etc., only to discover that he or she is disqualified. And the Air Force may have invested considerable money and effort in the training process which will be wasted on disqualification. A Department of Defense official suggests that the services may try to correct this by requiring that the DIS investigation be

completed before the recruit reports to camp.[3]

It is difficult to gauge the impact of these investigations on Air Force recruiting. Of the 80,000 or so agency checks run on Air Force recruits in FY 1976, the Air Force reports that 103 recruits were discharged on the basis of information in the reports. Among these were 21 recruits discharged for "fraudulent enlistment" -- lying about their age, a law enforcement record or other information which the Air Force regards as important.[4] We were told that such figures may not reflect the total impact of the investigative program since, to some extent, it may deter people from enlisting because they know that their records will be checked.

Assignment and Training

One of the goals which military and civilian employers share is to "match" individuals -- by preference and skills -- with jobs in the hope that the job may get done better and morale may be higher. The Air Force has some advantage over other services in this regard because it can attract recruits with higher educational levels who may be more motivated if they can acquire skills that are transferable to civilian employment.

PROMIS. One of the Air Force's responses to the problem of attracting and keeping recruits was to construct PROMIS, a subsystem developed partly in response to the prospect of an all volunteer force and the need to attract and select recruits rather than relying on the draft to prompt a sufficient number of enlistments. In the past, recruiters were set monthly quotas in different job areas to be filled according to aptitude test scores. Coordination in the system was poor and it was very difficult to meet either the personnel needs of the Air Force or the expectations of recruits.

Under the new system, information about the recruit (e.g., sex, test scores, educational background) is relayed to the central personnel system. What comes back after computer processing is a list of jobs, the date each will be available and a score indicating how well the Air Force thinks the recruit is likely to work out in each job. Counsellors at the recruiting station tell the applicant what training is required, what the job will entail and whether the job might be useful in post-service employment. Sixty-two percent of recent enlistments were on a contract basis, in which the AF guarantees a training/job slot. The AF says that less than 1% of those who come in on contract have to be given early honorable discharges because the AF could not keep its end of the bargain.

The PROMIS system doesn't solve all the problems of matching people with jobs. There are many dull jobs in the Air Force, just as there are in the civilian world, and some potential for dissatisfaction is thus built in. The thirty-eight percent who come in on a non-contract basis are likely to end up in the least desirable jobs.

TRAPMIS. This subsystem establishes optimum schedules for flight and related training. The system schedules each individual depending on

the availability of job slots, personal problems, travel time, etc. Its goals are to prevent frustrating delays and to economize by reducing travel costs and making sure there are very few empty seats in expensive training programs. From a morale standpoint, the goal is to give the individual some control over the timing of the training process. The amount of individual control depends on the cost of the training. "If somebody wants out of a training session that is going to cost us $400 a day, there had better be a very good reason. But if the cost to us is small, we do the best we can to meet the personal requests of the trainees."

Airman Assignments and Officer Career Management Subsystems

Assignment to actual tasks and locations is a source of complaint among some officers and enlisted people. The Defense Manpower Commission suggests that selecting the right people is somehow the key to the problem.[5] But in the end, there are going to be aspects of the assignments system that no one likes, and there is likely to be a feeling that some decisions are arbitrary, ill-timed, or unfair. Clearly, the military differs from the civilian world in that the penalties for refusing an assignment are much more severe.

The specific Air Force response to this kind of problem has been to devote greater attention to explaining the assignments system. More important perhaps, is the fact that the general centralization of management functions within the Air Force leads them to substantially centralize the assignment of officers and enlisted people, cutting into the authority of the local commander somewhat, and to use the computer system to coordinate decisions about the nearly 600,000 active duty personnel. One effect of this is that the assignments process is more open and visible. "Twenty years ago the philosophy seemed to be to make assignments in secret. Today we try for the reverse: to display to each person as much of the decision as possible." The Air Force notes that increasing the visibility of such decisions was not a primary goal of centralizing the assignments process. The effort to make the process more visible, and hence promote credibility, was a "natural outgrowth" of centralization for better management control, but was not the driving force behind centralization.

In both the Airman Assignments and Officer Career Management subsystems the individual is given an opportunity to express some preferences for location and job and to review the personal information on which assignment decisions will be made. The individual receives a printout containing all of the information the assignments officer will use. The computer system produces profiles of personnel needs, by specific job and location, in advance. With these, assignment officers make selections from lists of eligible people, choosing volunteers first. Assignment decisions are communicated back to the person concerned in time (usually) for challenges or requests to be made. "We get quite a few complaints," said one officer, "when the job is in Thule or Alaska."

Assignments officers take into account such things as grade, job specialty, efficiency ratings, security clearance, and recent overseas duty. Personal situations, such as the fact that both husband and wife are in the military, "are considered if the individual requests this." They also take into account whether the individual has an Unfavorable Information File at the base level. Such files are established through formal, standardized procedures when, for instance, a unit commander feels that an individual's violations of regulations are serious enough to warrant identifying him beyond the unit level. The central computer system flags the fact that there is such a file and the commanding officer must be contacted before the individual can be assigned. In fact, assignment decisions are communicated to commanding officers, so that they have a chance to intercede -- for instance, if they know that a court martial charge is about to be brought against the person, or if they want to keep the individual in their unit awhile longer. Recruits who have been identified as "marginal performers" (and who may ultimately be discharged for this reason) are not eligible for assignment.

Overall, Air Force enlisted personnel get one of their first three assignment choices about 30% of the time. An Air Force personnel officer suggested that this is better than it used to be under the decentralized assignments system, and that "...a wider choice of positions is available because we have better manpower distribution information about what kind of person is needed where." In addition, Air Force policy requires a minimum of 90 days notice for an assignment, in contrast to the shorter notice given prior to establishing the centralized system.

Especially where commissioned and noncommissioned officers are concerned, the system attempts to "open up" the opportunity structure so that individuals have the feeling that there are more alternatives open to them. "In the past, you didn't even get the chance to talk to the person assigning you; now it happens frequently, by letter and by phone -- almost 400,000 calls last year."

Security Clearances

Where an enlisted person or officer is being trained in a specialty that requires a given level of security clearance, or an individual is assigned to a particular position that requires a clearance, the Defense Investigative Service is asked to conduct the appropriate investigation. In addition to reviewing or updating earlier agency checks on the applicant, DIS may conduct some kind of field investigation to follow up on items revealed in the agency checks or to check one or more of the following: citizenship, education, employment, medical history, character, neighborhood, credit worthiness, involvement with law enforcement authorities, and organizational membership -- particularly those of a political nature. Field investigations may involve personal interviews, direct examination of local records and inquiries at credit bureaus and banks. An applicant's spouse may be investigated in some cases. DIS officers note that relatively few of their investigations will cover all of these areas.

Results of security investigations are sent to Air Force base Security Police Offices where the staff decides what level of security can be granted. Once the clearance has been granted, the investigative reports (which may contain very sensitive information even where the security decision is positive) are supposed to be destroyed. There are exceptions to this. Sometimes the investigative reports remain in base files because no one gets around to destroying them. In some cases Air Force policy requires that they be kept at the base level. A base detachment of the Office of Special Investigations, for instance, may maintain a continuing file because an individual has a relative behind the Iron Curtain, since such a person could be subject to the pressure of threats against friends or family abroad. Two informants told us that an open security file is sometimes maintained on those whose political activities are deemed suspect--as when a person is very active in the women's movement or supports unionization of the armed services. Under Air Force policy this would happen only where a person's activities are clearly "interfering with good order and discipline."

No detailed information growing out of security clearance investigations is placed in the base personnel file. The central personnel data system files at Randolph AFB record when the investigation was completed and what level of security access was granted. While base security files are open to higher level officers on a "need-to-know" basis, Air Force people we spoke with are convinced that sensitive information from security files rarely finds its way "down the pipeline" to unit commanders and lower level officers unless there is some legitimate reason for them to have it.

Under the Privacy Act, all Air Force personnel have a right to access investigative reports about themselves at DIS headquarters in Washington. DIS says that, by its own rules, all such requests are honored after an investigation has been completed. Information can be withheld from the report subject under a number of Privacy Act exemptions, such as cases in which DIS believes that a confidential source might be identified. Approximately 15 to 20 Air Force military personnel come into its headquarters every month seeking information about a security investigation. DIS retains copies of its investigative reports for up to 25 years, and they are indexed in the computerized Defense Central Index of Investigations along with references to investigations conducted by other DOD components. This, DIS says, is to avoid duplication of effort and to insure that important security information is not missed by any of the agencies that share information.

DIS keeps no reliable data on the number of clearances denied on the basis of its investigations. This makes it difficult to assess the effect of such clearance programs, as authorities have pointed out in the past.[6] Beyond discouraging espionage and unintentional security breaches, Roger Little suggests that military investigative programs have the overall impact of "keeping people in line."

"Since the areas of behavior under surveillance are known to members of the organization, intelligence files are also effective instruments of social control. The loss of a security clearance for officers or senior noncommissioned officers is the effective end of their careers. Hence they (and their families) are constrained to adhere to behavior standards that will not generate derogatory items for the record."[7]

Promotions

As in many civilian industries, the range of promotions and the rate of career movement available to the individual in the Air Force depend more on the structure of the organization than on personal characteristics or capabilities. The services frequently find themselves with a large pool of candidates who are roughly equal, but with too few slots into which to promote them all.

The Air Force response to these structural problems is similar to that of many private employers. For lower positions there is a series of almost automatic promotions that create a sense of movement, even though the changes in authority, job and pay are not great. For higher level noncoms and officers there is a competitive system. New slots open up as a result of retirement regulations, "up or out" promotion rules, and, occasionally, as the services seek special legislation to create more high level positions.[8] For officers and enlisted people alike, the rate of movement upward depends on a complex mix of factors, including seniority, the good opinion of their unit commanders and immediate supervisors, and their training, skills and test performance.

The Airman Promotion System operates under the concept of "equal promotion opportunity." Promotion quotas are set, but each Air Force Specialty Code (AFSC) in a given grade receives a similar promotion opportunity; i.e., aircraft mechanics receive the same promotion opportunity to a given grade as drivers, cooks, etc.

Airman promotions in the first four grades (E-1 to E-4) are handled at the base level. All those with the requisite time in service and grade, announced date of rank, and the recommendation of their commanding officer, are promoted to the next level. While such promotions are virtually automatic, the failure to secure a recommendation for promotion (e.g., because one has received a nonjudicial punishment or reprimand) can delay them. Further, promotion to E-4 may be delayed because there are too few slots available.

From grades E-5 to E-7, promotion decisions are centralized at the Air Force Military Personnel Center. Air Force personnel who are recommended for promotion compete by AFSC for available slots through the Weighted Airman Promotion Systems (WAPS). Points are assigned for the following criteria: test results in one's work specialty, knowledge of military procedure and responsibilities, performance reports, time in grade and service, and decorations received. Those with the highest total score are identified for promotion. Promotion sequence numbers are assigned by seniority. Quotas for how many can be promoted in each cycle depend on manpower requirements, budget restrictions and the number of projected openings.

Prior to promotion time, each person gets a printout showing all the information relevant to the promotion decision. Along with the decision comes information on how the person's score compares with that of others, or notification as to what deficiencies (e.g., missing information from the file) must be made up before the person can be considered. For lower grade promotions (E-2 to E-7), the commander has sole authority for recommendations, non-recommendations and removals from the selection list.

Senior noncommissioned officers compete for promotion annually under a weighted factor/evaluation board system. The following factors are considered: supervisory examination score, performance reports, time in grade, professional military education, time in service, and decorations. The evaluation board, in turn, operates under the "whole person" concept and evaluates all aspects of the individual's record. Because the judgments are subjective, the Air Force says, it is impossible to learn how a particular board score is determined. Selections are made by combining the weighted factor score with the board score. Airmen with the highest scores in each AFSC are selected for promotion within the limits of the promotion quota.

Similar to WAPS each eligible individual gets a printout showing the information relevant to the promotion decision. He also receives a score card showing his weighted factor and evaluation board scores and what the promotion cutoff score was in his AFSC. Like all other airman promotion programs, the individual must be recommended by his commander. However, if a commander fails to recommend, or removes a sergeant from the selection list, this decision must be "approved by the Major Commander (e.g., commanders of the major commands, SAC, TAC, etc.) Therefore the immediate commander's control and authority is not as absolute for promotion to grades E-8 and E-9 as it is for the lower grades."[9]

There is no WAPS system for officers. Above the grade of First Lieutenant promotions are decided by a board of senior officers. Officers, too, receive a printout of pertinent personnel data that will be used in conjunction with selection folders when assessing each record. As with enlisted promotions, the recommendation of a rating or endorsing official is very important.

Visibility and Fairness of Promotion Decisions

The Air Force has devoted considerable research and planning to establishing its promotion system. Background research by its Human Resources Laboratory was used in establishing WAPS categories. Teams of senior noncoms from various specialties participate in constructing the paper-and-pencil tests which figure in promotion decisions. Periodic surveys assess opinions of Air Force personnel on promotion criteria, fairness of procedures, etc.

We have had little opportunity to study promotion processes in detail, but it is our impression that several changes since the 1950s in Air Force promotions make the system more open and thus increase opportunity and morale:

- o Promotion boards are composed of officers from different units. They meet centrally and are encouraged to apply the same criteria across all the cases they process.

- o The fact that competition is service-wide opens the opportunity structure somewhat. "It used to be that you were promoted only when a local spot opened up; now more openings are available."

- o Promotion criteria for some ranks are more clearly stated than used to be the case. "The whole key to this," said one personnel officer, "is visibility." People start getting nervous only when they can't tell what is going on and what's going to happen."

- o The Air Force believes that most people who are passed over for promotion know the reasons why.

The Air Force promotion system is of course not entirely free of problems, and the anecdotal complaints we heard sounded very much like those we encountered in civil service and private employment settings. One third of the complaints from airmen that the Air Force receives concerning WAPS are about the relevance of written tests to actual job performance.[10] As we note elsewhere in this report, the development of tests that can accurately measure or predict job performance is very difficult. This is further complicated as a personnel issue because, even where a test is relevant, this may not be evident to those who are competing for promotions.

Where selections must be made, as sometimes happens, among many candidates who are almost equally qualified, arbitrary distinctions inevitably result. The Air Force notes that manpower and budget restrictions sometimes mean that not all "deserving and qualified individuals can be promoted." An airman told us: "Well, if you end up with a lot of scores the same, the decision still ends up being judgmental...I mean, so somebody takes an extra bullshit course and gets the promotion, while the next person doesn't? That doesn't make a lot of sense." Obviously,

there is opportunity here both for rationalization, in which the system is blamed for personal failings, and for mystification, as a result of which some people fail to grasp the quota limitations under which promotions are granted and blame themselves for what is in fact a lack of opportunity in the system.

For senior noncommissioned and commissioned officers, general promotion criteria are well publicized -- with notices sent around to indicate promotion board procedures and shifts in emphasis among the criteria. Ultimately, however, promotion board decisions are subjective. This, coupled with the fact that the boards give no specific reasons for their decisions, provides much room for doubt and speculation on the part of those who are not selected.

We were told that officers try to "keep their ears to the ground to sense what may be important." Those turned down "...frequently run right to their records - grasping at straws, really - to see what might have caused the problem." One base personnel officer said that "They sometimes just don't believe that the printout they got had all the information that was used by the Board. The whole idea that only limited information is used for the decision is hard to sell when you can't really see the Boards make their decisions."

Another personnel officer commented: "If you think about it, the promotion boards work quickly -- maybe three, at most ten minutes per case. How much time do they have to really look at the record? Sometimes they just look at the most recent endorsement (by a commanding officer), see who he is, and make a judgment just on that." In response to this, the Air Force notes that the boards work very carefully, beginning with some practice runs to make sure that everyone is familiar with the procedures, and sometimes spend "...considerably more than ten minutes to review a selection folder." They also note that it would be a violation of promotion board rules to look only at the most recent endorsement and that they know of no cases where this kind of abuse has occurred.

Speaking of racism in all of the services, the Defense Manpower Commission reported in 1976:

> "On the whole, most minority officers in the armed forces are crowded in the lower ranks...A partial exception to this rule is the Army where minorities are represented up through the rank of lieutenant colonel in slightly higher proportions than in the Army as a whole. Yet there are no minority officers above...Major General for the Army and Rear Admiral in the Navy. No black person has attained a rank above Colonel in the Marine Corps. The major single exception to the lack of black senior officers is General Daniel 'Chappie' James, USAF." [11]

The Commission identified some of the race discrimination as a result of "unintentional cultural bias," the result of written tests that are culturally slanted towards whites, or given to blacks with little test-taking experience who, in fact, may be able to do the job, their

poor test performance notwithstanding. But the Commission also noted "discrimination that can be seen in assignment and career patterns as well as in promotions...and in the administration of military justice."

Complaints about racial bias are often linked to complaints about the continuing influence of unit or base commanders in the promotions process. Some commanders, it is charged, slant evaluations and recommendations against blacks. One Air Force officer said, "It all depends on the facility you are assigned to; some officers handle this racial thing a whole lot better than others." It is not only in the formal recommendations that race prejudice occurs, it is charged. Unfair reprimands or punishment can ultimately have the same result. They can produce a cumulative record that "justifies" an impartial board in passing an individual over for promotion.[12]

As in the other services, distribution of minority service people across the rank structure is not even.[13] One Air Force spokesman noted to us that the services have worked for many years to reduce barriers to minority advancement and that, most recently, the Defense Manpower Commission Report "had pushed them considerably" in that direction. Much of the "bunching" of minority service people in the lower ranks, he said, may be due to recent recruiting efforts. In the same vein, Personnel Center officers said that results from very recent promotion cycles show no differences in selection rates between minority and non-minority candidates, but that it may take some time for this kind of development to result in a more even distribution across the ranks.

As we saw in business and industrial organizations, a major part of coping with challenges to internal practices is to keep data showing how various groups fare within the service. The Air Force recently announced plans to validate or expand the ethnic data it stores in the personnel system. Service people will be asked to check off one of fourteen categories naming the ethnic group "with which they identify" or "feel the strongest ties."[14]

The Discharge Process

Like civilian employees, many leave the Air Force by choice, though this is complicated by enlistment agreements (and in the recent past, Selective Service regulations) that are not easy to break. Other officers and enlisted people are forced to leave for reasons that resemble processes operating in the non-military sector of the economy: age; reductions in the work force; and because of behavior or characteristics which the services find unacceptable. In a very small number of cases, service people are discharged as a result of conviction by a military court.

The discharge of most enlisted people is initiated and finalized at base level. Most officer discharge actions are finalized at the Personnel Center and Secretarial level. Retirement applications are initiated at base level and are approved at the Military Personnel Center. As with its other important personnel functions, the Air Force has

centralized some aspects of the separations process in an effort to have better control over the structure and character of its work force and to reduce the amount of time and "red tape" which have long been among the problems of "getting out." The personnel data system is the source of much of the management information out of which "discharge planning" proceeds -- e.g., How many NCOs in various specialties are scheduled for retirement within the next 6 months? When there must be a reduction in personnel that exceeds the number of men and women who separate voluntarily, complete their enlistments, die or retire, the personnel data system advises planners what categories of personnel are most "eligible" to be separated involuntarily.

The centralized data system is also capable of handling much of the routine record-processing connected with separations, keeps track of congressional and other high level inquiries regarding discharges, and coordinates the flow of information regarding AWOLs and deserters.

Military Personnel Center officers believe that the centralized system has simplified the discharge process and made it shorter -- by weeks -- than in the pre-computer past. One indicator of this is that the level of congressional and other high-level complaints has dropped off, from over 1000 in 1970, to less than 500 in 1975. As one would expect, most of the improvement has been with respect to voluntary separations which are by their nature less controversial and more easily processed in routine fashion than involuntary separations.

Perhaps the most important document to come out of the separations process is DD Form 214, the "discharge paper." This contains some objective information (such as job specialty, rank, time lost through AWOL, and length-of-service) and the Air Force's more subjective characterization of the individual's service and separation as Honorable, General, Discharge Under Other Than Honorable Conditions, Bad Conduct or Dishonorable. Two additional items of evaluative information -- Reason for Discharge and Re-Enlistment code -- are entered on some copies of the DD Form 214.

Discharge Characterizations

The judgments which are made about service people at discharge affect veterans and unemployment benefits, re-enlistment opportunities, and civilian employment. The military services maintain that they have a need -- and the right -- to characterize the quality of each person's service on a descending scale from Honorable to Dishonorable. Honorable and General discharges are awarded on the basis of service guidelines and the commanding officer's judgment, and both are considered by the services to be "under honorable conditions." The Discharge Under Other Than Honorable Conditions (until recently called the "Undesirable Discharge") is awarded through administrative proceedings, though in some cases service people waive their rights to an administrative board hearing. Bad Conduct and Dishonorable discharges stem from military court convictions for serious

offenses that, in most cases, would also be punishable under civilian law.

The Air Force is distinctive among the services in awarding the highest proportion of Honorable discharges -- more than 97% in FY 1976 and never less than 94% since 1967. Most of the rest of its discharges are General. As an airman in the Personnel Center told us, "They really bend over backwards not to give even a General; and, now, they are even upgrading many (about 55% in 1976) of the General and Undesirable discharges they have given recently."

Two other important judgments are made about each service person just prior to discharge. The first has to do with the "program" or military regulations under which the individual is to be discharged. For instance, in FY 1976 the Air Force honorably discharged more than 10,000 people under its Marginal Performer regulations which are designed to rid the service of those whose work performance is defined as "lacking requisite aptitudes for satisfactory service."[15] In all, there are more than 300 reasons for discharge, each represented by a code number (the SPD or SDN). Most of these code numbers are neutral (e.g.,"Expiration of term of enlistment"; "Release from Active and Transferred to Reserve"), but some reflect the military's judgments about unsuitable conduct or character (e.g., "Homosexuality";"Alcohol abuse"; "Unsanitary Habits"; "Shirking"; "Unacceptable Conduct"; and so on).

Until mid-1974, the SDN number appeared on all copies of the DD Form 214, including that which the ex-service person might have to show to employers. Currently, the separation code number is left off the copy issued to the individual, but it, or a narrative description of the discharge reason, appears on copies which DOD reserves for its own uses, sends to the VA, and places in the permanent personnel jacket stored in St. Louis.

The services also make a judgment concerning their willingness to re-enlist the individual who is being discharged. The Re-Enlistment (RE) Code is normally a number from one to five. It, too, is currently excluded from the DD Form 214 which individuals receive, but appears on other copies of the certificate. Neither DOD nor the individual services maintain data on the distribution of RE codes assigned at discharge. Thus we do not know what proportion of veterans have been designated most desirable for re-enlistment, code #1.

Those with Honorable or General separations are automatically entitled to VA and state unemployment benefits. Those with Discharge Under Other Than Honorable Conditions or Bad Conduct certificates may have benefits at the discretion of the Veterans' Administration.[15a] In recent years, most people with this kind of discharge have been denied benefits. Those with Dishonorable discharges are automatically denied benefits and may lose civil rights in the same way that convicted felons are denied them.

Many employers treat the military discharge process as though it is a system that produces reliable work and character "references" in standardized fashion. Formally at least, the discharge characterization sys-

tem is not designed for such purposes Whether one makes comparisons from one service to another or over time, it is clear that, military intentions notwithstanding, the discharge process does not produce standardized judgments. The ongoing debate about how to control employment discrimination on the basis of military discharge characterizations is important. But since the Air Force is atypical in the high proportion of "good paper" discharges it awards, we must defer discussion of the discharge issue to another forum.

Appeals On Record Matters

Among the avenues of appeal open to military people who feel that they have been unfairly treated is the Board for the Correction of Military Records (BCMR) maintained by each service. The Boards are unusual in the breadth of issues that can be brought before them by present or past service people who have not received satisfaction in lower level appeals for correction or reconsideration. Performance evaluations, promotion pass-overs, non-judicial punishments, discharge characterizations, disability retirement determinations and many less serious actions can be the subject of an appeal to the BCMR.

The Boards' recommendations, for instance to throw out a low Efficiency Report, upgrade a discharge, or increase a travel allowance, are usually accepted, or, in the case of promotions, at least lead to further review of the case by the Air Force Personnel Center. In FY 1976 the Air Force received 3900 applications from individuals and from groups of individuals sharing a common problem. It approved the change requested in about half the cases.[16]

PRIVACY IMPLICATIONS IN AIR FORCE RECORD-KEEPING

1. Relevance

In discussing the relevance of personal information collected in personnel records we have generally used the rule of thumb of its relation to job performance. This is the rule that the courts have employed as to suitability criteria in civilian federal employment. It is the standard that many private businesses apply when they consider such personal matters as physical health, mental health, sexual activities, sexual preferences, etc., and the standard used as various interest groups challenge employment practices.

By contrast, many military regulations cover aspects of life that in a civilian position would have nothing to do with job performance: military courtesy on or off duty, the proper way to make a bed and maintain physical order in the barracks, length of hair, the maintenance of uniforms. Even when the individual is off the base -- traveling from one assignment to another -- he or she may be subject to many military regulations governing appearance, dress and recreational activities and may be under the scrutiny of military police. Under these circumstances,

the traditional military view of what information is relevant to job performance differs substantially from "civilian" thinking. Being in the service is the job; the particular work assignment that an individual may have at any particular time is by no means the sole focus of control efforts by military authorities.

Thus, military commanders during the Vietnam war declared off-limits for service people coffee houses in towns near military bases in California, Georgia and South Carolina because they featured anti-war entertainment. During the court-martial of Army Capt. Howard Levy (for refusing to train medics for combat), the prosecution introduced a surveillance file, ordered by his commanding officer, which showed that he had engaged in race relations and labor organizing activities off the base on his own time, as evidence of his "undesirable" attitude.[16a]

All of the services regard homosexuality as being relevant to determining suitability. Unlike the Civil Service Commission, they are under no legal compulsion to show that the homosexual conduct has in any way been displayed on the base, or with other service people, before they penalize this preference with a record notation, a bad discharge, or a derogatory reason-for-discharge code. A women's rights leader who has had substantial experience dealing with the rights of women in the military, commented: "Look, there are probably a larger percentage of homosexuals in the military than in the civilian work force. Most are never discovered, and they do just fine." The case of Air Force Sgt. Matlovich illustrates this. He had been decorated many times and had an excellent record for more than ten years. When he voluntarily revealed his homosexual preferences in order to attack the treatment of homosexuals by the Air Force, he was discharged. This is now on appeal.[17]

Over the years, the services have come to demand more and more information from applicants. In defense of this, the Defense Manpower Commission cites the need to identify unsuitable candidates before the services invest in them.

> "A requirement for applicants to provide more extensive medical, drug use and criminal histories may encroach upon current privacy laws. However, the usefulness of this information in enabling the Services to reduce the rate of attrition and costs of new enlistments may justify an increase in the amount of information required to be given to Service recruiters."[18]

Signs of Change

We see some sign that older standards are being challenged and in some cases modified or discarded. It is our impression, for instance, that the establishment of an all-volunteer force has created more pressure for modifying stringent hair and dress codes which have always characterized military life. One Air Force personnel expert noted, however, that the civilian world is probably changing much faster in these regards. As a result, differences between typical civilian and military "appear-

ance codes" may be even greater now than in the past -- even though there have been some changes in the military.

Increasing pressure from the women's movement and a shortage of talented recruits have combined to force some reconsideration of the relevance of sex to job performance. The Air Force now attempts to increase the proportion of women in "non-traditonal" work assignments. In the past, childbearing on the part of women has been defined as incompatible with military service. Backed by the ACLU, a group of Air Force women brought suit to protest the practice of discharging them for pregnancy.[19] Recently, Air Force regulations were changed so that pregnant women are discharged only at their own request, regardless of their marital status.

Many of the people we interviewed, including some in the services, said they anticipated changes in the military's treatment of homosexuals and political dissidents -- changes that will reflect the more permissive attitudes of the larger society and that will respond to the increasing demand that the military forces, like other contemporary institutions, justify the relevance of the criteria they use for decisions about people.

Like the issue of how to construct relevant tests for job assignment and promotion decisions, many of the privacy issues are complicated because it is often difficult to distinguish between policy changes that might reduce unwarranted discrimination and those that would harm a service's primary missions. By tradition, individuals have been able to purchase some degree of freedom by exercising discretion. If one is clever and keeps it quiet, one can be a homosexual in the military or engage in political activities (e.g., in the women's rights movement) that might result in discharge if they were highly visible. But demands for security insert a catch-22 in this arrangement: Those who are secretly deviant can be suborned, since they fear exposure. Further complicating the issue is the fact that maintaining secrecy can damage personal relationships among homosexuals; and much political action demands some kind of public display if it is to be successful. Finally, it is possible that many recruits into the "new military" bring a set of values that will not tolerate the old arrangements for hiding personal sexual preferences and politics.[20]

Yet, open display of homosexuality or unacceptable political activities fly in the face of a long standing tradition concerning the public image of the services. Further, the services argue, visible homosexuality could well harm the morale of non-homosexuals who find such behavior repulsive and threatening.

Finally, we should note two privacy questions that go beyond the scope of this report but are central to the ongoing debate about discharge characterizations: whether the services need to characterize people at discharge in the way that they do now; and whether such characterizations are relevant for non-military employment decisions. These go beyond the scope of this report.

2. Confidentiality

Since the range of personal information recorded about members of the military is so broad, the dissemination of an individual's record to others is even more crucial than dissemination is in civilian life. An elaborate set of confidentiality regulations governs the release of information from Air Force personnel, investigative, and intelligence records. Relatively few people have access to the entire set of military records established on active personnel. But those who have such access (for instance, unit commanders, base commanders, Security Police and the Office of Special Investigations) are often in a position to make critical decisions about the individual concerned.

A. Authorized Dissemination Within The Air Force

Information on each enlisted person or officer is typically maintained at several levels (e.g. Air Force headquarters may know as much about an officer as the Personnel Center). But the centers of focus seem to be the unit and base commanders. There is very little, if anything, that they cannot find out about the people they command. A unit commander is likely to be informed of everything from changes in living arrangements to the results of suitability investigations, and is likely to be told about even a minor involvement with the local civilian police.

In the Air Force, some centralized decision-making is done on the basis of a limited range of objective information rather than by review of the entire file. But this is so only because it is expected that other personal information will have been taken into account in the "prescreening" that is left up to the CO. Indeed, as we have already described, it is the record of such information at base level, the formal Unfavorable Information File, that the CO uses to justify holding up a promotion or assignment. And as we have also noted, while the central personnel records do not contain the full contents of the Unfavorable Information File, they are flagged to record its existence. In other words, even though only a few people have legitimate access to all the records in the system, virtually the entire record -- medical, security, work performance, testing, etc. -- is taken into account at some point in the chain of decisions which lead to an assignment, a promotion or a discharge.

In contrast with civilian settings, the broad "need-to-know" defined for unit and base commanders is especially striking when it comes to medical records. Under military law, communications between physicians and patients are not privileged; indeed, it is the duty of the medical officer to report derogatory information to a patient's commanding officer.

For example, an Army private who consulted a psychiatrist about his homosexual feelings, but claimed he was not a homosexual, was reported by the psychiatrist to his commanding officer, and received a bad discharge.[21]

Daniels has commented on the way some military psychiatrists may alter their professional standards to meet the lack of confidentiality of medical records in the military. For instance, instead of the word "homosexual" in the record, they may write "chronic depressive reaction" or "character disorder", with the result that the person is given an Honorable medical discharge rather than a General or Undesirable release.[22] However, not all psychiatrists and medical doctors are willing to alter the records to protect their patients, and service personnel understand that sensitive medical information will probably be shared with non-medical superiors. This lack of medical confidentiality leads some people not to seek needed treatment from military facilities for fear of the consequences of such information sharing, as the following incident illustrates:

An Air Force widow, whose husband had committed suicide, told the Inspector General's office that her husband had had psychological problems years before. When they recurred, he wouldn't seek help because "...he was afraid he'd be put on the street." In changing assignment locations once, she had even caught him tearing something out of his medical record which he was carrying to his next base. The Randolph Air Force Base I.G. told us, "The problem is, he probably would have been put on the street - just about four years short of his retirement."

The services have established programs to cope with alcohol and drug addiction. In the Air Force, temporary entries that reflect current participation in a rehabilitation program are made in the central personnel record in order to control duty assignments and provide tour stability for rehabilitees. Participation in the program is also noted in personnel records at the base level. In addition, the Air Force says, "a tightly controlled research data file separate from individual personnel records, has been instituted solely for the purpose of program evaluation. This file allows the Headquarters to conduct five-year followup evaluation of rehabilitee successes in the Air Force and helps insure that policies to destigmatize rehabilitation are working." When we asked one personnel officer whether the fact of having been in such a program might influence promotion recommendations, he said, "It really is in the hands of the commander. If promotion is O.K. with him, there's no way that having been in a 'rehab' program can hurt you -- since that information is not taken into account in the centralized promotion and assignments systems." From its research on this question, the Air Force concludes that "members who have successfully completed rehabilitation are re-enlisting and being promoted at realistic rates."

B. Unauthorized Dissemination Within the Military

Accidental or unauthorized dissemination of personal information from official files seems to be no more frequent than it is in civilian life, and except for the possibility that gossip travels faster in the "small world" of the military, it seems to have no worse consequences.

A woman was accused of being a lesbian and left the regular service for the reserves. "At her new duty station, the NCO who had seen her

record was mouthing it all over that she was gay." When she complained through a civil rights organization, the commanding officer said that the NCO should not even have had access to the record, to say nothing of revealing its contents. The NCO was transferred.

A civilian personnel employee revealed the fact that an officer had been in an alcohol rehabilitation program.

An officer revealed to another officer's wife what her husband's first choice for next duty assignment was. She had not been told by her husband and this caused trouble because the choice was an issue between them.

There are, no doubt, more serious as well as more trivial examples. However, this is the kind of breach of regulations that the services take some formal precautions to prevent, such as in personnel training courses and in communicating directives and regulations. Some of our informants seemed to think that this kind of gossip is sometimes used to harass dissidents, but none came up with concrete examples.

C. Authorized Dissemination to Outside Agencies

Under DOD and Air Force rules, limited information on all military personnel is made a matter of public record: name, rank, duty address, pay grade, gross pay, and a few additional items.

Military intelligence, suitability/security and criminal investigative files are open to inquiries from federal, state and local law enforcement agencies and to the Civil Service Commission. Under DIS rules non-federal civil service and licensing authorities have access to files only with permission of the person concerned.

Some information from criminal files is automatically reported to outside agencies. When an individual becomes a criminal suspect, it is reported to the FBI; when a soldier goes AWOL, it is usually communicated to federal law enforcement agencies and to the person's home town police department. As part of its new program to control child abuse, the Department of Defense reports "established" cases to "appropriate" law enforcement and welfare agencies."[23]

The veteran's personnel jacket and medical records are also open to law enforcement agencies (as long as the request is signed by the chief officer of the agency) and to the Veterans Administration. In both cases the Privacy Act requires the services and the Military Personnel Records Center in St. Louis to keep a record of disclosures. Military medical facilities are required to comply with disease reporting laws of the areas in which they are located.

Most other releases of information -- to credit bureaus, insurance companies, employers, private physicians, etc. -- require some kind of authorization form signed by the service person or veteran. The Air Force takes precautions to prevent unauthorized individuals from securing access to personnel records. Unfavorable Information Files maintained at the Air Base level,for instance, are stored under lock and key apart from other

personnel records. The sensitive Security Police files at Air Force installations and the "human reliability" files at missile installations are protected more carefully than other files because of the amount of detailed personal information they contain. For these and other files, there is a high degree of concern for physical security. Thus, for the curious civilian, the unauthorized credit investigator and the bill collector, Air Force personnel files are not an easy mark for unofficial access.

While we found no examples involving the Air Force, we do know that the unauthorized release of information on notorious or famous people is sometimes an exception. When columnist Jack Anderson reported that President Carter's son had been released from the military after drug charges, the Navy officer responding to questions certainly violated the spirit of military confidentiality regulations. He was reported to have said that under the Privacy Act, he could not reveal the exact circumstances surrounding Carter's discharge, but he could say that some 58 people were relieved of their duties at a nuclear power site on marijuana charges at about the same time and at the same location.[24] In the case of veterans who become criminal suspects, the information released to the press sometimes goes beyond what is permitted by military regulations or required by law.[25]

Release of information to non-military organizations raises two kinds of confidentiality questions:

-- The first is the same as we have observed in civilian life, that is, when the serviceman signs a blanket release to make his records available to a credit investigator, or others from whom he expects a benefit, he is likely to have little idea how much of the record will be released. Equifax (formerly the Retail Credit Company), for instance, sends investigators to the Military Records Center in St. Louis to examine or copy military personnel jackets.[26]

-- The second question stems from the unique character of military disciplinary standards. Some behavior that is punished under military regulations (and may even result in denial of an Honorable discharge) is not regarded as wrong and is not illegal under civilian law. Violations of military courtesy, political activity thought to be "subversive", private sexual activities, lack of personal neatness, etc., are included in this category. We comment on this problem from the opposite side of the coin in the Civil Service Commission, noting that the Commission in its suitability checks drew on FBI and "red squad" files that can contain inaccurate, undocumented and irrelevant materials. Military files may also contain derogatory information that, while it really has no relevance for civilian life, may lead to negative decisions when the files are shared. Attempts to restrict dissemination of such information are complicated by the competing interest of giving individuals access to their own records. As things now stand, employers can require applicants to supply information from their military records -- even if the individual thinks that the information should have no relevance for the employment decision.

3. Individual Access

Long before the passage of the Privacy Act, service personnel were given access to most of the records that are used in making decisions about them. Training, payroll, work performance evaluation, and health files are open to them. We have observed that several Air Force systems are designed to give service personnel an advance print-out of the file information that will be used during assignment and promotion cycles and an opportunity to challenge their contents and the decision. Such "open record" policies differ markedly from most civilian employment.

Service people do not routinely have access to suitability, security, criminal investigative, military police or child abuse registry records on themselves. But, on their request, they may be given access to information in these reports if the investigation is not ongoing and if no confidential sources will be compromised by allowing such access. And, as in the federal service, where a report from such agencies is used in an administrative proceeding (denial of a security clearance, for instance) individuals at least learn what allegations have been made against them.

Policies as to access to personal medical records vary from service to service. In some cases, medical officers are authorized to withhold information if they feel it would harm the individual to have it. However, in the Air Force and in the other services, military personnel are responsible for transporting their own medical records when they are reassigned, and on such occasions, they can look at everything in their files.

Under the regulations of all the services, individuals are required to review their base personnel file at least every two years. In the Air Force, individuals sit down with a personnel records clerk for this review. Commenting on this process, one airman said: "You usually go through the record about 90 miles an hour. You can ask questions and take more time with it, but many people don't -- and they may come out shaking their heads and wondering 'What was that all about?'" Along the same lines, another airman said that "...it usually takes two or three years after Basic to understand what the record means, and a couple of stripes before you stop being afraid to ask questions."

Others we talked to disagreed. They said they thought most people caught on quickly to the importance of the record. "Of course " said one sergeant, "there are some who never quite catch on; but, then, they never quite catch on to anything." A major at the Air Force Military Personnel Center pointed out that "We have on file the results of surveys of some 600 recent individual records reviews, the overwhelming preponderance of which indicates substantial knowledge of record content and satisfaction with the review process."

Impact of the Privacy Act

Air Force spokespersons note that the service already allows broad

individual access to records, and that the Privacy Act leaves intact pre-existing DOD regulations permitting broad sharing of personnel information within the services; sharing investigative files with non-military agencies; and requiring the individual's permission for most other releases of information. "As a result," said one briefing officer, "there are no users getting information now who didn't get it before, and very few denied access who had it before."

While there have been no major policy changes because of the Privacy Act, the Air Force notes some minor changes in practices:

As to Access

-- Personnel officers note that after the Privacy Act received publicity, there was an increase in people - especially officers - coming in to see their files. One personnel officer commented: "They thought there might be something there that they didn't already have access to..."

-- At the base level, personnel officers said the Act had speeded up the process of getting access to one's file -- by perhaps a day. They also said it is easier to get copies of reports (such as Evaluation Reports); no one has to give a specific reason for wanting a copy any more.

-- The Personnel Center at Randolph has experienced a 5-10% increase in letter requests for access to personnel files. Where the request identifies the specific filing system, copies are sent to the individual with no trouble. Where they are not identified, the Air Force refers the individual to the Federal Register listing of Air Force record systems so that they can construct a more specific request. The Personnel Center people we spoke with admitted that searching this Federal Register is quite difficult.

In the near future, a DOD pilot project will compile a more convenient index to Privacy Act record system descriptions.

As to Confidentiality

-- The nature of the information shared has changed a bit. "We used to give out home addresses; now it's just duty address. This makes the collection agency people mad as hell, but we're not too fond of them anyway."

-- The Federal Aeronautics Administration no longer receives a list of people who have recently left the Air Force. "I suppose this hurts some people, since they use that list to send people information about jobs."

-- Most Base Locator systems no longer give out phone numbers without the individual's permission.

-- The Act has affected file destruction practices. Much of the computer output has Social Security numbers on it and thus must be destroyed instead of just thrown away. "This costs no more..." said one officer, "but...now there's no way for our duty rosters, for instance, to end up as some downtown businessman's mailing list, or for them to be passed around the third grade class because some kid decided that printout makes great drawing paper."

-- At the Randolph base personnel office, a sergeant said: "We used to send salary and grade verification directly to the credit card company -- since the serviceperson had signed the application for the card. Now we send the form to the airman and let him send it to the company direct. It is a bit of a nuisance, but at least the person knows exactly what information is being sent out."

-- DOD recently proposed more restrictive rules about what information can be released on patients in service hospitals. If adopted, the new regulations would bring military hospitals closer to non-military institutions with regard to the information released without the patient's consent: name, age, sex, rank, service position and a one-word assessment of the patient's condition.[27]

As to Relevance

The Privacy Act directs federal agencies to collect only "relevant" information on their record subjects, and cautions against inquiring into constitutionally protected areas such as politics or religion. There is not, however, any machinery with which to enforce such a provision. All that the agencies need do is to state in general terms what the information is used for. As a result, the Privacy Act has prompted little reconsideration, in the Air Force or other services, of the relevance of personal information used for decisions.

Similarly, the Act has not affected the fairness of particular personnel decisions. Explaining the new law to service people, the Air Force Times noted that Privacy Act regulations would not cover "matters of judgment," such as an allegation of bias in a promotion passover.[28]

One aspect of the Air Force Personnel system is that a specific office or agency must be "responsible" for justifying the collection of each different item of information in the system. The inclusion of "spouse's educational level," for instance, depends on whether the item has an organizational "sponsor" within the Air Force. Even though this system was already in effect, the Privacy Act did prompt a review of some 7,000 data elements. This resulted in the removal of about 300. Among those removed were: Overseas Retirement Option; Passport Expiration Date; Previous Promotion Eligibility Status; and Scholarship Iden-

tifier. The Personnel Center officers do not believe that removal of such items will change the way decisions are made at all. They were removed not because they were intrusive or irrelevant, but because they proved not to be useful.

Privacy Act Tracking System

One Air Force response to the Privacy Act was to design the Privacy Act Tracking System (PATS). This system records disclosures from personnel files, except those made within DOD and under FOIA, and includes routine disclosures to other agencies. Decision-making offices at command and headquarters levels have on-line capability permitting quick retrieval of individual information, such as who has filed a dispute and what data were disputed. So far, there have been no disputes filed under Privacy Act provisions, since the Air Force already had established procedures for appealing and correcting records and these are used instead.

The Air Force Privacy Central Accounting Office is the only agency that has access to the disclosure file, which contains the "who", "what," "where," and "why" for each disclosure that is accountable under the Privacy Act. Service people could find out from this office or at the base level, what disclosures outside DOD had been made from their files. The Air Force reports that, as of June 1977, no service person had requested such a record of disclosures. PATS can produce management reports concerning disputes and the volume of accountable disclosures from each Air Force records system using PATS.

Air Force Personnel Reaction to the Privacy Act

Many people with whom we talked about the Privacy Act were polite but could barely restrain their contempt for the Act and its implementation by the DOD.

One airman said: "Well, DOD did its typical overkill job...everything gets a Privacy Act notification, even forms for signing out sports equipment..." DOD estimates that Privacy Act statements were prepared for some 15,000 forms used by the services.

Another airman said that he had had to sign his wife into the hospital at another base. He went to his "home" base medical facility to get his wife's file. "They gave me a very hard time about it at first. I mean...it's my wife and they were worrying about the Privacy Act. But I finally shook the records loose by telling them that it was an emergency."

Several people complained about no longer being able to get a friend's home telephone number from the base; some complained that even widows were denied information, although..."the Act doesn't really require us to protect the privacy of the deceased." When we asked an informal gathering of enlisted people whether the Privacy Act notices attached to forms were useful, several people snickered and said that

most people see them as simply "another form to fill out. Half the time you can't understand them anyway."

Some of these people we talked with were insensitive to the privacy issues in general. For instance, very few of the people we interviewed could think of any reason why anyone in the service would want to know about non-routine disclosures from their personnel or medical files.

The Department of Defense response to the Privacy Act has been that the privacy goals are appropriate but that the law is too cumbersome and expensive for the little additional protection it provides in military settings. DOD says it has spent more than $16 million since the Act was passed in preparing Privacy statements, revising forms, constructing training programs and drawing up detailed regulations.[29] The process of deciding where the Act applies and where it doesn't is still going on. Recently the Pentagon decided that service people did not have to sign Privacy Act statements when filling out absentee voter registration forms and that banks on military installations did not have to secure signed Privacy Act statements when eliciting information from depositors.[30]

THE IMPACT OF THE COMPUTER

The Air Force Advanced Personnel Data System is the most highly computerized of any of the services. As we have noted throughout this profile, much of the decision-making about individual members of the Air Force is made centrally at the Randolph Air Force Base personnel headquarters. The system uses computer files which can be accessed on-line via video display or printer, or more slowly, in batch mode. Each major base, command, and headquarters facility also has its own files, much of the information for which comes from the Personnel Center computer. Decisions made about service people from these files get communicated upward to the central files.

Everything in the employee's central record is available at more than two hundred remote terminals, depending on the user's authorized access. A file security system implements the confidentiality rules. A wide range of weekly and monthly reports is produced by the central system, including active duty rosters, promotion lists, AWOL reports, and summaries of separations from the service. In addition, the personnel system generates the records and reports from which the payroll system operates.

In all, more than 25 subsystems, each using a portion of central file information, are operating. These systems interact with each other in a complex fashion. This sophisticated, centralized system replaced one which operated through the early 1960s. Then, personnel record keeping was decentralized among more than 2,000 different personnel offices, with management-reporting and assignment and promotion decisions made by individual commanding officers. The results were that data in the manual individual records were of poor quality and were not easy to extract, either for statistical reports or for decisions about individuals.

Furthermore, neither the individual concerned nor higher Air Force authorities had as much control over promotions and assignments as they felt they deserved or needed. The difference between the old decentralized system and the new computerized central one is reflected in the comments from two of the people we interviewed:

> "What we used to have was a very decentralized, uncoordinated system -- 2700 separate personnel offices spread all over the place; in each one, the C.O. made all the decisions he wanted to make."

> "I remember keeping my crew up all night going through the files just for the information for one report. Well, you couldn't get people to do that too often."

More recently, development of the centralized computer system has been seen as a response to further personnel cutbacks and the advent of the all-volunteer military. "The Total Force idea has been very important," said one Personnel Center officer. "We, perhaps more than the other services, need to make use of our Reserve components. To do so, we have to be able to coordinate all three work forces: Regular, Civilian and Reserve."

Like many organizations switching to a centralized computer system from a manual, decentralized one, the Air Force had to make changes slowly. "There were lots of little baronies to invade, such as those of the Strategic Air Command commanding officers," said one officer. "In fact, we're still moving on that front."

What needs to be emphasized about this changeover is that it was not that computerization dictated a centralized system. Quite the contrary, the Air Force made a conscious decision that it wanted a centralized system for the reasons already cited: that it would give higher Air Force authorities better system-wide control of personnel deployment. This was seen as facilitating more efficient, cost-effective use of manpower. Computerization made centralization possible; but in no sense "dictated" it.

The Air Force is satisfied with its computerized personnel records system. Personnel Center officers cite the following accomplishments:

1. More data are available for decisions about individuals than previously. Management reports are also "richer," because they draw heavily on more complete and up-to-date records on individuals.

2. Record-keeping tasks are accomplished faster - from routine separations to transfer requests. "The turnaround time between base and headquarters is 2-4 days now; it used to be weeks in the past."

3. Individual files are more standardized and more up-to-date. While individual base personnel systems have some options as to what

they can do with data on their work force, the software for each of the 130 base systems is identical. Also, when an individual comes in to check his or her own file, a copy is provided, not the original. "This way we don't have people tearing things out or changing things without going through the proper procedures." Since record control is better, there are fewer problems with lost files.

4. It is possible to monitor the use of individual items in the computer files. "Generally, we find that those items used most frequently are the most accurate," said one briefing officer. "If we discover that the quality of a particular piece of information starts to decline (e.g., an item on a form is filled in in some cases but not in others) we can ask the users what's going on."

Personnel Center officers believe that there are several aspects of its operations that could not be carried on without the computer. "You couldn't handle assignments in the way we do -- with advance notice, feedback, and so forth -- on 500,000 people with a manual shop. Management reporting as well depends on the computer's capacity for extracting and combining items of information. "In the past," said one officer, "it was a struggle just to put together simple reports."

OBSERVATIONS

1. We see in the Air Force what we have noted so often in other organizations: First, that despite extensive records automation, manual records continue to play an important role in day-to-day decisions about employees and as a source of information about veterans. (When Air Force personnel separate, their manual files go to the military records center in St. Louis.) Second, we see that subjective elements remain in decisions about employees even in a system that relies heavily on more or less objective record information for much of its personnel decision-making. It is the judgments of unit commanders and selection boards, for instance, that continue to generate much speculation and some complaint among Air Force personnel.

2. Most privacy and confidentiality problems in military settings do not arise out of unauthorized access to, or leaks from, personnel files. Instead, the principal questions about the relevance of personal information and the propriety of sharing it arise out of practices that reflect military regulations; they are thus policy, not technical security, issues.

3. It is further clear that specific record keeping practices are less important as sources of civil liberties issues than are the gross characteristics and traditions of military organizations. The very broad range of personal information that is deemed relevant for personnel decisions reflects long standing military tradition. Similarly, the struggle with personnel actions biased by racist and sexist notions reflects the society's traditions rather than record keeping practices and new technology.

4. Yet, computer technology is not irrelevant in these matters. Computerization and centralization have helped carry forward the tradition of taking the "whole person" into account - by making more information available on each employee, at more locations, faster. It is an open question, we think, whether the Air Force's new and efficient information system might impede future attempts to narrow the range of information taken into account in some personnel decisions. On the one hand, when information systems accustom users to having information on employees when they want it, this may be a source of resistance to reducing the flow of information.

On the other hand, the Air Force system is clearly designed to implement policies that require control over who has access to what information. (In the policy section of this report we will discuss how such a system might be used to control the dissemination of information about veterans.) Further, the computer system helped make possible the centralization of decision-making which has at least increased the visibility and standardization of some personnel decisions. Finally, the personnel data system apparently makes more up-to-date and standardized records available and makes it somewhat easier for individuals to check on, and correct their files. In these respects, the computer systems support change away from arbitrary and unfair decisions.

5. The competitive recruiting and promotion systems that develop in many organizations -- government and private -- often stretch the concept of "merit selection" to its extremes. Where they must select from more or less equally qualified candidates for too few positions, they may use criteria that have little more than a surface connection with job performance, or resort to the subjective judgment of individuals or selection boards who would have difficulty explaining their decisions if they had to. We see some of this trend in the Air Force personnel system, though the Air Force people with whom we spoke disagree with this assessment. In all fairness, we should point out that, short of random selection, it is difficult to conceive of alternative procedures given the pyramidal structure of military organizations and the difficulty of developing anything more than crude predictors of job performance.

6. Changes in policy and procedure which increase privacy protections do not develop simply because a top management is liberal and well intentioned. Officers at the Personnel Center and other Air Force people we met displayed a genuine concern for treating Air Force people fairly. Yet, some of the beneficial changes which developed recently (e.g., the increased visibility of the assignments process) were almost incidental to broader changes taking place to meet management needs. Further, it is clear that political pressure from inside and outside the services (demonstrations, law suits and public challenges such as that of Sergeant Matlovich) continue to be important forces for change. Several of the service and DOD people with whom we spoke expressed the wish that Congress would take those actions that the services find politically difficult, e.g., to clarify the place of homosexuals in the armed forces.

An organization's resources also have something to do with the likelihood that employees will be treated in an open and fair fashion. We noted that the Air Force attempts to attract recruits by guaranteeing job training and assignments. This approach, and the computer system that helps implement it, is probably useful only where a service has many jobs to offer that are defined as desirable. Army problems are instructive in this regard. A greater proportion of jobs in the Army are boring and do not provide useful training for civilian life, or meaningful work even while the recruit is in the Army. In the opinion of one Air Force personnel officer, "Once boot camp is over, the Army doesn't really know what to do with its recruits who are in combat arms. After awhile, the recruits get the message that manueuvers may be all there is to it, and they want out."

Service morale problems can be exacerbated by hard-sell recruitment efforts: "Today's Army wants to join you," "Take a 16 month vacation in Europe," etc. These lead recruits to envision a life in which they will get to pick interesting assignments, learn a high-paying trade and enjoy the good life.[31] When the practices fail to square with the promises made, it can lead to resentment which in turn leads to poor quality work and a failure by the services to meet goals for completed enlistments and re-enlistments.

The real test of an organization's commitment to fair personnel practices lies in the methods it uses to get its "dirty work" done. Recent discussions of the military discharge issue note that "economic conscription" and the threat of stigmatization through "bad paper" discharges have played an important role in filling the less desirable jobs in some of the services.[32] While we cannot explore this issue in depth here, we should note that it appears that the services differ considerably in the extent to which they use such methods.

Viewing military institutions from outside there is a strong temptation to treat them as a whole, assuming that a monolithic military tradition creates nearly identical employee relations across the services. Our study of the Air Force, and the limited contrasts we were able to draw with other services, teaches us that the particular mission, the distribution of jobs, and the style of management of each service play a critical role in determining the civil liberties environment in which employees work.

SOURCES AND FOOTNOTES

Through the Defense Privacy Board, a number of briefings and interviews were arranged for the Project. On August 9, 1976, representatives from the various services described their personnel record systems and discussed the implications of the Privacy Act of 1974 with Westin and Baker. On August 30th, Baker met with Dr. Elliot Cassidy of DOD's Office of Security Policy. Between August 31st and September 2nd, briefings and interviews were held at Randolph Air Force Base, central site of the Air Force Automated Personnel Data System.

In February of 1977, the Air Force, the Defense Investigative Service and DOD's Office of Personnel Policy reviewed an early draft of the profile and offered corrections of fact and comments. In June, comments and corrections were received on the next-to-final draft.

Contacts were also made with a number of civil liberties and civil rights organizations (such as A.C.L.U., N.O.W., N.A.A.C.P., the Urban League, and the New York Human Rights Commission) to discuss their perceptions of civil liberties within the military and the employment problems of veterans. Brief field visits were made to state employment counseling offices and to local Veterans Administration offices. Some of this field work was done by Research Assistant Joseph Onufrak. Informally, Baker talked with a number of military and ex-military personnel.

In one way or another more than 75 people assisted our research on Air Force personnel record-keeping. We will not try to name them all, but we are very grateful for their patience and cooperation. The efforts of the following people are especially appreciated:

Mr. William T. Cavaney, Defense Privacy Board
Major L. O. Henry, U.S.A.F., Air Force Military Personnel Center
Mr. Herbert Geiger, Office of the Chief of Staff, U.S.A.F.
Lt. Col. D.L. Hartig, U.S.A., Defense Investigative Service
Lt. Col. J. Johnson, U.S.A.F.
Major N. Mokau, U.S.A.F.
Lt. Col. A. Nepa, U.S.A.F., Defense Privacy Board

Unless otherwise indicated by footnotes, the sources for this profile are from the above briefings, interviews and draft review memos. In a few instances I have quoted people anonymously -- at their request or in instances in which I felt that they expected anonymity.

1. On this question see, for instance, Edward F. Sherman, "The Rights of Servicemen," in Norman Dorsen, Ed., The Rights of Americans, (New York, Pantheon Books, 1972).

2. U.S. General Accounting Office, "Problems Resulting From Management Practices in Recruiting," Report #B-160006 (1976).

3. Department of Defense Appropriations, 1977. Subcommittee of Committee on Appropriations, House; 94:2, March, 1976, Part 4, (Washington, D.C., 1976) page 449.

4. In a memo to us, DIS reports conducting Agency checks (NAC's or ENTNAC's) on 130,628 Air Force civilian and military personnel in FY 1976. The "80,000 or so" figure is our guess from the information which they provided us.

5. Defense Manpower Commission, Report to the President, (Washington, D.C., April, 1976).

6. Orlansky, Jesse, "Security Investigations," in Stanton Wheeler, Ed., On Record: Files and Dossiers in American Life (New York, Russell Sage Foundation, 1969) pp. 255-74.

7. Little, Roger W., "The Dossier in Military Organization," in On Record: Files and Dossiers in American Life, Stanton Wheeler, Ed., (New York, Russell Sage Foundation, 1969) pp. 255-74.

8. For instance, H.R. 13958: Defense Officer Personnel Management Act, 1976.

9. This information quote comes from the Air Force written response to our first draft memo. Their response is dated 3/9/77.

10. U.S. Air Force Personnel Command, "Categories of WAPS Inquiries, 1975," (Briefing Slide).

11. Defense Manpower Commission, note 5 supra, p. 241.

12. Alband, Linda, Steve Rees and Denni Woodmansee, "The GI Movement Today," Radical America, 1976, pp. 27-45.

13. Butler, John Sibley, "Assessing Black Enlisted Participation in The Army," Social Problems, Vol. 23 #5 (June, 1976), pp. 558-66.

14. Air Force Times, April 19, 1976.

15. All data on discharges are from data supplied to our Project by DOD or the Air Force. In some cases we have made simple computations from raw data.

15a. Decision making by the VA in such matters is quite complex. For a discussion of this see D. Addlestone, S. Hewman and F. Gross, The Rights of Veterans (New York, Avon Books, 1978.) Ch. X.

16. Air Force Times, January 24, 1977.

16a. See Robert Sherrill, Military Justice is to Justice as Military Music is to Music (New York, Harper & Row, 1969) Ch. 4.

17. 4 Military Law Reporter 2453 (1976).

18. Defense Manpower Commission, Report to the President, (Washington D.C., April, 1976), page 196.

19. Rivkin, Robert S., ACLU Handbook On The Rights Of Servicemen, (New York, Avon Books, 1972), pp. 69-70.

20. Schreiber, Mark E., "Civil Liberties In The Green Machine," Civil Liberties Review, (June/July, 1976), pp. 34-47. See also Alband, et. al., op. cit.

21. Affidavit filed with Lawyers Military Defense Committee, June 28, 1974 See also, Westin, Alan F., Computers, Health Records & Citizens' Rights, National Bureau of Standards, Dept. of Commerce (Washington, D.C., January, 1977), page 34.

22. Daniels, Arlene K., "The Social Construction of Military Psychiatric Diagnoses," in Hans Peter Dreitzel, Ed., Recent Sociology No. 2., (New York, Macmillan, 1972), pp. 201-2.

23. Cooke, David O., "Testimony Before the Privacy Protection Study Commission, July 21, 1976," page 6.

24. Westin, Alan F., Computers, Health Records & Citizens' Rights, a report to the National Bureau of Standards, U.S. Dept. of Commerce (NBS Monograph 157, Washington, D.C., January, 1977), p. 73.

25. New York Times, Jan. 19, 1977. New York Post, January 18, 1977.

26. Addlestone, David F. and Susan Hewman, ACLU Practice Manual on Military Discharge Upgrading, (New York, American Civil Liberties Union Foundation, 1975), Exhibit "J".

27. Air Force Times, May 3, 1976.

28. Air Force Times, September 3, 1975.

29. Cooke, David O., "Testimony Before the Privacy Protection Study Commission, July 21, 1976."

30. Air Force Times, March 1, 1976.

31. Defense Manpower Commission, note 5 supra.

32. For instance, see:
Luthans, J., "How Do Recruiters View Military Experience?" Personnel Journal, Vol. 50 #7 (July 1971) pp. 530-4; Jones, Major Bradley K., "The Gravity of Administrative Discharges," Military Law Review, Vol. 59 (1973) pp. 1-25; Wilson, Thurlow R., Robert M. Madsen and John A. Richards, Employment Assistance to Ex-Servicemen With Other-Than-Honorable Discharges, U.S. Department of Labor, Manpower Administration (Washington, D.C., November 1972); U.S. General Accounting Office, Report: "Need For and Uses of Data Recorded on DD Form 214." Report #B-173688,(Washington, D.C., January 23, 1976), p. 6; Pearman, William A., "A Social Evaluation of the Implications of the Military Discharge Classification System," A Paper presented at the 1976 Annual Meeting of the American Sociological Association, New York City; Sieberling, John F. (Congressman), "Defense Department Promotes Unfair Job Description," Remarks in the Congressional Record of November 28, 1973,at 38517; Bureau of National Affairs, "Selection Procedures and Personnel Records." (PPF Survey #114, September 1976, Washington, D.C.); David Cortright, "Economic Conscription," (Center For National Security Studies, 1975).

Chapter Eight. THE BANK OF AMERICA*

INTRODUCTION

The Bank of America is the world's largest privately-owned financial institution. Its 1976 Annual Report shows that it had $66.7 billion in total assets. Net income for that year was $337 million, up 11% from the previous year. It had 1,100 California branches and 107 overseas branches, with approximately 65,000 employees working directly for the Bank.

In addition to its large size, there are several aspects of Bank of America's organization, policies and programs that make study of its personnel record-keeping particularly fruitful. Some of these special qualities are common to most banks:

-- Like other banks and financial institutions, Bank of America has traditionally regarded protection of customer information from unauthorized disclosure as critical to maintaining good customer relations. This tradition has played an important role in the Bank's perception of its responsibility to guard also the confidentiality of employment records.

-- Also, like other banks and financial institutions, it faces risks of embezzlement, fraud and conflict-of-interest problems on the inside, and robbery from the outside. This means that it must be particularly sensitive to the security of its physical plant, assets and records, and must conduct careful investigations of its employees' fiscal responsibilities.

-- Finally, banks are among the most extensively automated businesses in our society. Computer use moved early into banking operations, where high volumes of financial data and account transactions provided a natural setting for computerization in the late 1950s and 60s. With a base of large computer centers and data processing staffs, many banks in the 70s began automating their employee records and personnel affairs. In both account-processing and personnel-record computerization, Bank of America has been one of the most successful and pioneering financial institutions.

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*Interviewing at Bank of America was done by Project Director, Alan Westin. A first draft of the profile was written by Westin and Isbell, and the final draft by Westin.

In the three sections that follow, we will trace how Bank of America deals with the issues of what personal data it is relevant and proper to collect about applicants and employees; what rules of confidentiality are applied to employee data; and what access employees have to see and challenge what is in their own records. Before turning to these, however, it is useful to note a few things about the Bank's work force.

While working for a bank involves largely white-collar occupations, the employment force at Bank of America is still a fairly varied one. Of the 52,000 people who worked directly for B of A in 1975 (excluding subsidiaries and contract-services), some 35,000 were found in the 1,057 California branches. A branch will have tellers, cashiers, guards, officers (for loans, trusts, escrow accounts, etc.), and several levels of branch managers. Of the 35,000 workers in the branches, the largest occupation was teller, with 14,000 persons or 40% of the work force.

The remaining 17,000 B of A people worked either in the World Banking Administration (where typical occupations include economists, accountants, auditors, traders, tax specialists, appraisers, lawyers, and marketing experts) or in the Data Processing division (which employs computer programmers, systems analysts, and other computer specialists). The Bank classifies about a fifth of its total work force (11,830 persons) as supervisory or management personnel.

Bank of America operates an entirely non-union enterprise within California. Partly, this is explained by its being a white-collar rather than blue-collar, production-line operation. However, there were several unsuccessful efforts over the past decade to organize white-collar unions in its more mechanical, multi-shift operations (such as at its computer centers) and among its clerical and secretarial workers. Thus record-keeping policies have been adopted as management initiatives, not as part of collective bargaining responses.

One final point to note is that B of A's policies as to employee privacy have been the result of a series of internal management reviews beginning in the late 1960s and culminating in a major, Bank-wide data policy study that lasted for the entire year of 1976 and involved the full-time services of two executives. This has produced a level of documentation about old and new policies that is unusually detailed for such a large, complex enterprise.

COMPUTERIZATION OF PERSONNEL RECORDS

Bank of America was a pioneer user of computers for its customer operations, beginning in the 1950s. With the aid of the Stanford Research Institute, it developed the magnetic ink recognition system for automated sorting of checks that was later adopted by the American Bankers Association, and is now standard in American banking.

By 1971, the Bank had more than 14 million customer accounts in computerized storage. These included 7.2 million checking and savings accounts, and the rest divided among California Bank Americard accounts, installment and mortgage loans, trust and shareholder accounts, and business-service accounts. However, the only personal information on employees computerized through 1970 was payroll information and a small amount of current employment data. The full personnel record remained in file jackets in the personnel department, and local branches of departments maintained information they needed.

In 1969, B of A retained a consulting firm, Information Science Inc., to help it design a computerized personnel data system. As part of that effort, the Bank did tests with employees of the "acceptability" of various information items, as well as of the most effective way to word questions. Because of the high costs of data conversion and storage in 1970-71, the Bank subjected each informational item proposed to be computerized to close scrutiny as to its necessity and value. Almost all the data that were ultimately selected for entry into the new Personnel Data System (PDS) were already being collected and maintained in the Bank's personnel forms and manual files, so that the Bank's PDS essentially represented a skimming off of the most frequently used and currently-revised data elements for automated use.

When the PDS system began operations in 1971, it covered approximately 41,000 Bank employees and contained about 75 information items. Most of these came from the employment application, updated by inputs from payroll, training programs, benefits programs, absence reports, and other standard personnel reporting. About 10,000 employees at the management level also supplied a list of skills and outside activities that became their Career Profile. A printout of this profile was supplied annually to management-level employees for review and update, though access was not given to a few "codes" on the profile.(We will discuss this later in the section on "Employee Access.")

The Career Profile covers a wide range of personal items that employees are requested to provide in the interest of helping their assignment and promotional opportunities in the Bank. Work experiences, skills, career interests, licenses, patents, languages, and similar items are sought. So are "mobility limitations" (the example the Bank gives is a health condition of a family member requiring a dry climate).

By 1974, the Bank's automated personnel files were collected in its Personnel Information Center (PIC), administered by the central

Personnel Department. PIC files, which exist alongside the manual files, are maintained at branches, specialized departments, and regional headquarters. Included at PIC are employment history, career profiles, absences, benefits data, training information, other education, retirement calculations, participation in various insurance programs, and similar data.

The chief function of PIC is to generate reports that will help the Bank review past operations and plan for the future. Among the reports that PDS can generate on a weekly, monthly, quarterly and annual basis are absentee records; minority and women hiring patterns; education level; residence patterns; number of people in various salary grades; participants in stock option plans; and so on. For higher level employees, the Career Profile of skills and other special qualifications is made available to management in selecting candidates for open positions. In addition, PIC files allow personnel officials to specify various criteria for certain posts and then obtain a list of employees who fit these specifications. "For example," the Bank notes, "a list may be needed that shows all employees above grade ten with three years experience in branch operations, knowledgeable in tax accounting and having a performance rating of one or two." Combinations of most of the items stored in PIC can be retrieved in this fashion.

However, this selection system of matching employee skills and experience to available jobs is by no means automatic or all-encompassing. A Bank official noted that "a large percentage" of vacancies are filled without going through PDS, as with jobs below a certain grade or where a supervisor exempts a vacancy from the computer-search procedure. Some observers in the Bank approve of such supervisory control, since most of the information in the Skills Inventory comes from the employee and such self-evaluation does not always identify the best candidates. Others feel that the degree of supervisory discretion is too great, and using the PDS offers a more "objective and neutral" way to get a group of potential employees together for final consideration, and that more posts ought to go through that system.

There are other problems too that prevent the computer search from being determinative. If, for instance, the best candidate is from outside the region, he or she is likely to run into the natural resistance of the local region's managers who want to promote their own people as a morale matter, and from the outside region which will be reluctant to

"lose" a highly qualified person to another region. Despite these cavils, several Bank officials felt that the Skills Inventory is "excellent, the best thing we did."

In 1976, Bank of America began converting their manual records to microfiche and microfilm records, to save heavy storage costs and improve document retrieval. The Bank believes that this conversion will reduce filing space by at least 78%; increase the integrity and security of records by reducing the possibility of items being taken out of files and misplaced; and put "less important personnel documentation into a high-density cartridge film sub-system."

APPLICANT SELECTION AND EMPLOYEE SUPERVISION: THE ISSUES OF RELEVANCE AND PROPRIETY OF INFORMATION COLLECTION

Employment Applications

The best way of tracing Bank of America's changing standards of relevance of information is to study the evolution of its employment application forms. The present form, revised in March, 1976, is headed "All applicants will receive consideration for employment without regard to race, color, religion, sex, age (40-65), national origin or handicap." It is a one-page document, divided into five categories:

1. Identification: Name; Other or Former Name; Social Security Number; Present Address and how long living there; Telephone Number.

2. Position Objective: Position desired; Salary expected; Full time or other; Shift desired; By whom referred; and "Have you previously applied to Bank of America?"

3. General Information: Military status and background, including "If other than Honorable Discharge, explain circumstances;" (Veterans must submit a copy of their discharge papers.) "Have you ever been convicted of anything other than a minor traffic offense?"; "Have you ever been refused a fidelity bond?"; "Are you currently involved in the operations of any other business?"; "If hired can you furnish proof of age?"; "Proof of citizenship or authorization to work?"; "Do you have any relatives employed by Bank of America?"

4. Health: "Do you have any condition, illness or disability, either temporary or permanent, which may affect your ability to do the work in the position applied for?" According to Bank Policy, "Physical examinations are not required except for doubtful health cases or when specifically requested by Personnel Administration,"

5. Employment and Educational Experience: "Do you have any qualifications that you feel are applicable for the position applied for?" "List educational background; list employment experience." The applica-

tion form does not say so, but the hiring team is instructed to require employment experience only for the last five years. "Have you ever been employed by Bank of America; Have you ever been involuntarily discharged or fired? If yes, explain circumstances."

A notice on the bottom of the form states: "I understand that proof of citizenship, proof of age and fingerprinting will be required upon employment." (The decision to require fingerprinting for all new employees was instituted in 1975; previously, some units required this but others did not, When the Bank's Legal Department noticed this, and considered the Federal Deposit Insurance Corporation rule that FDIC approval must be secured to carry on an insured bank's payroll a person convicted of a crime of dishonesty or breach of trust, it decided that all new employees should be fingerprinted.)

The previous form, revised in June, 1973, has the same anti-discrimination heading except that it does not have (40-65) next to "age" and does not include "handicap." In addition to asking all of the questions contained in the present form, the 1973 form required the following additional information in each of the five categories treated:

1. Identification: How long have you lived in this area? Familiar name.

2. Position objective - No change.

3. General Information: Reserve military status; Do you own home, rent or live with friends or relatives? How long have you lived in this state? Do you have friends, relatives living in area? Approximate travel time to this office, round trip; Do you plan to commute?; Date of Birth, Age; Spouse's first name; Spouse's date of birth; Is your Spouse employed?; Spouse's occupation; Spouse's employer.

4. Educational and Employment Background: Education - grade averages and majors. Employment - supervisor's name, department title, description of duties, reason for leaving, list periods of unemployment.

5. Health: Height, weight, date of last physical, number of school or work days missed last year because of illness; because of personal reasons. "Do you have any condition, illness or disability, temporary or permanent, which puts you under a doctor's care?" Has the doctor recommended a restriction or limitation on your activities?; explain. This is followed by a check list of 19 conditions including "frequent headaches, asthma, hay fever, epilepsy, emotional disorder," plus a box to check for "rejected for life insurance" and "collected workmen's compensation or disability insurance."

In addition, the 1973 form featured a set of questions on Financial Information: It asked: Do you have income other than your salary, if yes, specify source and amount, Do you have a checking account, savings account, savings and loan account; Loan History: How much is owed

on automobile, home loan, bank loan, installment payments; list repayment schedules.

The scope of information collected from applicants was much greater in 1950. The 1950 application form was a 6-page document. Beside the questions asked on the 1973 and 1976 forms, it required information on the following:

State whether you are righthanded or lefthanded;

Marital status: Single, Married, Separated, Divorced, Widowed;

Are you personally well acquainted with anyone connected with Bank of America (not a relative)?

Have you ever been seriously ill? Do you have relatives suffering from ill health?

List names, occupations and home addresses of Father, Mother, Sisters, Brothers.

Are you self-supporting? Do you own a car? Is the car insured?

How many dependents? Relationship to you.

Do you have life insurance? How much?

What do you estimate it costs you to live per month?

In what extra-curricular activities did you participate in school?

Did you help finance your college education?

As to schooling beyond college - Why did you take this additional education? How was it financed?

Employees' files used to contain their photographs. They are now no longer required, and are not in employee files.

None of these three forms asks for racial data. Now that the Bank has an affirmative action program and is required to keep racial statistics to document its efficacy, the hiring team is instructed to have the applicant complete a separate form identifying his or her status under one of five categories: 1. Black; 2, Asian American; 3. American Indian or Eskimo; 4. Spanish surname; 5. Caucasian. The hiring team is prohibited from asking the new employee about his or her racial grouping, or make a "visual" determination. The form is then kept separately from the application.

The marked differences between the old and new application forms reflect not only the Bank's awareness of privacy and anti-discrimination

issues but also its recognition that it was collecting a lot of material that it never used. Even before the latest application form revision, a Research Department official told a Project interviewer that such questions as whether employees own their own homes or rent, how long the commute was, and so on, were not used in decision making, but only in research.

Similarly, when an employee using the Bank's Open Line (see below) wanted to know why the Bank of America needed to know whether he was divorced or not, the Bank realized that they asked that question only because they had always asked it, and not because they found it useful. It was dropped.

Investigations

Previous employers for the past five years are mailed a form to complete, as is the last educational institution attended. Personal references are required only when there is no previous employment history or when "unusual" circumstances exist. In past years, the Bank sometimes used Retail Credit Company for investigative reports on applicants, but since the passage of the Fair Credit Reporting Act in 1970, it has abandoned this practice. "We have not suffered any loss in quality of employees as a result of not getting an investigative report," a bank spokesperson said.

Each newly hired employee is fingerprinted and the fingerprint card is sent to the FBI. If conviction information turns up as a result of this check, the results are reviewed by the hiring unit which may call for further investigation, or may give the applicant an opportunity to refute or explain the FBI information.

Thus, in addition to the application form, personal information about a new employee comes from reference checks, confirmation from employers and schools, an FBI check, and from military discharge papers. Newly-hired employees who are handicapped may, if they wish, identify themselves as such so that their progress can be observed and positive affirmative action measures can be taken.

CHANGING STANDARDS OF EMPLOYEE SUPERVISION

Re-examination of the relevance and/or usefulness of the personal information collected about applicants was paralleled by the Bank's gradual abandonment (as in many other corporations) of policies setting rather extensive behavior norms for employees on and off the job.

These changes can be seen by comparing the Bank's recently adopted (1977) rules governing Conflict of Interest and Outside Activities of Staff Members with the regulations in effect in 1971 and 1972. The Bank's concern then and now was with situations in which the employee might benefit or appear to benefit from his or her connection with the Bank, to be involved in competing or conflicting business activities,

or to be pursuing activity which might impugn the public integrity or reputation of the Bank. Even when some of the rules remain the same, the tone is significantly different.

Old Manual: "A staff member must not purchase stocks or other securities for investment or otherwise beyond his independent financial ability to meet his commitments..."

New Manual: "While it is recognized that staff members have the right to make private investments, sound judgment must be exercised to avoid any involvement, either direct or indirect which might convey even the appearance of impropriety....(such as)....purchasing stocks or other securities...beyond the independent financial ability to meet his or her commitments..."

Old Manual: "Staff members should avoid accepting fiduciary appointments, such as executor, administrator...etc., except those involving members of their immediate families..."

New Manual: "Staff members who accept fiduciary appointments... do so as individuals and not in any way as representatives of the Bank. This distinction must be made clear at every step...."

The Old Manual had a section prohibiting "all forms of gambling" and attendance at "horse racing and dog racing." The New Manual eliminates this.

The change in supervisory standards was also reflected in observations by various bank officials to a Project interviewer:

-- Employees may have a free checking account at the Bank. Formerly, if an employee wrote a bad check, that branch would notify the employee's supervisor who would "counsel" the employee. "We don't do that any more. It's treated just as any other customer writing an overdraft."

-- The Bank used to have a uniform dress code which was rigidly enforced. Now the Bank leaves this question up to the local manager who is meant to take community standards into account. The new branch in Berkeley, for instance, permits male employees to wear beads and sandals, provided they are neatly groomed.

-- Ten years ago, some supervisors would not have hired a known homosexual and would have fired such a person if his status became known in the community. Some supervisors would also have fired a pregnant unmarried employee, especially in a small town where that condition would have been considered detrimental to the Bank's good reputation.

-- An unsuccessful effort was made a few years ago to unionize a Bank of America location. One union activist asked to see his file and

was pleased to discover that it contained no "black mark" or indication of his union activity in it.

-- Previously, when anyone sent anything to record clerks to file, it went in. Files got "fat and full of garbage...It was easy to put things in and there was no purging procedure to take them out." Starting in the early 70's, the Bank issued new regulations on what could be contained in personnel files, and starting in 1975, it reviewed all the old files to determine what should be destroyed.

The Bank's affirmative action programs in behalf of women and minorities have produced three significant changes in record-keeping practices:

1. Salary history cards are no longer kept in personnel folders. Earlier, a problem had been seen in keeping women's salary cards since their historically lower salaries might lead supervisors or personnel administrators not to equalize their salaries with men doing equivalent jobs. As one bank official interviewed put it, maintaining such salary records now would be "improperly allowing history to control, and letting 'the record' perpetuate the harm."

2. Some records for men employees sometimes used to include notations that "he's clubbable," meaning that the employee could get into the "right" clubs that would be good for business. Since the "right" clubs almost invariably excluded women and minority group members, this could have impeded promotions of female and minority employees. Such notations are no longer made.

3. EEO proceedings and the consent decree in a women's lawsuit have led the Bank to maintain records on the number of minority members and women in particular selection pools for hiring or advancement, and to be sure to have full documentation of the reasons for advancement or failure to advance in individual cases.

One of the ways in which the Bank of America gauges the social climate upon which its behavior criteria should be based is through Open Line. This is a suggestion channel through which employees are encouraged to complain, comment or inquire about Bank activites. The subjects are not limited to employee practices, but may cover such matters as policies towards customers, loan programs to minority contractors, etc. When the Open Line Coordinator receives an employee communication, he forwards it to the appropriate bank department for an answer, but first removes the employee's name and anything else that might identify him or her. The responding officer sends the answer back to the Coordinator, who in turn mails it to the employee's home so that none of his or her colleagues or supervisors can learn of the correspondence. (Employees may request that their letters be printed in the Bank house organ, or they may request an interview with the appropriate official to help resolve a problem, but unless they make such specific requests, only the Coordinator of Open Line knows the names of the correspondents.)

The following are some samples of Open Line subjects:

-- A complaint that men in the employee's department had to wear ties while women employees came to work in bare-midriffs and sequined T-shirts. The answer stated that the requirement that men in non-supervisory positions must wear ties is rescinded effective immediately, but that sweat shirts and football jerseys for men are prohibited, as are bare midriffs for women.

-- A complaint that a supervisor ruled that employees are not to drink during the course of the work day and the employee resents not being able to have a cocktail on his lunch hour. The answer stated that as long as lunch-hour or other out-of-the-bank, off-duty drinks did not cause problems with work efficiency (including the smell of alcohol offensive to colleagues and customers) there is no rule which prohibits staff members from drinking alcoholic beverages on their own time.

-- A complaint that despite the affirmative action program for women, prejudiced supervisors can block women's advancement with impunity, since the male supervisors who evaluate other male supervisors will not penalize their subordinates for failure to train and promote women. The answer stated that supervisors at all levels who fail to meet equal opportunity goals will be brought to the attention of the specialists in the Personnel Department who manage these equal opportunity programs. Computer reports will be reviewed frequently to insure there are no discrepancies in the employment, training and promotion of women employees.

CONFIDENTIALITY OF PERSONNEL RECORDS

Internal Confidentiality Policies

Bank of America has traditionally been highly sensitive to the confidentiality of its customer records, and this attitude has carried over to employee records. In general, the Bank protects confidentiality within the Bank by compartmentalizing it so that a particular department has access only to the specific information it needs to function, and not to the employee's whole file. Thus, the Training Department has access only to matters pertaining to course attendance, reimbursed tuition by the Bank, etc. The Benefits section has access only to information about medical and other claims and this information is not shared with the employee's supervisor. Also kept confidential from supervisors or personnel officers are benefits payments to the employee for alcoholism or drug treatments and up to $1,000 a year for psychiatric treatments. The Auditing Department does security investigations for bonding purposes, and supervisors do not have access to this information either.

Access to the personnel files kept by each branch or department on their own employees is restricted to the office manager or operations officer. That official is permitted to keep a temporary desk file covering an on-going personnel problem. If, for example, a pattern of coming in late began to develop, the office manager would keep notes in his desk until the matter was resolved. If the problem was resolved, all the records and notes would be destroyed. If it was found to be true, it could be the basis for an action in which the employee got to tell his/her side, but in such a case, statements taken from colleagues would not be shown to the employee. In any case, the policy about such manager's notes is either to destroy them at the end of a year or to send a memo to the personnel file; if the latter, the employee can review the memo along with the rest of his or her personnel file.

Applicant files are kept by the Employment office. Interview cards are kept separately in active files for three months, in inactive files for an additional five months, and then destroyed unless the applicant is hired. Fingerprint information is kept locked and separate, and employees with access to it are alerted to the "extremely confidential nature of the fingerprint cards and the accompanying rap sheets. No information from rap sheets is divulged..."

Although the Bank takes pride in its confidentiality protection measures, a 1974 internal report, "The Privacy of Bank Records," noted that "There is a significant trading of personnel information between the Regional VPs and Employee Loan Department and the Personnel Department. Much of this is oral...We were satisfied during our review that the officers in charge of personnel records...were aware of the proper limits for exchange of information and screened access carefully. However, there are no written guidelines in this area and officers in

Personnel have indicated they would welcome such guidelines. Even standards should be applied so that personnel data is confidential at all levels of employment."

The Report noted one other area in which more specific confidentiality guidelines would be useful, and that is access to the employee's computerized files in the Personnel Information Center. These files contain no subjective information except for a coded performance rating. The manual files in individual branches and offices are "richer", so the PIC files are less likely to lead to confidentiality abuses. Still, the report noted, "once (the information) is in 'hard' copy, (it) loses its visual semblance to something 'confidential' and is often widely distributed without proper screening for authorized access..." Guidelines were drafted to implement the policy and special arrangements were made by PIC Administration to monitor the systems logs to review the output of programs and the numbers of copies and recipients.

Dissemination of Personnel Information Outside the Bank

The Bank's policy is not to share employees' names and addresses with any other organizations for the purposes of commercial or nonprofit solicitation, either through rental or exchange of mailing lists. For its own house organ, which is delivered to employees' homes, the computer system produces name and address labels which are delivered to a mailing house, one set at a time, where they are locked up until used.

Since the Bank processes its own benefit programs and claims, large-scale exchange of personal information with outside insurance companies does not arise. (There is some disclosure, as with coordination of benefits with an outside insurance company covering a spouse.) Employees submit claim forms to a single claims unit in the San Francisco personnel department, whose staff is under strict rules for the confidential handling of such information. No medical-claims information about individual employees is shared with immediate supervisors or unit managers.

According to a Project interview with Bank officials, in former years Bank of America used to cooperate fully with law enforcement agencies when they requested information on an employee in the course of a local investigation -- e.g., an employee of the Bank who was also collecting welfare payments, or employees suspected of drug use. "Now we insist on a subpoena for such information, and notify the employee before we comply."

Physical Security

Physical security of personnel records is given a high priority at Bank of America, in keeping with its special concern for the safety of its cash and other convertible assets. Manual personnel records with sensitive materials in them are kept under lock and key. Computer facilities are guarded and require special access codes which specify the limits of the access.

EMPLOYEE ACCESS TO PERSONNEL RECORDS

Prior to 1968, B of A resembled most large corporations in that there was no formal policy allowing employees to see what was in their personnel records, either at the local or regional location or the central personnel headquarters. Beginning in 1968, the Bank's top management decided to open the personnel record -- with some exceptions -- to any employee who asked to see it. The exceptions included letters of reference and recommendation obtained at the time of applying for employment; ratings of promotability and potential assigned by supervisors; reports arising from security investigations; and a few similar items.

By the early 1970s, this policy was firmly in place and had been communicated to all Bank employees. Employees could review their files with a member of the personnel department. Employees responded by seeking such reviews of personnel folders in what one Bank official called "small but significant" numbers. By "significant," he explained, he meant that "it only took reviews of the records by a few people in a location to get the word out to other employees about what was and wasn't in the files. By the early 1970s, we had purged a lot of the wide-ranging materials that had been in files, and what was left was, for the most part, what our employees regarded as appropriate information for the Bank to be maintaining. From then on, it has been a small but steady stream of employee access requests, about 75-80 a month."

When the computerized personnel data system went into effect, the right of access was extended to that also. A 1974 in-house report on privacy of Bank records noted that "employees can request to see a display of information concerning them kept on the computer file..." Because "much of the information is abbreviated, a personal interview with a PIC employee would be required. No such interview or computer display has been requested to date." According to this report, "No subjective information is kept on the computer other than the performance rating, as represented by a number 1-4, and details supplied by the employee himself relative to activities outside the Bank."

A Bank official noted that their Career Profile used to have two codes on it that they wouldn't let an employee see. One was "promotability," which included a projection of the level of promotion that the employee might reach ("lateral move, 1 grade, 2 or more grades") and his/her "readiness" (such as: immediate promotion, by next review, in 18 months to 2 years, etc.). "Potential" was coded in a number scale to indicate a range from "limited" to "exceptional." "The idea was to see whether Joe Smith or Jane Doe might become General Counsel or Vice President for Personnel at the Bank some day. We don't use those now; they proved not to be valid and not needed. All we have today is a small research study, off the computer, to compare those codes when we did them with the career paths of a selected group of people."

Employee access has also been extended to the Bank's performance appraisal system, an annual review in which the supervisor sits down with each employee to review and evaluate work performance against job standards, set future goals for the employee, and review salary status against job performance to make "equitable salary decisions." The guidelines for performance appraisal caution: "Remember, you are evaluating performance...you are not asked to evaluate the underlying motivations or personality characteristics of an individual..."

The Bank's guidelines also stress that performance appraisal "provides a form of documentation for personnel decisions."

> "The day when management decisions went unquestioned is long past. Individual employees, special interest groups and both federal and state governments are challenging and questioning all employers. Increasingly, we are asked to explain why a promotion was given or denied. The recollection of a supervisor is not sufficient. What is needed is a careful system of performance evaluation to serve as a basis for and to document important personnel decisions. In short, it helps guarantee each employee fair treatment."

By the mid-1970s, the Bank had evolved a policy of full access by the employee to his/her performance appraisal, including the numerical rating assigned by the supervisor at the end of the interview. The Bank's instructions state:

> "Employee Review of the Report:
>
> During the interview, the report should be completely reviewed with the employee. At some time in your discussion, give the employee an opportunity to read the report and make comments on your ratings. It is our firm policy that employees have the right to know everything that appears on their performance report--and the right to discuss it with you freely. If there are any differences of opinion, it is your responsibility to make an honest effort to resolve them. In any situation where differences are not resolved satisfactorily, you should encourage the employee to take the problem to the next level of supervision or to go directly to the District Administrator or to an Employee Relations Officer in Personnel Administration."

The employee is also given copies of various forms when they first originate or when they are updated, some of which, such as benefit claims and medical information, are not shared with the supervisor. Officers can see their Progression file, which is maintained on every officer in the Bank. However, the officer is not permitted to see comments evaluating others in comparison to him or her where other individuals are competing with the officer for an executive opening; nor is the officer given letters solicited and received from former employers,

and he or she is informed of these two restrictions.

On January 1, 1976, a new California law went into effect which provided that:

"Every employer shall, at reasonable times upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

"This section does not apply to the records of an employee relating to the investigation of a possible criminal offense. It shall not apply to letters of reference."

When the new California law was passed, the Bank was in a good position to determine whether this act would pose any problems for it. A year earlier, shortly after the passage of the Privacy Act of 1974, and while its proposed California counterpart, AB 150 was being considered, the Bank undertook a department-by-department study to determine its practices as to access, confidentiality and relevance. It was able to identify 21 personnel record systems and to conclude that six of them were not covered by the law. Of the 21, four were duplicative with the information contained in individual personnel files; six fell under the law and the Bank's practices were already in compliance with it; and five required further legal study to see whether they were covered.

Following enactment of the California Access law, the Bank revised its Personnel Manual by adding a directive to each operations officer to allow employees access under the law.

It also issued to supervisors a separate circular with the same information but adding an additional warning: "Be sure contents are NOT removed from the files...Employees who wish to see files that pertain to them other than those kept in individual branches and departments are to be referred to the Employee Relations Department."

Aside from these two notices, the Bank has not conducted a campaign to inform employees about the access law, although Bank officials state that any employee could see all of the records pertaining to him or her upon request. The reason the Bank did not advertise the access law more widely is that it feared a deluge of requests that would be time-consuming and costly. Requests to review files are at about 100 a month, up 20% since before the law. So far nobody has asked to see the computerized files in PIC, presumably because all of that information is in the manual file in more readable form.

One problem of access arose when an ex-employee filed a complaint with the California Department of Labor that the Bank would not make their file available to her in the community where she had worked but

had required her to come to San Francisco to see the central file. The Bank responded by sending the employee's file to the regional office near her home. Although this particular case was resolved without difficulty, the Bank is concerned about the possibility of having to send files to more than 2,000 branch and departmental offices all over California.

Another problem of access is the request by ex-employees not only to inspect their files but to copy them. The Bank maintains that this cost would be excessive, since there are about 100 documents in a typical file, and if the law were interpreted to require permission to copy the file, it would cover all 60,000 employees.

While the Bank has not found the California access law difficult to administer, it has serious concern over proposed privacy legislation that would apply Federal Privacy Act concepts to private business. It believes that the timetable and methods for purging old data and for maintaining data control would be terribly costly. As for dropping the Social Security number as an identifier, it would cost hundreds of thousands of dollars to reprogram its numbering system and change all of their forms. Since the Bank has not identified any abuses of the Social Security numbering system, they believe that this cost would not be justified.

While its policies on employee privacy are much more detailed and have probably been in place longer than any other large American corporation except IBM, B of A is still in the midst of refining its policies, applying them in new record-keeping and confidentiality situations, and relating them to external legal and social developments.

For example, the Bank's 1975 report on privacy in employee records and its 1976 Task Force made a series of recommendations that the Bank has been responding to in 1977. For example:

- It was recommended that the Bank take the five principles of fair information practices enunciated by the HEW Report of 1973 and embodied in the Federal Privacy Act of 1974 for federal agencies and put these in the Bank's Standard Practice Manual; it was also recommended that a statement about what is in each of the Bank's employee record systems, manual and computerized, should be in that Manual. The Legal Department is proceeding with that now.

- It was recommended that, after determining the legitimate needs of potential users within the Bank, a set of guidelines on access for those users be drawn up and disseminated. This has been done.

- All computer system output should be reviewed to see if programs used need to disclose personal data or could do without that. The Legal Department is now reviewing all computer output and forms to do that.

- It was recommended that destruction dates be set for files and record elements, to insure that only needed information was retained. The Bank's Manual now directs that no outdated information should be kept, and some destruction dates have been set. However, the Legal Department has found that EEO regulations and litigation possibilities force the Bank to keep some personnel records longer than it would otherwise want or need to.

- It was recommended that no employee should photocopy his/her personnel file without the need to do so and authorization from a supervisor or manager. Following the California Labor Code, Bank policy now is to allow employees to inspect all files that are used or have been used "to determine that employee's qualifications for employment, promotion, additional compensation, termination or other disciplinary action."

- It was recommended that the contents of all employee files should be reviewed for legal propriety.This was done by the Legal Department during 1976-77. "We did set rules to dispose of many irrelevant items," one official noted, "such as letters of recommendation." In addition, a list was drawn up of the documents that can be kept in the local personnel file at the operating unit.

- It was recommended that the older manual personnel files be examined and obsolete material removed from them as part of the move to putting such records on microfiche. The Bank found this to be such a time-consuming and expensive task, and with so little value in terms of current personnel decisions not being based on review of those records, that they decided not to do this. They feel that the greater physical security controls that are part of handling microfiche records will insure that when a query is made about a particular record, improper material will not be made available.

- It was recommended that the Bank's training films on video tape for managers should include a privacy unit. These are being produced now.

Beyond carrying out its own in-house recommendations, the Bank has re-examined some of its employee privacy policies in light of its new Voluntary Disclosure Code for providing public information about the Bank's affairs. In setting out its code, the Bank's President, A.W. Clausen, noted that "the most perplexing problem was how to provide maximum, meaningful information without violating the rights of customers and employee privacy..." While the innovative aspects in the Code involve disclosure of Bank operating policies and procedures to the press, public-interest groups, and Bank customers, the Code also includes a section on what the Bank's own employees are entitled to know about administration of the Bank's compensation policies. Thus the Bank will now disclose to employees, among other things, the following:

> Criteria used in setting salary structures.
> Information on the salary grade system and salary ranges within grades.
>
> Information on salary surveys, and policy on the competitiveness of salaries.
>
> Special compensation benefits and other programs available to employees.
> How employee benefit plans are funded.
>
> Compensation and benefit plans extended to U.S. employees stationed abroad.

The number of overseas employees, including expatriates, third-country nationals and local employees.

Policy on extending credit to employees.

EFFECTS OF EDP ON PERSONNEL PRACTICES

We asked personnel officials at Bank of America to comment on how their uses of EDP in the personnel area had affected information handling and personnel decisions. We also asked them about employee perceptions of the Bank's new privacy policies. Some of our questions could be answered factually while others depended on informed speculation.

o On whether automation has increased the accuracy of personal data in employee files, bank officials felt that levels of accuracy were about the same as in past manual files. It was the "ease and timeliness" with which "updates and changes can be made" that Bank officials felt to represent the new benefits from EDP. Supplying printouts and other forms of automatic review of employee files was also felt to have increased the accuracy of information; employees now automatically receive printouts to review and update, "whereas in the past the employee had to initiate the review changes."

o Bank officials believe their current personnel process "affords employees an opportunity to know how the selection process works." Few if any employees, they say, come away from seeing their records still feeling that factors beyond what are recorded are being used to make promotion or assignment decisions.

o Bank officials disagree with the notion held by some observers that the value of skills profiles lies primarily in convincing employees that managers making assignment and promotion decisions have that data in front of them. The Bank sees "objective use" of such skills information as more important than "creating more favorable employee perceptions."

o When asked to provide any examples where information previously but no longer collected was "actually used" before in personnel decisions when it was collected, Bank personnel officials could supply no instances to us. Instead, they considered the information that was dropped to have been "superfluous" for current personnel decisions. Nor could they supply an example of information that was once used in making promotion, assignment, or termination decisions that "is not used now, as a result of privacy considerations."

o The Bank was aware of occasions when employees expressed concern about the release of their personal data outside the Bank, as to credit bureaus or law enforcement officials, and noted that "employees have commented favorably" on the Bank's policy of protecting such information.

o When asked what have been the major differences in the handling of personnel functions and making individual personnel decisions as a result of EDP, the reply was that their system was "more streamlined," and "capable of much more selective candidate searches." "Placement and candidate search" are being done, they believe, in ways that could not have been accomplished previously, along with "projecting staff planning needs and determining personnel market competitiveness."

o As far as expanding use of EDP in personnel during the next few years, Bank officials hope to go into "medical claims payment, new payroll system, computerized unemployment claims, and computerized pension system."

OBSERVATIONS

Looking back on Bank of America's employee privacy initiatives during the past decade suggests some useful overall observations.

The Bank began in 1968 by focusing on giving employees an opportunity to see their personnel records, if they wished to do so. In 1969-71, the same issue was further treated in terms of implementing the Bank's new automated personnel data system, with the concept established that it would be good for insuring accuracy and timeliness to have employees review and update a printout of their basic employee profile once each year. In 1971, the Bank ended its previous practice of buying investigative reports on job applicants. In 1973-74, the Bank mounted a general review and reform of its policies for handling customer, employee, and third-party data. Finally, in 1976, the Bank conducted its most extensive privacy review, a year-long internal survey of all data practices conducted by two full-time Bank executives.

What is worth emphasizing is that this decade of policy reviews and new data practices was not a response to pressures from disgruntled employees or outside protest groups. Nor were the Bank's privacy changes spurred on by litigation or government regulatory-agency orders.* The privacy reviews were basically management initiated. Partly, this was a result of the need to formulate clear policies for new automated personnel data systems. Partly, the Bank sought to anticipate and solve any policy shortcomings before state or federal privacy legislation might force such measures, and to see from internal examination which proposed federal or state privacy laws to oppose publicly as unnecessary, unwise, or over-costly measures.

Anticipating outside regulation was especially important in the 1973-77 period. "Without the threat of Congressional privacy bills like H.R. 1984 that would regulate the private sector, and similar bills

*Because the Fair Credit Reporting Act of 1970 did not forbid the use of pre-employment reports, the Bank's decision to eliminate these is not properly classified as compliance with outside legislation or regulation.

in the California legislature," one bank executive commented to us, "I don't believe we would have taken all the time and spent all the money to look over our record-keeping practices. That just isn't the kind of thing that a busy, profitable enterprise does unless it thinks that it had better get its house in order before a storm may hit."

What was distinctive about Bank of America's approach to possible state or federal privacy laws regulating private industry was that it had tremendous resources to commit to such efforts; that it decided to solve the privacy problems, not dig defensive trenches against outside criticism; and that it did so essentially on its own - without linking its making internal reforms to similar actions being followed by other California banks or corporations, or to state and national banking associations.

Furthermore, since it carried out its reforms in application procedures, employee records, and access policies over almost a decade, the Bank was able to pay the costs of such changes gradually, as part of its regular updating and revision of forms, creation of new automated files, training of managers, etc. "The costs of setting new privacy and employee access policies in the Bank was quite bearable to us," one official commented.

Has all of this activity on employee privacy been of concern and importance to employees and executives at Bank of America? We did not do an employee survey to answer that question scientifically. However, in four site visits to various San Francisco offices and operating units of the Bank running from 1970 to 1976, and conversations as recently as February of 1977, we found that employees and executives we talked with expressed a common satisfaction with these policies. One official in the Legal Department who conducted widespread interviews with Bank employees on these matters explained it this way:

"Our employees want to know what is in their records. If you were to ask a cross-section of them, "Does it matter to you that you can see your record if you wanted to, the great majority would say, 'yes.'" They want to know anything that can affect their lives and careers, so it's not mere curiosity. Also, people today are more willing to speak out, they're not afraid of management. It's also tied to the rising general awareness of privacy issues, and when employers are being held to account in government, that reflects inside corporations. Americans of all kinds today want both government and private employers held to account for what they decide about people. Our younger employees are the ones who are pushing most actively for such rights, but even the older ones have been affected by the general national climate."

However, Bank of America officials describe themselves as "essentially nonmissionary" with regard to their employee privacy policies. They are glad to tell other corporations what they have done, but they have not initiated a public-relations campaign to tell "their privacy story," as they <u>have</u> done with their Voluntary Disclosure Code. Bank

executives say they would be glad to join industry association groups in defining model organizational behavior in this area.

Another important observation involves the relation of computer technology to privacy policies. When the Bank first automated personnel data in 1970-71, the costs of converting data from eye-readable to machine-readable form, and of storing and accessing each bit of information, were so great that this provided a serendipitous protection to privacy. Each element of information had to prove its "worth," and such pressure for relevance helped prevent broad data collection in the computer files. Today, however, the costs of data conversion and storage have gone down so dramatically that they represent a minor constraint. "When we did the PDS system in 1972," one Bank official observed, "we cut out items because of cost. Now, everything is so cheap that if we feel we need it, and it meets our privacy policies, we computerize it."

The comparisons between old and new employee information practices -- given this profile's perspective that the new is an improvement on the old -- may leave the cumulative impression that in the "olden" days, employees were beaten down Bob Cratchits who were virtually chained to their desks, while under the new procedures a Nirvana of enlightenment has been achieved. Neither of these black and white perceptions is true, and a relatively brief profile does not allow enough room to highlight all the gray areas. For example, there are some employees who are still dissatisfied with what they regard as the Bank's slow movement toward racial and sexual equality; who are dissatisfied with the Bank's promotion and assignment policies because they rely too heavily on subjective supervisory endorsements; who are pushing for greater rights of access; who resent lingering regulation through local definition of dress requirements, financial disclosure requirements, and similar policies.

There are also some bank officers who view the Bank's new access and privacy policies as consumerism and radicalism; who resent the abandonment of bankwide standards governing appropriate dress and personal behavior; and who believe the Bank should be affirmatively helpful, and not neutral, in response to requests for assistance from law enforcement officers without legal process.

For those directing the Bank's privacy policies, however, the present approach seems to be just the right amount of innovation.

Chapter Nine. SKETCHES OF OTHER ORGANIZATIONS

OVERVIEW

Limitations of time and funds made it possible to do only three in-depth profiles for our report. However, we had contacts by mail with several hundred other organizations and interviews with several dozen of these. Extensive testimony and exhibits were also presented by about a dozen large employers before the Privacy Protection Study Commission. Extensive descriptions for nine business firms were provided by the Seligman study whose findings were summarized in Chapter Three.

Drawing on these sources, we present in this Chapter a series of sketches that highlight organizational variations in dealing actively with personnel privacy issues. We start with five business firms whose personnel data practices and recent changes in employee privacy policies provide interesting parallels to the Bank of America profile. Then we discuss organizational practices among state and local governments and nonprofit organizations, where the settings of law, employment policies, and privacy activity have been substantially different during the past three years than the Federal agencies we profiled, which were caught up in major efforts to comply with the Federal Privacy Act of 1974.

J. C. PENNEY COMPANY, INC.

J. C. Penney is one of the nation's largest general merchandise retailers. It operates over 1,700 stores throughout the United States and in Puerto Rico, directed by a New York headquarters office and five regional office centers. It has 186,000 employees.

Penney's review of its employment policies and procedures has been stimulated by its participation in a survey of record-keeping practices by the Privacy Commission, by the need to comply with governmental reporting requirements, and by passage, in 1974, of the Flynn Act in New York State prohibiting employment discrimination based on physical or mental conditions not related to the demands of a job. Most of the changes resulting from this review have been focussed on the kind and amount of material collected about applicants and employees, and as we will see below, these changes have been substantial.

Relevance. Among the questions eliminated outright are preferred name; maiden name; where did you obtain this application; what prompted you to seek employment with us; courses liked most at school; courses liked least; acquaintances in Penney's employ; and previous addresses going back more than 1 year.

Among the questions changed are these:

From: Date of birth - To - Are you under 18, or between 18 and 65 years of age (to determine whether juvenile working papers are required).

From: How do you spend your leisure time? - To - Extra-curricular activities, include scholarships, awards, honors, sports, hobbies, etc.

From searching questions about physical and mental health, including confinement in mental institution, time and reason for last doctor's visit, medication taken, etc. - To - Do you have any physical condition which may limit your ability to perform the job applied for?

From: Have you ever been convicted of a crime other than minor traffic violations? - To - Have you been convicted of a felony involving dishonesty, breach of trust, or one closely related to your future work here?

As to medical examinations and records, before passage of the Flynn Act, Penney used to require a pre-employment medical examination for all employees. Now it requires them only for those under consideration for physically demanding jobs which require lifting or have exceptional eyesight or hearing requirements. The medical center sends management only a statement of general acceptability or of necessary work restrictions.

The company also requires drug testing for all applicants less than

30 years old, and informs such applicants that employment may be denied if drug abuse is discovered. At the same time, the company has a policy of trying to employ ex-addicts or those who are under a recognized form of treatment.

Penney's does not use pre- or post-hiring polygraphing tests and limits outside investigative reports to management applicants for its New York headquarters office. According to Charles B. Farr, Personnel Relations Manager, this policy may be changed. "Frankly, as a result of our preparation for this testimony [before the Privacy Commission] we have had occasion to review the cost effectiveness of doing that and it is entirely possible that we will be discontinuing that to some extent..." Employees are given access to outside investigative reports as part of their regular files.

Penney's monitors employee honesty and performance by sending teams of test shoppers to visit stores on a random basis. These shoppers monitor not only cash handling and merchandise handling, for honesty, but other aspects of the sales transaction as well. Adverse information goes into the employees' regular files.

Access. Penney's policy is to provide the employee access to his or her records in periodic face-to-face performance appraisals; they will add or correct data or delete outdated material when changes in jobs or the acquisition of additional skills, etc. occur. Penney limits access to medical information. An employee may discuss the information with the company doctor, but may not have direct access to the record itself unless it is filtered through his or her personal physician.

It also limits access to security files, except that when a shopping team visits a store, an employee is given a rating (and told what it is) as to how he or she followed the procedures. If deviations from correct procedures are uncovered, the employee is counseled in how to correct them. However, when investigations into theft or breaches of security result from such visits, or from other sources, the results go into the company's security files and are not available to employees.

Penney does not grant employees access to their promotability ratings.

Confidentiality. There are broad variations in Penney's policies regarding confidentiality, depending upon the size of the particular facility. In the New York headquarters, for instance, where 4,800 people are employed, "there is a great deal of divisional and departmental separation which lends itself to separation of records...There is a separate employment division, a separate medical department, a separate security department, a separate benefit division...and so forth. Each of these separate divisions has the ability to maintain and segregate files related to their particular area and there is no commingling or centralization of all these files into a central master file."

In a small store, however, involving only a handful of employees,

the manager of the store has access to all the records, processes health benefit claims and security information, and conducts every other personnel records function. Thus in many stores, there is considerable disclosure to management about health claims and other employee information that is kept segregated from supervisors in large-sized locations.

As to disclosure outside the company, "It is our current practice to disclose requested information to government officials or law enforcement officers provided the official or officer properly identifies himself. While we require a subpoena...before the record itself is actually released, our general disclosure practice to such agencies is probably perhaps overbroad. The flash of a police badge may well elicit a too ready willingness to 'tell all.'" Penney's does not give employees notice when their information is disclosed to government or law enforcement agencies although it agrees theoretically that "an individual should have notice that information in his file is being sought by compulsory process and should have the opportunity to interpose objection. However, the burden of such notification should be on the person or agency seeking the information rather than on the person requested to supply it."

Views of Privacy Legislation. Penny did not submit evidence of what the costs of extending the Privacy Act to the private sector would be for the company. It urged that before immediate legislative action is recommended, industry be given the opportunity to take voluntary corrective action.

ROCKWELL INTERNATIONAL CORPORATION

Rockwell International is the nation's eleventh largest employer, with about 120,000 workers, 100,000 in the United States. In addition to aerospace products, it manufactures automotive, electronics, utility, and other industrial products. It operates 180 plants and research facilities and over 200 sales offices and service centers throughout the world. A large part of its aerospace activity is located in California and is done under Department of Defense contracts.

Rockwell maintains a centralized computerized file on its American employees for payroll and benefits purposes and also for government reporting purposes. But it emphasizes that its operations are extremely decentralized and its personnel policies vary from location to location.

Rockwell states that "As a result of the [Privacy] Commission's activities and the current interest in the country regarding privacy, we have recently reviewed our present policies and procedures." Throughout its presentation, it emphasized it considers its procedures adequate for protecting employee privacy and no changes are presently contemplated.

Employee Access. Employees' access to their records occupied much of Rockwell's presentation to the Commission. On the one hand, the State of California, where 35,000 Rockwell employees are located, enacted a law that became effective January 1, 1976 giving employees ac-

cess on request to their personnel records, excepting "records...relating to the investigation of a possible criminal offense" and "letters of reference." Rockwell's Director of Payroll-Personnel Operations, Robert E. Olson, stated "We did not, in order to comply with that law, reorganize the files. We did not change our personnel folders. One day it was December 31 and the next day was January 1, and that is about the only change we made." Rockwell states that of the 35,000 California employees, only 30 requested access to their files. In response to a question, Mr. Olson stated that California employees were not notified by the company of the new law but that the "substantial public notice" required by the law was met since the law was publicized by the media.

In general, in other plants as well as in California, there is no written policy notifying employees of Rockwell's access policies. Some plants show employees their performance appraisals; some do not. "There is certain information," Mr. Olson stated, "which we believe must be exempt from employee access. Such information includes: management planning documents or projections indicating...promotability; investigative data pertaining to the safety and security of the Corporation; Corporate or insurance company medical records; and information and reports prepared in connection with litigation, as well as equal employment opportunity or unfair labor practice matters." Asked specifically about employee access to medical records, Mr. Olsen said that if the employee requested it, his or her medical record would be sent to a private physician who might then share it with the employee, but that employees were generally not aware that they could make this request.

Confidentiality. Rockwell's policies on confidentiality are significantly shaped by the fact that it is legally required to share personal information with the government on those employees holding security clearances. "Approximately 85% of employees performing work in our government contract operations hold confidential, secret or top secret clearances." Rockwell's internal Industrial Security Staff completes the investigations for confidential clearances. The Defense Investigative Service, a branch of the Department of Defense, conducts investigations for secret and top secret clearances.

Rockwell does not use outside investigative agencies for its background investigations either for confidential security clearances or for regular commercial employees. They state that the material collected on these two kinds of employees is not too different, the main difference being that the candidate for a security clearance must fill out a defense department form which must be verified by the company. Rockwell is required to forward any derogatory information developed in its own security investigations to the Defense Investigative Service, which looks into the matter further. Mr. Olson was asked whether Rockwell was required to report to the DOD when the holder of a security clearance filed a medical claim for treatment by a psychiatrist. He responded, "I don't know the answer to that, but what I go to is our practice that that information has never come from an employee's claim."

As to sharing of medical records generally, the information from the pre-employment physical examinations that employees are required to have is not shared with management, except where a work-related disability is discovered. In that case, a note outlining the restriction is shown to the employee, and inserted in his personnel file.

Aside from its special relationship with the government in security clearances, Rockwell states that its policy as to outside disclosure is as follows:

"Our review of personnel practices indicates that employee information is disclosed to individuals outside the Corporation without the employee's consent in the following instances: (1) to the employee's collective bargaining representative as contractually or legally required; (2) to government auditors during an audit relating to a government contract; (3) to prospective employers and creditors for credit approval, both on a limited basis; (4) to Federal investigative and legally constituted law enforcement agencies; (5) to actuaries on a limited basis, during their preparation of an employee's annual benefit statement; and (6) when required to be made available because of legal requirements or a court order."

Specifically as to requests for personal information by law enforcement agencies, Rockwell stated that it would have no objection to providing notice to the employee, "if it did not become a burden," but that was not the present policy. "We feel the responsibility [for providing notice of a law enforcement request or of a subpoena] rests with the guy doing the investigating."

Views about Proposed Privacy Legislation. As indicated earlier, Rockwell stated that the California Employee Access law "did not make a significant change in our personnel policies;" Mr. Olson added. "We are not opposed to the California law," though he stated elsewhere in his testimony that "If that type of law were applied across the country, then we would have work to do, and we will be generating those costs."

Rockwell is opposed to any general application of the Privacy Act to the private sector unless it could be shown that "misuse of personal employee data...does occur on a significant scale." It favors, instead, voluntary establishment of policies and practices to achieve privacy goals. However, if legislation is passed, Rockwell feels that it should be Federal and pre-emptive of separate state statutes; compliance with individual statutes would create serious financial and administrative burdens for a company operating in all fifty states.

MANUFACTURERS HANOVER CORPORATION

Manufacturers Hanover is the fourth largest commercial bank in the United States with about 15,000 employees: 8,600-8,700 clerks and tellers, 3,700 officers and managers, 600 professionals (lawyers, accountants, etc.) and 400 service workers. Most of these employees work in the Bank's 200 branches in New York City and its suburbs. The Bank's personnel functions, however, are centralized in its personnel department; all its personnel records are maintained in two centralized locations.

In 1967, the Bank began computerizing its personnel records, and its Personnel Data System now includes all personnel information including payroll functions, benefits information and employee performance appraisal information. The bank relies on its computerized system for reports required by the government on equal employment, pension and other benefits, unemployment compensation, social security, and special regulations applying to banks and other government reporting. It also finds its computerized system essential for internal promotion of employees. "Our procedures for personal development and career path implementation rely almost completely on computer inputs that realistically could not be provided with manual systems."

"The very installation of the Personnel Data System led us to think through the issues of privacy," according to Frederick Oswald, Senior Vice President for Personnel. What follows is a summary of some of the Bank's privacy policies and procedures.

Relevance. Applicants are given a one-page form which asks standard identification data plus date of birth and male or female, with the notation that laws "prohibit discrimination because of age or sex." "Inquiries as to age and sex are for record purposes only." Applicants are also asked "Have you ever been convicted of any of the following crimes: "larceny, embezzlement, drawing or passing bad checks, forgery or other similar crime involving a breach of trust...or is there now pending against you any criminal proceeding for such a violation?" Referring in part to this question, and in part to any information that might surface in the course of an interview, the application carries a notice in boldface type: "No person will be refused employment or discharged from employment or penalized in any other way solely because of an arrest disclosed in answer to this question." As to convictions, however, the bank states that it is required to collect this information by the Federal Deposit Insurance Corporation and that employing someone with a conviction for crimes of breach of trust requires written FDIC permission, with a fine for the employer of $100 a day for non-compliance. The application also asks for type of military discharge and requires submission of the DD Form 214 discharge papers.

In addition to the application form, applicants--presumably those

who have been notified that they will be hired--must fill out a Personal Record form before they are actually hired. This asks for the name, occupation and name and address of the employer of the applicant's father, mother, brothers and sisters. Asked about the relevance of this information, the bank's representatives replied: "We don't employ relatives in many cases because of the possibility of collusion between two relatives..." However, the application form also asks for "Relatives in our employ: (If yes, give name and relation)." The Personal Record also asks: "With whom do you reside? Give full name and relationship." When asked "What is the purpose of that?" Mr. Oswald replied: "That is a very good question. I think we are going to have to go home and look again at this form. I suspect it is in there because it has been there forever."

Applicants are also given a series of tests for skills, for general aptitude and for "psychological stability".

Once a decision has been made to hire, applicants are required to fill out a medical questionnaire, after which the Bank's medical director may or may not require a physical examination as well. One of the Privacy Commission's staff members asked about this questionnaire:

"There is a stamp on it which indicates that [it] is solely...to identify easily detectable abnormalities which would interfere with job performance...What [is] the relationship of certain questions on the form to that statement? For instance, that you ask about mental disorder, change in sex habits, and drug use?"

The bank's representative answered: "I would guess a couple of those questions are not pertinent to one case or perhaps the other. Drug use is something we are certainly interested in, obviously, because of the possible temptation and the availability of cash and securities..."

Access. Manufacturers Hanover's basic computerized personnel record is a document which contains the employee's identification materials, education, work and salary history at the Bank, and probation reports. For tellers, this includes a report of overages and underages. It also contains a detachable performance appraisal which the employee reviews with a supervisor and then signs. After this interview, the supervisor fills out a section on the reverse side of the record on "Potential -- promotability," designation of a possible successor, listing of adverse characteristics, and "Do you know of any health, personal habits or other problems which may adversely affect the staff member's future?" This material forms the basis of a coded potential rating which is entered on the front side of the record. Employees also contribute to a computerized skill file, which they update yearly, and this, too, is summarized in the self-development section of the personnel record. Benefits are computerized separately, and as previously noted, medical records are not part of Manufacturers Hanover's computerized system.

The bank does not give its employees access to any of these records. It points out that much of the information in these records is generated by the employee, and that the employee signs off on performance appraisals and probation reports so that the only computerized personal information of which the employee is probably unaware is the potential evaluation. Mr. Oswald, responding to questions about why employee access was denied, stated that the bank was not "philosophically opposed" to access, but that since employees were scattered all over New York and its suburbs, it would interfere with productivity to have most of them frequently commuting to see their centralized records. The Privacy Commission spent a considerable amount of time with Manufacturers Hanover's position on this question of access, with one of the Commission's staff members summarizing the matter this way:

"I hope you...won't blame me for struggling with the notion that... no one cares about what is in their records on the one hand and on the other, the prospect that if it was announced they could have access to their records, all 15,000 would rush to the subway station and come downtown. I struggle with those concepts but I will leave it that way."

Confidentiality. Inside the bank, branch managers are given a copy of the employee's personnel record. As to medical records, the bank carries Blue Cross/Blue Shield and major medical policies. Employees submit claims to the bank but "Blue Cross really is automatic. The only input we have there is to confirm employment." However, major medical claims are processed through the bank in the personnel department. Claims people in the personnel department are instructed not to divulge any medical information to management.

Outside the bank, policy is to restrict release of employee information to dates of employment and title. On receipt of a subpoena, the employee is notified in time to contest it. An exception to this policy is made in the case of ex-employees who have been discharged for breach of trust. In such cases, if the inquirer is another bank or fiduciary institution, the bank will reveal the real reason for the discharge because banking regulatory agencies require it.

Costs and Desirability of Privacy Legislation. The bank believes that present state and federal EEOC legislation imposes an unfair financial burden on employers, who are forced to keep "specific data to prove our case before an agency which not only represents the complainant but also serves as judge and jury," in complaints that "often have no basis in fact." It fears that extending the Privacy Act to the private sector would increase this burden. "Social programs have costs that go well beyond the obvious and do contribute to the constantly increasing cost of living. It is hard to see how additional law in this area can be justified from our vantage point or that of our staff."

CUMMINS ENGINE COMPANY

Cummins Engine Company, located in Columbus, Indiana, manufactures diesel engines. It has 10,000 employees located at its Columbus headquarters and an additional 10,000 throughout the United States and worldwide.

In 1974, Cummins created an internal management team to study its personnel record-keeping system, then largely manual; this was primarily a response to the record-keeping demands of Title VII. That is, Cummins wanted to discover "the experiences and progression of affected class members that we had hired since the mid-1960s and to compare these to the experiences and progression of white males." As a result of that initial study, which showed Cummins how difficult it was to "reconstruct job, responsibility and salary progression from paper personnel files," Cummins decided to computerize its personnel files. This initial review of its manual files, although not undertaken for privacy purposes, also made the company aware that these files contained information that was no longer accurate or relevant, and that the files were available to potential supervisors who might be influenced by their contents in making promotion decisions.

At the beginning of 1975, Cummins created a computerized "Human Resource Information System," (HRIS). It simultaneously began a second and more systematic review of its personnel files to determine what should be computerized, what materials were inappropriate either for computerization or to remain in manual files, procedures for providing employee access; and information disclosure to supervisors, management, and outside third parties.

Computerization of personnel files of all Columbus headquarters personnel, both hourly and salaried, was completed in March of 1977, with the non-headquarters employees scheduled to be added, starting in the same month. As we will see below, some of the personnel decisions made at the time that computerization began have still to be implemented; other policies have still to be formulated. With that in mind, it is still possible to note substantial changes in all three of our areas of privacy concern: Relevance, employee access, and confidentiality.

Relevance. Cummins has eliminated the following items from its application form: Social Security number; relatives or friends at the company; previous addresses; spouse's name and place of employment; maiden name of wife; arrest record; type of military discharge. (Social Security number is required after an employee is hired.) The company does not employ psychological or polygraph testing, or use investigative agencies. It relies solely on the employment interview and reference checks. If the applicant is hired, neither the interview record nor the reference documentation becomes part of the permanent personnel record. For a small number of senior level jobs, Cummins uses executive search firms which provide much fuller family back-

ground and personal characteristics information than is asked of employees recruited through the normal processes.

Cummins keeps a manual personnel file on each employee. At present, this contains "obsolete and irrelevant information...Each file is now being reviewed and obsolete information is being identified and scheduled for purging."

Access. Before computerization, Cummins' access policy was to (a) require an employee to read, discuss with the supervisor, and sign the performance appraisal; and (b) to allow the employee to review his or her personnel folder, "but this fact was not commonly known." Employees were also given access to their manual claims and benefits files. These three manual systems still exist, and employees may still have access to them on request. In addition, Cummins gives employees an Employee Profile and, for the management level, a Career Profile. These are printouts from their computerized files. These are available not only in response to specific requests, but every time some significant job change takes place--promotion, transfer, salary change, etc., with the request that the employee bring the data up to date, add new skills to the employee profile or career profile, correct any inaccuracies, and challenge any unfavorable materials in the performance rating.

Cummins does not give employees access to their medical records. These records are manual and are maintained by the Columbus Occupational Health Association, a medical facility which also services other area companies. However, Cummins has employed Information Science, Inc. to design a computerized records section on health that would interface with its Human Resources Information system, scheduled to go into effect late in 1978. It plans to include employee access to most of the components in the proposed system.

The one problem caused by the policy of employee access to records that Cummins identified is that supervisors are sometimes reluctant to be candid in assessing the employee's performance. This means that sometimes "what they say about the performance of an employee will be different than what is written." But Cummins' officials note this is a problem that existed before computerization also.

In addition to the medical record, employees are denied access to files having to do with projected salary increases and promotion plans because these are considered "a planning tool which outlines many things that may or may not happen."

Confidentiality. Inside the company, supervisors are also given copies of the computerized employee profile, but their copies do not contain the personal information that Cummins collects for EEOC purposes and for benefits purposes, such as social security number, race, sex, marital status, dependents, age, citizenship and beneficiaries.

Applicants are required to take a physical examination as a condition of employment, and employees are encouraged to have a yearly phys-

ical, although this is voluntary. Nobody in management is permitted to have access to the medical record itself. If the examining physician finds a condition that might affect work performance, he or she sends a note to the employee's supervisor outlining the work restriction, but not the reason for it. That is, employee X should not be permitted to lift heavy weights, but not saying that the condition for the restriction is, for example, a hernia.

Employees may avail themselves of an in-plant counseling service in which not only job problems are discussed, but family problems may be revealed. "We don't feel we should be in the business of therapy... but we do think it is necessary for people to have an outlet to come to us in terms of talking about either personal problems, marriage problems, financial problems, etc." Once the counselor has identified the problem, it is referred to an appropriate community agency, e.g., the Regional Mental Health Center located in Columbus. The problems are not fed back to the employee's supervisor.

Cummins used to permit union representatives access to personal files up until "about three or four years ago...We really sort of had a loose process in terms of the union president being able to come into [the] personnel records [department] and say, 'I want to see the file of such-and-such a person.'...About three years ago we stopped that practice...The union does not have access to those files unless it is in connection with a specific grievance or specific problem [when] the manager of employee relations will get the folder from the file and [discuss] what information is relevant for them to know in terms of that particular problem."

One problem that Cummins has identified with its internal confidentiality policies involves supervisors. "Supervisors cannot see the complete file of the people who work for them nor can they readily get the files of people who do not work for them but about whom they would like to get information...The...reaction is to create increased 'desk files' on employees which are hard to control, and there is danger they will begin to rely on the unofficial verbal transfer of information instead."

Outside the Company. "Our written policy states that without the written consent of the employee or former employee, we release only a verification that the person was employed, the dates of employment, and the last job title. This applies to requests from researchers, creditors, insurance agencies, prospective employers and law enforcement agencies unless they have a subpoena...An employee is informed when we have received a subpoena to provide information about them unless we are prohibited from doing so by law." This policy was in existence before record computerization, and to enforce it, Cummins requires that all such inquiries must be directed to the Personnel Office so that individual supervisors do not have the discretion to answer outside inquiries on their own.

Desirability of Legislation. Cummins believes companies "have to think privacy every step of the way" and that if companies fail to meet their privacy responsibilities on a voluntary basis, federal legislation may be required.

On the question of whether legislation would mean heavy or unnecessary cost, Cummins stated "We have not done a cost analysis on privacy. We built a controlled access data center to provide security for all computerized information whether financial, marketing, manufacturing or personnel...Privacy costs would have been much higher if that was not done in the course of our work to overhaul our employee data processes generally. However, the overall process requires both knowledge and conceptual flexibility...It also requires lots of time and attention and things cannot be changed overnight. It will take us several years before we are near where we want to be."

IBM

IBM manufactures business machines and computer equipment. It has 170,000 employees throughout the United States, and an additional 140,000 throughout the world. Unlike the other private companies we have studied, IBM's concern with privacy pre-dates the reporting requirements of EEOC or any other external legislation or litigation. It began in the early 1960's, with its impetus from top management, and built steadily upward in scope and intensity through three major company-wide privacy reviews in the 1971-75 period, one of which included the use of an outside consultant.* Thus, IBM provides us with a model whose privacy practices are well established and were in operation before the idea of extending the provisions of the Privacy Act to the private sector surfaced.

IBM makes an unusual effort not only to adhere to the privacy principles of relevance, employee access and confidentiality, but to explain to employees -- in training sessions, articles and on various forms -- what those policies are. Its application form illustrates this effort.

Employment Application Form. The application form is headed by a statement which says in part: "...We will review your qualifications and will make every effort to reach a decision based solely on merit... The information you provide will be considered confidential..." Among the information the applicant is not asked to provide is age, family information, marital status, previous addresses, social security number. type of military discharge. A detachable portion of the form asks for convictions of a crime within the last five years. "Your answer is

*Since the director of this project, Alan Westin, was IBM's consultant, this account of employee privacy in IBM was written by Florence Isbell, from published sources and IBM testimony before various legislative committees and comissions.

looked upon as only one of the factors considered in the employment decision and is evaluated in terms of the nature, severity and date of the offense. Do not include arrests without convictions, convictions adjudged 'youthful offender' or convictions for drunkenness, simple assault, speeding, minor traffic violations or disturbance of the peace." This section is headed: "This portion of your application will be detached if you are hired by IBM and will not become a part of your permanent employment record."

After an applicant is hired, the company does collect age, for benefits purposes; race and sex for EEOC reporting purposes; and Social Security number for payroll reporting purposes. However, as IBM has its own internal numbering system, the company decided several years ago to continue the internal use of social security numbers only in response to government and legal requirements.

In 1968, IBM discontinued the use of outside credit agencies doing background checks. For some years, personality testing was a small part of the hiring process at some company locations. This practice was completely discontinued by 1971. Applicants are required either to take a pre-employment physical or complete a health questionnaire. Information from such examinations or questionnaires may be used to restrict placement, but may not be used as disqualifications. A previous item on the questionnaire dealing with prior treatment for a nervous disorder, mental problem or emotional difficulty has been eliminated.

Employee Access to Records. Employees are given a yearly print-out of their personnel records and encouraged to update them and correct inaccuracies. In addition, employees fully discuss job responsibilities and completed appraisals, are given the opportunity to sign off and may also add written comments disagreeing with any aspect of the appraisal.

Medical records are divided into three sections, and the employee is given access to the first two: (1) Material to which the employee has a legal right such as Occupational Safety and Health Act records and Public Health data; (2) Factual medical data such as the results of the voluntary health screening examination of which the employee may receive a copy of the print-out from the medical department upon request. As to the third section -- the primary active working medical record containing notes by the physician or from the employee's personal physician (with employee permission) the employee is given access to this material only at the discretion of the medical department and with professional interpretation.

Employees are not given direct access to Open Door Files, which are records of investigations of employee complaints and grievances. If an employee complains, for example, that he or she was not given an expected pay raise, the investigation might involve a comparison with other employees at the same level, and the company believes that such disclosure would violate the privacy of other employees. Employees may discuss the file in detail with the individual responsible for the investigation, but direct access is not permitted.

Employees are also not given access to promotability evaluations since these are "speculative" and might not occur, thus raising false expectations and subsequent disappointment.

Internal Confidentiality. The employee's personnel folder is divided into two sections: a work-related section to which management and supervisors have access, including jobs held, dates, performance appraisals, etc., and non job-related information to which the employee has access and only the department concerned -- not supervisors or management -- has access. Such information as wage garnishments, government savings bond deductions, charitable contribution deductions, and matching grants for college contributions are kept in the particular departments handling such matters and are not part of the regular personnel records and are not available to supervisors.

Some managers keep desk files on their employees with notes about attendance, performance and vacation schedules, etc. These files are meant to be temporary, and IBM has published guidelines which state that all materials must be work-related and that upon transfer information must be reviewed with the employee before it is forwarded to another manager.

As noted earlier, supervisors and managers may be told of job restrictions based on handicaps or disabilities, but they do not have access to the employee's medical records under any circumstances, nor are they informed about the employee's filing for medical benefits. All medical records are kept separately in the Medical Department, and the published rule is that "Management may neither request nor accept a medical record."

External Confidentiality. The only information that IBM will release to those seeking employment verification outside the company is the individual's last position title, last location and dates of employment. IBM will release salary and a five year job chronology only with the written approval of the individual involved. "Even with the individual's approval, IBM is very reluctant to release any performance or qualitative data." As to information requested by law enforcement investigations and information required in legal proceedings, such as a divorce, the decision about whether to release title, location and employment dates without prior employee consent is made on a case by case basis by the Legal Department.

IBM believed that some aspects of the Privacy Act of 1974 if transferred to the private sector would be burdensome and unnecessary, especially the requirement of maintaining records of internal uses made of employee data and a listing of those allowed access to every system -- especially "when data is used only for employment purposes, when its release outside the enterprise is highly restricted, and when general rules of access are known to employees." It urged a voluntary approach to privacy matters. However, if it is determined that "the voluntary

approach is not practical, then any legislative proposals should be designed to address specific problems and contain clear statutory remedies. Federal legislation, if enacted, should preempt State legislation to avoid complex and contradictory requirements."

IBM's privacy practices are similar to those of Bank of America and Cummins Engine. Like these two companies -- and a few others -- it has devoted a great deal of time and effort to establishing written privacy policies that cover every aspect of its record system and employer-employee relationships generally. It has determined that privacy must be an intrinsic part of its record-keeping system -- not tacked on as an afterthought, or in response to external pressures. However, it undertook its review of privacy practices several years before the two companies cited above began theirs, and as a result it has solved some of the problems that these companies are still grappling with: purging of irrelevant files, establishing retention and destruction schedules for ongoing information, etc. Its interest in privacy remains high; "New areas have unfolded as our understanding of the subject evolves," as IBM's Chairman, Frank Cary, put it, and he added, "For us, privacy is not a passing fad."

STATE AND LOCAL GOVERNMENTS AND NONPROFIT ORGANIZATIONS

In this section, we describe the experiences of state and local governments and nonprofit organizations in automating personnel records and providing various rights of privacy, confidentiality, and employee access in such systems. Our source material here is less extensive and less based on direct investigation of practices than material we assembled for corporations and federal agencies. Because we did not conduct site visits to any of these organizations, we have to rely on materials obtained in a mail survey, telephone interviews with selected officials, and published assessments by others. In addition, the practices of these organizations were not explored during the hearings of the Privacy Protection Study Commission, with the exception of one nonprofit organization, Harvard University, which has limited computerization of personnel files.

Despite this absence of primary materials and on-site examination, there are some useful things that can be pointed out in the personnel data system experiences of state and local governments and nonprofit organizations, and we offer these in the following pages.

State Governments

Thirty seven states responded to our project's inquiries about computer use and the rules they had established for confidentiality and employee access. These are:

Alabama
Alaska
Arkansas
California
Colorado
Connecticut
Florida
Georgia
Idaho
Iowa
Maine
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
New Jersey
New Mexico
Nevada
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
South Carolina
South Dakota
Tennessee
Texas
Vermont
Virginia
Washington
West Virginia
Wisconsin
Wyoming

Thirty three states replied that they used EDP at least for payroll operations; the remaining four are in the process of developing at least a payroll system. More significantly, 16 states replied that they also used EDP for more sophisticated personnel functions: employee history, government reporting, placement, test administration and scoring, etc. Of these, four reported that they were about to expand their personnel information systems.

Of the remaining 21 states, 13 reported that they were in various stages of developing a sophisticated personnel information system - from Missouri and North Dakota, which are "studying" the field, to Washington State and Alaska, whose systems are "just about to be installed." Among the reasons given by State Employment Divisions for the rush to computerization, two frequently cited ones are the increased demands to produce a wide variety of state and federal reports -- EEOC, pension, insurance, etc., --and collective bargaining agreements.

Many of the responding states have had detailed rules as to confidentiality for the past few decades, adopted when their systems were manual -- New Jersey, New Mexico, Alaska and Wisconsin, for example. These spell out which parts of the public employee's record are public -- typically, name, job description and salary; which parts are "confidential" to be seen only by personnel officials; which parts may or may not be seen by the employee who is the subject of the record; and

what the procedures are for releasing records outside the employee's agency for special purposes. These regulations often strike a thoughtful balance between the public's right to know and the employee's right to privacy. Some states, such as Kentucky and Alabama, have adopted general statements as to privacy and public disclosure and leave the detailed implementation of the policy to decisions by the state employment division.

Finally, some states, such as Nebraska, Maine and Pennsylvania, have developed privacy policies for personnel administration directed specifically at computerized files. These range from a simple and short statute declaring all computer files of personal information to be confidential and subject to controls over release unless they are public records (Nebraska) to rules for EDP files covering data collection, data access, and data security, as in Pennsylvania.

It must be borne in mind that, unlike the site visits and interviews that characterized the full-length profiles, the assessments in this section come only from formal statements of policy, legislation, and regulations. These cannot tell how well the policies are understood by employees and officials, or how casually or rigidly they are enforced. Nor can they tell us what problems have been encountered in the administration of privacy standards in computerized systems that have surfaced in the way of individual grievances or public dissatisfaction. There does seem to be a direct correlation, however, between the degree of computerization of employee records and the elaboration of privacy rules. California is a good example of that correlation and we will examine both its computerization programs and privacy protection policies in more detail below.

California Personnel Information Management System

The immediate impetus for computerization of all public employee records was the existence in 1972-73 of a large backlog of personnel documents (approximately 18,000) at the State Personnel Board, as a result of which 3,000 to 4,000 employees monthly were not receiving proper pay checks. As a result, the State Personnel Board simultaneously created a new and wholly computerized record system and a new division, the Personnel Services Division, to operate it.

The California EDP system consists of the following components for 120,000 state employees and 35,000 employees of the State's University System:

1. The Employment History System. This is an on-line system capable of retrieving the employee's entire work history. Inquiry capability is available at three terminals: the State Personnel Board, the State Controller's Office, and the Public Employees' Retirement System. Only the first of these has the authority to update a record. In addition, the Employment History system produces a turnaround document so that each time a departmental personnel office submits a docu-

ment to the State Personnel Board for processing, a new turnaround document is returned to the department with the current information displayed. This, say the system's managers, has markedly reduced record errors.

2. A Payroll System. The state's payroll roster is now being integrated into the employment history data base to eliminate costs of two duplicate personnel rosters.

3. Public Employees Retirement System. This consists of an active member roster maintained by computer, and a history file of former members, stored in card form. The active member roster interfaces with the employment history data base, but it presently has no on-line capability. The PERS also administers the state's Health Benefits System.

4. Applicants for Examination. This is currently maintained on cards and during the course of an examination is processed by computer. The examination system is now being redesigned for disk storage without on-line access.

Physical Security of Computerized Data

In addition to laws and regulations governing the privacy of personal data generally, some California laws deal with data processing specifically, as for example a section of the Budget Act which states:

> "No expenditure of funds for any data processing activities shall be authorized until the director of the department requesting the expenditure and the Director of Finance certify that adequate safeguards have been developed...to ensure the confidentiality of data."

One method used to ensure physical safety is, as noted above, limiting updating ability to specified members of the State Personnel Board; another is encryption of the employee information so that potential unauthorized users could not interpret it; another is the use of inquiry codes, access codes and passwords. Finally, each state department and consolidated data center must appoint an Information Security Officer who is responsible for preventing unauthorized access.

Employee Access

State employees have access, under the supervision of personnel office staff, to their official personnel file folder; to employment history printouts, automatically provided when any change in status takes place, or upon request; to attendance, sick leave, vacation, etc. reports; to examination, training, certification and position specifications, except for "examination material" that is designated as confidential by the State Personnel Board (presumably test scores which might undermine the integrity of the tests); and to legal and investigatory files pending punitive action. "The employee has access to such material (at least) five days prior to the...date of such proposed action...

However, good personnel management practice dictates the sharing of performance problems as they develop...Much of this documentation should already be incorporated in the employee's official file folder."

Internal Disclosure

Information in all these categories is also available to the employee's supervisor and to personnel officers. The Personnel Information Management System has adopted a guideline that personal data collected by one state agency shall be shared with other state agencies only to the extent that there is a determined, authorized need, but the guideline does not spell out how that need is to be determined, or who authorizes it.

Employee Organizations

Unions are entitled to the following public information without the employee's consent: Name, title, salary and salary range, classification, department, county, tenure, time base. Release of all other information requires the written consent of the employee, designating a specific organizational representative. With or without consent, union representatives are denied access to attendance and related documents.

Public Information

Much the same information is available to the public under the California Public Records Act, including appointment date, title, salary range and salary, work location, telephone and assignment. With or without permission, test questions, scoring keys, attendance records and investigatory files are not released. Prospective employers may get rehire information where specifically authorized by the employee.

The Effects of State Fair Information Practices Acts

We wrote to the Attorneys General in each of the states that had (by 1976) enacted state fair information practices acts covering the record systems of state agencies. We also examined published materials on how these acts have been working, and discussed with officials at the Privacy Protection Study Commission the impressions they drew from a conference of state officials the Commission held in 1976, at which the experiences of states with fair information practices acts were explored. On the whole, our judgment from these sources is that state fair information practices acts have had little significant impact as yet on personnel data practices. Interviews with officials from Minnesota, which has the state act longest in force, indicated little use of the act so far by state employees. Basically, the acts have been in effect for only a year in most jurisdictions. And, as we have already noted, state government employees already had legally defined access rights to significant portions of their personnel records, so that access rights did not open up previously closed record systems in

the way that access to FBI and CIA files was initiated under the Federal Privacy Act or 1974 Freedom of Information Act Amendments.

One judgment we did hear was that automated personnel data systems are proceeding independently of the presence or absence of state fair information practices laws. To put this another way, states that have such laws are experiencing no more difficulty in complying with such acts through automated systems than through manual files.

City and County Government

We have already described trends in city and county use of EDP for personnel functions in Part II.

Whether or not EDP is used for the entire personnel system or for just payroll processing, local government privacy policies seem, in general, less clearly formulated and less detailed than on the state level. Some local governments say that they are governed by state laws as to access and confidentiality; some have not yet articulated anything beyond a very general statement. As examples:

Phoenix: "All requests for personnel information...must be made through and authorized by the Personnel Department Director. At the point of implementing an on-line system for Personnel, it will be necessary to establish much more elaborate and sophisticated safeguards."

Boston: "No standard set of rules and regulations has been established concerning confidentiality of data or release of data to third parties...We have had no problems in these areas but if conditions should warrant, we would certainly consider the establishment of a standard set of rules and regulations."

Wichita: "In September, 1974, an outside consultant provided the city with a proposed design document for the project but due to a lack of funds and adequate computer time, the system has not been implemented. The proposed design document did not really address the subject of confidentiality of personnel data...We are not likely to realize what problems of citizens' rights are being created...by such computerization until after (its) implementation."

San Antonio: "We have not published extensive rules and regulations concerning the confidentiality of personnel data...We will undoubtedly have to publish something on this in the near future."

These views underscore a long-standing complaint of civil liberties and consumer groups about the creation of new automated data systems, which was discussed in a previous project study, Computers, Health Records and Citizen Rights. That is, privacy safeguards need to be built into automated data systems from the very beginning -- at the planning

stage. If they are added when the system is already operating, as a grudging afterthought, they may not be as effective as they could have been, nor will they meet the fears of consumer, civil liberties and employee groups as to starting up data systems without rules in place.

We noted above that several cities, when asked for their privacy policies about employee data collection, referred to the appropriate state laws. This was the response of Norfolk, Virginia; Denver, Colorado; and Toledo, Ohio. However, Dayton, Ohio, responded by noting the special problems of confidentiality posed by its newly automated data system -- a system that covers not only payroll and some aspects of personnel records, but also traffic engineering, police, water department, street maintenance, etc.-- and indicating that it had passed a city ordinance which created a permanent Data Access Control Board. It does not appear to be more inclusive or more detailed than the state statute; on the other hand, it does not appear to conflict with it, and there is value in having a local statute that provides local remedies for potential abuses in a city computer system.

Although the Ohio statute clearly directs computerized systems to "Collect only personal information that is necessary and relevant to the functions that the agency is required to perform by statute, ordidance, code or rule," the proposed Personal Data form for the Cincinnati Police Division surely raises relevance questions. Among other things, it asks officers to reveal whether they are single, married, widowed, divorced or separated; whether their childhoods were spent in Urban, Suburban or Rural settings; whether they have lived in Cincinnati from less than one year to 20 or more years; their fathers' occupations; the number of brothers and sisters from none to five or more; and to list all hobbies.

The city of Dayton (and its surrounding county) also participated in a Housing and Urban Development pilot project meant to assist cities in computerizing all or major modules of their record-keeping systems to achieve better delivery of municipal services. Like Dayton, Charlotte, North Carolina participated in HUD's Urban Information Systems Inter-Agency Committee (USAC) (1970-1975) which funded cities with populations between 50,000 and 500,000 in the development of an Integrated Municipal Information System or subsystems. Both Dayton and Charlotte achieved some degree of computerization within their funding periods (three years and five years respectively), and Charlotte also enacted a data access control ordinance. But at the end of the funding, there was neither the local money nor the felt need to realize the elaborate plans of the original prospectus, and the personnel functions in both cities remain largely uncomputerized.

While the HUD-sponsored plans in Charlotte and Dayton did not address the question of relevance in computerized data, and disclosure would be covered in state public access and confidentiality statutes, both computer proposals had built in physical security factors to limit access by unauthorized persons (special access codes, identification, etc.) and mechanisms for purging outdated material.

Nonprofit Organizations

People who work for nonprofit organizations -- unions, private hospitals and schools, religious organizations, civic groups, charities, etc., -- have traditionally been paid less, and received fewer fringe benefits than have their counterparts with equal education and experience in the commercial world. Nonprofit workers were thought to receive compensatory psychic income from participating in idealistic work and the knowledge that they were performing socially useful tasks. Employers of individuals in such organizations tended to look not so much for conformity to community standards on dress, life-style, credit worthiness, etc., as to conformity and dedication to organizational philosophy.

The majority of such organizations were -- and most still are -- small operations in personnel size; their personnel record-keeping practices remain manual and informal. However, even small organizations (over 100 employees) are subject to record-keeping pressures generated by EEOC reports; tax reports; local, state and Federal nonprofit reporting requirements; and the like. Also, unionization of white collar workers or workers in private hospitals and universities in the last two decades has included many of these organizations, and this has generated the creation of formal records as to salary classifications, dues payments, and grievance procedures.

In general, though there may be an overall resistance to formalized, computerized record keeping in this field, the progression to computerization generally follows the lines of computerization in the commercial world: the larger the organization becomes, and the more impersonalized employer-employee relationships become, the more likelihood there is that computerization of some personnel records will take place in response to outside reporting demands and the need for internal efficiency. The fact that computerization in the nonprofit field remains low is generally evidence of small size and low budgets, not intellectual or moral resistance to the process.

Twelve nonprofit organizations -- union, church, and professional associations -- replied to our inquiries about computerized records and the privacy policies pertaining to them. As we noted in Part Two, four did not maintain computerized records on personnel at all (although two of these respondents were unions who do maintain extensive computerized membership lists); the remaining eight used EDP only for payroll processing and EEOC reporting.

As with business firms, nonprofit organizations are generally not subject to legal controls over their internal confidentiality or employee access practices. Also as with business firms, nonprofit organizations <u>are</u> regulated in their data collection about applicants and maintenance <u>of</u> data about current employees as far as discrimination is concerned. Color-blind practices as to initial collection of information about race,

sex, national origin, religion, etc. are therefore mandated, and various degrees of color-consciousness govern maintenance of such data for affirmative-action compliance. While the four state laws in 1978 giving employees a right of access to their personnel records contain no exemption for nonprofit organizations, it is generally true that organizations concerned with religious, political, and civic causes are under First Amendment guarantees of free association and privacy that would raise constitutional questions about extensive government supervision and auditing of their internal practices, even in the name of protecting privacy rights. This means that any state or Federal fair information practices laws or privacy codes would have to tread a very careful line if they extended their regulatory provisions to these kinds of private-sector organizations.

PART FOUR:

THE INTERPLAY OF TECHNOLOGY AND POLICY

Chapter Ten. EFFECTS OF PERSONNEL DATA SYSTEMS ON INDIVIDUAL RIGHTS

OVERVIEW

We present in this Part a discussion of how the privacy, confidentiality, and individual-access interests of employees have been affected by computerization of personnel data.

When computer use in organizations was given a first worried look by social and legal analysts in the middle to late 1960s, it was often assumed that automation would "inevitably" lead to certain kinds of data practices that threatened the privacy and due process rights of record subjects. These fears and assumptions were examined in detail by the National Academy of Sciences' Project on Computer Databanks. Its report stressed that computerization of personal data by organizations had not, as of 1972, led automatically to the collection of more detailed and wide-ranging personal data about the people on whom records were kept, or the sharing of data between organizations with computers more widely than had been the practice in that area of record-keeping activity previously, or to the creation of secret or inaccessible files where individual rights of access had previously existed. The two central conclusions drawn were that organizational motives and policies still controlled the uses of personal information far more than the technology of data processing, and that a variety of intra-organizational constraints, cost factors, and limitations on software flexibility had torpedoed many data bank projects long before their potential effects on citizens' rights had to be addressed.

However, the NAS study did note some emerging trends in the use of EDP that deserved close attention in the coming years, not because these were automatically harmful to citizens' rights but because they changed traditional informational relationships in ways that might require new organizational or legal controls. These trends included the creation of more up-to-date and complete records about individuals; faster responses to inquiries about persons; more extensive manipulation and use of stored information than previously; the creation or expansion of large-scale networks for the exchange of data among organizations in particular fields of activity; and the creation of some large data bases of information about people that would not have been feasible without automation.

In this section, we will look at the general patterns of EDP use in personnel to see whether these judgments of the NAS report still hold true today. Our focus will be on how the new arrangements of employee data through EDP compare with the pre-computer situation in terms of four key aspects: the scope of data collection, employee access to their own records, control over disclosures within the organization, and release to third parties.

THE SCOPE OF DATA COLLECTION

A major concern of citizens' rights supporters is that the reduced costs of data storage and processing in automated systems may lead organizations to collect more detailed and wide-ranging personal data about record-subjects, thereby raising new privacy problems. We compared the data elements contained in automated payroll applications, specialized application modules (benefits, EEO, ERISA, etc.), and the data-base systems with the items such organizations already stored in their central personnel folders or in specific personnel-function records (compensation, benefits, EEO, etc.). We found that the automated files were designed by selecting from existing records those elements of employee information most frequently used for current action (payroll deductions, home address, military-reserve status, medical work restrictions, etc.) and those historical items used either for making evaluative judgments (the past three years of performance evaluation ratings) or satisfying government reporting requirements (such as elected options by employees affecting pension rights).

In only one type of EDP personnel application did we notice that the scope of data collected was sometimes widened beyond existing manual data. Skills inventories ask employees to report recent job-related educational and professional activities, hobbies, political and civic activities, and similar "extracurriculars." (See the description of the Corn Products International skills profile in Part Two, page 87.) Before computerization, such updated and extensive skills information was either not kept at all, because of the costs of collecting and using it, or else collected at rather long periodic intervals (at the time of initial hiring, when a special search was made for technical or executive talents, etc.). For organizations that use automated skills inventories, therefore, a wider range of potentially sensitive personal data has been acquired as a result of EDP systems activity, with the concomitant problems of assuring proper use, limiting access of such information within the organization, and preventing any unauthorized dissemination beyond it.

EMPLOYEE ACCESS TO THEIR RECORDS

No principle is more central to citizens' rights in record-keeping than the right of individuals to see and contest what is in their records. As we observed in Part Two, the early installation of automated employee profiles (in the late 1960s) was usually accompanied by a policy of having employees regularly see and correct their automated records. This was usually done by providing an input form to each employee when the profile program was instituted, then providing a "return" printout to be checked immediately for accuracy. Each newly hired employee would follow such an input-verification procedure. Then, usually on an annual basis, each employee would be given a printout of his or her employee profile and asked to correct mistakes, up-date outmoded facts, and add new information.

The reasons managements gave for providing such employee access were: to insure higher informational accuracy, and to win employee acceptance of the new EDP systems. Large organizations were also concerned about making their promotion, assignment and other discretionary decisions seem fair to employees. Several management officials commented to us, for example, that skills inventories were much more useful in making professional and management-level employees feel their qualifications were being carefully considered than the inventories were in actually locating employees who would otherwise have been overlooked.

In the first period of automated profiles, organizations tended to omit from the forms supplied to employees various "management-only" items. These would be stored in the automated file, and would be printed out for supervisors, managers examining candidates for transfers and promotions, EEO affirmative action officials in the organization, etc. Among these items were such things as salary grade or level (because it could lead to "undesirable" comparisons among employees and be leaked outside the organization); performance rating code (where organizations shared details but not the final rating with employees in the appraisal process); "confidential" evaluations from special training courses or educational programs; and promotability code ("promotable now," "not yet ready for higher responsibilities," or similar terms, color-codes, or numbers that managements did not want to disclose). Since those items had not been available for employees to see before computerization, those access rules were simply carried over into the early automated profiles.

It was during the next phase, the 1970s, that citizens' rights issues began to be widely discussed in society, among computer and systems experts, and by organizational managers. As we have seen in the profiles, leading organizations began to re-examine the exclusion of such items from total employee access. Some developed policies of adding such information to the regular printouts, while others would allow employees to see such matters only on special application, and often by applying to supervisors or the personnel department.

The provision of employee access to automated data did not lead in all organizations to similar access being given to the larger body of employee information that remained in manual files (the personnel jacket, investigative or security reports, etc.) Whatever rules had existed before computerization tended to be continued as to those records, unless changed by general privacy reviews by the organization or by legal intervention.

CONTROL OVER CIRCULATION WITHIN THE ORGANIZATION

Though a given organization may be regarded as having a legitimate right to obtain sensitive information from an individual to perform its functions, a central aspect of citizens' rights is limiting access to such sensitive data only to those within the organization that have a need to know and use it. Such compartmentalization, as we saw in Part One, was observed by many organizations as a norm in the manual-record era, with rules restricting access to medical department records, health-insurance claims, special loans, and similar information. A major concern over computerization has been that creation of data bases would merge sensitive information from various separate record systems, and

give organizational units wider access than they previously had.

Several general features of data systems bear on this problem. When organizations want to control accessibility to particularly sensitive information, they can define access levels and install authorization codes and check-procedures that reproduce the compartmentalization which prevailed in the manual-record environment. This has been done in many of the personnel data system designs and installations we examined. In addition, some organizations have carried compartmentalization still further by putting the data of a special personnel function on its own minicomputer, as with medical records.

Whether such policies of limiting the circulation of employee records to those authorized to see them are in fact being carried out--that is, whether the organization's promises of confidentiality are being kept--is the internal aspect of information security. We heard of several situations in which traditional problems of data security in the manual era had carried over into the EDP systems, such as keeping confidential salaries and bonus payments safe from curious fellow employees or executives. Such attempts at "payroll peeping" seem to have followed the processing of such data from bookkeeping departments to computer rooms.

As far as preventing access to employee data by intruders from outside who might try to penetrate the computer files, the kind of information automated about employees and executives is not in the same class as the customer lists and trade secrets that have been the traditional targets of outsiders. We found no instances of efforts to get at personnel data systems to extract identified information, either reported in the personnel or computing literature or in our interviews with managers, EDP experts, or citizens' rights groups.

LIMITING RELEASE TO THIRD PARTIES

A serious concern of citizens' rights advocates is that automated record systems pose such an inviting resource of newly accessible information that many more requests would be made for the production of personal data than had been feasible in the manual era. These would be by regulatory, taxing, and licensing authorities; law enforcement officials; credit bureaus and government agencies verifying financial status for benefit programs; and many other third parties. Where once organizations might have been able (if their policies so inclined them) to resist the production of such records because of the high cost and personnel time needed to comply, those excuses are not usually available in a highly automated setting. Thus, the NAS study found many organizations--life insurance companies, hospitals, universities, etc.--being directed to furnish an increased volume of both identified personal records and statistical reports requiring more elaborate identified records to be kept as the basis for such reports.

Employers have indeed been among those experiencing such increased reporting duties, particularly for Federal programs in equal employment,

pension funds, health and safety, and hiring-the-handicapped. But it would be imprecise to say that those programs either arose or were fundamentally shaped as a result of EDP activity in the personnel sector. Rather, as we showed in Part Two, the enactment of such federal employee-protection laws, with their heavy record-keeping and trend-reporting duties, acted as a spur to the adoption of EDP systems in many, many organizations that had not been using computers beyond minimum payroll applications. It could be argued that an awareness of the capacity of automated data systems to make complex reporting duties feasible was somewhere in the mental consciousness of Congress or federal enforcement offices, but it would be a mistake to assign that a primary role.

Apart from reporting of employee data for regulatory programs, we did not find that personnel data systems are being used by business or nonprofit organizations to distribute employee information more widely to other third parties--other employers, credit inquirers, law enforcement bodies, etc. Most of such requests, as we noted in the profiles, are still "custom" inquiries rather than file searches, and are handled according to the policies for third-party release set by the organization or mandated by law.

Government agencies are in a different position. The automation of large files that contain information open under freedom of information laws to any person who applies presents a situation in which the sorting and listing capacities of computers can drastically cut the cost and time limitations that once limited outside inquiry. In terms of the public's right to information, that may be a positive development. But when automated government files are used by businesses to compile lists for commercial and advertising purposes, or by private organizations to solicit new members, or by political and civic groups to seek financial contributions, privacy issues arise. Government employee files fit under this and several other categories of use that raise privacy questions, such as access by unions. The public-record nature of some employee data has caused concern among computerizing government agencies. (See also the discussion on pages 257-258 about welfare-fraud investigations.)

Summarizing these general effects of EDP use, we find that the main conclusions of the NAS study of 1972 still apply to the personnel sector. The motives and policies of organizational managements remain the most important considerations, along with legal interventions, in shaping the relation of personnel data systems to citizens' rights interests.

Incidentally, it is worth observing that while computerization of personnel information has not yet had significant effects on the privacy interests of employees, privacy protection measures -- whether voluntary or legally required -- have had some significant effects on personnel data systems. The most extensive have been the costs and system modifications required of Federal agencies under the Privacy Act of 1974, and of state agencies in the nine states having similar state privacy laws. This suggests that such considerations deserve attention when proposed privacy safeguards are considered.

THE IMPACT OF EDP ON THREE SETTINGS OF EMPLOYER DATA PRACTICES

1. Pre-Employment

The largest amount of current action challenging employer practices is in the pre-employment area. In Part One we described privacy-based complaints against asking questions of applicants at all as to certain topics (political loyalty, arrest records, marital status, psychological or psychiatric treatment, etc.); as to the use of certain techniques of information verification (such as polygraphs and personality tests); and as to the areas inquired into by third-party investigators (such as homosexual status, cultural life style, associations, drinking habits, etc.).

Pre-employment is also the area in which computerization of personal data has played virtually no role. Job applications are still filled out by hand and their contents are not being automated for hiring decision purposes. (EEO does require keeping statistics on the total number of minority persons applying and the number hired, but this is statistical reporting and does not produce personal data for hiring decisions.) Furthermore, the firms that do pre-employment investigations, both commercial reporting agencies such as Equifax and Hooper-Holmes and detective firms such as Wackenhut and Fidelifacts, have not automated the records they keep on persons for such employment reporting purposes. Such records are usually used only once in a long time, and are narrative reports with considerable textual information in them; thus they do not represent an area that is cost-effective for automation, as are the often-used and generally short-code credit histories that have been extensively computerized during the past decade.

2. Post-Employment

Post-employment activity has also not been affected significantly by employer computerization. The great majority of information releases on former employees are handled as single inquiries, with the identity of the inquirer conveyed and the purpose of the request stated. Most employers with automated employee records print out a final profile on persons leaving their employ and place this in manual storage (personnel jacket, microfiche, etc.), reserving the on-line personnel data base for current employees. Furthermore, employers are not usually asked to do large-scale searches of ex-employee lists for regulatory or investigative purposes. The few cases we did hear about were "custom" searches, such as police requests that employers supply lists of discharged employees who might be suspects in bombings of the employer's property. These were met by having personnel officials go through the manual employee jackets, reviewing reasons for discharge and checking with supervisors for their recollections of the employee's attitude on termination.

3. Current Employee Data Files

This leaves personnel administration of current employees as the prime area in which EDP use coincides with privacy concerns by employees

and individual rights groups. The main decisions about employees that computerization affects here are promotion, assignment, and transfer. The employee-rights issues here involve whether the standards used for making those decisions are proper and whether the employee is able to see and challenge the records used by managers to arrive at their conclusions.

Another major area in which automated records are being used is benefits administration (medical records, health insurance claims, handicaps, etc.); here, the employee rights issue is protection of the confidentiality of such sensitive data from being seen by officials within the employer's organization who do not have a genuine need to know such information.

We did observe in 1977 one striking example where the availability of computerized personnel records was substantially responsible for the conduct of a government investigatory search unconnected with any on-the-job matter. This involved growing demands by city, county, state, and Federal welfare authorities that private employers and/or government agencies supply computer tapes of their employees to screen against lists of individuals receiving welfare or other special-assistance benefits. The goal of these "match" searches is to identify persons on the payrolls of such employers who had lied about having such employment when they applied for public assistance or had failed to notify authorities that they had secured such a job after going on the assistance rolls.

In the private sector, we found business opinion to be divided over such cooperation with welfare investigative programs. Several corporate officers said they were strongly in favor of cooperating in such inquiries. However, one corporate general counsel told us: "We don't like the idea of giving the city our employee rolls. They are doing it just because they know we have these on computer tape, and they can do a fast run of the welfare rolls against our payroll records. What worries me is that if we cooperate in this program, government will start asking us to supply tapes or make comparison runs for lists of aliens suspected to be in the area, or persons on drug programs, or lots of things that we think we ought not to do." Another corporate leader, this one a systems manager in a large national firm, said that the legal and personnel staffs were preparing to recommend a refusal to cooperate to the top management when the president of the company delivered a strong speech against welfare abuses, and now they weren't sure whether a principled stand against cooperation would be accepted. Still another business executive commented that local, state, and Federal Governments already had his company's employee rolls in the form of payroll-tax tapes, federal income tax reports, or Social Security payment reports; "why shouldn't they use what they already collect," he said, "instead of asking us to be the instrument of law enforcement, and divulge employee rosters in a way that will harm our relations with employees? This is especially true because of the possibility of criminal prosecutions of employees resulting from such investigations." Reflecting these concerns, both IBM and

A.T. and T. were reported to have declined to turn over their payroll records to HEW for the welfare-fraud check.*

The same issue surfaced in 1977 with regard to tracking welfare abusers among city, county, state, and Federal workers. Tape-Matching Projects initiated by New York City and in a national sample by the U.S. Department of Health, Education, and Welfare found a substantial number of employees holding down government jobs and also collecting public assistance. In some cases, project officials noted, where employees had large families or impaired persons in their families, they would be eligible for such aid even though they were employed. The purpose of the inquiry was to identify those receiving aid illegally, and those who were properly receiving aid because of special circumstances would not be affected, once those special factors were verified. The HEW sample project was scheduled to be carried out on a nationwide basis in 1978, using personnel tapes of cooperating cities, counties, and states, as well as the U.S. Civil Service Commission and the Department of Defense.

The HEW project was criticized by a number of privacy experts in 1977. The ex-chairman of the Privacy Protection Study Commission, David F Linowes, said that HEW Secretary Joseph Califano displayed a "file cabinet mentality" in supporting the program, failing to recognize that "computer-to-computer linkage" is the "biggest threat to personal privacy today." Several members of Congress were reported as saying that such activities threatened to sacrifice the expectation of confidentiality that individuals had in their employment records with the government in the pursuit of eliminating welfare abuses -- an important goal but one that could be accomplished without jeopardizing record-privacy and creating a spectre of an Orwellian Big Brother.

The HEW response to these criticisms in 1977 was to stress that the personnel tapes and printouts would be carefully handled by Federal and state agencies; that only senior staffs in HEW and cooperating agencies would have access to "sensitive data"; and that decisions as to criminal prosecutions would rest with the U.S. Attorney General's Office. Secretary Califano concluded that the operation "is being conducted under procedures aimed at ensuring the privacy rights of all Federal employees.

SUMMING UP EDP IMPACT ON PERSONNEL PROCESSES

The following chart summarizes the overall impact of EDP on the personnel function, drawing on the discussions in this chapter and earlier.

*"Privacy Backers Hit HEW Project," Computerworld, Nov. 21, 1977.

ROLE OF EMPLOYER'S USE OF EDP IN EMPLOYEE-RIGHTS ISSUES

RELATIONSHIP OF INDIVIDUAL TO EMPLOYER		NATURE OF THE DECISION BEING MADE	IS EDP BEING USED BY EMPLOYER TO PROCESS INDIV. DATA?	DOES USE OF EDP RECORDS AFFECT DECISIONS ABOUT INDIVIDUALS?
PRE-EMPLOYMENT	POTENTIAL EMPLOYEE APPLICANT	Whether to consider 1. To offer employment or reject.	NO	NO
		2. Compilation of statistics for EEO purposes.	YES	NO
EMPLOYMENT	EMPLOYEE	1. Promote	YES	YES
		2. Assign and Transfer	YES	YES
		3. Administer benefits	YES	YES
		4. Discharge	Rarely	Rarely
		5. Release of personal data to 3rd party	Rarely	NO
POST-EMPLOYMENT	FORMER EMPLOYEE	Release of data to 3rd party	Rarely	NO

EFFECTS OF EDP ON PERSONNEL DECISIONS

Computerization has been of great help to employers, especially large employers, in administering complex tax and benefits programs for employees; meeting reporting requirements for government regulatory and employee-protection programs; coping with complicated wage, salary and benefits negotiations with unions (which also rely heavily on computers in collective bargaining); and doing studies of manpower needs, staffing problems, and similar future-oriented matters. To the extent that decisions about these matters affect groups and classes of employees, the computer is now a major management tool. And, as we noted earlier, whether EDP is cost-effective in some rigid, dollars-saved formula is not the controlling factor when there are serious needs to meet government regulation-program duties and reporting requirements, and to defend the organization effectively against potentially large damage suits.

However, after two years of studying the literature, visiting leading organizations in the adoption of personnel data systems, talking to software specialists and systems designers, and questioning personnel administrators, we are unable to identify significant effects of computerization on the way that individuals are being hired, supervised, promoted, disciplined, or discharged by their employers. Even when printouts and visual display devices are available, when central personnel data files contain core information about each employee, or when special skills inventories have been created, we found that important personnel decisions about individuals are being made just about as they were before EDP came to the personnel function. Where decisions are being made differently, it is in response to forces such as government employee-protection programs, not automation.

This has not been because of a lack of serious effort to use EDP to improve personnel decisions, or because too little money has been spent. Rather, our sense is that when there is a weak linkage between indicators or predictors and the desired goals, data base approaches are not effective. That is, we lack strong evidence of what personal qualifications or disqualifications really predict success in employment or even in particular kinds of jobs. The serious difficulties in carrying out scientific validation studies in the future does not hold out much hope that this absence of causal relationship between informational inputs and diagnostic outputs will be soon remedied. Still another factor that complicates the application of data-rich techniques is that many considerations other than pure competence, performance, or "merit" operate in personnel work, ranging from those that law or public policy may impose (such as compensatory affirmative action practices) to those that are unwritten political rules of the game in a given type of organization. Where such considerations play important roles, not only is it impossible to quantify the decision but the very creation of too detailed and explicit a record can work against the "higher" (e.g., the inescapably political) rationality of such decisions.

These considerations suggest that there may be major structural limitations on effective use of EDP in many areas of individual personnel administration. Unlike the situations such as computer-assisted medical diagnosis, credit-scoring for loans decisions, or computer-assisted tax auditing -- where richer data and better formulae hold out significant hope of improving decisions - personnel decisions about individuals may just not be such an area of EDP suitability. One favorable implication for citizens' rights in that context is that the collection of more detailed personal data from applicants and employees may not become a demand pressed by EDP-oriented personnel executives. Even if some should try to pursue that goal, the top managers of organizations may well cast a coldly-skeptical eye on the value of such efforts and decline to authorize them. Since one of the central tenets of privacy protection is that, unless the organization can demonstrate that it really needs sensitive personal information to make socially-accepted decisions, individuals should not be compelled to disclose it and it should not be collected through third-party techniques, the low-yield prospects in greater personal data collection may operate to assist privacy advocates.

Chapter Eleven. IMPACT OF THE FEDERAL PRIVACY ACT AND FREEDOM OF INFORMATION ACT AMENDMENTS ON FEDERAL PERSONNEL PRACTICES

It is still quite early to assess the impact of the Federal Privacy Act of 1974 on the personnel practices of federal agencies. Since the Act took effect in September of 1975, and our report was drafted in late 1977, we had only two years of experience to examine. In the life of as large and glacial an establishment as the federal executive branch, two years of compliance with as potentially significant a piece of legislation as the Privacy Act can only be considered the beginning.

To find out what the beginning has meant as far as federal employment practices are concerned, we reached out to a diverse set of sources. Two of our on-site visits and profiles were of federal agencies, the U.S. Civil Service Commission and the Air Force. As already noted in Part Two, we sent a questionnaire to the personnel administrators of federal agencies asking not only about their computerization of personnel records but also their experiences under the Privacy Act and Freedom of Information Act; we received replies from 64 agencies, bureaus, and departments, and these will be analyzed as part of this chapter.

Our project also conducted interviews with a small but well-informed group of civil liberties experts: lawyers and staff from the Capitol Areas ACLU affiliate; the ACLU National Privacy Committee; the Mental Health Law Project; the ACLU Project on Privacy and Data Collection; and the Military Discharge Project. We also interviewed leaders from several federal employee unions, women's rights groups, and racial equality organizations.

Beyond these activities of our own, we found excellent material in work being done by others. Several federal officials testifying before the Privacy Protection Study Commission discussed their handling of employment matters, and we have discussed the Act's impact with staff member of the Commission. There have been two important reports by the Office of Management and Budget dealing with experience under the Privacy Act, as well as a consultant's report for the Federal Paperwork Commission covering federal-agency implementation of both the Privacy Act and the 1974 Freedom of Information Act Amendments. Special note should be made of the report of the Privacy Protection Study Commission assessing the impact of the Privacy Act. A summary of the Commission's report is included in this chapter.

We will first present the observations and empirical data gathered by our own site visits and survey, then sum up our evaluation of federal-agency experience on the basis of all the sources mentioned above.

OBSERVATIONS FROM OUR TWO FEDERAL SITE VISITS

The following comments sum up the specific impressions that we drew from site visits to the Civil Service Commission and the U.S. Air Force.

- Changes in Data Systems: Neither of these two agencies had to alter the basic content, structures, or procedures of their existing personnel record systems, manual or automated, in order to comply with Privacy Act requirements. Interesting though minor changes did occur, including compliance and tracking procedures for the Privacy Act and reorganization of how data is physically arranged in files.

- Effects on Basic Personnel Operations: In neither agency has the Privacy Act disrupted basic operations. What has been most affected is release of personnel information to outside firms or agencies (delays because of consent procedures) and for "convenience" activities inside the organization (furnishing a visiting officer on a base with his buddy's home telephone number). There were some overreactions and unnecessarily restrictive interpretations of the Act's requirements by Air Force personnel (often following DOD guidelines) during the first year (as in many civilian agencies), but these seem to be in the process of being smoothed out.

- Effects of EDP on Compliance: The high state of automation in the Air Force seems to have enabled it to be especially responsive to the Privacy Act. For example, the Privacy Act Tracking System (PATS) records access requests under the Privacy Act and non-routine-use disclosures from individual files, both automated and manual. These can be audited, are available for the service person's inspection, and a PATS printout goes into the permanent manual record kept in the St. Louis Armed Forces Record Center.

- Effects on Information Collection: Officials from the Defense Department feel that the quality of information obtained in suitability investigations in the services -- including the Air Force -- has decreased as a consequence of the Privacy Act. "People don't want to have themselves listed as a Confidential Source," it was observed, especially because "they are concerned that suitability investigation files could be opened up to inspection later and what they said in confidence will be seen. So people just don't give as full information, or any information at all." However, this view is not shared by the CSC. (See the discussion in the Profile.)

- Effects on Employee Requests to See Their Files: Since neither the Air Force nor the Civil Service Commission is involved in large service programs affecting the public, as are IRS or Social Security, requests under the Privacy Act for individuals to examine the files maintained about them have understandably been mainly concentrated on employee requests. (In our later discussion, we will compare this trend with experiences in the public-program agencies.)

- Enhancement of Employee Rights: Since the selection, promotion, and disciplinary processes of the Civil Service Commission had been under attack by civil liberties and minority-rights groups during the past decade, and there have been extensive changes as a result of constitutional rulings by the courts and executive policies, the Privacy Act has had less impact on these functions of the Commission -- and has continued to have less impact -- than those larger social and legal forces have exerted. Generally, especially given the exemptions as to personnel examinations and investigations written into the Act, the Privacy Act has ratified rather than drastically altered the Commission's basic rules for federal agency practices as to privacy, confidentiality and access. In the Air Force, the Act stimulated a minor increase in officer requests to inspect the files about them prepared for use in promotion decisions; however, these requests have slackened off as officers came to learn that nothing contained in those files revealed the motives of promotion boards beyond the explanations formally given to promotion candidates. Moreover, files previously closed to individual access, such as investigative files, promotion board proceedings, and evaluation files for senior officers, still remain closed. Confidentiality rules for data release have been tightened up in the Air Force.

Generally, the most important citizens' rights issues in the federal services, both civilian and military, are not being fought out today either as record-keeping issues affected by computerization or as matters for decision under the Federal Privacy Act. Such questions include: whether homosexuals will be allowed to serve in the armed forces, and with what off-limits assignments if they are; how medical and psychiatric conditions of employees are to be regarded and handled; how continued race and sex prejudices are to be dealt with, especially in the more subtle areas of personnel decision; and how "less than honorable" discharges and pejorative separation numbers in the military are to be handled in the future.

RESULTS FROM THE PROJECT'S SURVEY

Earlier in this report we presented some of the findings from our survey of personnel officers in 64 federal bureaus, agencies and departments. A number of our questions dealt with the impact of the Privacy Act of 1974. We asked first whether their agency had encountered "significant problems," as to their personnel files, in complying with the requirements of the Act. We deliberately did not break the term "problems" down into elements of financial cost, personnel time, administrative delay, or other components, preferring to let any type of problem be the basis of the answer. Of the 64, 54 said they had not experienced significant problems. The Civil Aeronautics Board and the General Services Administration stated generally that problems had arisen with regard to their personnel records; the Department of Defense, Department of Commerce, Bureau of Customs, and Tennessee Valley Authority cited problems of guaranteeing physical security, costs of reporting, or insufficient manpower to meet the requirements of the Act. The Marine Corps cited inability to supply addresses in requests for location of veterans.

Thus the overwhelming sense from these 64 agencies is that the Privacy Act did not create significant implementation problems in the personnel sector.

We then asked the federal agencies whether there has been an increase in the volume of requests by employees to see their personnel records since the passage of the Privacy Act. Thirty-one agencies said yes, thirty-three, no. A few agencies, such as NASA, specified that the increase was temporary. Others, such as the Army and Customs, noted that it was difficult to come up with a "percentage increase" figure for their organization as a whole.

Of those agencies who said that there had been an increase, the following were the percentages of increase supplied:

United States Information Agency	10%
Export-Import Bank of the United States	1%
Federal Home Loan Bank Board	15%
Securities and Exchange Commission	less than 1%
Farm Credit Administration	10%
Department of the Interior	30%
Equal Employment Opportunity Commission	10%
U. S. Government Printing Office	100%
Federal Trade Commission	75%
Action	25%
Board of Governors of the Federal Reserve System	1%
Federal Energy Administration	15%
Department of State	20%
Department of Commerce	50%
Department of Health, Education & Welfare	2%
Department of Defense	5-10%

Central Intelligence Agency	28%
Civil Service Commission	less than 5%
Agency for International Development	10%
Veterans Administration	100%
U.S. Secret Service	50%
Department of Commerce	50%

Our next set of questions probed whether compliance with the Privacy Act had produced changes in the scope of data collection or in patterns of data usage.

* When asked whether they had eliminated any elements of personal data that were kept about employees prior to the Act, 51 said "no" and 13 "yes."

  (Those answering "yes" included: Community Services Administration, National Foundation on the Arts and the Humanities, United States Information Agency, the four military services, the Bureau of Customs and the Central Intelligence Agency.)

* When asked whether they had consolidated or otherwise rearranged personnel files, 45 said "no" and 19 "yes."

  (Those answering "yes" included: Department of Commerce, Community Services Administration, Federal Trade Commission, Federal Reserve Board, General Accounting Office, the four military services, the Central Intelligence Agency, Secret Service, and the National Aeronautics and Space Administration.)

* When asked whether they had destroyed any record systems or files about employees as "unnecessary to maintain," 40 said "no" and 24 said "yes."

  (Among those answering "yes" were: Department of Commerce, Action, Community Services Administration, Federal Trade Commission, General Accounting Office, General Services Administration, National Foundation on the Arts and the Humanities, the Customs Bureau, the Panama Canal Company, the Central Intelligence Agency and the four military services.)

* When asked whether there had been a reduction in the levels of personnel information about employees released outside their agencies, 32 said "yes" and 32 "no."

  (Among those answering "yes" were: Department of Defense, Department of State, Action, Civil Aeronautics Board, Community Services Administration, Equal Employment Opportunity Commission, Export-Import Bank of the United States, Federal Energy Administration, Federal Trade

Commission, General Services Administration, National Gallery of Art, National Science Foundation, Securities and Exchange Commission, Tennessee Valley Authority, United States Information Agency, United States Tax Court, the Customs Bureau, the Veterans Administration and the four military services.

Finally, we asked a question to probe what inquiries from personnel files were being made by employees or third parties, not under the Privacy Act but the Freedom of Information Act. Thirty-nine said there had been such inquiries under FOIA and twenty-five said that there had not. A few agencies, such as the Bureau of Customs, noted that it is difficult to distinguish FOI requests from Privacy Act requests when the people inquiring do not specify the law under which they are seeking access to their files. The agency decides what regulations they are processing the request under. Twenty-two of the twenty-six answered our requests for an estimate of how many such inquiries there had been and their nature. These replies are as follows:

United States Information Agency	6
Federal Communications Commission	5-6
Export-Import Bank of the U. S.	1
Federal Home Loan Bank Board	49
Securities and Exchange Commission	10
Community Services Administration	9
National Credit Union Administration	1
U. S. Department of Labor	3
Equal Employment Opportunity Commission	5
U. S. Nuclear Regulatory Commission	6
General Services Administration	91
Board of Governors of the Federal Reserve Board	12
Civil Aeronautics Board	15
Department of State	12
Department of Health, Education & Welfare	48
Tennessee Valley Authority	"Very Few"
Department of the Army	160
Department of the Navy, Office of Civilian Personnel	2
Bureau of Naval Personnel	2
U. S. Marine Corps	48
U. S. Air Force	384
Central Intelligence Agency	*2,013
Civil Service Commission	2
National Aeronautics and Space Administration	60
Bureau of the Mint	10
Secret Service	35
Bureau of Alcohol, Tobacco, and Firearms	6
Internal Revenue Service	200
Health, Education, and Welfare	48

*(Includes Privacy Act also.)

Most of the agencies answered our question as to the nature of the inquiries they received with narrative replies. The following were the main patterns they reported:

1. Some requests come from the record subject, asking for things such as a copy of his or her entire personnel folder (e.g., Secret Service, Comptroller of the Currency, General Services Administration); for promotion evaluation reports or position-decision actions (USIA, Bureau of the Mint, Bureau of Alcohol, Tobacco, and Firearms, IRS); for information from their "intelligence dossiers" (Army); and "internal investigation into an employee's misconduct" (SEC). The Air Force averages 64 requests a month "from individuals who cited the Freedom of Information Act for access to criminal and background investigations on themselves..." Requests came also from former employees (USIA: "For the most part, former employees who were separated for cause, reduction-in-force, rankings, etc. or an employee who was not hired by agency.")

2. Some requests come on behalf of a former employee who is now suing the government, as for information about other employees' salaries, promotions, and assignments so that these can be compared for EEO charges (Department of Labor, Civil Service Commission).

3. Some requests are from third parties, such as business firms wanting employee addresses for soliciting purposes (TVA); a disabled veterans group seeking names of disabled officers to contact as potential members (Air Force); various public-interest groups, journalists, and scholars seeking employee records where celebrated cases or agency actions are involved; locator information and employment verification from financial institutions.

LITIGATION UNDER THE PRIVACY ACT AND FOIA

We have already noted several lawsuits brought by Federal employees or applicants for Federal jobs, especially the Gang case against the Library of Congress and the Civil Service Commission (pages 148-149). There have been several cases under the Freedom of Information Act involving personnel matters that deserve mention.

Exemption 6 excludes from public access under FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The legislative history of this section when the Act was first passed in 1966, and unchanged by the 1974 amendments, shows that Congress expected this section to "involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government information." The federal courts were expected to do this balancing when someone denied access to such files challenged the agency's invocation of Exemption 6.

One of the first major cases to reach the U.S. Supreme Court under Exemption 6, following passage of the 1974 FOIA amendments, involved a

denial by the U.S. Air Force to student editors of the New York University Law Review of case summaries from recent Air Force Academy hearings into cadet violations of the Academy's Honor Code. The editors called for personal references and other identifying material to be deleted, but the Air Force refused them access, invoking the personnel privacy interest in Exemption 6. The Supreme Court affirmed a lower federal court ruling directing the Air Force to produce the summaries for in-camera inspection by the lower court and elimination of identifiers.[1] A five-man majority of the Court, in an opinion by Justice Brennan, held that these records had the attributes of personnel files, that a "balancing test" approach should be used in the case, that the public had a significant interest in the disciplinary system used for training future military officers, and that Exemption 6 would not apply merely because it could not be guaranteed that stripping identifying information would prevent all risks of identification of disciplined cadets.

Interestingly, it was three of the Court's more conservative members -- Chief Justice Burger, Justice Blackmun, and Justice Rehnquist (Justice Stevens did not participate in the decision) -- who dissented on the ground that the personnel privacy exemption should prevail, upon proper balancing of the competing interests, over the alleged interest of the public. Burger called the interest of the law review editors "relatively inconsequential" while the possible exposure of the cadets' identities and circumstances would be a "clearly unwarranted invasion of personal privacy." He and his fellow dissenters did not believe that lower court inspection and purging of identifying information was a proper procedure to use in Exemption 6 cases. They also cited passage of the Privacy Act of 1974 as proof that Congress was deeply concerned over protection of privacy: "it is indeed difficult to attribute to Congress a willingness to subject an individual citizen to the risk of possible severe damage to his reputation simply to permit law students to invade individual privacy to prepare a law journal article."

The other interesting case, still under litigation, is Weissman v. CIA.[2] The CIA conducted a covert personnel investigation of Weissman -- without his knowledge -- because it was considering recruiting him as an agent. Weissman brought an FOI suit to get a copy of the record compiled by the CIA. A federal district court ruled for the CIA, relying on the exemption for law enforcement investigatory records in Exemption 7 of the FOI Act. In 1977, the District of Columbia circuit court ruled that while some personnel investigations may qualify as being done for law enforcement purposes, those done by the CIA on persons unaware of the investigation do not qualify under Exemption 7, because the CIA is prohibited by statute from performing any law enforcement functions.

EVALUATION OF THE PRIVACY ACT'S IMPACT BY THE PRIVACY PROTECTION STUDY COMMISSION

Part of the Privacy Protection Study Commission's mandate was to recommend to what extent the requirements of the Privacy Act as currently applied to the Federal Government should be extended to the private sector. To fulfill this mandate, the Commission undertook an assessment that included areas of Federal personnel work: how it has affected Federal agency personnel records management; what impact it is having on government employee privacy; and what problems agencies have encountered in interpreting and complying with the act. The Commission's analysis appears as an appendix to its main Privacy Report*. What follows is a summary of the Commission's findings in the above three areas.

Changes in Federal Agency Personnel Records Management

The Privacy Act's requirements that agencies publish annual systems notices, establish individual access procedures, and insure accuracy, relevance and timeliness of individual records have caused many agencies to eliminate whole systems of records, and others to reduce the types of information they collect. A third effect has been the elimination of duplicate, or outdated records, and records containing extraneous personal information. In the first category, the Export-Import Bank reported that the requirement that a system of records be publicly acknowledged prompted them to eliminate some systems. The Civil Service Commission abandoned (see profile) its Security Research Index which contained records on 1.3 million individuals, only a small portion of whom had been applicants for Federal jobs. Cross index systems and other methods of associating records with individuals were destroyed by the Department of Interior in order to reduce the number of agency systems subject to the Act. The U.S. Information Agency eliminated 9,300 individuals from its Personnel Security and Integrity Records Files.

In the second category - reduction of the types of information collected - the Foreign Service said that it had reduced the amount of material in its personnel records by 50 to 60 per cent. The Air Force has eliminated 300 of the 6,700 data elements in its personnel system.

In the third category - duplicate, outdated or extraneous records - NASA now prohibits supervisors from creating their own, duplicate personnel files. The Community Services Administration is now routinely shredding outdated employment histories and several other agencies are reviewing their record systems to shorten retention periods. The International Trade Commission has stopped listing employees' home telephone numbers and addresses and removed Social Security numbers, home addresses and telephone numbers from its carpool application forms. The International Trade Commission's personnel roster no longer lists employees' age or marital status.

*The Privacy Act of 1974: An Assessment, Appendix 4 to the Report of the Privacy Protection Study Commission, July, 1977.

Very few agencies, however, have taken steps to insure their personnel records' accuracy. Among the handful that have are ACTION, the Pennsylvania Avenue Development Corporation, the Committee for the Purchase of Products from the Blind and other Severely Handicapped and the Federal Reserve Board. All of these agencies monitor accuracy by arranging for their employees to review the contents of their records at regular intervals.

Government Employees Privacy Access

The Commission's analysis confirms the Project's own conclusion that government employees are by far the greatest users of the Privacy Act. For example, the Department of Defense reported in 1976 that 90 to 95% of requests to it came from current or former employees. The Civil Service Commission and the U.S. Information Agency also note that the majority of Privacy Act requests come from government employees. It is easy to understand why this is so. Government employees are more knowledgeable about agency operations and more comfortable dealing with bureaucratic procedures than the ordinary citizen. Having said that, the Commission points out that in the light of the number of records federal agencies maintain -- 3.85 billion as of December 31, 1976 -- utilization of the Act, even by government employees, is very low, and far lower than was predicted when the Privacy Act was passed. This low utilization may be explained, in part, by the formidable barrier of having to wade through the Federal Register to figure out which agencies have what record systems, and which of these are exempted because of "routine use."

The Commission finds some evidence, whether because of employee interest in the Act, or the mere existence of the Act itself, that access and correction rights have been strengthened. For example, the Coast Guard claims that while it has long had procedures for giving its employees access to their personnel records, the Privacy Act has made it easier for them to get these records corrected. Individuals today also seem to find it much easier to gain access to medical records and employment-related investigatory files that agencies maintain on them.

Third Party Disclosure

While access rights are certainly not ideally guaranteed, and monitoring mechanisms are needed to overcome bureaucratic difficulties, including the problems of identifying the appropriate record systems to be accessed and delays in fulfilling requests, the legislative groundwork for making access rights effective is in place. Most agency managers have a system, or beginnings of a system, for complying with access requests. The same cannot be said as surely for policies regarding third party disclosure. The Commission focusses on the concept of "routine use" to highlight the difficulties of controlling third-party disclosure.

Routine use provides an exemption to the requirement that an individual must give written consent before a record about him or her can be transferred from one agency to another. Routine use is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected." Such routine uses can be government-wide, or agency-wide, or system-specific. Many routine uses are just that, and are indeed compatible with their original collection purpose. Forwarding payroll information on a government employee, for instance, to the Treasury Department so that a paycheck can be generated clearly meets the compatability test.

However, other accepted routine uses are highly questionable. For example, the Veteran's Administration provides for information in 16 separate systems to be disclosed to debt collection firms. The USIA provides for the disclosure of information in all its systems to any other government agency that has statutory or other lawful authority to maintain it. Other routine uses merely continue disclosures, regardless of compatibility, that an agency habitually made prior to passage of the Privacy Act. Under the routine use rubric, for instance, the Justice Department has adopted this policy:

"A record may be disseminated to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information relates to the requesting agency's decisions on the matter." This underlined phrase means that it is the requesting agency's needs that determine whether the disclosure will be made, not the compatibility test.

Problems with disclosure have arisen when different agencies have defined routine use in different, and indeed, in opposite ways, as the following illustrates:

The Civil Service Commission, which is responsible for most federal personnel files, did not issue its guidelines on disclosure to labor unions representing Federal employees until 15 months after the Privacy Act took effect. Meanwhile, the Department of Defense and the Veterans Administration reduced the amount of information given out to labor unions, while HEW made no change. Thus, in some cases the American Federation of Government Employees was excluded from labor management negotiations in which records subject to the Privacy Act were discussed. At the VA, unions were not allowed to review merit promotions at all, while at HEW merit promotion records were released with the names removed. The belated CSC guidelines resolved the problem by instructing agency officials to provide information, wherever possible without personal identifiers, and in any case to remove sensitive materials such as marital status, age, allegations of misconduct or proposed disciplinary actions.

Finally, some officials say that agencies "trade" routine uses. That is, when one agency wants information from another, it asks the other agency to publish a routine use allowing the information to be disclosed to it, and the maintaining agency agrees so long as the requesting agency publishes a reciprocal routine use allowing information in its records to flow the other way. This is not illegal, but from a privacy point of view, it would be better for an agency desiring information about an individual to get that individual to sign an authorization allowing it to acquire the information rather than to handle the matter as a quid pro quo of which the individual is likely to be unaware.

Despite the lack of control over routine use disclosures, the Commission believes that the Privacy Act has caused a modest decline in the amount of information about individuals that agencies disclose to others. For example, the Civil Service Commission no longer discloses applicants' examination scores to their parents and spouses and has limited the disclosures they will make of information in an individual's retirement records. Again, in their 1975 annual reports, the most frequently cited change in agency disclosure policy was the addition of a requirement that an individual's prior written authorization be obtained before information about him or her is disclosed in response to credit inquiries and non-governmental employment verification requests. But these examples, and others, are outside of the disclosure of information within the vast network of the government. This problem remains, and will require continuing refinement of policy and continuing monitoring before employees' rights to control the flow of their personal information can become a reality.

Interpreting and Complying with the Act

One great difficulty with achieving uniform compliance with the Privacy Act stems from its definitions. The Act applies to a "record" that is "retrieved" from a "system of records" by the name of an individual "or by some identifying number, symbol or other identifying particular assigned to him." This allows for considerable latitude in compliance. The Interior Department, for example, files its records on job candidates recommended by Congressmen under the Congressmen's names, rather than the names of the applicants. A small component of one agency rearranged its personnel records by Civil Service grade, instead of individual identifier, in order to avoid meeting the Act's requirements. The major flaw in the law's definition, however, is that it springs from a manual mode of information processing, not with computer possibilities. One capability of computers is that they are capable of attribute retrievals, or combination retrievals that do not require name code or number to identify them. Such computer systems would be exempt from inclusion as a system of records as defined in the Act.

On the whole, the Commission has concluded that:

1. The Privacy Act represents a large step forward, but has not resulted in the broad-scale benefits that its passage had led supporters to expect;

2. Agency compliance is difficult to assess because of the ambiguity of some of the Act's requirements, but on balance, it appears to be neither deplorable nor exemplary;

3. The Act ignores or only marginally addresses some personal-data record-keeping policy issues of major importance now and for the future.

AN OVERALL ESTIMATE OF PRIVACY ACT EXPERIENCE AFFECTING FEDERAL PERSONNEL DATA PRACTICES

Drawing on the material that our Project collected and the work of other investigators cited in the introduction to this section, we offer the following overall impressions of federal-agency experience under the Privacy Act, as far as personnel data practices are concerned.

First, there is considerable irony in the fact that employees seeking access to their own personnel records represent the largest single type of access request for the total Federal system in the Act's first 18 months of use.* When Congress was considering the issue of letting record-subjects have a right to inspect what was in the files Federal agencies kept about them, it was the public that was foremost in the legislators' minds. The hearings and debates dealt with access rights by the people covered by Federal programs of regulation, service, licensing, taxation, law enforcement, intelligence, etc., not Federal employees or people in the military services. In fact, civilian employees and military personnel already had substantial rights to inspect their personnel records guaranteed by Federal law and personnel regulations.

What explains the fact that employee requests have been the biggest type of use? The answers are that Federal employees received more notice about the Act from publicity, intragovernmental publications, and on-the-job communications than the larger, more amorphous pools of the public involved in Federal service or regulatory programs. They are also in daily contact with the supervisors and managers who compile records about them. They receive both formal orientation and written descriptions of how records are used in personnel work, as well as typical "grapevine" rumors. Many Federal employees obviously feel also that examining their records under Privacy Act access procedures might reveal

*The First Annual Report of the President on Federal Personal Data Systems Subject to the Privacy Act of 1974 found that, except for requests for access to law enforcement systems, most requests for access to agency records were being made by Federal employees. An Office of Management and Budget report in March, 1977 on Costs of Implementing The Privacy Act of 1974 found that granting individuals access to their records represents the single largest operating cost under the Act, $10.7 million or 29.2% of total operating costs. In the Department of Defense, which maintains a third of all the Federal systems subject to the Act and registers 48% of the total operating costs in the Federal Government, OMB notes that it is responses to DOD personnel that accounts for this high expense.

recorded information or evaluations that had not been available to them previously, and that seeing such information might aid them in matters affecting promotions, job assignments, and other employment concerns.

By contrast, despite extensive national publicity about public rights of access under the Act, most individuals on whom records are kept in federal public-service or regulatory programs are not oriented to think about records as being important to their interests. Most are not in daily, direct contact with federal officials. Most are not used to filling out forms and negotiating with federal officials over inspection procedures. We suspect that most members of the public do not assume that having access to their records would make a difference in their treatment by Federal agencies in the areas covered by specific agency operations.

Two qualifications should be made in this comparison between Federal employees and the general public. One is that requests for access to law enforcement and intelligence files has been a marked exception, with the FBI and CIA having registered very high access requests. This is explained by a combination of the novelty and curiosity factor of individuals getting access to such files and the sustained campaigns being conducted by various civil liberties and public-interest groups to get people to request their FBI and CIA files. The second qualification is that most members of the public are still probably unaware of the Act's access provisions, or if they have heard something in general about it are probably still unsure whether it would help them in any concrete way to ask for access to their records. This may be a temporary phase in the operations of the Act, or it may become subject to periodic fluctuations involving other particular Federal record systems beside law enforcement and intelligence. It may also be that access requests by the public correspond broadly to the percentages of members of the public who customarily contest agency decisions, and that access correlates with existing levels of grievance and appeal. And while there are ways that the Privacy Act could be amended or interpreted to inform the public far more effectively about Federal record systems and access rights than the Federal Register notices and Privacy Act forms that have been used so far, should that objective be one desired by Congress, it is probable that Federal employees would remain the single largest users of record access rights for some time to come.

Second, it is our impression that automated personnel files have made it easier for those Federal agencies using them to keep track of non-routine disclosures under the Act. This accounts for 25.7% of the total operating costs under the Act, second only to the costs of providing access (29.2%), so that it is a major aspect of compliance. It also has a major psychological effect on either employees or members of the public who inquire about such non-routine uses to have an immediate, detailed response capacity to requests. The Air Force's Privacy Act Tracking System offers a model of how this can be done, and it ought to be widely emulated as automation of personnel systems proceeds.

Third, as individuals appeal to the courts personnel decisions by Federal agencies that they allege to be in violation of the Privacy Act, we may obtain some judicial construction of the duties Federal agencies have to maintain personnel records with the "accuracy, relevance, timeliness, and completeness" needed to insure that fair personnel decisions are made. Until such time, this declaration of agency duty places a heavy burden on the managers of information systems, because they lack a record of interpretation of those terms from the pre-computer era, a solid legislative history of just what each of those duties were intended by Congress to mean, and much useful clarification from OMB Privacy Act guidelines to date.

Fourth, we agree in general with the Privacy Protection Study Commission's preliminary assessment of the effects of the Privacy Act on the quality of federal personnel practices. We would hypothesize that employee satisfaction has increased a bit, but not in a major degree. We hypothesize that the amount of adverse information obtained from informants in suitability or clearance investigations has probably declined a bit, and the frankness quotient has dipped somewhat; but whether this has substantially affected the quality of employees hired or cleared we hypothesize to be doubtful. We hypothesize that there has been a useful cleaning out and purging of biased or inappropriate material from files in some agencies, though still not in others, and that time and money would have to be provided if this is to be done properly. In the future, questions such as these are the ones that ought to be addressed in empirical studies or legislative reviews.

"Given the fact that the Act was a pioneering first venture in defining principles of fair information practice for the entire federal establishment, and has been in operation for only three years, experience to date seems to us to represent a promising start. If not quite enough to justify cheers of final victory over the dark forces of Big Brother, neither is the record a sound basis for despair over the ability to have the Federal Government operate in conformity with the Bill of Rights. As employees claim their rights under the Act, guardian-groups support them where necessary, the federal courts apply Privacy Act standards to disputed matters and Congress has the opportunity to consider and enact perfecting amendments, the Federal Privacy Act should develop into a highly effective set of principles and procedures for assuring adherence to basic citizen rights in the conduct of Federal personnel affairs."

FOOTNOTES

1. Department of the Air Force v. Rose, 425 U.S. 352 (1976).

2. Weissman v. CIA, 565 F. 2d. 692 (U.S. ct. app., D.C.) 1977.

PART FIVE:

POLICY PERSPECTIVES

Chapter Twelve. ATTITUDES OF EMPLOYEES AND EXECUTIVES TOWARD JOB PRIVACY ISSUES

INTRODUCTION

Developing sound public policies to protect privacy rights in employment does not depend on the results of opinion polls any more than do the decisions of courts or even the making of state and federal laws. However, it is always relevant in a democratic society to inquire whether people feel there is a problem that needs attention, which aspects of it seem most pressing, and what approach to defining and enforcing rights seems to command wide support.

While our funds did not permit conducting or commissioning a full national survey of public attitudes toward work place privacy issues, the project director did conduct an inquiry into national attitudes in this area for publication independently, in a national civil liberties magazine.* The highlights of this inquiry are included in this report for assistance in considering policy alternatives.

It should be emphasized that this was not a survey meeting standard requirements for representativeness of national opinion. As the explanation at the outset of the report indicates, however, the people responding to the inquiry approximate many of the characteristics of the national work force by sex, by their type of employer, by length of time at their present job, and similar factors. Also, many of the opinions expressed on specific policy issues -- such as attitudes toward employment of homosexuals or support for having a legal right to see their personnel records -- are closely in line with the result of recent national surveys that asked about those matters. Used with proper caution, then, as a suggestive reading of employee and executive feelings about workplace privacy issues and especially for the narrative comments that respondents wrote on their forms, we think the inquiry is worth reporting as background for our later policy analysis.

In March, 1977, a form containing 27 questions was sent to 750 persons drawn by random selection from the telephone books of 36 cities and suburbs across the United States, with a male-female ratio approximating that of the national work force. (A copy of the questionnaire and the covering letter appear at the end of this discussion.)

Six cities and suburbs were selected for each of six geographical regions covering the nation. This provided approximately 20 names to be selected from each of 36 telephone directories. The total number of pages in each directory was divided by 20, and from the distribution of pages this produced in each directory, one name was selected from the top of the leftmost column of that page. Of each three names so chosen, two male names were selected and one female name, to produce a rough equivalent of the sex ratio of the national work force.

* This appears in the January/February 1978 issue of The Civil Liberties Review.

Thirty two percent (240) of those written to returned their questionnaires. These respondents represented a fair approximation of the national work force. 69% were male and 31% female. In terms of the organizations they work for, 61% were employed by business firms, 31% by government, and 8% by nonprofit organizations (defined in the survey as "religious group, private hospital or university, charitable or fraternal organization, labor union, etc."). In terms of occupation and position, 11% described themselves as manual/production workers; 15% as office/clerical workers; 44% as professional/technical workers; 8% in sales; and 22% in management. When asked how long they had worked for their present employers, 28% said over 15 years; 35% said 6-15 years; 28% said 1-5 years; and 8% said less than 1 year. 20% belonged to labor unions and 80% did not.

A SUMMARY OF THE INQUIRY'S FINDINGS

The main findings of the inquiry were the following:

1. Half of these workers and executives consider the personal records kept by their employers to be "very important" in terms of privacy, and almost 60% regard a general right to see their personnel records as very important.

2. Almost a third of these workers do not know whether they could see their personnel records or not, or whether they could see their performance appraisal.

3. Almost a quarter of these people feel their employer's current policies on confidentiality or employee access are poor or could be improved; over a third feel their employer does not generally hire, promote, or fire people "in a fair way."

4. By overwhelming majorities, these respondents favor enacting laws to give employees a right of access to their personnel records and to written "promotability" ratings, and a right to notification before their personal information is given up in answer to subpoena.

5. Majorities favor passage of laws to forbid employers to require polygraph tests for job applicants, inquire about arrest records that have not led to convictions, and inquire about a job applicant's homosexuality.

6. Almost half the respondents are more worried about the confidentiality of employee records because these are computerized.

7. Though they favor the creation of employee privacy rights, almost two-thirds of the respondents are opposed to establishing a government supervisory agency to enforce such

privacy rights against their employers.

With these highlights flagged, we turn to a detailed report of the responses, including many of the interesting comments written in answer to open-ended questions or responding to a request to supply examples of various privacy issues in employer practices.

HOW IMPORTANT IS PRIVACY OF EMPLOYMENT RECORDS?

Several questions probed how important issues of privacy and employment records were to these respondents. "Thinking about the general protection of your privacy," one question asked, "how important are the personal records about you kept by your employer?" Only 5% checked "Not too important," while 40% said of "average" importance and 55% said "very important."

Most of the respondents (86%) answered "no" to a question asking "Did an employer ever ask you to provide information about yourself that you thought you should not have been required to provide?" Of the 14% who said they had been required to provide such data, the types of information considered intrusive covered the following:

- "Wanted to know about all traffic tickets even though the job was for a typist and didn't involve driving."
- "Parents' marital and financial status."
- "Birth control methods, dating relationships. The latter was aimed at determining if I was a lesbian or not. The last tall woman hired was fired because she was." (a female office worker in a university)
- "Religious affiliation."
- "Off-time activities."
- "Making employees write notes of explanation when they want personal off-time, without pay."
- "What car I drive, credit references, sex life." (a male production worker working for a business firm)
- "Ethnic origin."
- "Race, sex, criminal, financial, and married or not."
- "Loyalty oath, years ago."

We asked what information kept by employers about them the respondents regarded as "the most sensitive." 78% of our sample wrote in answers. By far the most frequent was job performance ratings. This

was followed by salary or income, medical or health records, personality or psychological information, notations on attitude, references and recommendations, and personal histories. Mentioned only by several persons were the following varied items: age, address, Social Security number, home telephone, "my personal feelings about the company," security files, sex, layoff retention rating, police record, attendance and tardiness record, appearance, and "social information." One management-level employee in a large corporation cited "information about outside activities and community involvement," and a state government employee cites "union matters." One woman, who said she "had a son and am not married," felt that whether she was "married, any children" was highly sensitive.

The survey attempted with several questions to get a general picture of how people regard the personnel practices of their current employers. When asked whether their employer "generally hires, promotes, and fires people in a fair way," over a third (39%) said "no." 52% said "yes," and 9% replied they did not know. Asked to rate their current employer's "overall policies about confidentiality and employees seeing their own records," 34% said this was "very good," and 42% "satisfactory." 20% checked that these "could be improved," and 4% said they were "poor." In terms of their own experiences, 15% said "yes" when asked if they had ever been turned down for a job unfairly, because of information about their past that they would have wanted to explain further to the potential employer.

When asked whether they had ever been denied a promotion or new assignment because of information recorded by their employer that they thought was inaccurate or unfair, 13% said "yes." Among the information cited as having been used unfairly in such promotion or assignment decisions were the following:

- "Two written reviews totally contradicting each other about my achievements. The good one went to me. The bad one went to my record." (a male corporate professional)
- "Records on my attitudes" (a male production worker in business).
- "Improper information, only later corrected"
- "Because I am black." (female office worker in state government)
- "Can do the work, but I don't have the schooling." (manual worker, male, federal government)
- "Military discharge record" (professional/technical worker in local government)

- "Previous state government employer used personal past history and personal facts not affecting job performance." (professional/technical worker in state government)

On the other hand, some respondents commended their employers:

- "My employer is very considerate of our personal lives" (a female production worker in business)

- "Our state agency is rather sensitive to these matters." (a female professional in state government)

- "As long as you show up for work and do your work, you are left alone. I have never worked for a concern or company where I feel I have had my privacy invaded in any way." (a female production worker in business)

- "I think my employer is quite scrupulous about issues of confidentiality and very responsible. However, I would have taken more of a hard line with just about any other employer." (a female technical worker in a hospital)

HOW MUCH DO EMPLOYEES REALLY KNOW ABOUT HOW THEIR RECORDS ARE HANDLED?

To probe how much employees know about record-keeping practices by their employers, the survey asked several questions about employee access, confidentiality, and release of employee data to outsiders. When asked whether they could see their "personnel records" if they wanted to, 61% said they could and 8% they could not. Almost a third, 31% said they did not know. When asked if there were some things they could not see, even if there was a general right of access, typical replies were that the following could not be seen: pre-employment reports, medical records, appraisal and performance ratings, promotion recommendations, letters of recommendation, and "attitude reports." One respondent, a male professional in business, commented: "If so, it would be kept from me without my knowledge." One male worker in state government wrote: "I recently viewed my personnel file. The agency has a double standard of having two files -- one for show and another not shown to the employee. I found two letters related to union affairs which should not have been there."

Another survey question asked whether, if their organization has a performance appraisal or evaluation procedure for employees, the employee could "see the entire report that is produced by such a review?" 59% said they could see the entire report; 12% that they could not; and 28% answered that they didn't know. Only 6% said that they knew of "any problem of confidentiality involving the handling of employee medical records or medical claims" in their organizations. (57% said "no" and 37% "don't know.") However,the respondents who knew of problems were quite concrete in describing medical record issues:

- "All employees in his/her peer group know about medical claims." (a female professional in a nonprofit organization)

- "This organization collects medical records from childhood, not having anything to do with work performance." (a male technical worker in local government)

- "Because employees handle this information, usually every one knows everything about how a claim is being handled and what's going on." (a male clerical worker in a corporation)

- "If the illness is a certain type (mental, alcoholic, etc.) everyone is aware of it." (female office worker)

- "Recently an employee was on medical leave of absence. The employee found a letter in her file from the psychiatrist upon her return which was not meant for her personnel file." (a male professional worker in state government)

- "Paying doctors' bills for on the job injury." (a male production worker in business)

Asked about "any other confidentiality problems involving personnel records" at their job, 13% reported that they knew of some. Among those mentioned in response to this question were the following:

- "Any clerk working in Personnel has access to all employees' files. They read the files and keep nothing confidential." (a female clerical worker in federal government)

- "The reasons, in detail, why employees were fired." (a female production worker in a nonprofit organization)

- "Salary information leaks." (a salesman in business)

- "An employee's absenteeism and personal problems (especially financial ones) have been openly discussed by office manager with access to personal records." (a male clerical worker in corporation)

- "The state selling lists of state employees' names and addresses to private firms." (a male professional in state government)

- "An employee had his check garnisheed and everyone knew about it." (a male production worker in business)

- "Many times, information on employees from transfer requests, etc., is given out by the Personnel Department." (female clerical worker in a business firm)

- "Supervisor told an employee who came out first, second, and right down the line in personal evaluations." (male office worker in large corporation)

PERCEPTIONS ABOUT COMPUTER USE IN THEIR ORGANIZATION

Three questions were asked about computerization. 42% said "yes" to a query whether any of their personnel records were maintained in computers. (23% said "no" and 35% said "don't know.") Of the respondents who knew that their records were automated, 18% had heard about "particular problems caused by the use of computerized personnel data." The problems cited ran a wide gamut, including:

- "Mailing lists have been obtained with personal information without my knowledge" (a male technical worker in local government)

- "Errors are harder to correct." (a male manager in federal government)

- "Lots of privacy problems." (a male professional in a corporation)

- "Reports easily given or sold to other organizations." (a salesman in business)

- "Unauthorized access to or use of confidential information." (a male office worker in business)

- "Incorrect and misleading information." (a male professional in state government)

- "A friend working in the computer room accidentally obtained the entire bonus printout -- with names and amounts." (a male technical worker in business)

- "It's unfair that the computer doesn't contain all of the data regarding a person's qualification, in regards to job assignments." (a woman professional in state government)

When asked whether the use of computers in personnel work by their employer made them more concerned about the need for insuring confidentaility of their employee records, almost half -- 48% -- answered "yes."

ATTITUDES TOWARD THE DESIRABILITY OF NEW LEGAL PROTECTIONS

Some of the most interesting answers in the inquiry dealt with the attitudes of respondents toward enactment of laws to protect rights of privacy, confidentiality, and employee access.

1. When asked how important to them was a "general right to see" their "personnel records," 59% considered this "very important." Only 11% said it was "not very" important. 30% said it was of "average" importance.

When asked, "Do you think laws should be enacted giving employees who do not have such rights today the right to see their own personnel records," a resounding 92% said "yes."

Finally, as to access, the survey asked: "If your employer maintains a written rating of you that indicates to managers whether you are considered 'promotable' to a higher post, do you think that you should have a right to see that if you wanted to?" Again, an overwhelming 95% answered "yes."

2. A series of questions asked whether the respondents favored passing laws to forbid hiring practices that "some employers follow today."* The following are the percentages of those who favor enacting laws to forbid:

A. Requiring a polygraph test for job applicants - - - 57%

B. Requiring personality tests for job - - - - - - - - 44%

C. Asking job applicants about arrests that have not led to convictions - - - - - - - - - - - - - - - - 57%

D. Inquiring about a job applicant's homosexuality - - 53%

Broken down into some important subcategories, manual workers were the occupational group most strongly in favor of laws to forbid employer use of the polygraph (75%), personality testing (69%) and arrest-record inquiries (75%). The weakest levels of support for such laws came from office and clerical workers (48, 48, and 56% respectively), and management (50, 31, and 44%). However, on laws to forbid employers to inquire about homosexuality, management (39%) and manual workers (50%) registered the lowest support, while professional and technical workers had the highest (62%).

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* Because of space and response-time limitations, the inquiry did not specify what kinds of jobs these employer inquiries would be used for. Many respondents wrote in the margin that their view would depend on the type of job -- "security," "teacher," etc. The responses should be read with this problem of questionnaire phrasing in mind.

3. On release of personnel data, the survey asked: "If a court order or subpoena was obtained calling on your employer to release personnel information about you, would you want to be notified so that you could decide whether to challenge the subpoena in court?" A heavy majority of 90% said "yes," with only 5% saying "no" and 5% "don't know."

WHAT MECHANISMS SHOULD BE USED TO ENFORCE NEW RIGHTS?

Having probed the feelings of respondents about the passage of laws to secure employee rights in personnel data, the survey also asked whether they favored "having an independent government agency concerned with privacy rights to supervise your employer's handling of personnel information and to investigate complaints." About a third of the respondents (38%) favored the creation of such an agency, while 62% were opposed. Some of those opposed - seven persons working in business, one in local government and one for a nonprofit organization - wrote pungent comments in the margin to underscore their strong feelings:

- "Absolute not! If government gets into it, I will have no privacy."
- "Government should stay out of private business."
- "Please, no more government agencies."
- "It shouldn't have to go that far."
- "There are entirely too many government agencies now."
- "We need another self perpetuating government agency like we need more holes in our heads. Possibly a private organization funded by contributions by some large employers, but please do not promote any more government agencies."
- "We don't need more government. A clear case here for higher taxes with non-commensurate benefits."
- "I would favor an agency with authority to investigate complaints. Supervision smacks of another paralyzing agency."
- "Keep government out. They screw up nearly everything they are involved with."

There were clear differences among occupational levels on the matter of a supervisory government agency. While only 23% of sales people, 30% of professional/technical workers, and 39% in management approved the idea of a supervisory agency, 52% of office/clerical workers favored it, and 56% of manual production workers; 57% of union members also favored creating such an agency. Had our respondents been representative of the work force, sentiment about the value of a government agency would have been about equally divided.

What is worth underscoring is that while two-thirds of the respondents were opposed to creating a supervisory government agency over their employer's practices, giving legal rights to employees to see their personnel records, to see any promotability ratings, and to be informed of any subpoena requests before their data were furnished to outsiders drew approval from 92, 95, and 90 percent, respectively, of the respondents. Obviously, this two-thirds of the sample favors other remedies for enforcing such rights than a regulatory agency. One respondent explained that "court challenges generally take care of this type of problem," and thus a regulatory agency did not seem necessary.

CURRENT EMPLOYER PRACTICES THAT ARE FELT TO BE INTRUSIVE

Finally, an open-ended last question invited people to describe "any rule of practice of your present employer that you think is an improper invasion of privacy." Some of the responses were directly in that vein. For example:

- "Lots of employers are damn nosy and are determined to stop people with ambition." (a male production worker in business)

- "Several years ago an elementary school teacher was reassigned from a teaching position to an administrative position, which he subsequently left, because it was somehow discovered that he was a homosexual. It was an inquiry that produced the situation, not any improper act on the teacher's part. Due to publicity of the situation at the Board of Education and other meetings, this gentleman's record is clearly marked 'homosexual' ... I consider my private life as with the above mentioned teacher's to be my business and not my employer's, as long as whatever I do does not directly affect my ableness as a teacher." (a female professional in a county school system)

- "My employer has talked about another employee several times. I considered the information given out as personal so I am now careful not to reveal anything that I don't want talked about." (a male technical worker in city government)

- "You shouldn't have to 'sign out' during your lunch hour stating where you're going. And the State of Arizona shouldn't be allowed to sell listings of state employees' names to private businesses."

- "I was arrested once for obscene discourse and assault on a police officer, Shortly thereafter, and prior to the conviction, I obtained this job. As a result, this employer may not have found my arrest record in the police

files. Approximately two years after my being hired, I was in line for a promotion. Accidentally, I overheard my Section Manager gasp in amazement during a phone conversation, 'obscene discourse!' Since that time, all indications of promotions have been dead. Incidentally, I might point out that I have a B.A. and 15 out of 30 hours on an M.B.A. and still, after 10 years, remain a CLERK. I have been a good employee and told I'm a valuable asset. Perhaps that's why I'm still here. But, where can I go? 'Let him who is without sin cast the first stone.'" (clerical worker in a large corporation)

- "Questions about personal life, such as marital, alcohol consumption, 'affairs,' happiness. It's none of their business and has no bearing on job performance." (a male professional in a corporation)

- "Discussion of matters of a personal nature when other employees are present. (My employer) appears to use this method as a 'tool' to keep employees 'in line' or in agreement with the employer's views. (a female professional worker in a business firm)

- "They asked for criminal record which should not be asked, because the person ends up paying for his mistake the rest of their life (unfair). They asked for sex, and they shouldn't. You should be hired on your ability and not sex quotas set by government that reverse discrimination. They asked for race for the same reason. In other words, your social security number and your abilities should be the only information an employer needs to hire you, and after you are hired they can see if you are white, black, yellow, or male or female. Then no one can say they were discriminated against. The employer is happy because he has the best person for the job and the government is happy because no discrimination was made." (a male production worker in business)

- "I'm more concerned about my professional organization/ union. To 'help' others they wanted information from me I was reluctant to give. In the end I was hurt." (a female professional/technical worker in local government)

- "Homosexuals can legally be dismissed from employment even if their sexual orientation does not interfere with the job. Politics remains a motivation factor for promotions and employment in many jobs." (a female professional/technical worker in state government)

ADDITIONAL IDEAS ABOUT PRIVACY IN THE EMPLOYMENT RELATIONSHIP

In addition, some respondents took advantage of this final question to offer a variety of observations about privacy and employment. Among these were:

- "I think private employers are more prone to privacy than governmental units." (a female professional in state government)

- "The government does the most invasion of privacy, and I don't mind the CIA and FBI files." (a male production worker in a corporation)

- "I wish to state that there are certain occupations in this country that personnel information about an individual should be known. However, the applicant should be advised of this investigation and exactly what information is going to be checked. He (the applicant) should then decide if he wants the position under these terms." (a male professional in a corporation)

CONCLUSION

Our mini-survey, for all its small size and lack of representative exactness, confirms what a growing body of other evidence also finds: that securing rights of access, having rules of confidentiality enforced, and participating meaningfully in the release of personnel information outside the firm are significant and growing concerns to many, probably most American workers and executives. It has not yet become an issue of high immediacy or urgency to employees, especially in a time of economic hardship and job shortages. But it is coming steadily into focus, and the attitudes indicated by our respondents suggest strongly that employers and protectors of individual rights should be preparing now to meet these concerns.

Columbia University in the City of New York | *New York, N.Y. 10027*

DEPARTMENT OF POLITICAL SCIENCE 420 West 118th Street

March 15, 1977

Dear Friend:

I hope you will be willing to give 10 minutes of your time to answer -- anonymously -- some questions that may help protect your rights as an employee or executive in the future.

I am conducting a research project on how employers handle the personal records that they collect to make decisions about all of us who work for business, government, or non-profit organizations. The results of the survey will be published as part of a full study of these issues. It will be read by lawmakers, judges, organizational managers, labor union leaders, and many others.

We usually hear only from the officers and personnel managers of organizations about their policies. But there is very little information about what individual employees and executives think is happening, and what they feel <u>should</u> happen.

To try to collect that information, I selected your name at random from the telephone book of your city, to make up a list of 1,000 people covering 48 cities across the country.

If you work for an organization that has about 100 employees or more, I sincerely hope you will give the 10 minutes that we find it takes for most people to answer the enclosed questions. It is completely anonymous, since there is no way I can tell which person that I write to has sent back his or her questionnaire.

If you do <u>not</u> work for an organization, or it has fewer than 100 employees, I would very much appreciate it if you would pass this request on to a relative or friend who does work for such an organization. Because surveys are so expensive to conduct, <u>every single response is very important</u>!

A pre-addressed and pre-stamped return envelope is enclosed for your convenience. Here is a chance to have <u>your</u> experiences and <u>your</u> views help make policies and laws in our society.

Sincerely,

Alan F. Westin

Alan F. Westin
Professor of Public Law
and Government

ANONYMOUS QUESTIONNAIRE. PLEASE DO NOT SIGN YOUR NAME OR IDENTIFY YOUR EMPLOYER.

1. What kind of organization do you work for?

   A. Large national corporation (over 1,000 employees)_____
   B. Other business_____
   C. Federal government_____
   D. State government_____
   E. Local government (city or county)_____
   F. Non-profit organization (religious group, private hospital or university, charitable or fraternal organization, labor union, etc.)_____

2. Please check the most appropriate description of your position:

   A. Manual/production worker_____
   B. Office/clerical worker_____
   C. Professional/technical worker_____
   D. Sales_____
   E. Management_____

3. How long have you worked for your present employer?

   A. Less than 1 year_____; B. 1-5 years_____; C. 6-15 years_____; D. Over 15 years_____

4. What is your sex? A. Male_____ B. Female_____

5. Do you belong to a labor union? A. Yes_____; B. No_____.

6. Thinking about the general protection of your privacy, how important are the personal records about you kept by your employer?

   A. Very important_____; B. About average_____; C. Not too important_____

7. If you wanted to see your personnel records, could you?

   A. Yes_____; B. No_____; C. Don't know_____.

8. If "yes," is there anything you would not be allowed to see?_____

   _____

   _____

9. How important to you is a general right to see your personnel records?

   A. Not very_____; B. Average_____; C. Very Important_____.

10. If your organization has a performance aporaisal or evaluation procedure for its employees, can you see the entire report that is produced by such a review?

    A. Yes_____; B. No_____; C. Don't know_____.

11. If your employer maintains a written rating of you that indicates to managers whether you are considered "promotable" to a higher post, do you think you should have a right to see that, if you wanted to?

    A. Yes_____; B. No_____.

12. What type of information kept about you by your employer do you consider the most sensitive?

    _____

13. Has there been any problem of confidentiality involving the handling of employee medical records or medical claims in your organization?

    A. Yes_____; B. No_____; C. Don't know_____.

    If "yes," please note what this is:_____

    _____

14. Have you heard about any other confidentiality problems involving personnel records at your job?

    A. Yes_____; B. No_____. If "yes," what did these involve?_____

    _____

15. Did an employer ever ask you to provide information about yourself that you thought you should not have been required to provide? A. Yes____; B. No____. If "yes," please indicate type_____

16. If a court order or subpoena was obtained calling on your employer to release personnel information about you, would you want to be notified so that you could decide whether to challenge the subpoena in court? A. Yes____; B. No____; C. Don't know____.

17. Thinking about your employer's overall policies about confidentiality and employees seeing their own records, how would you rate your employer's current practice? A. Very good_____; B. Satisfactory_____; C. Could be improved_____; D. Poor_____.

18. Do you think your employer generally hires, promotes, and fires people in a fair way? A. Yes_____; B. No_____; C. Don't know_____.

19. Do you feel you have ever been turned down for a job unfairly, because of information about your past that you would have wanted to explain further to the potential employer? A. Yes_____; B. No_____.

20. Have you ever been denied a promotion or new assignment because of information recorded about you by your employer that you thought was inaccurate or unfair? A. Yes_____; B. No_____. If "yes," what kind of information was this?_____

_____

21. Do you think laws should be enacted giving employees who do not have such rights today the right to see their own personnel records? A. Yes_____; B. No_____.

22. Would you favor passing laws to forbid any of the following hiring practices that some employers follow today:

A. Requiring a polygraph test for job applicants A. Yes_____; B. No_____.
B. Requiring personality tests for job applicants A. Yes_____; B. No_____.
C. Inquiring of job applicants about arrests that have not led to convictions? A. Yes_____; B. No_____.
D. Inquiring about a job applicant's homosexuality? A. Yes_____; B. No_____.

23. Are any of your personnel records maintained in computers? A. Yes_____; B. No_____; C. Don't know_____.

24. If "yes," have you heard of any particular problems caused by the use of computerized personnel data? A. Yes_____; B. No_____. If "yes," what_____

_____

_____

25. If your organization does use computers in personnel work, does that make you more concerned than you have been about the need for insuring confidentiality of such computerized employee records? A. Yes_____; B. No_____.

26. Would you favor having an independent government agency concerned with privacy rights to supervise your employer's handling of personnel information and to investigate complaints? A. Yes_____; B. No_____.

27. If you wish to, would you tell us about any rule or practice of your present employer that you think is an improper invasion of privacy?

_____

_____

_____

_____

_____

_____

_____

_____

THANK YOU VERY MUCH FOR FILLING OUT AND RETURNING THIS QUESTIONNAIRE.

Chapter 13. POLICY ANALYSIS AND RECOMMENDATIONS

OVERVIEW

Our policy analysis and recommendations are addressed primarily to issues that concern automated data systems, since that represents the special focus of this study. We first summarize some broadly-accepted concepts as to how individual and social interests should be balanced in the development of data systems, identifying six standards of fair information practices that have emerged in the past few years as our society's sense of what ought to be done. Next we apply these six standards to the field of employment, indicating in practical terms what employers could do to carry out these standards in their personnel systems.

We then present three alternative positions as to what needs to be done with such standards in the private and state-government sectors: that nothing needs to be done at the present time; that voluntary compliance with recommended fair information practices should be encouraged; and that some legislative interventions are necessary.

We note that the recent report of the Privacy Protection Study Commission basically adopts the second or voluntary-compliance position for employment record-keeping. After quoting the Commission's explanation as to why it adopted that position, we summarize the specific recommendations as to employer action made by the Commission.

Finally, we explain why we advocate adoption of the third alternative, and describe a concept of first-stage legislative action by state governments as the line of policy action that we believe would most effectively continue the momentum of gradual reform in the private sector, and extend fair employment information practices to all state and local governments.

BASIC ASPECTS OF THE EMPLOYMENT RELATIONSHIP

At the most general level, as we have already noted, two fundamental clusters of principles define the American approach to employment relationships:

1. Employer Prerogatives. Both private and government employers are considered entitled to select the most qualified employees from pools of available applicants; to require satisfactory work performance as a condition for continued employment; to set reasonable rules for behavior on the job; to assess performance and predict potential in making assignment and promotion decisions; to protect the employer's property from theft or damage by employees; to lay off employees when this is necessary for business reasons or because of government funding limits (even where seniority or job tenure rights are present); or to fire employees who are found (under appropriate hearings procedures) to be violating work rules or committing crimes on the job. The exact definition of relevant inquiries for job applicants, reasonable work rules, fair disciplinary proceedings and so forth will vary considerably depending on the type of occupation (street sweeper, policeman, salesman, research chemist, teacher, nuclear power plant worker); the type of employer (business, government, religious body, university, etc.); whether the employees are covered by collective bargaining contracts; and other divergent aspects of each employment setting.

While it may be softened by humane personnel administration and the employer's responsiveness to worker concerns for respect and fair treatment, employment is fundamentally a relationship of superiors to subordinates, and this applies from the assembly line or typing pool to the executives suites. The ultimate goal of personnel administration is to select employees and direct their talents and energies efficiently in order to accomplish the employer's organizational goals. Personnel administration is also inescapably judgmental. There are always more candidates for good jobs or higher positions than there are openings, so that some persons must be denied opportunities while others are chosen. Some employees will be selected for bonuses, recognition, and prestige treatment while others will fail to "perform" well enough to win these rewards. Personnel administration must also deal with the fact that some people fit comfortably and happily into the jobs they occupy but others do not -- whether because of personal and family problems, lack of fit between job and person, personality clashes with fellow employees or supervisors, or the objective nastiness of the job itself and how it is run.

Reflecting these aspects of work in America, the law does not guarantee anyone a right to work or to be retained in a job once hired. In terms of information-collection and record-keeping, it is accepted as legitimate that employers will collect and verify personal data and work history about job applicants and will maintain extensive records about employees for purposes of payroll, benefit administration, performance evaluation, security, and many other employment matters.

Finally, we should appreciate that the relationship between employer and employee is a continuous rather than episodic one, with direct, face-to-face daily relationships with supervisors. Employment is thus a significantly different setting for collecting and using personal data than are situations such as credit, insurance, licensing, taxation, medical care, law enforcement, and most others, where the individual (by application, compliance with reporting duty, or social act) sets in motion a specific response by some organization and generates a new (or updated) record as part of that transaction. It is also different in that formal records will be only a part -- sometimes a very small part -- of the total knowledge about the individual's personality, behavior, performance, and relations with others that will generally be known to supervisors from the work setting.

2. Employee Protection Laws. American law, unionization, and social expectations have built up a network of important limits on employer prerogative in hiring, supervising, and firing, including the information-collection and record-keeping aspects of such activities. As we have already noted, there are national protections forbidding employer practices in hiring, promotion, and firing that discriminate on the basis of race, religion, nationality, sex, age, or union membership. Government agencies are limited in applying loyalty criteria and some jurisdictions today limit employer discretion in taking into account health criteria, handicap status, homosexuality and other conditions. In government and under union contracts, compensation levels, promotion, seniority, discipline, and discharge are closely regulated, with access to records by individuals or their representatives part of the usual process. Government legislation to protect worker rights now imposes detailed record-keeping and employee-disclosure duties on employers in areas such as pension administration, occupational health and safety, affirmative-action practices, handicapped-worker programs, and others. The right of employers to use various intrusive techniques to gather information -- polygraphs, personality testing, hidden-camera or hidden-microphone surveillance -- are subject in many employment settings to legal controls by law, civil service regulation, collective bargaining contract and arbitration decision, and similar constraints.

Thus the legal position of the employer is in fact one of limited power, with American society having felt it necessary during the past half century to curtail employer prerogative and institute enforcement machinery of varying kinds. Whether the practical effect of these controls is seen as hampering management's capacity to run efficient and productive enterprises, or providing the right balance between authority and employee rights, or still leaving managements far too much arbitrary power over the lives of their employees represents a social judgment, and one which may be viewed differently depending on which sector of employment is being examined, what level of occupation, etc.

THE RELATION OF RECORD-KEEPING TO CITIZENS' RIGHTS IN EMPLOYMENT

Information collection and record-keeping figures in this shifting balance as to employee rights in three ways. First, record-keeping is-

sues are often surrogates for more primary questions of social policy -- issues of race or sex discrimination; treatment of cultural nonconformists or homosexuals; employment of the physically handicapped, persons with major health episodes, or those receiving mental health treatment; and similar matters. Opponents of discrimination against such groups often assert a privacy claim -- that employers may not inquire about such conditions or statuses in hiring practices -- as a technique for pursuing equal opportunity by calling the factor "irrelevant" to proper employment decisions. Where the condition that has been the subject of job discrimination is not apparent to the job interviewer's eye -- as with most homosexuals or persons in psychiatric treatment -- forbidding the asking of questions or investigation of background can be effective. But where the condition is immediately visible -- as with race, sex, physical handicap, and others -- it takes both rules against using such criteria to make hiring decisions and the systematic collection of identified data about the race, sex, etc. of those hired or not hired to enforce anti-discrimination. At that point, protection against improper use of such records becomes the key issue. In these instances, privacy claims are a valuable means to pursue other social ends -- such as furtherance of equality or protection of non-conformity and rights of dissent.

The second way in which record-keeping figures in the employment-rights context is in the administration of good personnel practices. Here, the concern is that the employer use only correct, up-to-date, complete, and proper information to make hiring, supervisory, promotion, and termination decisions about employees, and be able to document that this has been done. The assumption is that employers want their records to be in such good order, and that making fair (equitable) personnel decisions is a goal most employers support, if for no other reason than its value in reducing employee discontent and grievances.

Finally, there is a growing public feeling that employers ought to treat the personal data they obtain from employees as given under a bond of confidentiality, to be used within the employer's organization for personnel administration but not to be released to outsiders without the employee's consent or under proper legal requirements. Here, the proper use of information is an end in itself, arising out of a duty to protect employee confidences.

IS THERE A NEED FOR NEW CITIZENS' RIGHTS IN PERSONNEL DATA SYSTEMS?

If the answer to this question depended on the level of organized demand during the past few years for observance of fair information practices in employment, the answer might well be "no." There has not been broad pressure from labor unions or professional associations, for example, nor has the issue been brought to focus by heavy individual complaints in Congressional hearings, as credit reporting was in the late 1960s. And, while the American Civil Liberties Union and other civil liberties and civil rights groups are active in campaigns dealing

with some specific aspects of citizens' rights in employment -- such as employer use of arrest records and military discharges, job discrimination against homosexuals, use of polygraphs or on-the-job physical surveillance, etc. -- general legislation to protect individual rights in employment record-keeping has not been proposed by these groups as they have done in fields such as health care or criminal justice.

Yet the current state of organized protest would be a very misleading basis on which to measure either the need for or the wisdom of installing fair information practices in employment. First of all, the opinion inquiry in Chapter Twelve suggests that there is widespread employee support for basic rights of privacy, confidentiality, and employee access to records. Secondly, when this issue surfaces, as a result of recommendations made by the Privacy Protection Study Commission and reports such as this one, there is likely to be a very swift and broad response from unions, professional groups, minority-rights organizations, public-interest groups, and civil liberties organizations picking up those recommendations and pressing for their adoption; no long period of digestion is likely to be needed before these forces press legislatures, regulatory agencies, and courts to protect employee informational rights. Also, the fact that some leading employers in business, universities, state government, and similar sectors have moved recently to adopt most of these fairness concepts as responsible management policies, and federal agencies are observing them daily under the Privacy Act, suggests that when the issue does come into the national spotlight, there will be strong support for the idea that good organizational managements ought to have such policies regardless of whether law says they must. Finally, where employers are creating or expanding automated systems in the personnel field, the public is quite likely to want full-dress protections of citizens' rights, out of concern that such data systems pose special dangers that require protective action.

Thus we conclude that instituting basic employee rights in the use of employment data is an issue whose time has come.

Based on the realities of the employment relationship we have noted, and of the ripeness of this issue for policy action, our analysis will address three questions:

1. Are there broad principles of fair information practice that have become widely accepted as proper guides to the management of data systems by organizations?

2. In general, how would these be applied to the employment relationship, and especially to the use of personnel data systems?

3. What should be the implementation mechanism for creating and enforcing such rights in employment?

In considering these key issues, we will include along with our analysis the recommendations recently made by the Privacy Protection

Study Commission, in its report, Personal Privacy in an Information Society.

BASIC PRINCIPLES OF FAIR INFORMATION PRACTICE

While it is clear that setting a proper balance between claims of citizens' rights and organizational freedom to collect and use personal data will vary from field to field, six concepts have been widely discussed and generally accepted as principles that should be pursued by all organizations managing data systems with personal information:

1. Decisions about an individual's rights, benefits, and opportunities in society should not be made by organizations on the basis of secret files, or of record-based procedures about which individuals are not informed.

2. Only information relevant to the organization's legitimate purposes should be collected and stored, and the definition of relevance must respect both guarantees of privacy and legislative prohibitions against making improper racial, sexual, cultural, and similar discriminatory decisions.

3. Managers of a data system should take reasonable steps to insure that the records they keep are accurate, timely, and complete, as measured by the kinds of uses made of the data and the social impact of their use.

4. Detailed rules of confidentiality should govern who within the organization maintaining the data system has access to a record, and this should be based on a need-to-know principle.

5. Disclosure of personal data outside the organization that collected it should be made only with the informed and voluntary consent of the individual, obtained at the time of collection or by subsequent query, or under a constitutionally-valid legal order.

6. An individual should have a right to see his or her record, and have an effective procedure for contesting the accuracy, timeliness, and pertinency of the information in it. There may be some exceptions to this right of inspection, as in the interests of protecting confidential law enforcement sources, but these should be rare.

APPLYING FAIR INFORMATION PRINCIPLES TO THE EMPLOYMENT FIELD

The first question that arises is whether the same standards ought to be applied in each of the three sectors of employment we have treated in this study - government agencies, business firms, and nonprofit organizations. Our response is uncomplicated: we believe the same principles ought to apply to all employer establishments, across each of the three zones of employment. However, the translation of these principles into specific policies and techniques of implementation

may well vary among the three sectors. We also believe that the same principles should apply to information in both manual and automated records, though there may be special problems as well as special capacities for compliance in the automated systems.

In keeping with these judgments, we turn to a discussion of the six general principles of fair information practices just summarized. Our presentation will be couched in terms of how these principles ought to be applied to the employment setting, and the choices of policy within each principle. What this will produce, as in the predecessor study of the health care field, is our suggestions for a code of employer data practices with discussions of the problems of coverage and implementation as well as of desirable policy directions.

1. DECISIONS ABOUT AN INDIVIDUAL'S RIGHTS, BENEFITS, AND OPPORTUNITIES IN SOCIETY SHOULD NOT BE MADE BY ORGANIZATIONS ON THE BASIS OF SECRET FILES, OR OF RECORD-BASED PROCEDURES ABOUT WHICH INDIVIDUALS ARE NOT INFORMED.

Most private employers and government agencies distribute booklets or employee manuals informing new employees about the organization and its operations, rules, and conditions of work, employee benefits programs, medical facilities, optional services provided, and a host of other important orientation materials. Virtually all employers communicate to their employees statements of newly adopted or externally mandated policies or procedures involving personnel matters, whether through bulletin board notices, company newspapers and magazines, policy manuals, etc. These two vehicles supply the practical machinery for giving all employees two vital pieces of information that would satisfy the notice-to-employees duty and respond to the first principle of fair employment information practices. These two are a general directory of data maintained about the employee (describing the types of information, the uses made, and authorized users within the organization) and a policy and practices guide, describing the collection, internal use, employee access rules, and external release of all personal data on employees.

As we saw in Part Three, some leading corporations, state agencies, and universities have voluntarily begun to do this already. Federal agencies are not required by the Privacy Act to provide such directories and policy guides directly to the employee, but operate through general Federal Register system notices and Privacy Act explanations when collecting information through forms. We believe that a clearly written and explicit directory and policy guide ought to be provided directly to the new employee on joining the organization, to all current employees when the directory and policy guide is first compiled, and with an annual update or revision that notes new record systems created, major modifications of systems, changes in policy, etc.

Furthermore, in the spirit of openness with employees that we noted in the Bank of America profile, we believe that such an annual update ought to report to employees how the fair employment information policies were used during the previous year. For example, figures ought to

be compiled and reported on how many employees asked to see their records; how many corrections or revisions resulted and of what character; what classes of employee personal data were disclosed outside the employer's organization and to whom; and similar kinds of data. It would be especially appropriate to attach a blank form with such an annual report inviting voluntary comments about the directory, the policy guide, and the administration of these policies, so that there could be effective feedback of employee satisfactions and concerns.

One main problem is posed by this seemingly "innocuous" or "common sense" standard. Many organizations would have no trouble in listing and describing the uses made of their general personnel records; special files in departments such as benefits, medical, or security; or the government reports they prepare for purposes such as equal employment, occupational health and safety, etc. However, in almost all organizations there are records that have traditionally not been talked about. These range from the manager's informal "desk file" of notes about an employee's tardiness, poor performance, attitude on being corrected, and other job-related behavior to special lists of "promotables now" in each unit, "key replacements" for top executives if they should leave for any reason, and similar aids to personnel management. Many organizations would be loathe to have such files listed, on the ground that these are not files that employees ought to have access to and therefore to list them would stir unnecessary concern among employees. Furthermore, they often believe such files require informal procedures rather than rigorous rules, and their disclosure would create difficult personnel relations.

However, if the first principle of "no secret files" is to have real meaning, and if basic employer credibility is to be established with its employees, there ought to be no exceptions to the listing and description requirement. If the organization feels that employee access to certain files is not appropriate, and if this is not regulated by law, then the employer can explain why it believes such access is not necessary -- that the desk file is kept only between performance evaluation periods and is never passed on to new managers; that "promotability codes" and "replacement tables" are only "soft, predictive speculations" subject to business conditions and government-funding factors, etc.

The "no exceptions" position being advocated here corresponds to the way the Federal Privacy Act requires even record systems exempt from disclosure requirements under the Act to be registered. And, if one consequence of such a listing and description requirement would be that employers drew up clear rules for handling such files where these did not exist before, this ought to be seen as a benefit rather than an impediment to good personnel management.

It may be worth observing that employers with automated personnel systems would find it quite easy and not expensive to compile such a directory and policy guide, to update it annually, and to monitor uses of the rights and procedures provided. While it could not be an accept-

able excuse for not meeting this first standard that the organization did not have a computer, it is probably true that automated firms would find it easier to comply.

One other important thing that belongs under the notice standard is for the employer to give both applicants for jobs and employees being considered for promotions who are to be the subject of pre-employment reports by commercial reporting agencies a more detailed statement of what will be done than is presently required by law. This should include the kinds of information that will be collected; the sources to be contacted and records to be examined; a specific right of the applicant to be personally interviewed (to be checked off if desired at the time such notice is given and asking the individual for a convenient time and place for such interview); the individual's right of inspection, explanation, and copying of any report that is provided; other rights now provided by the Fair Credit Reporting Act (FCRA); and the new requirement that the employer who used such a pre-employment report give an applicant who is rejected or an employee who is not promoted a specific statement of the reason for the adverse decision. It is worth observing that the reason for making an adverse decision for employment is often likely to be more general than in the credit or insurance situations, where some piece of adverse payment history, current liability, bad health condition, bad driving record, or similar specific factor is usually the basis for rejection. However, even though there is a risk that "employment boilerplate" would be used at times -- "other applicants displayed better potential," "not as qualified for this post as we require," etc. -- the reasons will be specific in some cases, and this would serve a highly useful purpose for the individual's sense of his or her job potential. And, if the "boilerplate" reasons are suspected by the individual to be phony, the fact that they were formally stated and that the records of hired applicants and their credentials would show up this falsehood could be grounds for seeking damages for evasion of a FCRA reporting duty.

2. ONLY INFORMATION RELEVANT TO THE ORGANIZATION'S LEGITIMATE PURPOSES SHOULD BE COLLECTED AND STORED, AND ONLY IF CONSISTENT WITH PRINCIPLES OF PRIVACY AND EQUALITY.

Employers have a legitimate need to collect considerable personal information about job applicants -- education, skills, employment history, job performance, reliability, service or criminal record related to the job, and similar types of data. Once hired, employers not only need to collect data about employee performance, skills, and capacities but also to know much sensitive personal and family information to administer payroll, Social Security, health insurance, life insurance, retirement and other "service" programs. Opinion studies are clear that the public -- and employees themselves -- consider this kind of data collection to be quite proper, not a voyeuristic or surveillance-oriented activity.

The problems arise in defining what kinds of data collection resented

by some employees and affecting larger values in American society (privacy, dissent, non-conformity, etc.) are truly necessary for making sound personnel decisions (the relevance standard) or socially acceptable given other constitutional values to be protected (the propriety standard).

This issue arises in the context of automated personnel data systems in several ways:

- o If very sensitive personal data is collected in the manual application and hiring process, should it be entered at all into the new employee's automated record or simply put into dead storage?

- o If new concepts of relevance and propriety are determined by society, are obsolete or improper information items purged from all files?

Since our focus is on such issues involving automated files, we have not thought it essential to consider in general what public policy ought to be as to the relevance and propriety of each element of personal information sought in the hiring process or in advancement. However, in several cases the importance of automated files in the current problem or its resolution leads us to make some comments here.

Take arrest and conviction records. Today, more and more local, state, regional, or federal criminal history records are automated. If employment is involved for which either criminal conviction or arrest records are directly relevant, as where required for licensing, bonding, security employment, and similar settings, it is typical today for the entire summary criminal history record to be forwarded to the inquiring employer or his agent. However, if a standard of relevance were imposed, so that, for example, only arrests or convictions for fraud or related crimes involving breach of trust were to be considered for a new bank employee, the computerized system could easily be programmed to have categorical inquiry codes and print out only the relevant records. Not giving the employer anything else would be a protection of the individual's privacy right when arrests-only were involved and would be a major step toward aiding employability for ex-offenders.

A second example may be drawn from the controversy surrounding the use of military discharge records in civilian employment decisions. It has been proposed that employers be prohibited from asking about discharge characterization, reason-for-discharge, AWOL time, or court martials that did not lead to convictions; on the other hand, they might be encouraged to ask about military training and experience that would be relevant to the job applied for. In the same spirit, the Privacy Commission has urged DOD to consider ways to further restrict dissemination of irrelevant information from military records to employers. Enforcement of such policies would be difficult today for several reasons, not the least of which is the fact that it is awkward and expensive to share information selectively from military files. For instance, the primary

discharge document (the DD Form 214) is a multi-purpose form that contains both work-relevant data and information that is potentially stigmatizing in civilian labor markets. DOD maintains that all of this information is necessary for its own administrative tasks and those of the Veterans Administration. At present, there is no convenient way to share only those elements of information that would be relevant for a veteran's job application.

The possibility of tailoring data flows to policy guides through automation is very attractive. Were the DD Form 214 automated it would be easier to supply employers directly with only job-relevant information, while continuing to meet internal military needs. Along the same lines, it would be easier to give the veteran a document to show prospective employers. Furthermore, computer monitoring of releases to civilian employers could, as with the Air Force's Privacy Act Tracking System, offer better possibilities for learning about improper uses than we have now. In short, if law is enacted to control what discharge data employers can and cannot use, based on relevance and propriety criteria, an automated discharge-record system promises to increase the ease of implementing such policy and permit far more effective public monitoring of large-scale uses than would be possible manually.

3. MANAGERS OF DATA SYSTEMS SHOULD TAKE REASONABLE STEPS TO INSURE THAT RECORDS ARE ACCURATE, TIMELY AND COMPLETE.

Because employers are in direct and continuous contact with supervisors or managers, and a great deal of the information recorded about employees is obtained directly from them (filling out forms, answering questions in person, etc.), some of the difficulties in assuring accuracy of personal data found in other fields are not present here. However, mistakes of fact or incomplete records can be present whenever information comes from third parties (other employees, supervisors, persons outside the organization, publications, public records, etc.). In addition, employee information can become outdated or obsolete -- and thus seriously misleading -- rather quickly, as when selection for promotions or desirable job opportunities rely on records for data about new skills, extracurricular activites, or language capacities.

Here, an expansion of the annual review of employee profiles that we saw widely used in automated personnel data systems seems in order. Giving such an annual printout of the profile and having the employee make immediate corrections is a major step toward insuring accurate records. But the profile usually contains only part of the total personnel records maintained on employees and executives. It would be helpful to add to that printout a listing of the other records in which employee information is currently maintained that would not be automatically updated by corrections and revisions of the profile. If the employee felt that new information ought to be added to those other files, he or she could notify the personnel department and this could be done.

Obviously, how far employees could see and make copies of their records, or contest the accuracy or completeness of the entries found in them, is a matter of access policy, and we have our main discussion of that under principle 6 below.

4. DETAILED RULES OF CONFIDENTIALITY SHOULD GOVERN WHO WITHIN AN ORGANIZATION HAS ACCESS TO A RECORD, BASED ON NEED-TO-KNOW PRINCIPLES.

Employment is an area in which the concept of compartmentalization of sensitive employee data has special meaning. It is extremely important to many people that other employees at the job or their immediate supervisors not know about elements of their personal life that are acceptable for the proper unit in the organization to know in full. A person's age may be very sensitive vis-á-vis other employees; so may salary, bonus, or employer-loan data; the fact of wage garnishment; marital status; reason for absence from the job; and a host of other matters. On the whole, most employees want the information they give to the health-claim unit, the medical department, the pension and stock-option program, and similar divisions to be kept confidential there. In some cases, as with the medical department, it is accepted that a work restriction for an employee must be communicated to managers but not the underlying medical condition that prompts it.

The key point is that rules of confidentiality and data sharing need to be set up for each unit or activity that keeps personal data. The employee should be told what these rules are and the situations in which his or her consent to intra-organizational sharing are or are not required. Where small units are present and separate offices are not available to compartmentalize data handling, some adjustments would obviously have to be allowed.

From the standpoint of computer systems, these rules then need to be built into the access controls whenever data base systems are involved where more than one department or unit is a user of the system.

Insuring compartmentalization of data in areas such as security or when grievances are processed is particularly important, since these usually involve third-party communications about the individual given in confidence and are usually records to which the employee will not have access.

5. DISCLOSURE OF PERSONAL DATA OUTSIDE THE ORGANIZATION SHOULD BE MADE ONLY WITH THE CONSENT OF THE INDIVIDUAL OR UNDER A VALID LEGAL REQUIREMENT.

As with universities, hospitals, and other data-collectors, many employers in recent years have developed a set of "directory" or "identification" information about their people that they will release to various outside inquirers. In the case of employment, press and public inquirers will usually be given the job title or work position, how long the person has worked there, and if they have left, when they left. Sometimes, a reason for leaving mutually agreed upon by the employer and the employee at departure time will be furnished. Holding responses to public inquiries to such minimum directory information and letting the employee decide what additional information to release, if any, seems the proper principle.

Beyond that, there are several more difficult situations. For some kinds of releases, such as to credit bureaus, credit-grantors, and similar commercial inquirers, some employers inform employees of the items of information that will be released -- salary, length of time at work, etc. -- and require that the employee provide written consent for such release before it is done. How much information from records (and how much by conversation on the telephone) will be released to prospective employers varies widely today, with firms like IBM at the minimal end of the scale and others taking a broader view of what will be provided for such employer exchanges. Where the release is of ratings or judgments that have been shared with the employee, the minimum approach is to be sure the employee knows what will be communicated.The feeling of unfairness that many employees have arises when someone leaves a job and fears that biased, prejudiced, or distorted information may be forwarded by supervisors. While this is an extremely difficult problem to deal with, the way many responsible employers try to deal with it is by conducting a termination interview with the employee or preparing a termination document to be signed by the employee that states frankly what judgments were made and what will be released to prospective employers. While this procedure will not resolve flat disagreements, it meets due process notions as much as one can do so in a judgmental setting, especially if the employee can place in the record his/her side of a disputed statement.

How to deal with responses to subpoenas is another problem area. The principle that ought to be followed is that the employee is notified of the service of a subpoena and is given an opportunity to contest its scope or validity, unless a court has certified that there is a danger of compromising an investigation, destruction of records, or other special situations (national security, threat to life etc.). Here, as in banking and other financial-record situations, American law ought to give this minimum recognition that sensitive personal data is being held under a duty of confidentiality, and that the data-keeper ought not to decide whether and how far to comply with legal process when it involves a particular person's information.

There are other problems of disclosure that would need to be considered in any complete policy guide, such as release of information without subpoena to law enforcement officials, tax authorities, and others. However, since these rarely involve use of automated files, we assume that our discussion above indicates the main approaches that deserve to be followed.

6. AN INDIVIDUAL SHOULD HAVE A RIGHT TO SEE OR COPY HIS OR HER OWN RECORDS, AND TO HAVE A PROCEDURE FOR CONTESTING THE ACCURACY, COMPLETENESS, OR PERTINENCY OF INFORMATION IN THESE. EXCEPTIONS TO PROTECT CONFIDENTIAL SOURCES OR EMPLOYER PREROGATIVES SHOULD BE VERY RARE.

There are a few main problems with this bedrock general principle. We already noted the reluctance of many managements to allow access to promotability codes, replacement tables, salary levels or grades, and similar things that are regarded as management aids, subjective and "soft" predictions, etc. The argument is that employees may adopt unrealistic assumptions about their prospects if they know these ratings, or feel so disheartened that they will quit or slacken off, or become jealous of other employees who have been better rated. The tension here is between two styles of personnel management -- one that believes in open management and total disclosure and one that would limit such communication in the interest of reducing unnecessary friction. Whichever one of these might prove most attractive in the abstract, the concept of individual access to the records that matter most presses heavily in favor of total disclosure. At the least, if this is not required by law or adopted by managements, the reasons for not giving access should be fully explained and employee reactions can then be part of the feedback to management.

Another set of access problems involves records in non-union grievance or complaint programs, security investigations, and other situations in which protecting the confidence of third-party witnesses is involved. Two ways short of total access could meet fair information practices interests. One is to allow employees to obtain a precis of the findings which embodies all the key points made and the conclusions reached. The second is to insure that no code or flag is put onto the employee's profile or general personnel record, to be seen and used for making personnel decisions, unless such a right of precis or full access is provided.

Finally, the right to have a copy made has been opposed by many managements -- usually non-unionized firms -- on the ground that circulation of personnel documents is unwise for relations between employees or for the company in terms of union campaigns. Neither of these reasons seems persuasive enough to overcome the natural inclination and interest that some employees will have to take away a copy of their records for careful study, under conditions less potentially threatening than on the job.

THREE POSITIONS ON POLICY ACTION

Looking at the publicly-expressed views of employers, industry associations, personnel experts, public interest groups, legislators, and other major forces in the employment area, we can identify three alternative positions as to what should be done in the handling of personnel data by employers in the private sector and state and local government.

1. Nothing is required.

In this view, employee privacy is seen as a non-issue, something that is not considered to be a significant concern of workers and executives. To the extent that there may be problems of personnel record-keeping or data collection, it should be dealt with as a matter of regular personnel administration, without special codes, rules, or procedures. This position assumes that employers are already under sufficient state or federal regulation of their hiring, promotion and discipline practices, as a result of EEO and similar employee-protection laws, to insure accurate and proper record-keeping. Nothing would be gained, in this view, by putting managements under further costly and time-consuming information-handling requirements, especially if these resulted in new government reporting duties, complaint procedures, agency investigations, and judicial reviews. Those companies, nonprofit organizations, and government agencies that feel it useful to promulgate privacy rules for their operations should certainly be allowed to do that, but other firms that feel this is not required for good employee relations and fulfillment of social responsibility ought not to be coerced, by law or peer-group pressure, to adopt similar policies.

2. Encourage Voluntary Employer Action.

For private employers and state and local agencies in states without fair information practice laws, this position favors the enunciation of fair information principles by individual employers and expert groups, and the voluntary adoption of such principles by responsive managements. This view usually assumes that there are principles that ought to be applied by employers in the interests of fairness and good personnel practices, but that legislative compulsion should not be applied. The reasons for favoring voluntary action are a combination of the following: that employment situations vary very widely by industry, occupation, job level, and other factors, and these are not easily covered by uniform regulations; that general rules would be very difficult to enforce in practice, since employers can engage in punitive actions through such a variety of subtle ways or alternative personnel measures that little real protection could be given to employees; and that the history of legal interventions such as equal employment opportunity suggests that regulatory -agency enforcement is extremely time-consuming, costly and -- many would say -- ineffective. Therefore, this view concludes that American society ought to wait for more employer-generated privacy codes to be developed in the late 1970s, to serve as models in various industries and settings; if it turns out that large sectors of employment do not adopt these princi-

ples voluntarily, it would be time enough to move to legal codes in the early 1980s, and to draw on good employer practices if and when such a need was established.

3. Some Legislation Is Needed to Insure Momentum and Distribute Costs.

Those who favor some legislative action do so because they feel that the pattern of past private and state-government action in related employee-protection areas -- such as equal employment, occupational health and safety, and pension-rights -- demonstrates a need to set uniform legal standards and provide enforceable rights if the general conduct of employers is to be reached and the rights of most workers are to be protected. In this view, only a very small number of firms or governments can be expected to adopt good practices voluntarily in areas of employee rights. There are over 85,000 business firms with more than 100 employees,* yet no more than a few dozen have adopted the exemplary, full-dress privacy rules and implementing procedures of the highly visible innovators, such as IBM, Bank of America, Cummins Engine, or Ford. Many very large companies -- say the Fortune 500 -- probably have instituted some up-to-date privacy policies but have not done as much as is needed. (Furthermore, the Fortune 500 companies only employ 15 million persons, out of the total business workforce of 70 million.) This leaves the great majority of the 85,000 business firms, and the fifty million employees and executives who work for them, without the kinds of minimum protections that would meet the core principles discussed earlier in this report (or, as will be discussed shortly, that would meet the recommendations of the Privacy Protection Study Commission).

In this view of what policy action is needed, the assumption is that minimum-legal standards and a set of assertable interests subject to outside review represent the only way to insure that the basic principles of fair employment information practices are adopted within the next few years by the 98% of American businesses that have not taken significant action in this field.

Among those who feel legal action is needed, there are varied views as to just what intervention would be appropriate. There are those who favor a complete employee privacy code; for example, one enacted at the state level for both private and governmental employers that would deal with all facets of personnel data uses, from what information should be collected for various kinds of jobs to rights of confidentiality, data-release, and individual access. Others favor more limited legislative interventions, such as the California-type statute covering only access rights to personnel records by private employees.

The basic thrust of this third position, however, is that relying on voluntary employer action in the private and state-government sectors will produce compliance only by a small number of progressive managements, leaving far too many employees outside such protections. Furthermore,

*U. S. Bureau of the Census, County Business Patterns, 1974, April, 1977.

setting general rules for all employers distributes costs of privacy protection equitably among all employers, and prevents a marketing penalty of higher costs for those managements that pioneer in protecting employee rights.

RECOMMENDATIONS OF THE PRIVACY PROTECTION STUDY COMMISSION

The second of the three positions just described was the view adopted by the Privacy Protection Study Commission. In its July, 1977 report, Personal Privacy in an Information Society, the Commission explained its approach to the employment field as follows:

"As elsewhere, the Commission has formulated its recommendations on records generated by the employment relationship in the light of three broad public-policy objectives: (1) to minimize intrusiveness; (2) to maximize fairness; and (3) to create a legitimate, enforceable expectation of confidentiality. In contrast to other areas, however, the Commission envisages adoption of most of its employment-related recommendations by voluntary action. The exceptions are all instances in which statutory or regulatory action appears to be both necessary and feasible. For example, the Commission recommends a statutory prohibition against the use of some exceptionally intrusive techniques for collecting information about applicants and employees, such as truth verification devices and pretext interviews. It also recommends amendment of the Fair Credit Reporting Act to regulate further the conduct of background investigations on applicants and employees, and proposes legislative or administrative action to constrain some practices of Federal agencies which impinge on the private-sector employment relationship. In other recommendations, however, the implementation strategy the Commission recommends is by and large a voluntary one.

"Private-sector employers maintain many different kinds of information about their employees in individually identifiable form. The use of that information in decision making about employees is, however, difficult for an outsider to describe, particularly since employment decisions frequently are not solely based on recorded information. Both the scope of records and the elusiveness of their use distinguish employment record-keeping from most other areas the Commission has studied.

"Further, as stressed earlier, the absence of a general framework of rights and obligations that could accommodate disputes about recorded information places severe limitations on the extent to which rules governing the creation, use, and disclosure of employee records can be enforced. The Commission believes that flexibility in decisions about which job an employee is best suited to perform is essential to good management and should be constrained by public policy only to the extent that employers show themselves unable or unwilling to respond to concerns about the protection of employee privacy. Nonetheless, the enforcement problem is the primary reason why the Commission does not believe that many of the privacy protection issues the private-sector employee-employer relationship raises can be resolved by legislated record-keeping requirements.

"One can conceive of approaches to enforcing rules the Commission recommends for voluntary adoption by means which do not involve the creation of new labor laws, but all of the ones the Commission considered, it found wanting. One might give an employee a right to sue for failure to produce records on request, for example, but such a right would hardly be effective where records are difficult to identify with any reasonable degree of specificity; where it is difficult to link adverse decisions to records; and where it is often difficult to determine even that a particular decision was adverse. Given this situation and the possibility of reprisals, it seems reasonable to expect that most employees would be unwilling to sue an employer for access to records, or for correction of erroneous records. Furthermore, without specific protections, record-keeping personnel might find themselves in an awkward bind, if, for example, persons with more status in the organization pressured them to divulge information they were required by law to keep confidential. If they complied, they would violate the law; if they refused, they might lose their jobs.

"In many other areas the Commission has studied, there are either Federal or State bodies responsible for monitoring the operating and performance of particular industries, such as insurance and banking. In the employment area, however, enforcement through government monitoring of employment record-keeping, or even through a system whereby an employee could complain to a government agency about his employer's failure to comply with privacy protection requirements, would require creation of a new government program. Given the great number of records that would be eligible for oversight under the Commission's recommendations, and the fact that the collection and use of records varies con-

siderably among employers, it would be a massive task for any government agency to oversee effectively the internal record-keeping practices of private employers. Such intervention by government, moreover, could markedly change the character of the employee-employer relationship in directions the Commission has not considered itself competent to evaluate.

"The Commission does, of course, recognize that a voluntary approach may not be effective. Indeed, a minority of the members of the Commission are convinced that it will not be. They do not agree that to give an individual a statutory right to see, copy and correct a record an employer maintained about him must be, of necessity, to give him a right without a remedy. The entity the Commission recommends in Chapter 1 might give further consideration to this matter.

"It should be noted that there are no legal barriers or conflicts with other laws that would prevent companies from voluntarily complying with the Commission's recommendations. In addition, the experience of companies that have complied voluntarily will no doubt guide future determinations as to the need for, and practicality of, legislative action. Thus, the Commission as a whole hopes that the analysis and recommendations in this chapter will move the society toward a better understanding of the issues involved, the remedies that might be possible, and the balances that need to be struck."

We will summarize here the main recommendations made by the Commission under its voluntary-compliance approach, with the full text of the Commission's presentation reproduced in the Appendix.

Recommendation 1 calls for employers "periodically and systematically" to examine their personnel record-keeping practices, including the numbers and types of records maintained; the information in each type of record; the uses made of such records internally and their external disclosure; and the extent to which applicants, employees and former employees are informed of their contents, uses and disclosure. The Commission notes that many employers are already engaged in such systematic record review and considers it indispensable to the formulation of a responsible privacy protection policy.

Recommendation 2: Employers should adopt and implement fair information practices which should include:

o limiting the collection of personnel information to that which is relevant to specific decisions;

o informing employees (and in each case this includes applicants and former employees) as to the types of records being maintained in general and giving them the right to see, copy, correct or amend their individual records;

o adopting procedures to assure the accuracy, timeliness and completeness of information collected, maintained, used or disclosed about employees;

o limiting both internal use and external disclosure.

Recommendation 3 proposes a federal law banning employer use of the polygraph or other truth-verification equipment to gather information from applicants or employees.

Recommendations 4 and 5 call for amending the Fair Credit Reporting Act to ban "pretext" interviews as a means of gathering personal information (i.e. an employment/credit investigator pretending to be an encyclopedia salesman in order to elicit personal information) and charging employers with the responsibility of making sure that the investigative firms they hire do not engage in such deceptive practices.

Recommendations 6 through 10 would limit the collection and use of arrest records in private-employment licensing decisions. The Commission urges state and local legislatures to amend existing statutes that now require employers to seek arrest record information; and urges employers not to request such information unless required to do so by law, and if so, to destroy such records as quickly as legally permissible. It calls upon the Law Enforcement Assistance Administration to create a model law which states can adopt to limit the disclosure of arrest records to employers.

Recommendations 11 and 12 seek to limit the use of conviction records to decisions directly relevant to a specific job and to maintain such conviction records separately from other individually identifiable employment records.

Recommendation 13 would prohibit the use of Separation Program Number codes (SPN) by the Defense Department on military discharge papers, and would review bad discharges that unfairly limit employment for veterans. SPN codes unbeknown to many veterans frequently contained derogatory, irrelevant and unsubstantiated characterizations ("has homosexual tendencies," "bedwetter," etc.). Although the Defense Department discontinued use of the SPNs in 1974, the majority of veterans were discharged before then and still carry the stigmatizing codes on their papers. The Commission recommends issuing new discharge papers to all those whose forms include SPN numbers, and would prohibit disclosure of the meanings of the codes to employers.

Recommendations 13, 14 and 15 would amend the Fair Credit Reporting Act to require the employer to notify applicants and employees when the employer either hires an outside firm to do a background investigation or when the company itself conducts such an investigation itself as to: what information will be collected; from what sources it will be collected; to whom the information so collected will be disclosed; the statutory bases on which the individual may gain access to the record based on the investigation and correct or dispute the contents of the record; and how long the record may be maintained by the original collectors or those to whom it is disclosed.

Recommendation 16 would ban "blanket" authorization forms for the disclosure of employees' personal information. The Commission would require authorization forms to be written in plain language, to be dated, and to be specific as to what individuals or institutions will recieve the information, specific as to the nature of the information, specific as to the purpose for which the information may be used, and specific as to the expiration date of the authorization, which should not exceed one year.

Recommendation 17: The Commission recommends that employers should give employees access to their individual employment records, including employment performance, medical record, insurance record, or any record obtained from a consumer reporting agency. The Commission would permit employers to maintain an "unavailable records" category which might include "promotability" or "potential" evaluations and records of ongoing or completed security investigations.

Recommendation 18 calls for amendment of the Fair Credit Reporting Act to give employees the right to see and copy investigative reports maintained by a consumer reporting agency, and dispute in writing their contents. At present, the employee has the right only to be told the substance of such reports. The amendment would also require that an employer automatically inform the consumer-reporting agency of any correction made by the employee, and provide the employee a copy of the investigative report when the employer receives it from the agency.

Recommendations 19 and 20 would urge employers who maintain their own medical care facilities to give employees access to their own medical

records, including the right to copy it; employers who do not provide direct medical care should provide such access either directly or through a licensed medical professional chosen by the employee.

Recommendation 21 urges employers who act as providers or administrators of an insurance plan to give employees access to their insurance records, either permitting them to see and copy them, or providing the substance of the information by telephone.

Recommendations 22 through 25 would create mechanisms for employees to correct or amend their records. These four recommendations impose not only an obligation for the employer to provide for such corrections, but to disseminate the resulting correction or amendment to any entity to whom the employer has disclosed the original record in the past, and with each subsequent disclosure. "Unavailable" records, as described in Recommendation 17, would be exempted from these mechanisms. The Commission recommends specific procedures for correction of medical and insurance records. The amendment of medical records would include the right of the employer to refuse to amend the record if he does not agree with the correction, in which case the employee and the employer may both file explanatory statements. Amending insurance records might result in similar explanatory statements, which would be included in any subsequent disclosures and might call for a reinvestigation by the insurance supplier which would be limited to the disputed information in the record.

Recommendations 26 through 31: These six recommendations address the desirability of limiting internal dissemination of employees' personal information only to authorized users who need it to fulfill particular functions. For instance, the payroll department may need to know the employee's charitable deductions, but the employee's supervisor does not. Among the specific recommendations for compartmentalizing employees perfonal information are:

o Personnel and payroll records should be available internally only on a need-to-know basis.

o Security records should be maintained apart from other records.

o Medical records should be maintained apart from personnel records and no diagnostic or treatment information in any such record should be made available for use in any employment decision. Managers may be informed generally as to work restrictions but not of the conditions generating such restrictions.

o Individually identifiable insurance records should be maintained separately from other records and not available for use in making employment decisions; insurance benefits such as workmen's compensation, sick pay, and disability payments should be available internally on a strict need-to-know basis.

Recommendations 32 through 34: These final three recommendations contain detailed rules governing disclosure of employees' personal information to third parties. External disclosure may include, among other things, responses to requests for information from previous or prospective employers; a wide range of government reporting, including Social Security, IRS, EEOC, OSHA, ERISA, etc.; and responses to requests by law enforcement officials. As to all of these disclosures, the Commission believes that the employer should "inform all applicants upon request, and all employees automatically, of the types of disclosures it may make of information in the records it maintains on them, including disclosures of directory information, and of its procedures for involving the individual in particular disclosures."

The Commission recommends that specific authorization be obtained from the employee for each external disclosure, with the following exceptions:

1. Directory information, limited to dates of employment; title or position; salary; location of job site.

2. Dates of attendance at work and home address in response to a request by a properly identified law enforcement authority.

3. Voluntary disclosure by the employer when he or she has reason to believe that the actions of the employee threaten the employer's property or the security of other employees, or if the employer suspects an employee of engaging in illegal activities, whether or not those activities relate to his employment. However, the Commission recommends that other law enforcement requests for information, beyond directory information and the employees' home addresses, should be disclosed only with a subpoena or other legal process.

4. In response to Federal, State, or local compulsory reporting statutes.

5. In response to a collective bargaining unit pursuant to a union contract.

6. To an agent or contractor of the employer, but disclosure should be limited only to what is necessary for performance of the agent's function and the agent or contractor is prohibited from redisclosing the information.

7. To a physician for the purpose of informing the individual of a medical problem of which he may be unaware.

8. In response to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena.

The Commission proposes special procedures to deal with the confidentiality problems arising from the Occupational Safety and Health Act, which requires that the employer provide medical surveillance of employees

known to have been exposed to hazardous environments or substances. While the purpose of this disclosure is continuous protection of the worker's health, disclosure of the record to a prospective employer may result in the employee not being hired. The Commission therefore recommends that the Department of Labor should consider (a) restricting the availability of records generated by medical examinations conducted in accordance with OSHA requirements for use in making employment decisions; and (b) establishing mechanisms to protect employees whose health has been affected by exposure to hazardous environments from the economic consequences of employers' decisions concerning their employability.

THE IMPLEMENTATION STRATEGY RECOMMENDED BY THIS REPORT

The recommendations of the Privacy Commission and the guidelines for personnel data systems presented in this report are quite similar in their assumptions about the need to build protections for individuals into the record-keeping activities of employers, and also as to what kinds of employer data practices would be effective to accomplish this. The one primary area of difference lies in the matter of implementation strategy. As already noted, the Commission believes there is no legal "handle" with which to grasp the issues of defining employee privacy rights and protecting them effectively, and that government intervention would inevitably be a clumsy, even counter-productive force. Therefore, the Commission has framed most of its recommendations for voluntary compliance by employers.

While we share the Commission's concern that remedies in the privacy field be appropriate, practical, and respectful of other valuable interests in our political system (such as autonomy in the private sector and state roles in a Federal system), we conclude that there are legal measures that would respect such values but also provide a critical continued momentum for employee-privacy protections in the next five to ten years.

We reach this conclusion not as an ideological judgment in favor of government regulation per se but because of two empirically-based judgments: our reading of the kinds of forces that will -- and will not -- foster large-scale employer adoption of fair employment information practices, and our sense of how best to facilitate evolutionary reforms in the data-handling aspects of personnel management.

Reforms in information processes and record-keeping are expensive and time-consuming matters. They also disturb the customary ways of line managers and personnel departments, as well as altering aspects of employer-employee power relations. Unless there is a strong reason to pursue such changes, they are not going to be done. While we have seen that a few private and government managements pioneered in creating new privacy rules without the spur of trying to ward off proposed state or federal

legislation, most of the changes by innovative organizations between 1974 and the present have been primarily in response to proposed regulation, such as the Koch-Goldwater H. R. 1984 bill in Congress and similar bills in state legislatures. If the judgment of most of the nation's 85,000 private employers were to be that no legislation is going to be enacted, and that a period of five to ten years is available during which to consider "voluntary" adoption of recommendations such as the Privacy Commission's, there is serious doubt whether 1982 or 1984 would see more than 10% compliance in the private sector with the fundamental principles of fair information practice. Thus we view the enactment of modest, first-stage legislation and the possibility of a second legislative action as critical to insure large-scale employer response.

To explain what we mean by first-stage legislation, let us draw on national experience with the Federal Fair Credit Reporting Act, and how that legislation has constructively altered information-handling practices in the credit-reporting field.

After extensive hearings in the middle and late 1960s, Congress decided that too many American consumers were being vitally affected by credit-reporting to continue the existing situation, in which an applicant denied credit did not know who prepared a credit report or what was in it, and had no right to contest the accuracy of the report. At that point, Congress was presented with three main alternatives. It could leave the industry to reform its own practices, assuming that national publicity had alerted the industry to public desires for fair data practices. It could enact a comprehensive code for credit-reporting that would mandate what personal information could be collected, from what sources, providing rights of inspection and challenge, and provide an enforcement mechanism (regulatory-agency supervision, judicial review, etc.). Finally, Congress could adopt a two-stage strategy, legislating first to insure openness of practices and due process rights for the consumer but leaving questions about the propriety of information used in commercial reporting and other major privacy issues for later consideration, in light of experiences under the due-process statute.

As we know, Congress chose the last alternative. In the Fair Credit Reporting Act of 1970 (FCRA), it required that a person denied credit, insurance, or employment when a commercial report had been used was entitled to be told that a report had been used, who had done it, to be informed by the reporting agency of the contents of his or her report, to have the accuracy of disputed items rechecked by the agency, and -- if a disagreement still existed -- to have the right to enter in the report an explanation of up to 500 words giving the individual's version of any disputed item, and to have that explanation disseminated whenever the report was. In the six years that the Act has been in effect, it has profoundly altered the field of commercial reporting. From a consumer's viewpoint, it has brought what had become a profoundly unfair process of making judgments about large numbers of people into an equitable system that respects individual rights while still allowing credit-grantors to make effective business judgments. And by opening up to expert and

public views the types of personal information that were being collected, the data-gathering techniques that were being used, and the ways that credit-grantors seemed to be using such reports, the FCRA facilitated intelligent public understanding of the whole commercial reporting system. It allowed the identification of some problems of privacy protection not reached in 1970, such as the inability of consumers in many cases to learn whether it is a derogatory item in their credit report or temporary aspects of the lender's overall credit-extension levels that produced a denial of credit. Such problems are now being addressed by Congress through proposed amendments to the FCRA, and the additions likely to be enacted will probably reflect not only views of the Privacy Commission and consumer groups but also considerable industry support as well.

There are still some disagreements over the scope of second-stage legislation between the commercial reporting agencies and their user-industries on the one hand and some consumer and privacy-protection groups on the other. But the enactment of the FCRA in 1970 was exactly the right way to calibrate the first, regulatory intervention in that industry, facilitating reforms that served both the consumer's interests and assured public acceptance of the credit-reporting industry as a valuable social institution. Furthermore, while compliance with FCRA has involved substantial outlays by commercial reporting firms, their testimony before the Privacy Commission and in other public statements is that their costs have been reasonable and acceptable amounts in light of the total volume of their businesses and the added consumer satisfactions that have resulted.

Of course, as we have observed several times during this report, employment differs from the credit or insurance situations because it is a continuous rather than occasional relationship, with face-to-face contacts between supervisor and employee that produce many personal observations as well as recorded judgments. Employment also involves evaluations by personnel managers that lead to some employees obtaining preferred advancements and others being denied them, not necessarily because of some objective failing by the individual but because organizational mobility is pyramidal in nature, with a steadily narrowing set of posts at the upper levels. While we recognize these special characteristics of employment, we do not think they remove employment from the analogy of the successful approach of the FCRA, but only demonstrate that the realities of the employment relationship should be carefully addressed in any legislative proposals.

Using the analogy of the FCRA, therefore, what kinds of first-stage legislative approaches would be useful in the employment area? In discussing this, we will be presenting principles for legislation, not drafts of statutory language, since we believe the discussion at the level of general principles is what a report such as this one should address.

1. The Scope and Focus of First-Stage Legislation

In our descriptions of personnel data practices, we have identified four main activities that might be the subject of regulation:

a. The hiring decision

b. Maintenance of regular personnel records

c. Internal circulation of employee data

d. Release of employee data to outsiders

Since the hiring decision is already regulated by federal and state laws of various kinds, from equal opportunity laws on race, sex, and handicap to fair credit reporting in pre-employment, we do not think that it is a first-stage privacy priority to enact legislation in this area now. Laws to forbid denial of employment on the basis of sexual preference (homosexuality) represent, in our terminology here, equality legislation rather than privacy laws, and thus we leave that prospect outside our recommendations.

We also conclude that internal circulation of employee data does not need to be a matter of first-stage legislation. Employers vary enormously in how their units and divisions are organized, and thus how they exchange employee data. They also vary as to how decisions about promotion and assignment are made, and in the ways that evaluative reports and personnel assessments are used. While it is possible to conceive of protective legislation as to these employer activities, there are substantial problems of defining internal information exchange practices in terms of legal duties and employee rights. Thus we reserve this area for possible second-stage legislation.

The two areas we believe do necessitate first-stage action are maintenance of regular personnel records and release of employee data outside the employer's organization, the two areas in which respondents to our survey indicated an overwhelming belief that rights should be provided.

As of September, 1978, four states -- California, Maine, Oregon, and Michigan -- had legislated employee right of access laws covering the private as well as public sectors. The brief California statute has already been quoted and discussed in our profile of Bank of America, and the Oregon and Maine laws are similar in scope. However, the Michigan law (signed in August, 1978 and taking effect on January 1, 1979) is the most detailed and extensive of the state access statutes, and may well become the model used by many other states in the next few years. It applies to all private and public employers of four or more persons and gives their employees the right to see any personnel-record information used in determining employment, promotions, transfers, additional compensation, or disciplinary action. However, it creates eight exemptions

to such access rights: (1) for identified references; (2) staff planning records relating to more than one employee; (3) medical reports to which the employee has access from the doctor or medical facility itself; (4) information about other persons where disclosure would constitute a "clearly unwarranted invasion" of the other person's privacy; (5) security investigation information kept separate from personnel records; (6) separately-kept grievance investigation records; (7) records of an educational institution covered by the Federal "Buckley" Act of 1974; and (8) records made and kept solely by one supervisory person and not shared with others.

An employee may also obtain copies of the personnel record "at cost;" if unable to review the record personally, he or she may obtain a copy by writing to the employer. An employee is entitled to have his or her version of any disputed information placed in the record; this must be made a permanent part of the file, including when it may be disseminated to third parties. An employer must notify the employee in writing whenever disciplinary reports, letters of reprimand, or disciplinary-action reports are disclosed to a third party, unless this is waived by the employee. No derogatory information more than four years old may be sent to third parties.

In a new departure for state employee-privacy legislation, the Michigan law prohibits employers from gathering and keeping records of an employee's political activities, associations, publications, or communications on "non-employment activities," unless the employee gives written authorization for their inclusion in the file. If an employer undertakes any investigation of suspected criminal activity, the information collected must be kept in a separate file; on the completion of the investigation or after two years (whichever comes first), the employee must be notified that an investigation was or is being conducted. On its completion, if disciplinary action is not taken, the file must be destroyed.

If an employee believes the Michigan Act has been violated, he or she may sue in state circuit court; actual damages suffered, a $200 penalty, court costs, and "reasonable attorney's fees" may be awarded for violations. No state agency is designated to oversee the Act or enforce it.

Though the Michigan law is the most far-reaching statute in the nation on employee rights in personnel records, it actually represented a legislative compromise between the positions taken by business groups and civil liberties advocates. As the bill's principal sponsor, Representative Perry Bullard, told our project, extensive negotiations were held with business groups when it became clear that the original bill could not be passed over their opposition. Several key modifications responsive to business concerns were made, and the bill's final version was <u>not</u> opposed by the Michigan Manufacturers' Association or the state Chamber of Commerce, nor by such powerful Michigan employers as General Motors and Ford. While the Michigan Chapter of the American Civil Liberties Union strongly supported the need for such "landmark" legislation and the original bill, it criticized some of the later exceptions

as well as the failure to spell out as clearly as the ACLU thought necessary what some of the bill's protections actually meant. However, in its final revised form, the bill drew broad interest-group support, passed both houses of the legislature (though by narrow margins), and was signed by the Governor.

Interestingly, nothing was said in the Michigan Act about computers, EDP systems, or other information-handling media. This followed Representative Bullard's judgment that legal rights to protect employees' privacy and due process should be specified and employers should be expected to comply whether the employee information is kept on 5 by 8 cards, microfiche, or computer tapes, or whether communication of personnel information is by interoffice mail, telephone, or computer terminal. Therefore no special provisions for the creation or modification of EDP personnel systems were written into the Act.

The new Michigan statute provides strong legislation on just the two sectors of personnel data practices that we believe need state attention: maintenance of personnel records (including the employee's right of access and exclusion of data about political or off-the-job activities) and release of employee data to outsiders. (The full text of the Michigan Act has been included in Appendix Two of our report.)

There may well be other versions of state employee informational privacy and due process laws that will fall between the brief, declaratory format of the California, Maine, and Oregon statutes and the detailed code enacted by Michigan. If several more of the major industrial states were to enact such legislation -- especially New York, Illinois, Pennsylvania, and Massachusetts, which have a long history of pioneering in civil liberties and employee-protection laws -- the net effect would be to convince almost any large business firm operating nationwide that reviewing its personnel data practices and bringing them into compliance with these laws was simply good management.

After a reasonable period of time, states could examine whether practices in the hiring and internal information-sharing areas were being handled properly. If so, no second-stage legislation would be needed. If abuses and problems will have surfaced, the experience obtained under first-stage laws would provide a factual picture of employer personnel data practices on which to frame additional legislation.

2. The Choice of State Legislation

We have recommended that state laws be the focus of first-stage action because states have traditional and primary jurisdiction over businesses and nonprofit organizations operating within their borders. A state law would also be able to include municipal, county, and state government employees under its policy. We do not believe enactment of this kind of statute would put interstate businesses under inconsistent or uneven duties in their operations the way that some state regulatory measures have done. Rather, we assume that enactment of this legislation

would be done through creation of Model Bills. While some variations in terms might be produced from state to state, the main definitions of legal rights, employer duties, and implementation procedures would be fairly uniform. If a group of leading states were to enact such a law, one could expect that a majority of businesses and nonprofit organizations that operate interstate would bring their entire personnel data systems into line with such laws, since uniform rules and systems procedures would be an efficient way to meet such state requirements. Many states are now considering the recommendations that the Privacy Commission addressed to the states for action, and we believe employment records are a prime field for state action.

At the hearings of the Privacy Commission, however, several employer witnesses indicated that, if there were to be legal regulation of personnel data practices, they would favor a uniform national law rather than varying state enactments. Though we have urged state law as the ideal first step, should state laws develop along lines that created a serious burden on interstate organizations, Congress could certainly step in and set national minimum standards, with oversight of duties under the law given to the U.S. Department of Labor or the National Labor Relations Board.

There were signs in late 1978 that some members of Congress favored acting on employment records through an immediate federal measure. If so, our recommendation would be that the two areas discussed as first-stage matters -- employee access and outside disclosure of employee data -- would still be the best focus for a federal law. As we see it, a broad general code of employment privacy would not be the wisest approach for the Congress to take in the late 1970s.

At the time this report was finished for publication (September, 1978), the Carter Administration had not yet released its recommendations for privacy actions, in response to the Privacy Protection Study Commission's Report of July, 1977. Just what role the U.S. Department of Labor would play in monitoring employer privacy practices and/or fostering compliance with a voluntary code of fair employment information practices was one issue up for decision. Since it seemed doubtful whether the Administration would recommend the creation of any "federal entity" to oversee privacy issues in general, the role designated for the Department of Labor was especially important. There was also the issue of whether the Administration would recommend to Congress enactment of a federal statute giving employees access rights to their personnel records, or would recommend leaving this to state law or private action.

3. The Role of Software and Systems Consultants

The growing move toward Human Resources Information Systems among large employers and the increasing sales of pre-packaged personnel data systems have the potential to be another important force for implementing employee rights. Most of the major software developers in this field have seen social pressures for employers to provide better privacy and

confidentiality measures as offering systems developers an excellent marketing opportunity. They have developed sales materials showing how they can do this for clients, have sponsored national and regional conferences for users and potential customers on how to create and manage socially-responsible personnel data systems, and have accumulated some very useful field experience on the real-world privacy and confidentiality issues that arise in handling sensitive employee information through EDP. While any organization building or expanding its personnel data system must still make the basic policy decisions itself as to privacy, confidentiality, and due process matters, or determine how best to comply with new legal requirements in this area, software firms in the personnel field offer considerable experience in working with business, government, and non-profit organizations in carrying out such policies.

This comment is not meant as an uncritical "plug" for software and systems consultants, nor is it an assumption that the leaders of this sector of the computer industry are any more devoted to the values of personal privacy and due process than organizational managers at large. Rather, what we mean to underscore is that social pressures to develop new protections for employee personal data have generated a small corps of professional experts who can offer significant experience to help accomplish these goals, as a skilled service. This can allow employer organizations to undertake the installation of employee-privacy protections in EDP systems with the confidence that such policies have already been installed successfully, and at acceptable costs, in many other organizations, through techniques that are readily transferable.

A CONCLUDING NOTE

This report has ranged widely across the landscape of American employment. It has documented the increased recording by employers of personal employee data - for reporting duties in equal employment, pension rights, handicapped opportunities, and occupational safety and health; for current programs in human resource utilization and employee fair-hearing procedures; and for very wide-ranging employee benefit and education programs. Employers have not always sought to collect such data, but they now have it on their files, and increasingly, it is going into automated data systems. More and more, employees have been shown to be concerned about the uses of their data, not so much because they hate or fear the employer but because of our era's general awareness that sensitive personal information needs to be safeguarded from potential abuse.

In this situation, it is not employer motives or good intentions that matter but the implementation of sound principles and practices of fair information handling. Employers who do this have much to gain and little to lose in their personnel relations, as the examples of IBM, Bank of America, Ford and many other progressive companies indicate, as well as that of innovative state and local civil service systems.

The key issue is probably one of convincing employers that this is a genuine issue, and one that can be dealt with in a progressive way. Creating such an awareness in managements, by advocacy, publicity, and the kind of first-stage legislation recommended here, is a major task of all those who wish to see personnel data systems function not only efficiently but also with fairness to employees and responsiveness to social concerns about privacy in a high-technology age. Pursuing such an objective is a major way in which societies with regard for individual rights can shape the future uses of computer technology by powerful organizations, rather than to allow machine and bureaucratic efficiencies to misshape organizational life along non-democratic pathways. Much is at stake for the quality of life in our electronic civilization.

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APPENDICES

APPENDIX 1

RECOMMENDATIONS ON EMPLOYMENT AND PERSONNEL RECORDS BY THE PRIVACY PROTECTION STUDY COMMISSION*

GENERAL RECOMMENDATIONS

As elsewhere, the Commission has formulated its recommendations on records generated by the employment relationship in the light of three broad public-policy objectives: (1) to minimize intrusiveness; (2) to maximize fairness; and (3) to create a legitimate, enforceable expectation of confidentiality. In contrast to other areas, however, the Commission envisages adoption of most of its employment-related recommendations by voluntary action. The exceptions are all instances in which statutory or regulatory action appears to be both necessary and feasible. For example, the Commission recommends a statutory prohibition against the use of some exceptionally intrusive techniques for collecting information about applicants and employees, such as truth verification devices and pretext interviews. It also recommends amendment of the Fair Credit Reporting Act to regulate further the conduct of background investigations on applicants and employees, and proposes legislative or administrative action to constrain some practices of Federal agencies which impinge on the private-sector employment relationship. In other recommendations, however, the implementation strategy the Commission recommends is by and large a voluntary one.

Private-sector employers maintain many different kinds of information about their employees in individually identifiable form. The use of that information in decision making about employees is, however, difficult for an

*Reproduced from Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission (U.S. Government Printing Office, Washington, D.C., July 1977), pp. 231-275.

outsider to describe, particularly since employment decisions frequently are not solely based on recorded information. Both the scope of records and the elusiveness of their use distinguish employment record keeping from most other areas the Commission has studied.

Further, as stressed earlier, the absence of a general framework of rights and obligations that could accomodate disputes about recorded information places severe limitations on the extent to which rules governing the creation, use, and disclosure of employee records can be enforced. The Commission believes that flexibility in decisions about which job an employee is best suited to perform is essential to good management and should be constrained by public policy only to the extent that employers show themselves unable or unwilling to respond to concerns about the protection of employee privacy. Nonetheless, the enforcement problem is the primary reason why the Commission does not believe that many of the privacy protection issues the private-sector employee-employer relationship raises can be resolved by legislated record-keeping requirements.

One can conceive of approaches to enforcing rules the Commission recommends for voluntary adoption by means which do not involve the creation of new labor laws, but all of the ones the Commission considered, it found wanting. One might give an employee a right to sue for failure to produce records on request, for example, but such a right would hardly be effective where records are difficult to identify with any reasonable degree of specificity; where it is difficult to link adverse decisions to records; and where it is often difficult to determine even that a particular decision was adverse. Given this situation and the possibility of reprisals, it seems reasonable to expect that most employees would be unwilling to sue an employer for access to records, or for correction of erroneous records. Furthermore, without specific protections, record-keeping personnel might find themselves in an awkward bind, if, for example, persons with more status in the organization pressured them to divulge information they were required by law to keep confidential. If they complied, they would violate the law; if they refused, they might lose their jobs.

In many other areas the Commission has studied, there are either Federal or State bodies responsible for monitoring the operations and performance of particular industries, such as insurance and banking. In the employment area, however, enforcement through government monitoring of employment record keeping, or even through a system whereby an employee could complain to a government agency about his employer's failure to comply with privacy protection requirements, would require creation of a new government program. Given the great number of records that would be eligible for oversight under the Commission's recommendations, and the fact that the collection and use of records varies considerably among employers, it would be a massive task for any government agency to oversee effectively the internal record-keeping practices of private employers. Such intervention by government, moreover, could markedly change the character of the employee-employer relationship in directions the Commission has not considered itself competent to evaluate.

The Commission does, of course, recognize that a voluntary approach

may not be effective. Indeed, a minority of the members of the Commission are convinced that it will not be. They do not agree that to give an individual a statutory right to see, copy, and correct a record an employer maintains about him must be, of necessity, to give him a right without a remedy. The entity the Commission recommends in Chapter 1 might give further consideration to this matter.

It should be noted that there are no legal barriers or conflicts with other laws that would prevent companies from voluntarily complying with the Commission's recommendations. In addition, the experience of companies that have complied voluntarily will no doubt guide future determinations as to the need for, and practicality of, legislative action. Thus, the Commission as a whole hopes that the analysis and recommendations in this chapter will move the society toward a better understanding of the issues involved, the remedies that might be possible, and the balances that need to be struck.

Review of Record-Keeping Practices

Although private-sector employers are increasingly aware of the need to control the collection, maintenance, use, and disclosure of information about employees, employer practices vary widely, as do their methods of conforming practice to policy. The Commission's hearing record illustrates this variety.

Some large corporations have developed comprehensive fair information practice policies that they have systematically communicated to their employees.[15] Others have developed practices to deal with some privacy protection concerns, but not others.[16] Most employers, however, have not undertaken any sort of systematic review of their employment record-keeping policies and practices with privacy protection in mind. If such studies are done, it is usually because of Equal Employment Opportunity Act requirements or because the firm wants to automate some of its employment-related record keeping.[17] Only rarely has the employee's perspective motivated reform of record-keeping practices, and in only a very few instances has an employer invited active participation by employees in revising its policies and practices.[18]

Several employers testified that they had created privacy protection

[15] See, for example, Submission of the Cummins Engine Company, "Employee Profile," Employment Records Hearings, December 9, 1976, p. 7; Submission of the Equitable Life Assurance Society of the U.S., "Privacy Principles, General Operating Policy No. 29," March 19, 1976; and Submission of International Business Machines, "Four Principles of Privacy," Employment Records Hearings, December 10, 1976.

[16] See, for example, Submission of the Proctor and Gamble Company, "Release of Information About Present or Former Employees," Employment Records Hearings, December 9, 10, 16, 17, 1976; and Submission of the Manufacturers Hanover Corporation, "The Standards We Live By," Employment Records Hearings, December 16, 1976.

[17] See, for example, Testimony of the Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 369; and Testimony of the Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 2.

[18] See, for example, Testimony of the Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 13.

review committees to study and report on employment-related record-keeping practices. In some instances, these bodies have been given permanent advisory responsibilities.[19] Such high-level committees, however, are rare. Some corporations have issued statements of policy or principle which inform employees and the public of their concern about the employment records they maintain. Others, without making any formal statements, have instituted record-keeping procedures that take account of privacy protection concerns.[20] One major corporation testified that it had had a policy of allowing employees to have access to their records for years, but in reviewing its practices, discovered that its employees were unaware of the policy.[21] Nothing in the Commission's record suggests that such a finding is unusual.

Among organizations that have adopted policies or practices to regulate the handling of records about employees, few have any way of checking to see if they are being carried out uniformly.[22] Moreover, action taken at the corporate level is not always communicated to field offices, and few employers testified that they penalize record-keeping personnel for failure to comply with administrative instructions about the handling of employee records.[23]

The first step for employers who want to develop and execute privacy protection safeguards along the lines recommended by the Commission is to examine their current record-keeping policies and practices. The Commission also believes that employees should be represented on any group that undertakes such an examination.

Any review of current policy and practice should look carefully at the number and type of records held on applicants, employees, and former employees, and the items of information in each record. It should examine the uses made of employee records, their flow both within and outside of the employing organization, and how long they are maintained. Compliance with established policies and procedures should also be reviewed, particularly when a corporation has offices and plants in different States or in foreign

[19] See, for example, Testimony of the Equitable Life Assurance Society, Employment Records Hearings, December 9, 1976, p. 107; Testimony of the General Electric Company, Employment Records Hearings, December 9, 1976, pp. 226, 227; Testimony of the Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 10; and Submission of the International Business Machines Corporation, "The Managing of Employee Personal Information and Employee Privacy," Employment Records Hearings, December 10, 1976, pp. 8-9.

[20] See, for example, Testimony of the Inland Steel Company, Employment Records Hearings, December 10, 1976, pp. 332, 373.

[21] Testimony of the Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 517.

[22] Alan Westin, "Trends in Computerization of Personnel Data," Part II, 1955-1976, Unpublished Report for the National Bureau of Standards' Project on Personnel Practices, Computers and Citizens Rights, p. 4; Testimony of the General Electric Company, Employment Records Hearings, December 9, 1976, pp. 267-268; Testimony of the Equitable Life Assurance Society, Employment Records Hearings, December 9, 1976, p. 133; and Testimony of Rockwell International, Employment Records Hearings, December 17, 1976, pp. 922-924.

[23] See, for example, Submission of General Electric, "Safeguarding Confidential Data," Unpublished memorandum to Major Appliance Group, June 21, 1976; and Testimony of the Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 366.

countries. Finally, the review should determine whether, or in what situations, an employer systematically informs individuals of the uses and disclosures that are made of employment records about them. The Commission, in sum, recommends:

Recommendation (1):

That an employer periodically and systematically examine its employment and personnel record-keeping practices, including a review of:

- **(a) the number and types of records it maintains on individual employees, former employees, and applicants;**
- **(b) the items of information contained in each type of employment record it maintains;**
- **(c) the uses made of the items of information in each type of record;**
- **(d) the uses made of such records within the employing organization;**
- **(e) the disclosures made of such records to parties outside the employing organization; and**
- **(f) the extent to which individual employees, former employees, and applicants are both aware and systematically informed of the uses and disclosures that are made of information in the records kept about them.**

Once having initiated such a program, an employer should be in a position to improve, articulate, and communicate to its employees both its privacy protection policies and its internal arrangements for assuring that these policies are consistently observed.

Adherence to Fair Information Practice Policy

Although consenting to the divulgence of information about oneself can have little meaning for an individual who needs a job, an employer's adherence to a fair information practice policy can alleviate an applicant or employee's sense of uncontrolled exposure to intrusion on his personal privacy. The preliminary health questionnaire used by the IBM Corporation, for example, includes a detailed explanation of its purpose.[24] The Cummins Engine Company's employee profile form, a copy of which is routinely sent to all employees, lists all possible users within the corporation, tells which information on the form goes to which users, and invites employees to address questions to the record system manager or the personnel office.[25] Other employers follow similar procedures.[26]

If, however, a category of employment records is not shared with

[24] Submission of International Business Machines, "Preliminary Health Questionnaire," Employment Records Hearings, December 10, 1976.

[25] Submission of Cummins Engine Company, "Employee Profile," Employment Records Hearings, December 9, 1976.

[26] See, for example, Submission of J. C. Penney, "Drug Screen Report," Employment

applicants and employees as a matter of policy, prevailing practice appears to be for employers not even to inform employees that such a category of records exists. Some employers indicated to the Commission that employees, in their opinion, have no legitimate interest in knowing of the existence of certain records, such as evaluations of employee "potential" used for management planning or records associated with security investigations.[27] This position is hard to defend, since it argues for record-keeping systems whose very existence may be concealed, a posture with respect to minimum standards of fairness in personal-data record keeping that even the investigative agencies of the Federal government have not vigorously put forward. Nonetheless, there are many who will still try to defend it.

In the Commission's view, an employer's fair information practice policy must recognize eight basic obligations:

(1) *to limit the employer's collection of information about applicants and employees to matters that are relevant to the particular decisions to be made and to avoid items of information that tend to stigmatize an individual unfairly.* This can be a difficult judgment to make as there is little agreement on the characteristics that suit an individual to a particular job. The J.C. Penney Company has recently made an interesting attempt to limit its information collection to relevant items, and as a result, the firm's new employment application no longer asks about such things as leisure activities, military history, convictions (except for specific offenses), physical or mental condition, or alien status.[28]

(2) *to inform all applicants, employees, and former employees with whom it maintains a continuing relationship (such as retirees) of all uses that may be made of the records the employer keeps on them.* This makes it possible for individuals to understand the record-keeping aspects of their employment relationships and thus, as indicated earlier, to alleviate any sense they may have of uncontrolled intrusion on their personal privacy.

(3) *to notify employees of each type of record that may be maintained on them, including records that are not available to them for review and correction,* so that employees need not fear that hidden sources of information are contributing to decisions about them;

(4) *to institute and publicize procedures for assuring that individually identifiable employment records are (a) created, used, and disclosed according to consistently followed procedures; (b) kept as accurate, timely, and complete as is necessary to assure that*

Records Hearings, December 10, 1976; and Submission of General Electric Company, "Medical History," Employment Records Hearings, December 9, 1976.

[27] See, for example, Testimony of the Ford Motor Company, Employment Records Hearings, December 16, 1976, pp. 559, 560. In addition, every corporate witness testified that some of its employment records were unavailable to employees.

[28] Submission of J. C. Penney, "Application Form," Employment Records Hearings, December 10, 1976.

they are not the cause of unfairness in decisions made on the basis of them; and (c) disclosed within and outside of the employing organization only according to stated policy;

(5) *to institute and publicize a broadly applicable policy of letting employees see, copy, correct, or amend, and if necessary, dispute individually identifiable information about themselves in the employer's records;*

(6) *to monitor the internal flow of individually identifiable employee record information,* so that information is available only as actually needed according to clearly defined criteria;

(7) *to regulate external disclosures of individually identifiable employee-record information in accordance with an established policy of which employees are made aware,* including specific routine disclosures such as disclosures of payroll tax information to the Internal Revenue Service and disclosures made without the employee's authorization in response to specific inquiries or requests to verify information about him; and

(8) *to assess its employee record-keeping policies and practices, at regular intervals, with a view to possibilities for improving them.*

In sum, as an overall framework for addressing fair information practice concerns in the employment relationship, the Commission recommends:

Recommendation (2):

That an employer articulate, communicate, and implement fair information practice policies for employment records which should include:

(a) limiting the collection of information on individual employees, former employees, and applicants to that which is relevant to specific decisions;

(b) informing employees, applicants, and former employees who maintain a continuing relationship with the employer of the uses to be made of such information;

(c) informing employees as to the types of records that are being maintained on them;

(d) adopting reasonable procedures to assure the accuracy, timeliness, and completeness of information collected, maintained, used, or disclosed about individual employees, former employees, and applicants;

(e) permitting individual employees, former employees, and applicants to see, copy, correct, or amend the records maintained about them;

(f) limiting the internal use of records maintained on individual employees, former employees, and applicants;

(g) limiting external disclosures of information in records kept on individual employees, former employees, and applicants, includ-

ing disclosures made without the employee's authorization in response to specific inquiries or requests to verify information about him; and

(h) providing for regular review of compliance with articulated fair information practice policies.

SPECIFIC RECOMMENDATIONS

With a few important exceptions, the Commission's specific recommendations on record keeping in the employee-employer relationship also embody a voluntary scheme for resolving questions of fairness in the collection, use, and dissemination of employee records. The reasons for not recommending statutory implementation of many of these recommendations should by now be clear. The Commission does, however, believe that employees, like other categories of individuals, should have certain prerogatives with respect to the records that are kept about them, and the recommendations below, if adopted, would serve to define those prerogatives as a matter of practice.

Intrusiveness

Some of the information an employer uses in making hiring and placement decisions is acquired from sources other than the individual applicant or employee. In addition to former employers and references named by the individual, such third-party sources may include physicians, creditors, teachers, neighbors, and law enforcement authorities.

One way to keep an employer's inquiries within reasonable bounds is to limit the outside sources it may contact without the individual's knowledge or authorization, as well as what the employer may seek from the individual himself. To do so, however, is to grapple with long and widely held societal views regarding the propriety of inquiries into an individual applicant or employee's background, medical history, credit worthiness, and reputation. As the Commission has agreed elsewhere in this report, the intrusions on personal privacy that seem to be taken for granted in many of the record-keeping relationships the Commission has studied usually begin with the criteria we, as a society, accept as proper ones for making decisions about people. Thus, while the Commission was struck by the extensiveness of the inquiries some employers make into matters such as medical history, it concluded that so long as society considers the line of inquiry legitimate, judgments about how extensive it should be must be largely aesthetic.

The same was not true, however, with regard to some of the *techniques* that are used to collect information about applicants and employees. There the Commission found a few it considers so intolerably intrusive as to justify banning them, irrespective of the relevance of the information they generate.

Truth Verification Devices

The polygraph examination, often called the lie-detector test, is one technique the Commission believes should be proscribed on intrusiveness

grounds. The polygraph is used by employers to assess the honesty of job applicants and to gather evidence about employees suspected of illegal activity on the job. An estimated 300,000 individuals submitted to this procedure in 1974.[29]

The main objections to the use of the polygraph in the employment context are: (1) that it deprives individuals of any control over divulging information about themselves; and (2) that it is unreliable. Although the latter is the focal point of much of the continuing debate about polygraph testing, the former is the paramount concern from a privacy protection viewpoint. During the 93rd Congress, the Senate Subcommittee on Constitutional Rights concluded that polygraph testing in the context of *Federal* employment raises intrusiveness issues of Constitutional proportions.[30] Similarly, the Committee on Government Operations of the House of Representatives emphasized the "inherent chilling effect upon individuals subjected to such examinations," and recommended that they no longer be used by Federal agencies for any purpose.[31]

Advocates of banning the polygraph in employment describe it as humiliating and inherently coercive and suspect that some employers who use it do so more to frighten employees than to collect information from them.[32] Use of the polygraph has often been the subject of collective-bargaining negotiations and has even inspired employees to strike. The Retail Clerks Association, with more than 700,000 members, urges its locals to include anti-polygraph provisions in all contracts.[33]

Other truth-verification devices now on the market, such as the Psychological Stress Evaluator (PSE), pose an even greater challenge to the notion that an individual should not be arbitrarily deprived of control over the divulgence of information about himself. Like the polygraph, the PSE electronically evaluates responses by measuring stress. Unlike the polygraph, the PSE uses voice inflections to measure stress and thus may be used without the individual knowing it is being used.[34] The use of such devices in the employment context, and the practices associated with their use, are, in the Commission's view, unreasonable invasions of personal privacy that should be summarily proscribed. The Commission, in effect, agrees with the conclusions of the two Congressional committees that have examined this issue as it arises in the Federal government and, therefore, recommends:

Recommendation (3):

That Federal law be enacted or amended to forbid an employer from

[29] *Privacy, Polygraph, and Employment*, Report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 93d Congress, 2d Session, November 1974, p. 3.
[30] *Ibid.*, pp. 9-14.
[31] *Op. cit.*, House Committee on Government Operations, p. 46.
[32] *Ibid.*, p. 38.
[33] Testimony of the Retail Clerks International Association, Employment Records Hearings, December 17, 1976, p. 1009.
[34] Joseph F. Kubis, "Comparison of Voice Analysis and Polygraph as Lie Detection Procedures," (Report for U.S. Army Land Warfare Laboratory, August 1973) p. 6.

using the polygraph or other truth-verification equipment to gather information from an applicant or employee.

The Commission further recommends that the Congress implement this recommendation by a statute which bans the manufacture and sale of these truth-verification devices and prohibits their use by employers engaged in interstate commerce. A clear, strong, Federal statute would preempt existing State laws with less stringent requirements and make it impossible for employers to subvert the spirit of the law by sending applicants and employees across State lines for polygraph examinations.

Pretext Interviews

The Commission also finds unreasonably intrusive the practices of investigators who misrepresent who they are, on whose behalf they are making an inquiry, or the purpose of the inquiry. (These so-called "pretext interviews" are discussed in some detail in Chapter 8.)

Because background checks in connection with the selection of an applicant or the promotion or reassignment of an employee are not criminal investigations, they do not justify undercover techniques. Nor, according to testimony before the Commission, are pretext interviews necessary to conduct adequate investigations in the employment context. Witnesses from private investigative firms repeatedly said that extensive information about an applicant can be developed without resorting to such ruses.[35] Accordingly, in keeping with the posture it took on pretext interviews in connection with insurance underwriting and claims investigations, the Commission recommends:

Recommendation (4):

That the Federal Fair Credit Reporting Act be amended to provide that no employer or investigative firm conducting an investigation for an employer for the purpose of collecting information to assist the employer in making a decision to hire, promote, or reassign an individual may attempt to obtain information about the individual through pretext interviews or other false or misleading representations that seek to conceal the actual purpose(s) of the inquiry or investigation, or the identity or representative capacity of the employer or investigator.

Amending the Fair Credit Reporting Act in this way would be a reasonable extension of the Act's goal of assuring that subjects of investigations are treated fairly.

[35] See, for example, Testimony of Pinkerton's Incorporated, *Private Investigative Firms*, Hearings before the Privacy Protection Study Commission, January 26, 1977, p. 156 (hereinafter cited as "Private Investigative Hearings"); and Testimony of Wackenhut Corporation, Private Investigative Hearings, January 26, 1977, pp. 53-54.

Reasonable Care in the Use of Support Organizations

An employer should not be totally unaccountable for the activities of others who perform services for it. The Commission believes that an employer should have an affirmative obligation to check into the *modus operandi* of any investigative firm it uses or proposes to use, and that if an employer does not use reasonable care in selecting or using such an organization, it should not be wholly absolved of responsibility for the organization's actions. Currently, the responsibility of an employer for the acts of an investigative firm whose services it engages depends upon the degree of control the employer exercises over the firm. Most investigative reporting agencies are independent contractors who traditionally reserve the authority to determine and assure compliance with the terms of their contract. Thus, under the laws of agency, an employer may be absolved of any liability for the illegal acts of an investigative firm if those acts are not required by the terms of the contract.[36] Accordingly, to establish the responsibility of an employer which uses others to gather information about applicants or employees for its own use, the Commission recommends:

Recommendation (5)

That the Federal Fair Credit Reporting Act be amended to provide that each employer and agent of an employer must exercise reasonable care in the selection and use of investigative organizations, so as to assure that the collection, maintenance, use, and disclosure practices of such organizations comply with the Commission's recommendations.

If *Recommendation (5)* were adopted, and it could be shown that an employer had hired or used an investigative firm with knowledge, either actual or constructive, that the organization was engaging in improper collection practices, such as pretext interviews, an individual or the Federal Trade Commission could initiate action against both the employer and the investigative firm and hold them jointly liable for the investigative firm's actions.

Fairness

Unfair practices can enter into employment record keeping in four main ways: (1) in the kinds of information collected for use in making decisions about individuals; (2) in the procedures used to gather such information; (3) in the procedures used to keep records about individuals accurate, timely, and complete; and (4) in the sharing of information across

[36] See, e.g., *Milton v. Missouri Pacific Ry. Co.*, 193 Mo. 46, 91 S.W. 949 (1906); *Inscoe v. Globe Jewelry Co.*, 200 N.C. 580, 157 S.E. 794 (1931). However, recent decisions in a few jurisdictions indicate that under certain circumstances, one who employs a private investigator may not thereby insulate himself from liability for torts committed by the investigator by merely arguing that they were committed outside the scope of the employment. *Ellenberg v. Pinkerton's, Inc.*, 125 Ga. App. 648, 188 S.E.2d 911 (1972); *Noble v. Sears, Roebuck and Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269, 73 A.L.R. 3d 1164 (1973).

the variety of record-generating relationships that may be subsumed by the employment relationship.

Fairness in Collection

When employers ask applicants and employees for more personal information than they need, unfairness may result. The process of selecting among applicants generally involves step-by-step disqualification of applicants on the basis of negative information. Where jobs require routine skills, or where many apply for a few vacancies, items of information that have little to do with job qualifications can become the basis for sifting among otherwise undifferentiated applicants. An arrest or conviction record remote in time or pertinence to the job being sought, or a less-than-honorable military discharge, are items of information that can be used in that way.

The cost of collecting information tends to limit what employers collect, but cost is not an effective deterrent when the item is easily obtained. Moreover, in employment, as well as in other areas in which records influence decisions about individuals, too much deference is often paid to records generated by other institutions. Unwarranted assumptions can be made about the validity and currency of information that other organizations record and disseminate. Questions are seldom asked about how the record came to be. As a result, records created by other institutions for their own decision-making purposes can unfairly stigmatize an individual. In the extreme case, they can set in motion a series of events which permanently exclude an individual from the economic mainstream, condemning him to marginal employment for a lifetime. Again, arrest, conviction, and military discharge records are principal culprits in this regard.

Use of Arrest Information

Arrest information raises perplexing questions of fairness. Although the Commission's hearing testimony indicates that many employers no longer use arrest information in their employment decisions, a great many still do.[37] The use of arrest information in making employment decisions is questionable for several reasons. An arrest record by itself indicates only that a law enforcement officer believed he had probable cause to arrest the individual for some offense; not that the person committed the offense. For instance, an individual may have been arrested for breaking and entering a building, while further investigation revealed that he had the owner's permission to be in the building. Constitutional standards specify that convictions, not arrests, establish guilt. Thus, denial of employment because

[37] Written statement of American Civil Liberties Union, Employment Records Hearings, December 9, 1976, p. 5; and testimony of Sorrell Wildhorn, Rand Corporation, Private Investigative Hearings, January 26, 1977, p. 237. See also the testimony of Charles S. Allen, Jr., President, Armored Car Division, Contract Carrier Conference, American Trucking Association, and Donald J. Jarvis, Vice President - Secretary and General Counsel, Burns International Security Service. *Criminal History Records*, Hearings before the Law Enforcement Assistance Administration, U.S. Department of Justice, December 11, 1975 (transcript on file at LEAA).

of an unproved charge, a charge that has been dismissed, or one for which there has been an adjudication of innocence, is fundamentally unfair.

There is a balance to be struck between society's presumption of innocence until proven guilty and its concern for security. When it has been forced to strike that balance in the past, laws have been enacted declaring that arrests for certain offenses *must* be considered in choosing among applicants for certain kinds of employment.[38] While such action is clearly the obverse of a ban on the use of arrest information in employment decision making, it can be treated as a limit on the collection and use of such information. Accordingly, the Commission recommends:

Recommendation (6):

That except as specifically required by Federal or State statute or regulation, or by municipal ordinance or regulation, an employer should not seek or use a record of arrest pertaining to an individual applicant or employee.

In addition, to give this recommendation force, the Commission further recommends:

Recommendation (7):

That existing Federal and State statutes and regulations, and municipal ordinances and regulations, which require an employer to seek or use an arrest record pertaining to an individual applicant or employee be amended so as *not* to require that an arrest record be sought or used if it is more than one year old and has not resulted in a disposition; and that all subsequently enacted statutes, regulations, and ordinances incorporate this same limitation.

Where an *indictment* is outstanding, *Recommendations (6)* and *(7)* would allow an employer to use it, even if a year had passed without disposition of the charge. Without the limitation *Recommendation (7)* would impose, however, the use of an arrest record is doubly unfair in that the information is untimely as well as incomplete. Because of rules requiring that cases be dropped if there is not a speedy trial and because the prosecution frequently drops cases where it does not have sufficient evidence to bring them to trial, the record of such cases may remain without disposition, and therefore be incomplete.

Occupational Licensing

Many jurisdictions have occupational licensing laws that require an

[38] See, for example, California Labor Code Sec. 432.7(e)(1) and (2).

applicant to be of good moral character, the definition of good moral character being left to administrative boards or the courts to determine.[39] Commonly, these bodies define an arrest record as pertinent to assessing moral character. The Commission obviously believes that an arrest record *per se* is an uncertain indicator of character; that if arrest records are to be sought, the language of the statute or regulation should specifically state both the type of occupation for which such information is necessary and the type of offense that is relevant to the required assessment of moral fitness. To do otherwise, in the Commission's view, is to invite unfair discrimination. Accordingly, the Commission recommends:

Recommendation (8):

That legislative bodies review their licensing requirements and amend any statutes, regulations, or ordinances to assure that unless arrest records for designated offenses are specifically required by statute, regulation, or ordinance, they will not be collected by administrative bodies which decide on an individual's qualifications for occupational licensing.

The Law Enforcement Assistance Administration Role

The Commission believes that it will be difficult to stop the inappropriate use of arrest information in employment decision making unless the dissemination of such information by law enforcement agencies and criminal justice information systems is restricted. Although no national policy or Federal legislation deals comprehensively with the collection, storage, and dissemination of criminal justice information by law enforcement authorities, some State laws do, and a start in the direction of formulating a national policy has been made. The Omnibus Crime Control and Safe Streets Act of 1968, as amended in 1973, contains some loose protections against unfair uses of records in State criminal justice information systems. It specifies that if arrest information is maintained, disposition information should also be maintained where feasible; that there should be reasonable procedures for assuring the accuracy of the information maintained and disseminated; that the subject of the information should be allowed to review it and challenge its accuracy; and that the information should only be used for lawful purposes. *[42 U.S.C. 3771(b)]* Even with this statute, however, and the Law Enforcement Assistance Administration regulations implementing it *[28 C.F.R. 20.21]*, criminal histories are still too readily available to employers. Criminal justice information systems at State and local levels frequently do not have the capacity to disseminate only conviction information or records of arrest for specific offenses. Few are able to update arrest and disposition information promptly. The systems as they have developed often are incapable of making fine-grained distinctions between an arrest with pending disposition and one which has been recently

[39] See, for example, *Purdon's Pennsylvania Statutes Annotated: Professions and Occupations, Title 63*, and Code of Laws of South Carolina 56-1305 ("Licensing of Pharmacists"), 1952.

dismissed. Thus, while it is feasible to correct information in a system after a year or so, the status of an arrest may be inaccurately recorded during the intervening period.

The Commission has not found a solution to this problem, but believes that the Law Enforcement Assistance Administration can and should do so. Accordingly, the Commission recommends:

Recommendation (9):

That the Law Enforcement Assistance Administration study or, by its grant or contract authority, designate others to study, alternative approaches to establishing within State and local criminal justice information systems the capacity to limit disclosures of arrest information to employers to that which they are lawfully required to obtain, and to improve the system's capacity to maintain accurate and timely information regarding the status of arrests and dispositions.

Retention of Arrest Information

Because of the stigma attached to having an arrest record, and because arrest information is primarily used in hiring, the Commission believes that no employer should keep an arrest record on an individual after he is hired, unless there is an outstanding indictment or conviction. Accordingly, the Commission recommends:

Recommendation (10):

That when an arrest record is lawfully sought or used by an employer to make a specific decision about an applicant or employee, the employer should not maintain the record for a period longer than specifically required by law, if any, or unless there is an outstanding indictment.

Conviction Records

The problems conviction records present in employment decision making are different from those presented by arrest information. A conviction is a societal judgment on the actions of an individual. Unlike arrest information, a conviction record is not incomplete.

Federal and State laws sometimes require employers to check the conviction records of applicants for jobs in particular industries. Banks, for example, are required by the Federal Deposit Insurance Corporation to have the FBI check every job applicant for conviction of crimes involving dishonesty or breach of trust. *[17 C.F.R. 240.17 f. -2]* Similarly, the Department of Transportation requires the trucking industry to find out whether a would-be driver has been convicted of reckless driving. *[49 C.F.R. 391.27]* The Bureau of Narcotics and Dangerous Drugs requires drug manufacturers to check the conviction records of all job applicants. *[21 C.F.R. 1301.90, 1301.93]*

Nevertheless, uneasiness among employers about the relevance of conviction records to employment decisions is growing. Some employers have stopped collecting them;[40] others have reworded their application forms to inquire only about convictions relevant to the position for which an individual is applying. For example, the J.C. Penney Company now asks an applicant to list only convictions for crimes involving a breach of trust.[41] Other employers specify felonies only or exclude traffic offenses, and some ask applicants to list only felonies committed during the past five years.[42]

Thus, to encourage employers to take steps voluntarily to protect individuals against unfair uses of conviction records in employment decision making, the Commission recommends:

Recommendation (11):

That unless otherwise required by law, an employer should seek or use a conviction record pertaining to an individual applicant or employee only when the record is directly relevant to a specific employment decision affecting the individual.

Retention of Conviction Records

Once conviction information has been collected and used in making a particular decision, retaining it raises still another fairness issue. The Commission has recommended that arrest-record information be destroyed after use, but the need for conviction information may recur, as when an employee is being considered for bonding or a position of trust. For the employer to have to seek the same information again and again would inconvenience both employee and employer.

Two witnesses before the Commission, IBM and General Electric, testified that they request conviction information on a perforated section of the application form. The personnel department tears off this segment and either seals it or maintains it separately from the individual's personnel file before circulating the form to potential supervisors.[43] Thus, conviction information is not available in making decisions except when it is specifically required. The Commission believes this practice is a sound one, and thus, recommends:

Recommendation (12):

That where conviction information is collected, it should be maintained separately from other individually identifiable employment

[40] Cummins Engine Company, interview with staff, November 4, 1976.

[41] Submission of J. C. Penney Company, "Application Form," Employment Records Hearings, December 10, 1976.

[42] See, for example, Submission of International Business Machines, "Application Form," Employment Records Hearings, December 10, 1976.

[43] See, for example, Submission of International Business Machines, "Application Form," Employment Records Hearings, December 10, 1976; and Submission of General Electric Company, "Application Form," Employment Records Hearings, December 9, 1976.

records so that it will not be available to persons who have no need for it.

Military-Record Information

SPN Codes. The use some employers make of military discharge records, and of the administrative codes found on the Department of Defense (DOD) form known as the "DD-214," raises still another set of fairness issues. Of particular concern is the use of the separation program number (SPN) codes that the DOD assigned to all dischargees beginning in 1953. These codes may indicate many things, including an individual's sexual proclivities, psychiatric disorders, discharge to accept public office, or status as sole surviving child. The DOD uses them in preparing administrative and statistical reports and in considering whether an individual should be permitted to re-enlist. The Veterans Administration uses them to determine eligibility for benefits. Employers, however, also use them, and in the employment context they can do a great deal of harm

SPN codes are frequently assigned on the basis of subjective judgments which are difficult for the dischargee to challenge. Until recently, the codes had different meanings in each branch of service, and they have been changed several times, leaving them prone to misinterpretation by employers not possessing the proper key. (Although employers are not supposed to know what the SPN codes mean, many have found out as a result of leaks from the agencies authorized to have them.)[44]

In 1974, the DOD tried to stop unfair use of SPN codes by leaving them off its forms and offering anyone discharged prior to 1974 an opportunity to get a new form DD-214 without a SPN code. This solution has several defects. For one thing, not all pre-1974 dischargees know of the reissuance program. For another, a pre-1974 DD-214 without a SPN code may raise a canny employer's suspicion that the applicant had the SPN code removed because he has something to hide.

Inasmuch as this problem still seems to be a significant one, the Commission believes that the DOD should reassess its SPN code policy. The Department might consider issuing new DD-214 forms to all dischargees whose forms presently include SPN codes. Although such a blanket reissuance could be costly, without it employers will continue to draw negative inferences from the fact that an individual has exercised his option to have the SPN code removed. In any case, SPN code keys should stay strictly within the DOD and the Veterans Administration.

Issuing new DD-214s and tightening code key disclosure practices, however, will not resolve the problem if employers can continue to require that dischargees applying for jobs authorize the release of the narrative descriptions in their DOD records. The most effective control over this information would be a flat prohibition on its disclosure to employers, even when the request is authorized by the applicant. This would have to be done

[44] *Need for and Uses of Data Recorded on DD Form 214 Report of Separation from Active Duty*, Report of the Subcommittee on Drug Abuse in Military Services of the Committee on Armed Services, U.S. Senate, January 23, 1975.

in such a way as not to preclude individuals from requesting narrative descriptions from the DOD for their own purposes, since they are entitled to do so under the Privacy Act.[45]

Military Discharge Records. The military discharge system, as it works today, still influences employment opportunities. There are five types of discharges: honorable, general, other than honorable, bad conduct, and dishonorable. General and other than honorable discharges are products of an administrative process which usually includes the right to a hearing before a board and a subsequent right of administrative appeal. Bad conduct and dishonorable discharges, on the other hand, are only given after a full court-martial.

In practice, it appears that employers tend to disregard the distinction between the administrative discharge and discharges resulting from courts-martial.[46] Thus, any discharge except an honorable one can be the ticket to a lifetime of rejected job applications. Nor is that accidental. The DOD has intentionally linked discharge status to future employment as an incentive to good behavior while in the service.[47]

It can be argued that military service is just another kind of employment, and that discharge information is no different from information about any other past employment which applicants routinely release to prospective employers. Military service and civilian employment are not, however, comparable, since few civilian jobs involve supervision of almost every aspect of an employee's life.

On March 28, 1977, the Secretary of Defense announced a program for reviewing Viet Nam era discharges. It applies to two categories of individuals: (1) former servicemen who were discharged during the period August 4, 1964 to March 28, 1973, and who, if enlisted, received an undesirable or general discharge, or if an officer received a general or other than honorable discharge; and (2) servicemen in administrative desertion status whose period of desertion commenced between August 4, 1964 and March 28, 1973, and who meet certain other criteria. The discharge review portion of this program gives eligible veterans six months to apply for possible upgrading if positive service or extenuating personal circumstances appear to warrant it. The program aims at adjusting inequities that occurred during a particularly troubled period in our nation's history. It does not, however, address all the problems mentioned above. It does not extend to veterans with honorable discharges that carry possibly stigmatizing SPN codes. Nor does it apply to anyone separated from service with a general or undesirable discharge after March 28, 1973, although the normal channels for administrative review of such discharges are open to such individuals.

[45] Letter from Walter W. Stender, Assistant Archivist for Federal Records Centers, General Services Administration National Archives and Records Service, to the Privacy Protection Study Commission, March 3, 1977; see also, General Services Administration "Release and Access Guide for Military and Personnel Records at the National Personnel Records Center," December 30, 1976.

[46] See, for example, Testimony of the Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 585.

[47] Letter from D. O. Cooke, Deputy Assistant Secretary of Defense, to the Privacy Protection Study Commission, January 18, 1977.

Thus, despite this welcome initiative, the Commission recommends:

Recommendation (13):

That Congress direct the Department of Defense to reassess the extent to which the current military discharge system and the administrative codes on military discharge records have needless discriminatory consequences for the individual in civilian employment and should, therefore, be modified. The reassessment should pay particular attention to the separation program number (SPN) codes administratively assigned to dischargees so as to determine how better to limit their use and dissemination, and should include a determination as to the feasibility of:

- **(a) issuing new DD-214 forms to all dischargees whose forms currently include SPN numbers;**
- **(b) restricting the use of SPN codes to the Department of Defense and the Veterans Administration, for designated purposes only; and**
- **(c) prohibiting the disclosure of codes and the narrative descriptions supporting them to an employer, even where such disclosure is authorized by the dischargee.**

Notice Regarding Collection From Third Parties

The background check is the most common means of verifying or supplementing information an employer collects directly from an applicant or employee. Some employers have their own background investigators,[48] but many hire an outside firm. The practices of private investigative firms are discussed in detail in Chapter 8. The discussion here focuses on the employer's responsibility when it conducts such an investigation itself, or hires a firm to do so in its behalf.

A background check may do no more than verify information provided by an applicant. It may, however, seek out additional information on previous employment, criminal history, life style, and personal reputation. The scope of such a background check depends on what the employer asks for, how much it is willing to pay, and the character of the firm hired to conduct the investigation. The Fair Credit Reporting Act (FCRA) protects the subject of certain types of pre-employment investigations by providing ways for him to keep track of what is going on and contribute to the investigative process. The Act's protections, however, do not extend to many applicants and employees, and the FCRA pre-notification requirement and the right of access the Act affords an individual to investigative reports are both too limited.

The FCRA requires that an individual be given prior notice of an employment investigation, but only if the investigation relates to a job for

[48] See, for example, Testimony of the Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 531; and Testimony of Rockwell International, Employment Records Hearings, December 17, 1976, pp. 953, 955, 957.

which he has formally applied and only if the employer retains outside help for the investigation. It does not require that an individual be told the name of the investigating firm, the types of information that will be gathered, the techniques and sources that will be used, or to whom information about him may be disclosed without his authorization. Furthermore, there is no requirement that the individual be notified if the information is or may be retained by the investigative agency and perhaps used by it in whole or in part during subsequent investigations it conducts for other employers or other users. Nor does the Act, as a practical matter, give an individual an opportunity to prevent the investigation, to suggest alternative sources, or to contradict the investigative agency's interpretation of what it discovers about him. The Act does require that an applicant be told when an adverse decision has been based on information in an investigative report and that he be given a chance to learn the nature and substance of the report, but these requirements only apply in situations where prior notice of the investigation is also required. *[15 U.S.C. 1681d, g]* That is, an individual need not be told anything if he has not applied for the job or promotion that has prompted the investigation, or if the investigation was conducted by the employer rather than by an outside firm. Thus, to strengthen the notice requirements of the FCRA as they protect individuals being investigated in connection with employment decisions, the Commission recommends:

Recommendation (14):

That the Federal Fair Credit Reporting Act be amended to provide that an employer, prior to collecting, or hiring others to collect, from sources outside of the employing organization the type of information generally collected in making a consumer report or consumer-investigative report (as defined by the Fair Credit Reporting Act) about an applicant, employee, or other individual in connection with an employment decision, notify the applicant, employee, or other individual as to:

(a) the types of information expected to be collected about him from third parties that are not collected on an application, and, as to information regarding character, general reputation, and mode of living, each area of inquiry;
(b) the techniques that may be used to collect such types of information;
(c) the types of sources that are expected to be asked to provide each type of information;
(d) the types of parties to whom and circumstances under which information about the individual may be disclosed without his authorization, and the types of information that may be disclosed;
(e) the procedures established by statute by which the individual may gain access to any resulting record about himself;
(f) the procedures whereby the individual may correct, amend, or dispute any resulting record about himself; and

(g) the fact that information in any report prepared by a consumer-reporting agency (as defined by the Fair Credit Reporting Act) may be retained by that organization and subsequently disclosed by it to others.

If *Recommendation (14)* were adopted, the current FCRA enforcement mechanisms would apply to employers who do their own investigations, as well as to investigative agencies. Employers argue that not letting a candidate for a job or promotion know he is being investigated protects him from disappointment. In the Commission's view, that argument is overridden by considerations of fairness to the individual. The purpose of requiring a notice of investigation is to alert an individual before information about him is collected. The purpose of requiring specific items in the notice is to apprise the individual of the extent of the intrusion. The purpose of the notice regarding access, correction, and amendment procedures is to assure that applicants and employees know that these rights exist and how to exercise them.

Notice As Collection Limitation

The anticipated benefits of *Recommendation (14)* for the individual would be negated if an employer deviated from its notification. Moreover, many employers depend on investigative-reporting agencies whose collection practices could go considerably beyond what is stated in such a notice. Thus, to guard against these possibilities, the Commission recommends:

Recommendation (15):

That the Fair Credit Reporting Act be amended to provide that an employer limit:

(a) its own information collection and disclosure practices to those specified in the notice called for in *Recommendation (14)*; and

(b) its request to any organization it asks to collect information on its behalf to information, techniques, and sources specified in the notice called for in *Recommendation (14)*.

Like the notice recommendation itself, the existing Fair Credit Reporting Act enforcement mechanisms would be available to individuals when the limitations on notice have been exceeded either by employers or investigative firms. Consequently, an applicant or employee would be able to pursue Fair Credit Reporting Act remedies when an employer or investigative firm collected information from third parties or used techniques of collection other than as stated in the notice. Also, if an individual finds that the consumer investigative report has information beyond that specified in the notice, he should be able to have it deleted from his record.

Authorization Statements

In many instances an employer must have an applicant or employee's

permission before it can get personal information about him from other persons or institutions. In general, physicians and hospitals do not disclose individually identifiable information about a patient without the patient's specific written authorization. As a consequence of the Family Educational Rights and Privacy Act of 1974 (see Chapter 10), educational institutions no longer respond to an employer's inquiries about a current or former student without the individual's consent. Testimony before the Commission indicates that employers themselves are becoming reluctant to disclose information about their former employees to other employers.[49]

Nonetheless, many employers' job application forms still include a release which the applicant must sign, authorizing the employer to acquire information from organizations or individuals that have a confidential relationship with the applicant.[50] Or, as noted in Chapter 8, an investigative firm may require that the employer get releases from employees to facilitate its inquiries on the employer's behalf. As in the insurance area, these authorizations are usually broad; and few warn that the information collected could be retained and reported to subsequent clients of the investigative firm.

When any authorization or waiver of confidentiality is sought from an applicant or employee, fairness demands that it be limited both in scope and period of validity. It should bear the date of signature and expire no more than one year from that date. It should be worded so that the individual who is asked to sign it can understand it, and should specify the persons and institutions to whom it will be presented and the information that each will be asked for, together with the reasons for seeking the information.

Requiring this degree of specificity in authorizations should not unduly hamper legitimate investigations and will go far to improve the quality of the personal information held not only by investigative firms and employers, but by other keepers of individually identifiable information as well. Accordingly, the Commission recommends:

Recommendation (16):

That no employer or consumer-reporting agency (as defined by the Fair Credit Reporting Act) acting on behalf of an employer ask, require, or otherwise induce an applicant or employee to sign any statement authorizing any individual or institution to disclose information about him, or about any other individual, unless the statement is:

(a) in plain language;

[49] See, for example, Testimony of International Business Machines, Employment Records Hearings, December 10, 1976, p. 315; Testimony of Manufacturers Hanover Trust Company, Employment Records Hearings, December 16, 1976, pp. 678-679; and Testimony of Civil Service Commission, Employment Records Hearings, December 10, 1976, p. 414. Exception to this general practice may occur when an employee is terminated for cause, in which case this fact may be released. Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, pp. 517-518, 599.

[50] See, for example, Testimony of General Electric Company, Employment Records Hearings, December 9, 1976, p. 252.

(b) dated;
(c) specific as to the individuals and institutions he is authorizing to disclose information about him who are known at the time the authorization is signed, and general as to others whose specific identity is not known at the time the authorization is signed;
(d) specific as to the nature of the information he is authorizing to be disclosed;
(e) specific as to the individuals or institutions to whom he is authorizing information to be disclosed;
(f) specific as to the purpose(s) for which the information may be used by any of the parties named in (e) at the time of the disclosure; and
(g) specific as to its expiration date which should be for a reasonable period of time not to exceed one year.

It should be noted that the necessary generality permitted by parts of *Recommendation (16)* need not apply to an employer that obtains an authorization from an applicant, employee, or former employee permitting it to release confidential information to others. In that case, the authorization form can and should be specific as to what information may be disclosed, to whom, and for what purpose.

Fairness in Use

Access to Records

Fairness demands that an applicant or employee be permitted to see and copy records an employer maintains about him. Allowing an employee to see and copy his records can be as advantageous to the employer as to the employee. As discussed earlier, employment records in the private sector are generally regarded as the property of management.[51] Except where limited by State statute, as in Maine[52] and California,[53] or where controlled by collective-bargaining agreements, all the rights of ownership in employment records vest in the employer. Although many firms permit, and some even encourage, employees to review at least some of the records kept about them, there is no generally accepted rule.[54] Where records are factual, e.g., benefit and payroll records, or where they are the sole basis for making a decision about an individual, such as in a seniority system, the advantages of employee access to assure accuracy are rarely disputed. However, many employers do not give their employees access to promotion tables, salary schedules, and test scores. Some employers believe that employee access to

[51] Letter from the Association of Washington Business to the Privacy Protection Study Commission, November 22, 1976; and Letter from The Standard Oil Company to the Privacy Protection Study Commission, October 18, 1976.

[52] Maine Rev. Stat. Ann. Tit. 5, Sec 638; Tit. 30, Sec. 64 and 2257.

[53] California Labor Code, Sec. 1198.5.

[54] See, for example, Testimony of General Electric Company, Employment Records Hearings, December 9, 1976, p. 235; Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, pp. 58-59; and Testimony of Inland Steel Company, Employment Records Hearings, December 10, 1976, pp. 370-373.

information may weaken their position when they are potentially in an adversary relationship with an employee, e.g., in a dispute regarding a claim for benefits. Most employers do not want employees to have access to information they believe requires professional interpretation, such as medical records and psychological tests. In addition, employers are reluctant to give employees access to information supplied by sources requesting an assurance of confidentiality. While testimony before the Commission suggests that this last problem is diminishing as reliance on references diminishes,[55] in the academic community, where candidates for tenure are traditionally evaluated by unidentified peers, concern about access to letters of references is great.[56]

Although union contracts rarely address the access issue, where formal grievances are filed, the records supporting management's decisions must, by law, be shared with the union and with the grievant. Also, certain information, such as seniority, salary, and leave, must be posted.[57] Unions have won access to particular records in specific circumstances by arbitration, and even where there is no union some employers have grievance and arbitration procedures. Without a union, however, employees who complain of violations of an internal policy on employee access to records have little protection from reprisals and no right of appeal if their complaints are ignored.

Furthermore, a right to see, copy, and request correction or amendment of an employment record is of little value, so long as an employer is free to designate which records will be accessible and to determine the merits of any dispute over accessibility or record content. Nonetheless, a well-considered access policy, consistently carried out, is strong evidence of an employer's commitment to fair practice protections for personal privacy. Such a policy gives an employee a way to know what is in records kept about him, to assure that they are factually accurate, and to make reasoned decisions about authorizing their disclosure outside the employing organization.

While recognizing that periodic evaluations of employee performance contain subjective information developed by the employer for its own use, the Commission believes that employees should have a right of access to those records also. Many employers do, in fact, share performance evaluations with their employees, as guidance on how to improve perfor-

[55] See, for example, Testimony of General Electric Company, Employment Records Hearings, December 9, 1976, pp. 279-280; and Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 68.

[56] See, for example, Testimony of Harvard University, Employment Records Hearings, December 17, 1976, pp. 864-902; Letter from Jean Mayer, President, Tufts University, to Roger W. Heyns, President, American Council on Education, August 9, 1976; and Sheldon Elliot Steinbach, "Employee Privacy, 1975: Concerns of College and University Administrators," *Educational Record*, Vol. 57, No. 1, 1976.

[57] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. 141 *et seq.* (1947). For case citations, see Clyde W. Summers, *op. cit.*

mance is generally regarded as one of the more important functions of these evaluations.[58] The employee's interest in these records is obvious, since negative evaluations can deny an employee opportunities for promotion or placement. They may also disqualify him from entering the pool of employees from which such selections are made. Furthermore, records pertaining to employee performance are usually maintained in individually identifiable form and could be disclosed in that form to outside requestors.

When it comes to evaluations of an employee's *potential*, however, the testimony suggests that the resulting records frequently are not shared with employees.[59] The Commission finds it difficult to justify the difference in treatment. Performance evaluations and evaluations of potential are intimately related. Moreover, where an employee does not have access to both, supervisors can evaluate an employee one way to his face and another way behind his back, so to speak, making it impossible for him to assess his standing.

The Commission recognizes a valid difference between performance and potential evaluations when a separate set of records pertains to employees thought to have a *high potential* for advancement. Since such records are mainly a long-range planning tool of management, employees should not necessarily have a right to see and copy them, whether or not they are maintained in individually identifiable form. The mere existence of such records, however, should not be kept secret from employees.

Another type of evaluation record an employer might justifiably withhold from an employee is the security record concerning an ongoing or concluded investigation into suspected employee misconduct. Although employees have a right to know that their employer maintains security records, a general right to see, copy, and request correction of such records would seriously handicap security investigations. Nonetheless, as the Commission contends later in this chapter, access should be allowed to any information from a security record that is transferred to an individual's personnel file.

The Commission strongly believes that employees should be able to see and copy most employment records. If an individual cannot conveniently do this in person, he should be able to arrange to do so by mail or telephone, provided the employer takes reasonable care to assure itself of the identity of the requestor. Nonetheless, as the Commission has already emphasized, to legislate a right of access to records without a more general scheme of rights to protect the employee who exercises it could be futile. When the employee-employer relationship is defined by collective bargaining, access to records is an obvious topic for contract negotiation and the resulting provisions would then be binding on the parties. When, however, employee access rights are not defined by contract, or enforceable by a

[58] See, for example, Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, pp. 46-47; Testimony of Equitable Life Assurance Society of the U.S., Employment Records Hearings, December 9, 1976, pp. 131-132; and Testimony of J. C. Penney Company, Employment Records Hearings, December 10, 1976, p. 464-465.

[59] Testimony of Manufacturers Hanover Trust Company, Employment Records Hearings, December 16, 1976, p. 653.

government agency with rule-making powers, individual employees are in a poor position to resist their employer's refusal to honor their access and correction rights. As indicated earlier, there were differences within the Commission as to whether such a right need be a right without a remedy, and thus a right that should not be legislated. Recognizing that employers have discretion to determine which records they will make available to their employees, the Commission believes that employers should develop and promulgate access and correction policies voluntarily. Accordingly, the Commission recommends:

Recommendation (17):

That as a matter of policy an employer should

(a) designate clearly:
- **(i) those records about an employee, former employee, or applicant for employment (including any individual who is being considered for employment but who has not formally applied) which the employer will allow such employee, former employee, or applicant to see and copy on request; and**
- **(ii) those records about an employee, former employee, or applicant which the employer will not make available to the employee, former employee, or applicant,**

except that an employer should not designate as an unavailable record any recorded evaluation it makes of an individual's employment performance, any medical record or insurance record it keeps about an individual, or any record about an individual that it obtains from a consumer-reporting agency (as defined by the Fair Credit Reporting Act), or otherwise creates about an individual in the course of an investigation related to an employment decision not involving suspicion of wrongdoing;

(b) assure that its employees are informed as to which records are included in categories (a)(i) and (ii) above; and

(c) upon request by an individual applicant, employee, or former employee:
- **(i) inform the individual, after verifying his identity, whether it has any recorded information pertaining to him that is designated as records he may see and copy; and**
- **(ii) permit the individual to see and copy any such record(s), either in person or by mail; or**
- **(iii) apprise the individual of the nature and substance of any such record(s) by telephone; and**
- **(iv) permit the individual to use one or the other of the methods of access provided in (c)(ii) and (iii), or both if he prefers,**

except that the employer could refuse to permit the individual to see

and copy any record it has designated as an unavailable record pursuant to (a)(ii), above.

Access to Investigative Reports

The Fair Credit Reporting Act requirement that an employer notify an individual when information in an investigative report was the basis for an adverse employment decision about him is inadequate. That an individual, so notified, can go to the investigative-reporting agency that made the report and demand to know what information is in it gives him some protection. *[15 U.S.C. 1681h]* The Commission believes, however, that in employment, as in insurance, the subject of an investigative report should have an affirmative right to see and copy it, and to correct, amend, or dispute its contents. When corrections, amendments, or dispute statements are entered into a report by an employer, it should so inform the investigative-reporting agency so that its records may also be altered. Finally, it is important for an individual to be notified in advance of his right to see, copy, correct, amend, or dispute a proposed report, and of the procedures for so doing.

The Commission's recommendations in Chapter 5 on the insurance relationship specify that the subject of an investigation has a right to see and copy, in two places, the report prepared by a support organization in connection with an underwriting investigation: at the office of the insurer that ordered it, and at the office of the firm that prepared it. Hence, the Commission does not recommend that the insurer or investigative agency routinely provide the individual with a copy of the report, either before or after using it to make a decision about him. To do so would be costly because of the volume of reports insurers order, many of which do not result in adverse decisions, and because *Insurance Recommendation (13)* on adverse underwriting decisions, would immediately expose a report that did result in such a decision.

In the employment context, however, several considerations urge a different approach. First, all the evidence available to the Commission indicates that there are far fewer investigative reports prepared on job applicants and employees than on insurance applicants.[60] Second, the Commission's recommendations on employment records provide no guarantee that an employee will be able to see and copy an investigative report on himself that remains in an employer's files after he is hired, even though the report could become the basis for an adverse action in the future. Third, while the Commission considered tying a see-and-copy right to the making of an adverse employment decision, it rejected the proposal because the relationship between items of information and employment decisions is not always clear enough to make such a right meaningful. Fourth, it seemed to

[60] See Chapter 8 of this report; See also, for example, Testimony of Equifax Services, Inc., *Credit Reporting and Payment Authorization Services*, Hearings before the Privacy Protection Study Commission, August 3, 1976, pp. 162-163; Testimony of Wackenhut Corporation, Private Investigative Hearings, January 26, 1977, p. 29; and Testimony of Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 349.

the Commission that for a rejected applicant to exercise a see-and-copy right would be awkward at best.

Hence, to balance an employer's legitimate need to collect information on applicants and employees through background checks against the procedural protections needed to insure fairness to the individual in making such investigations and using the information so acquired, the Commission recommends:

Recommendation (18):

That the Fair Credit Reporting Act be amended to provide:

(a) that an applicant or employee shall have a right to:
- **(i) see and copy information in an investigative report maintained either by a consumer-reporting agency (as defined by the Fair Credit Reporting Act) or by the employer that requested it; and**
- **(ii) correct, amend (including supplement), or dispute in writing, any information in an investigative report maintained either by a consumer-reporting agency (as defined by the Fair Credit Reporting Act) or by the employer that requested it;**

(b) that an employer must automatically inform a consumer-reporting agency (as defined by the Fair Credit Reporting Act) of any correction or amendment of information made in an investigative report at the request of the individual, or any other dispute statement made in writing by the individual; and

(c) that an employer must provide an applicant or employee on whom an investigative report is made with a copy of that report at the time it is made by or given to the employer.

Access to Medical Records

The medical records an employer maintains differ significantly in character and use from the other records created in the employee-employer relationship. Responsibility for giving physical examinations to determine possible work restrictions and for serving as primary medical-care providers is falling ever more heavily on employers, giving them increasingly extensive medical files on their employees. These records, and opinions based on them, may enter into employment decisions, as well as into other types of non-medical decisions about applicants and employees. Hence, the Commission believes that access to them should be provided in accordance with the Commission's recommendations on medical records and medical-record information in Chapter 7. That is, *when an employer's relationship to an applicant, employee, or former employee is that of a medical-care provider*,[61] the Commission recommends:

[61] The term "medical-care provider" includes both "medical-care professionals" and "medical-care institutions." A "medical-care professional" is defined as "any person licensed or

Recommendation (19):

That, upon request, an individual who is the subject of a medical record maintained by an employer, or another responsible person designated by the individual, be allowed to have access to that medical record, including an opportunity to see and copy it. The employer should be able to charge a reasonable fee (not to exceed the amount charged to third parties) for preparing and copying the record.

However, when the employer's relationship to an applicant, employee, or former employee is *not that of a medical-care provider*, the Commission recommends:

Recommendation (20):

That, upon request, an individual who is the subject of medical-record information maintained by an employer be allowed to have access to that information either directly or through a licensed medical professional designated by the individual.

In Chapter 7, where the rationale for these recommendations is presented in detail, "medical-record information" is defined as:

> Information relating to an individual's medical history, diagnosis, condition, treatment, or evaluation obtained from a medical-care provider or from the individual himself or from his spouse, parent, or guardian, for the purpose of making a non-medical decision about the individual.

As to *Recommendation (19)*, the Commission would urge that if a State enacts a statute creating individual rights of access to medical records pursuant to *Recommendation (2)* in Chapter 7, it encompass within the statute medical records maintained by an employer whose relationship to applicants, employees, or former employees is that of a medical-care provider.

Access to Insurance Records

In their role as providers or administrators of insurance plans, employers maintain insurance records on employees and former employees and their dependents. Since the considerations governing access to these records are largely the same as when the records are maintained by an insurance company, the Commission believes that employer policy on access to them by the individuals to whom they pertain should be consistent

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certified to provide medical services to individuals, including, but not limited to, a physician, dentist, nurse, optometrist, physical or occupational therapist, psychiatric social worker, clinical dietitian or clinical psychologist." A "medical-care institution" is defined as "any facility or institution that is licensed to provide medical-care services to individuals, including, but not limited to, hospitals, skilled nursing facilities, home-health agencies, clinics, rehabilitation agencies, and public-health agencies or health-maintenance organizations (HMOs)."

with the recommendation on access in Chapter 5. Accordingly, the Commission recommends:

Recommendation (21):

That an employer that acts as a provider or administrator of an insurance plan, upon request by an applicant, employee, or former employee should:

(a) inform the individual, after verifying his identity, whether it has any recorded information about him that pertains to the employee's insurance relationship with him;
(b) permit the individual to see and copy any such recorded information, either in person or by mail; or
(c) apprise the individual of the nature and substance of any such recorded information by telephone; and
(d) permit the individual to use whichever of the methods of access provided in (b) and (c) he prefers.

The employer should be able to charge a reasonable copying fee for any copies provided to the individual. Any such recorded information should be made available to the individual, but need not contain the name or other identifying particulars of any source (other than an institutional source) of information in the record who has provided such information on the condition that his or her identity not be revealed, and need not reveal a confidential numerical code.

It should be noted that this recommendation as it would apply to insurance institutions (see Chapter 5) would not apply to any record about an individual compiled in reasonable anticipation of a civil or criminal action, or for use in settling a claim while the claim remains unsettled. After the claim is settled, the recommendation would not apply to any record compiled in relation to a a third-party claimant (i.e., a claimant who is not an insured, policy owner, or principal insured), except as to any portion of such a record which is disseminated or used for a purpose unrelated to processing the claim.

Inasmuch as this recommendation and *Recommendation (25)*below, are proposed for voluntary adoption by employers, it should be noted that there is a gap in the Commission's recommendations regarding records generated in the insurance relationship (Chapter 5) and that it may affect a substantial number of individuals, given the proportion of the workforce currently insured under employer-provided or employer-administered group plans. Thus, while the Commission hopes that employers will voluntarily adopt *Recommendation (21)* and *(25)*, it also hopes that because their adoption must be voluntary, employers will not seize on self-administered insurance plans as a way of avoiding the statutory access and correction requirements recommended for insurance records in Chapter 5.

As to medical-record information maintained by an employer as a consequence of its insurance relationship with an individual employee or

former employee, the Commission's intention is that *Recommendation (20)* apply.

Correction of Records

Any employee who has reason to question the accuracy, timeliness, or completeness of records his employer keeps about him should be able to correct or amend those records. Furthermore, the procedures for correcting or amending employment records should conform to those recommended in other chapters of this report. For example, when an individual requests correction or amendment of a record, the employer should notify persons or organizations to whom the erroneous, obsolete, or incomplete information has been disclosed within the previous two years, if the individual so requests. When the information came from a consumer-reporting agency (as defined by the Fair Credit Reporting Act), any corrections should routinely be passed on to that agency so that its records on an applicant or employee will also be accurate. When the employer rejects the requested correction or amendment, fairness demands that the employer incorporate the employee's statement of dispute into the record and pass it along to those to whom the employer subsequently discloses the disputed information, as well as to those who need to know the information is disputed in order to protect the individual from unfair decisions being made on the basis of it. Moreover, if an employer attempts to verify allegedly erroneous, obsolete, or incomplete information in a record, it should limit its investigation to the particular items in dispute.

The Commission does not intend that the correction or amendment procedures alter any existing retention periods for records or require employers to keep an accounting of every disclosure made to a third party. However, when an employer does keep an accounting of disclosures to third parties, for whatever purpose, it should let an employee use it in deciding to whom corrections, amendments, or dispute statements should be forwarded. Accordingly, the Commission recommends:

Recommendation (22):

That, except for a medical record or an insurance record, or any record designated by an employer as an unavailable record, an employer should voluntarily permit an individual employee, former employee, or applicant to request correction or amendment of a record pertaining to him; and

- **(a) within a reasonable period of time correct or amend (including supplement) any portion thereof which the individual reasonably believes is not accurate, timely, or complete; and**
- **(b) furnish the correction or amendment to any person or organization specifically designated by the individual who may have, within two years prior thereto, received any such information; and, automatically to any consumer-reporting agency (as**

defined by the Fair Credit Reporting Act) that furnished the information corrected or amended; *or*

(c) inform the individual of its refusal to correct or amend the record in accordance with his request and of the reason(s) for the refusal; and

(i) permit an individual who disagrees with the refusal to correct or amend the record to have placed on or with the record a concise statement setting forth the reasons for his disagreement;

(ii) in any subsequent disclosure outside the employing organization containing information about which the individual has filed a statement of dispute, clearly note any portion of the record which is disputed, and provide a copy of the statement along with the information being disclosed; and

(iii) furnish the statement to any person or organization specifically designated by the individual who may have, within two years prior thereto, received any such information; and, automatically, to any consumer-reporting agency (as defined by the Fair Credit Reporting Act) that furnished the disputed information; and

(d) limit its reinvestigation of disputed information to those record items in dispute.

The procedures for correcting and amending insurance and medical records which the Commission recommends in Chapters 5 and 7 should be voluntarily adopted by employers who maintain such records. Thus, with respect to a medical record maintained by an employer whose relationship to an employee is that of a medical-care provider, the Commission recommends:

Recommendation (23):

That an employer establish a procedure whereby an individual who is the subject of a medical record maintained by the employer can request correction or amendment of the record. When the individual requests correction or amendment, the employer should, within a reasonable period of time, either:

(a) make the correction or amendment requested, or

(b) inform the individual of its refusal to do so, the reason for the refusal, and of the procedure, if any, for further review of the refusal.

In addition, if the employer decides that it will not correct or amend a record in accordance with the individual's request, the employer should permit the individual to file a concise statement of the reasons for the disagreement, and in any subsequent disclosure of the disputed information include a notation that the information is disputed and the statement of disagreement. In any such disclosure, the employer

may also include a statement of the reasons for not making the requested correction or amendment.

Finally, when an employer corrects or amends a record pursuant to an individual's request, or accepts a notation of dispute and statement of disagreement, it should furnish the correction, amendment, or statement of disagreement to any person specifically designated by the individual to whom the employer has previously disclosed the inaccurate, incomplete, or disputed information.

As with *Recommendation (19)*, the Commission would urge that if a State enacts a statute creating individual rights regarding the correction of medical records pursuant to *Recommendation (2)* in Chapter 7, it encompass within the statute medical records maintained by an employer whose relationship to applicants, employees, or former employees is that of a medical-care provider.

In addition, when an employer maintains medical-record information about an individual applicant, employee, or former employee, the Commission recommends:

Recommendation (24):

That notwithstanding *Recommendation (22)*, when an individual who is the subject of medical-record information maintained by an employer requests correction or amendment of such information, the employer should:

(a) disclose to the individual, or to a medical professional designated by him, the identity of the medical-care provider who was the source of the medical-record information;
(b) make the correction or amendment requested within a reasonable period of time, if the medical-care provider who was the source of the information agrees that it is inaccurate or incomplete; and
(c) establish a procedure whereby an individual who is the subject of medical-record information maintained by an employer, and who believes that the information is incorrect or incomplete, would be provided an opportunity to present supplemental information of a limited nature for inclusion in the medical-record information maintained by the employer, provided that the source of the supplemental information is also included.

Although *Recommendations (22), (23)* and *(24)* appear complex, they contain only two key requirements:

- that an individual have a way of correcting, amending, or disputing information in a record about himself; and
- that the employer to whom the request for correction or amendment is made shall have an obligation to propagate the resulting correction, amendment, or statement of dispute in

any subsequent disclosure it makes of the information to certain prior or subsequent recipients.

Finally, with respect to the correction or amendment of insurance records maintained by an employer, the Commission recommends:

Recommendation (25):

That when an employer acts as a provider or administrator of an insurance plan, the employer should:

(a) permit an individual to request correction or amendment of a record pertaining to him;

(b) within a reasonable period of time, correct or amend (including supplement) any portion thereof which the individual reasonably believes is not accurate, timely, or complete;

(c) furnish the correction or amendment to any person or organization specifically designated by the individual who may have, within two years prior thereto, received any such information; and, automatically, to any insurance-support organization whose primary source of information on individuals is insurance institutions when the support organization has systematically received any such information from the employer within the preceding seven years, unless the support organization no longer maintains the information, in which case, furnishing the correction or amendment would not be necessary; and, automatically, to any insurance-support organization that furnished the information corrected or amended; *or*

(d) inform the individual of its refusal to correct or amend the record in accordance with his request and of the reason(s) for the refusal; and

(i) permit an individual who disagrees with the refusal to correct or amend the record to have placed on or with the record a concise statement setting forth the reasons for his disagreement;

(ii) in any subsequent disclosure outside the employing organization containing information about which the individual has filed a statement of dispute, clearly note any portion of the record which is disputed and provide a copy of the statement along with the information being disclosed; and

(iii) furnish the statement to any person or organization specifically designated by the individual who may have, within two years prior thereto, received any such information; and, automatically to an insurance-support organization whose primary source of information on individuals is insurance institutions when the support organization has received any such information from the employer within the preceding seven years, unless the support organization

no longer maintains the information, in which case, furnishing the statement would not be necessary; and, automatically, to any insurance-support organization that furnished the disputed information; and

(e) limit its reinvestigation of disputed information to those record items in dispute.

Fairness in Internal Disclosures Across Relationships

Just as fairness must be a concern of employers when gathering information from external sources, they have a duty to see that information generated within the several discrete relationships subsumed under the broad employee-employer relationship is not shared within the employing organization in ways that are unfair to the individual employee.

As a rule, employers large enough to have separate functional units for personnel, security, insurance, and medical-care operations have voluntarily taken steps to assure that the records each of these units generates are maintained separately and not used improperly. The biggest problems are in small organizations that cannot realistically segregate record-keeping functions. Another potential problem is the impact of technology which could make retrieval of information stored in a common data base by unauthorized persons easier than is currently the case.

Personnel and Payroll Records

As personnel planning and management systems have become more elaborate, so have the personnel files and payroll records an employer keeps on its employees. This is not to say that all employees expect personnel and payroll records to be held in confidence within the employing organization. Some may not; but out of consideration for those who do, the Commission believes that an employer should limit the use of personnel and payroll record information to whatever is necessary to fulfill particular functions. Therefore, the Commission recommends:

Recommendation (26):

That an employer assure that the personnel and payroll records it maintains are available internally only to authorized users and on a need-to-know basis.

Security Records

Security records differ from personnel records in that they frequently must be created without the employee's knowledge. Sometimes the information in them is inconclusive; sometimes the problem that precipitated the security record is not quickly resolved. Nonetheless, an employer may have to keep security records in order to safeguard the workplace or corporate assets. As a rule, employers document any action resulting from

security investigations in the individual's personnel file, but do not include the details leading up to the action.[62]

Security departments usually work with personnel departments in the course of investigating incidents involving employees.[63] When the security function is separate from the personnel department, however, security records are generally not available to management and are frequently, though not always, filed by incident rather than by name, at least until the case is resolved.[64] Since security records maintained apart from personnel records can have little impact on personnel decisions about an employee, and since employee access to security records could substantially hamper legitimate security investigations, allowing the employee to see and copy them while they are being maintained as security records seems hard to justify. If, however, information in the security record of an employee is to be used for other purposes, such as discipline, termination, promotion, or evaluation, fairness demands that the employee have direct access to it. Thus, the Commission, again taking the voluntary approach, recommends:

Recommendation (27):

That an employer:

(a) maintain security records apart from other records; and
(b) inform an employee whenever information from a security record is transferred to his personnel record.

Medical Records and Medical-Record Information

As indicated earlier, an employer may maintain both medical-record information and medical records: the former as a consequence of requiring it as a condition of employment, placement, or certification to return to work; the latter as a consequence of providing various forms of medical care, including routine physicals. However collected, there is a case for requiring employers to restrict the circulation of medical records and medical-record information outside the medical department. Corporate physicians are sincerely concerned about possible misuses of the records they maintain. No matter how hard they may strive to be independent of the employing organization their allegiance is ultimately to the employer.

Many large employers have procedures that guarantee the confidentiality of medical-record information in all but the most extreme circumstances; and many corporate medical departments only make recommenda-

[62] See, for example, Testimony of Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 388; Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 576; and Testimony of International Business Machines, Employment Records Hearings, December 10, 1976, p. 309.

[63] See, for example, Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 19; and Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 556.

[64] See, for example, Testimony of Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 388; and Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 576.

tions for work restrictions, carefully refraining from passing on any diagnosis or treatment details in all but the most extreme circumstances.[65] Nevertheless, it is the duty of the corporate physician to tell his employer when he finds in an individual a condition that could negatively affect the interests of the employer or other employees.[66] Furthermore, employers rely on corporate physicians for evaluation of an applicant or employee's health in making hiring and placement decisions. A further complication arises if, as often happens, the corporate physician also provides regular medical care for employees outside of the employment context, perhaps functioning as the family doctor.

An employee availing himself of medical services offered by his employer does so at some risk to the traditional confidential relationship between physician and patient, unless great care is taken to insulate that relationship from the usual work-related responsibilities of the medical department. Thus, when a medical department provides voluntary physicals or routine medical care for employees, the resulting records should be maintained separately from the records generated by work-related contacts and should never be used to make work-related decisions. This is a difficult policy to enforce and can work only where management understands and respects the need to separate the compulsory and voluntary functions of the medical department. Thus, the Commission recommends:

Recommendation (28):

That an employer that maintains an employment-related medical record about an individual assure that no diagnostic or treatment information in any such record is made available for use in any employment decision; and

Recommendation (29):

That an employer that provides a voluntary health-care program for its employees assure that any medical record generated by the program is maintained apart from any employment-related medical record and not used by any physician in advising on any employment-related decision or in making any employment-related decision without the express authorization of the individual to whom the record pertains.

[65] See, for example, Testimony of Dr. Bruce Karrh, Assistant Medical Director, du Pont de Nemours and Company, Employment Records Hearings, December 17, 1976, pp. 782-783; and Testimony of Dr. Norbert Roberts, Medical Director, Exxon Corporation, Employment Records Hearings, December 17, 1976, p. 785. This is also the policy of the Ford Motor Company and the Atlantic Richfield Company. See "Employee Records & Personal Privacy: Corporate Policies & Procedures," McCaffery, Seligman & von Simpson, Inc., November, 1976, pp. 105, 139.

[66] See, for example, Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 587; and Testimony of Dr. Bruce Karrh, Assistant Medical Director, du Pont de Nemours and Company, Employment Records Hearings, December 17, 1976, pp. 781-783.

Insurance Records

Insurance claims records often contain information about medical diagnosis and treatment. This information is given to the employer to meet a need of the employee; that is, to protect the employee against loss of pay due to illness or to arrange for medical bills to be paid. Where an employer either self-insures or self-administers a health-insurance plan, it necessarily maintains a significant amount of information about employees and their families. Some of this information can be useful in making personnel decisions, especially if it gives details of the diagnosis or treatment of a mental condition, a terminal illness, or an illness which drains the emotions of an employee. Testimony before the Commission indicates that many employers guard claims information carefully, apparently understanding how unfair it is to make an employee choose between filing a legitimate insurance claim and jeopardizing future employment.[67] Some physicians say, however, that this kind of information is available for use in personnel decision making,[68] and there is evidence of its unauthorized use in making decisions unrelated to claims payment.[69]

In its consideration of insurance institutions and the records they maintain, the Commission saw how important a confidentiality policy is to insureds. It believes that such a policy is no less important when the insurance plan is administered by an employer. Although it may be difficult to segregate insurance claims records completely, fairness demands that the claims process be walled off from other internal functions of the employing organization.

Employment-related insurance, such as disability or sick pay, usually involves the corporate physician in claims processing, as it is his function to evaluate the medical evidence on which the claim is based. Thus, corporate physicians must have access to information about these claims. They do not, however, have to use information thus obtained in making decisions that are unrelated to the claim. If asked for an opinion of a candidate for transfer to a job at a new location, for example, the physician can determine a person's physical capacity by examination without delving into claims records for clues to potential medical problems. Nor should these records influence other employment decisions, such as determinations of tenure, promotion, or termination. Accordingly, the Commission recommends:

Recommendation (30):

That an employer that provides life or health insurance as a service to its employees assure that individually identifiable insurance records are maintained separately from other records and not available for use in making employment decisions; and further

[67] See, for example, Testimony of Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 334; and Testimony of General Electric Company, Employment Records Hearings, December 9, 1976, pp. 248-250.

[68] "Confidentiality and Third Parties," The American Psychiatric Association Task Force of June 1975, Appendix Vol. H, p. 53.

[69] *Ibid.*, p. 55.

Recommendation (31):

That an employer that provides work-related insurance for employees, such as worker's compensation, voluntary sick pay, or short- or long-term disability insurance, assure that individually identifiable records pertaining to such insurance are available internally only to authorized recipients and on a need-to-know basis.

Expectation of Confidentiality

Employers have regular access to more information about employees than do credit, depository, or insurance institutions; yet there are no legal controls on the disclosure of employment information. The confidentiality of these records is maintained today solely at the discretion of the employer and can be transgressed at any time with no obligation to the individual record subject.

Evidence before the Commission indicates that, although there is no legal requirement for them to do so, private-sector employers tend to protect information about employees against disclosure.[70] In part, this is because answering requests for such information can be a substantial administrative burden with no compensating advantage to the employer. In part, it is because employers fear common law actions brought for defamation or invasion of privacy. Such restraints, however, are uneven at best; and there are circumstances under which almost any employer routinely discloses the information in its employee records, as, for example, in response to inquiries from law enforcement authorities.[71]

The question of how much confidentiality can be expected of employers for information in their employment records is significant. Because of the amount and nature of the information held, the pressures under which it is usually collected, and the diverse circumstances in which it could be used, the creation of an expectation of confidentiality is at least as important in the employee-employer relationship as in any other relationship the Commission studied. Furthermore, while there is generally no valid business-related reason to disclose this information, modern technology, as discussed earlier, is making the process of disclosure much easier than it has been. Thus, the employee needs protection against the disclosure of information outside of the employing organization.

Although employees, as a rule, recognize that employment information will be used within the employing organization for a variety of purposes, and that they cannot be notified of and asked to approve each use, they should be able to assume that this rather free flow will be contained within the boundaries of the employing organization. The expectation that

[70] All employers who testified to the Commission have policies limiting the disclosure of information about employees, although there is some variation from employer to employer regarding what information is disclosed.

[71] See, for example, Testimony of the Equitable Life Assurance Society of the United States, Employment Records Hearings, December 9, 1976, p. 125; Testimony of Inland Steel Company, Employment Records Hearings, December 10, 1976, p. 390; and Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, pp. 540-541.

the confidentiality of information about them will be respected as to outside requestors depends on certain assurances on the part of employers.

The Commission believes that an employer has an obligation to inform its employees as specifically as possible of the kinds of information about them that may be disclosed both during and after the employment relationship. This means that at the beginning of the relationship, the employer should tell the applicant or employee what information about him may be disclosed. This communication is essential to protect the individual's right to determine what information he will divulge in case disclosure in some particular quarter could embarrass or otherwise harm him.

Notice Regarding External Disclosures

An employer should notify each applicant and employee of its policies regarding the disclosure of *directory information*, that is, basic factual information freely given to all third parties. The applicant or employee should also be informed of disclosures that may be made pursuant to statute or collective-bargaining agreements, and of the procedures by which he will be notified of or asked to authorize any other disclosures. Because information may have to be released under subpoena or other legal process, employees should be assured prior notice of subpoenas where possible in sufficient time to challenge their scope and legitimacy. Chapter 9 on government access to records about individuals examines this problem and recommends placing the notice burden on the party issuing the subpoena.

In sum, the Commission recommends:

Recommendation (32):

That an employer clearly inform all its applicants upon request, and all employees automatically, of the types of disclosures it may make of information in the records it maintains on them, including disclosures of directory information, and of its procedures for involving the individual in particular disclosures.

The Employer's Duty of Confidentiality

As the first premise of a responsible confidentiality policy, disclosures to any outside entity without the employee's authorization should be prohibited. Exceptions can then be made for directory information, subpoenas, specific statutory requirements, and disclosures made pursuant to collective-bargaining agreements.

Directory Information. Although employers do not, as a rule, object to giving employees some control over the disclosure of information in records the employer keeps on them, they fear that requiring consent in every instance will be unmanageably burdensome. To alleviate this fear, and in recognition of the fact that most external disclosures of information from employment records are made in the interest of the employee rather than of the employer, the Commission believes that disclosure by an employer of a limited category of factual data without employee authorization can be

justified. This category, which the Commission has designated as "directory information," should include only information an employer considers reasonably necessary to satisfy the vast majority of third-party requests. That is, it might include the fact that an individual is or has been employed by the employer, the dates of employment, the individual's present job title or position, and perhaps wage or salary information. This is not to suggest, however, that every employer should freely disclose all of these items. The Commission commends employers whose disclosure policies are even more limiting.

Disclosures for Law Enforcement Purposes. Law enforcement authorities frequently ask employers for information about employees. In addition to the items designated as directory information, they often seek an individual's dates of attendance at work, home address, and, in some cases, personnel and payroll records. Reasonable as it may seem to some to give properly identified law enforcement authorities access to information in employee files, there can be no employee expectation of confidentiality without limits on such access. The Commission's hearing record suggests that most law enforcement requests for information can be met by disclosing directory information, the employee's home address, and specific dates of attendance at work.[72] When law enforcement authorities need more extensive information than that, they can obtain it by means of a subpoena or other legal process; requiring them to do so would reinforce realistic expectations of confidentiality for employment records without unduly burdening either law enforcement authorities or employers. It would also allow an employer to give a consistent response to all law enforcement requests.

Conversely, the Commission believes that an employer should remain free to disclose information about an individual applicant, employee, or former employee to law enforcement authorities if it has reason to believe that actions of the individual threaten the employer's property or the safety or security of other employees, or if it suspects an employee of engaging in illegal activities, whether or not those activities relate to his employment. Such disclosures, in the Commission's view, should not be considered violations of an employee's reasonable expectation of confidentiality.

Other Disclosures. In addition to the types of disclosures dicussed above, an employer must fulfill the obligations set by its collective-bargaining contracts. When an employer retains an outside agent or contractor to collect information about an employee or group of employees, the employer must be in a position to disclose enough information for the agent or contractor to perform its legitimate functions. The agent or contractor, however, should be prohibited from redisclosing such information, and the employee should be able to find out that it has been disclosed. In addition, when a physician in an employer's medical department, or one retained by the employer, discovers that an employee has a serious medical problem of which he may not be aware, the physician should be free to disclose that fact to the employee's personal physician.

[72] See, for example, Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, pp. 539, 592.

In contrast to its duty of confidentiality recommendations with respect to credit, insurance, and medical-care record keeping, the Commission is not prepared to urge that the employer's duty of confidentiality be established by statute or regulation. The absence of legal barriers to voluntary implementation by an employer, coupled with the fact that the employee-employer relationship is not one in which the record keeper is performing a service for the individual, justifies, in the Commission's view, a voluntary approach. This is not to say that there should be no legislative or regulatory action at all. Chapter 9, on access to records by government agencies, calls for legislating constraints on access to records about individuals when the record keeper is not bound by a statutory duty of confidentiality. In addition, when an employer does perform services for employees or former employees, such as providing life and health-insurance coverage or medical care for employees or former employees who want it, the Commission's recommendations with respect to those types of record-keeping relationships could also be made applicable to employers. Earlier in this chapter, the Commission has suggested how the access and correction rights that would prevail in a normal insurance or medical-care relationship might be applied to an employer by extension. Likewise, the duty of confidentiality recommended for insurers and medical-care providers could be made applicable to employers to the extent that the relationship with an applicant, employee, or former employee mirrors those types of relationships. In the main, however, the Commission believes that the employer's duty of confidentiality, at least with respect to those records that are peculiarly the product of the employment relationship, can be implemented by voluntary compliance reinforced by mutual agreements, such as through collective-bargaining contracts. Accordingly, the Commission recommends:

Recommendation (33):

That each employer be considered to owe a duty of confidentiality to any individual employee, former employee, or applicant about whom it collects information; and that, therefore, no employer or consumer-reporting agency (as defined by the Fair Credit Reporting Act) which collects information about an applicant or employee on behalf of an employer should disclose, or be required to disclose, in individually identifiable form, any information about any individual applicant, employee, or former employee, without the explicit authorization of such individual, unless the disclosure would be:

(a) in response to a request to provide or verify information designated by the employer as directory information, which should not include more than:
  (i) the fact of past or present employment;
  (ii) dates of employment;
  (iii) title or position;
  (iv) wage or salary; and
  (v) location of job site;
(b) an individual's dates of attendance at work and home address in

response to a request by a properly identified law enforcement authority;

(c) a voluntary disclosure to protect the legal interests of the employer when the employer believes the actions of the applicant, employee, or former employee violate the conditions of employment or otherwise threaten physical injury to the property of the employer or to the person of the employer or any of his employees;

(d) to a law enforcement authority when the employer reasonably believes that an applicant, employee, or former employee has been engaged in illegal activities;

(e) pursuant to a Federal, State, or local compulsory reporting statute or regulation;

(f) to a collective-bargaining unit pursuant to a collective-bargaining contract;

(g) to an agent or contractor of the employer, provided:

(i) that only such information is disclosed as is necessary for such agent or contractor to perform its function for the employer;

(ii) that the agent or contractor is prohibited from redisclosing the information; and

(iii) that the individual is notified that such disclosure may be made and can find out if in fact it has been made;

(h) to a physician for the purpose of informing the individual of a medical problem of which he may not be aware; and

(i) in response to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena.

Disclosures of OSHA Records to Prospective Employers

A confidentiality problem mentioned earlier in this chapter derives from the Occupational Safety and Health Act (OSHA), which mandates that an employer provide medical surveillance of employees known to have been exposed to certain hazardous environments or substances. This, of course, requires the employer to keep records of medical examinations and other tests made to find out if a worker's health has been adversely affected. The Commission's hearings showed that some employers have already established procedures for exchanging medical surveillance records of workers known to have had such exposures.[73] A worker's former employer may disclose such a record to a prospective employer solely in the interest of continued protection of the worker's health, but the possibility remains that the prospective employer may discriminate against the worker because of its fear that previous hazardous exposure may lead in time to partial or complete disability.

The central problem with these disclosures from one employer to another is that the use of medical surveillance records as a measure of

[73] Letter from C. Hoyt Anderson, Director Personnel Relations and Research Office, Ford Motor Company, to the Privacy Protection Study Commission, January 14, 1977.

employability is not a use for which the information is collected and thus is inherently unfair. Accordingly, the Commission recommends:

Recommendation (34):

That Congress direct the Department of Labor to review the extent to which medical records made to protect individuals exposed to hazardous environments or substances in the workplace are or may come to be used to discriminate against them in employment. This review should include an examination of the feasibility of:

(a) restricting the availability of records generated by medical examinations and tests conducted in accordance with OSHA requirements for use in making employment decisions; and

(b) establishing mechanisms to protect employees whose health has been affected by exposure to hazardous environments or substances from the economic consequences of employers' decisions concerning their employability.

* * * * * * *

The Commission's recommendations assign employers an important task: to adopt policies and practices regarding the collection, use, and disclosure of information on applicants, employees, and former employees without being forced to do so by government. Unless each employer has a conscientious program on which applicants and employees can rely to safeguard the records the employer keeps about them, the voluntary approach recommended in this chapter will prove unsuccessful. Thus, a future commission or legislative bodies may have to consider compulsory measures, with all the disadvantages for the employee-employer relationship that would entail.

When asked how he thought industry would respond to guidelines for voluntary compliance in developing policies and procedures on employment record keeping, a witness representing the Ford Motor Company said:

> Certainly it has the merit of allowing various corporations to develop guidelines that are appropriate to their situations . . . there is a wide diversity of situations and there are numerous ways by which the principles of privacy could be implemented . . . I would simply want to take a hold on determining whether at some later date legislation is necessary. The suggestion is that we start with the voluntary and determine to what extent the compulsory may be necessary based on experience.[74]

The Commission shares that view.

Finally, the Commission also believes that its recommendations with respect to the employment relationship, or at least the concepts on which

[74] Employment Records Hearings, December 16, 1976, p. 528.

they are based, apply equally to Federal, State, and local governments and their employees.[75]

[75] A more complete discussion of the topics of this chapter will be forthcoming in a separately published appendix volume.

APPENDIX TWO

MICHIGAN EMPLOYEE RIGHT TO KNOW ACT

Act no. 397. Public Acts of 1978. Approved by Governor August 1, 1978

STATE OF MICHIGAN
79TH LEGISLATURE
REGULAR SESSION OF 1978

Introduced by Reps. Bullard, Clodfelter, Padden, Hollister, Conroy, Ferguson, Jondahl, Monsi Holcomb, Barcia and Evans
Rep. Angel named co-sponsor

ENROLLED HOUSE BILL No. 5381

AN ACT to permit employees to review personnel records; to provide criteria for the review; prescribe the information which may be contained in personnel records; and to provide penalties.

The People of the State of Michigan enact:

Sec. 1. (1) This act shall be known and may be cited as the "Bullard-Plawecki employee right to kn act".

(2) As used in this act:

(a) "Employee" means a person currently employed or formerly employed by an employer.

(b) "Employer" means an individual, corporation, partnership, labor organization, unincorpora association, the state, or an agency or a political subdivision of the state, or any other legal, business, commercial entity which has 4 or more employees and includes an agent of the employer.

(c) "Personnel record" means a record kept by the employer that identifies the employee, to the ext that the record is used or has been used, or may affect or be used relative to that employee's qualificati for employment, promotion, transfer, additional compensation, or disciplinary action. A personnel rec shall include a record in the possession of a person, corporation, partnership, or other association who ha contractual agreement with the employer to keep or supply a personnel record as provided in t subdivision. A personnel record shall not include:

(i) Employee references supplied to an employer if the identity of the person making the refere would be disclosed.

(ii) Materials relating to the employer's staff planning with respect to more than 1 employee, includ salary increases, management bonus plans, promotions, and job assignments.

(iii) Medical reports and records made or obtained by the employer if the records or reports available to the employee from the doctor or medical facility involved.

(iv) Information of a personal nature about a person other than the employee if disclosure of information would constitute a clearly unwarranted invasion of the other person's privacy.

(v) Information that is kept separately from other records and that relates to an investigation by employer pursuant to section 9.

(vi) Records limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision.

(vii) Records maintained by an educational institution which are directly related to a student and are considered to be education records under section 513(a) of title 5 of the family educational rights and privacy act of 1974, 20 U.S.C. 1232g.

(viii) Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known.

Sec. 2. Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding. However, personnel record information which, in the opinion of the judge in a judicial proceeding or in the opinion of the hearing officer in a quasi-judicial proceeding, was not intentionally excluded in the personnel record, may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the information. Material which should have been included in the personnel record shall be used at the request of the employee.

Sec. 3. An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. The review shall take place at a location reasonably near the employee's place of employment and during normal office hours. If a review during normal office hours would require an employee to take time off from work with that employer, then the employer shall provide some other reasonable time for the review. The employer may allow the review to take place at another time or location that would be more convenient to the employee.

Sec. 4. After the review provided in section 3, an employee may obtain a copy of the information or part of the information contained in the employee's personnel record. An employer may charge a fee for providing a copy of information contained in the personnel record. The fee shall be limited to the actual incremental cost of duplicating the information. If an employee demonstrates that he or she is unable to review his or her personnel record at the employing unit, then the employer, upon that employee's written request, shall mail a copy of the requested record to the employee.

Sec. 5. If there is a disagreement with information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position. The statement shall not exceed 5 sheets of 8-1/2-inch by 11-inch paper and shall be included when the information is divulged to a third party and as long as the original information is a part of the file. If either the employer or employee knowingly places in the personnel record information which is false, then the employer or employee, whichever is appropriate, shall have remedy through legal action to have that information expunged.

Sec. 6. (1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.

(2) The written notice to the employee shall be by first-class mail to the employee's last known address and shall be mailed on or before the day the information is divulged from the personnel record.

(3) This section shall not apply if any of the following occur:

(a) The employee has specifically waived written notice as part of a written, signed employment application with another employer.

(b) The disclosure is ordered in a legal action or arbitration to a party in that legal action or arbitration.

(c) Information is requested by a government agency as a result of a claim or complaint by an employee.

Sec. 7. An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered in a legal action or arbitration to a party in that legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

Sec. 8. (1) An employer shall not gather or keep a record of an employee's associations, political activities, publications, or communications of nonemployment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records shall not apply to the activities that occur on the employer's premises or during the employee's working hours with that employer that interfere with the performance of the employee's duties or duties of other employees.

(2) A record which is kept by the employer as permitted under this section shall be part of the personnel record.

Sec. 9. (1) If an employer has reasonable cause to believe that an employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Upon completion of the investigation or after 2 years, whichever comes first, the employee shall be notified that an investigation was or is being conducted of the suspected criminal activity described in this section. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it shall be destroyed.

(2) If the employer is a criminal justice agency which is involved in the investigation of an alleged criminal activity or the violation of an agency rule by the employee, the employer shall maintain a separate confidential file of information relating to the investigation. Upon completion of the investigation, if disciplinary action is not taken, the employee shall be notified that an investigation was conducted. If the investigation reveals that the allegations are unfounded, unsubstantiated, or disciplinary action is not taken, the separate file shall contain a notation of the final disposition of the investigation and information in the file shall not be used in any future consideration for promotion, transfer, additional compensation, or disciplinary action.

Sec. 10. This act shall not be construed to diminish a right of access to records as provided in Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, or as otherwise provided by law.

Sec. 11. If an employer violates this act, an employee may commence an action in the circuit court to compel compliance with this act. The circuit court for the county in which the complainant resides, the circuit court for the county in which the complainant is employed, or the circuit court for the county in which the personnel record is maintained shall have jurisdiction to issue the order. Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to this act the following damages:

(a) For a violation of this act, actual damages plus costs.

(b) For a wilful and knowing violation of this act, $200.00 plus costs, reasonable attorney's fees, and actual damages.

Sec. 12. This act shall take effect January 1, 1979.

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15. SUPPLEMENTARY NOTES This report is a follow-up study of automated personal data systems. The first report, "Computers, Health Records and Citizen Rights," by Alan F. Westin, NBS Monograph 157, was issued December 1976.

☐ Document describes a computer program; SF-185, FIPS Software Summary, is attached. LOC: 79-600081

16. ABSTRACT *(A 200-word or less factual summary of most significant information. If document includes a significant bibliography or literature survey, mention it here.)*

This report investigates the impact of computers on citizen rights in the field of personnel record-keeping. Part one traces the changing patterns of employment and personnel administration in America from the 19th century to the present. Part two examines the trends in computer use in personnel administration starting with payroll processing in the mid 50s to the present day Human Resources Information Systems. The effect of organizational policies, computerization efforts, and socio-legal trends on citizen rights are highlighted in eight profiles (3 in-depth) of Federal Government and business organizations and a discussion of non-Federal Government and non-profit organizations in Part 3. Part 4 compares the overall effects of computer technology against the effects of current personnel administration policies (organizational and legislative) on the four key dimensions of employee rights; relevance of data collected, employee access to records, confidentiality of data collected, and disclosure of data to third parties. Part 5 discusses policy alternatives for observing fair employee information practices. An extensive bibliography (52 pages) of material compiled and used by the project in preparing this report is appended.

17. KEY WORDS *(six to twelve entries; alphabetical order; capitalize only the first letter of the first key word unless a proper name; separated by semicolons)*
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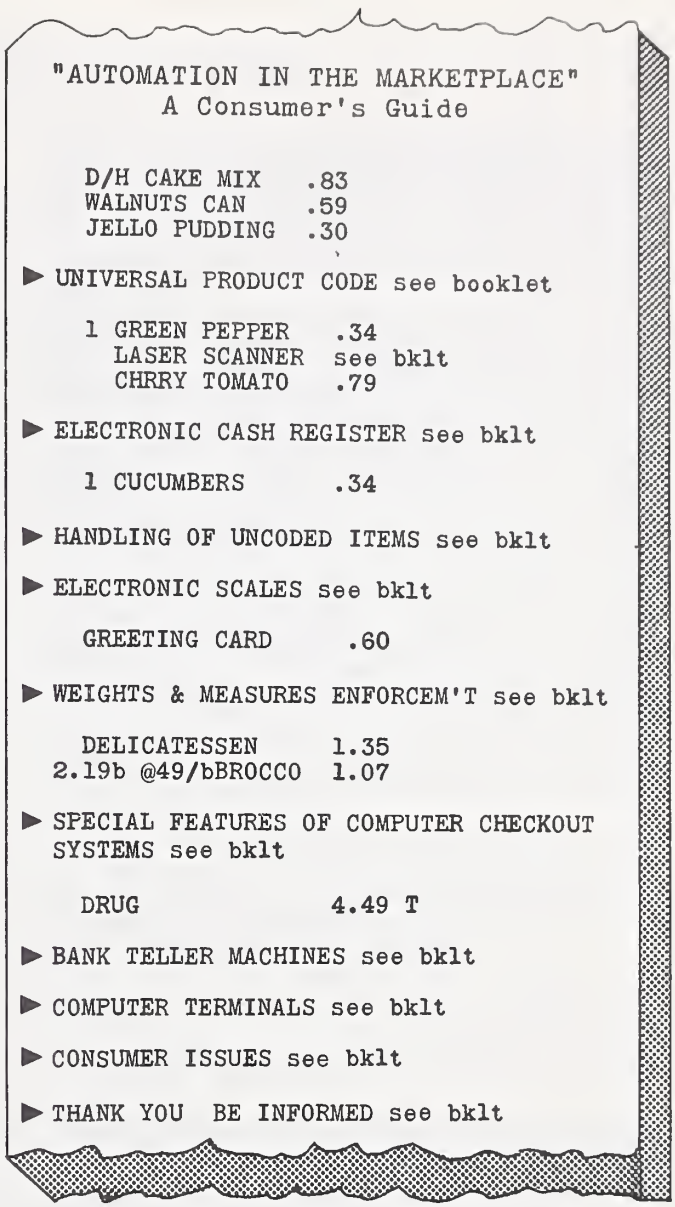

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