

Employment Records



APPENDIX 3
TO
The Report of
The Privacy Protection Study Commission

July 1977

The Report of the
Privacy Protection Study Commission

*Personal Privacy in an
Information Society*
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Appendix 1:
Privacy Law in the States
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Appendix 2:
The Citizen as Taxpayer
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Employment Records
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Table of Contents

Preface

Historical Relationship Between the Employer and Employee	2
Personnel Management and Personnel Record Keeping	4
The Law and the Courts	6
Labor Law	7
Protective Labor Legislation	8
Employer Records about Employees	9
Records Created in Hiring	10
Records Created After Hiring	13
The Role of Records in Employment Decision Making	15
Selection and Placement Decisions	16
Developmental Decisions: Transfer, Promotion, Demotion and Training	20
Discipline	22
The Administration of Employee Benefits	24
Separation	25
Forces for Change	26
Government Action	26
Growth of Fringe Benefits	29
Management and Personnel Management	30
Technological Developments	31
General Recommendations	32
Review of Record-Keeping Practices	34
Adherence to Fair Information Practice Policy	36

Specific Recommendations	43
Intrusiveness	43
Truth Verification Devices	44
Pretext Interviews	45
Reasonable Care in the Use of Support Organizations	46
Fairness	47
Fairness in Collection	47
Arrests, Convictions, and Military Discharges	50
Use of Arrest Information	50
Occupational Licensing	51
The Law Enforcement Assistance Administration Role	52
Retention of Arrest Information	53
Conviction Records	54
Retention of Conviction Records	55
Military-Record Information	55
Notice Regarding Collection from Third Parties	58
Notice as Collection Limitation	60
Authorization Statements	61
Fairness in Use	62
Access to Records	62
Access to Investigative Reports	71
Access to Medical Records	72
Access to Insurance Records	73
Fairness in Internal Disclosures Across Relationships	79
Personnel and Payroll Records	79
Security Records	80
Medical Records and Medical-Record Information	81
Insurance Records	84
Expectation of Confidentiality	86
Employer Disclosure Practices	87
Notice Regarding External Disclosures	95
The Employer's Duty of Confidentiality	96
Disclosures of OSHA Records to Prospective Employees	99

Preface

The employee-employer relationship affects most people over the greater part of their adult lives and is basic to the economic and social well being of our society. Loss of work is for most people a considerable hardship. Its consequences for an individual and for his family can be disastrous. The employment relationship has grown increasingly complex in modern organizations, with multiple personnel management functions, elaborate benefit programs, and government regulation. The number and types of records about individuals the relationship generates have grown correspondingly.

This volume provides a more detailed description and analysis of employment and personnel record-keeping practices than was included in the Commission's final report to the President and the Congress. It is offered as an aid to employers and unions implementing new programs to protect employees' privacy.

In its study of the creation, maintenance, use, and disclosure of employment records, the Commission concentrated on the practices of large private corporations. The Commission did not examine public-sector practices, since a substantial amount of work on others was already completed or in progress on employment record keeping in the public sector. Congressional committees and government agencies have examined public-sector employment practices, information collection techniques, and personal-data record-keeping systems.¹ The Project on Personnel Practices, Computers, and Citizens' Rights being carried out for the National Bureau of Standards, with partial Commission funding, has analyzed personnel record-keeping policy and practice in several agencies of Federal, State, and local government.

Within the private sector, the Commission had to choose between looking at the record-keeping practices of a broad cross section of employers or confining our inquiry to the practices of sizeable organizations. We

¹*The Use of Polygraphs and Similar Devices by Federal Agencies*, Report of the Government Operations Committee, U.S. House of Representatives, 94th Congress, 2d Session, 1976, p. 61; *Rights to Privacy of Federal Employees*, Hearings before the Subcommittee on Retirement and Employee Benefits of the Committee on Post Office and Civil Service, U. S. House of Representatives, 93d Congress, 1st and 2d Sessions, 1974, p. 378; and *Government Dossiers: Survey of Information Contained in Government Files*, Report of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U. S. Senate, 90th Congress, 1st Session, 1967, p. 605.

concluded that concentrating on the employment-related record-keeping practices of large organizations had advantages. Although they constitute less than one percent of the many millions of business organizations in the country, firms with over 1,000 employees account for more than 40 percent of total business employment.² Records also tend to matter more in large organizations. Because management can deal on the basis of personal knowledge or acquaintance with only a small number of employees, records can play an important role in the employment decision making of large companies. Such firms tend to provide a wide range of benefits, frequently administering their benefit programs themselves, and hence, their records about applicants and employees generally contain more information than those of smaller employers. Also of importance to the Commission was the fact that many large private corporations have already had to deal with privacy protection concerns raised by their decisions to apply new information processing technologies to their personal-data record keeping. We believe, however, that the general principles and recommendations included in this volume will be useful for small employers as well as large ones, particularly as smaller firms increasingly come to rely on information service bureaus to process their data on applicants and employees.

Many contributed to the research and analysis that made this volume possible. We wish to take special note, however, of the contributions of Jane H. Yurow, the Project Manager; Major Francis M. Rush, Jr., who was loaned to the Commission staff by the Department of the Air Force; and David M. Klaus, who also served as manager of the Commission's project on private investigative agencies. To each of them, we express our sincere appreciation.

David F. Linowes
Chairman

²U. S. Department of Commerce, *1967 Enterprise Statistics, (Part I, General Report on Industrial Organization)*, 1967.

Employment Records

When an individual applies for work, he is required to supply information about himself as an aid to the employer in making the hiring decision. This information may be supplemented and verified by psychological tests, interviews, a medical examination, reference and credit checks, and a background investigation. After hiring, the records kept about the individual expand to accommodate applications for benefits, performance evaluations, attendance and payroll data, and much other information. All of this creates a broad base of recorded information about the employee. Because so much information about employees is available in one place, various entities unrelated to the employee-employer relationship view it as a valuable resource.

At what point do inquiries about applicants and employees become unduly intrusive? What does fairness demand with respect to the uses and disclosures of records that support an employment decision? What expectation of confidentiality can an individual legitimately have with respect to the records his employer makes and keeps about him? What record-keeping trends and impending developments are likely to impact on the personal privacy of employees? These are the questions that have concerned the Commission, and they can be answered only within the social, legal, and organizational contexts that shape and give meaning to contemporary employment and personnel practices.

In American society today the individual who takes a job must often surrender a great deal of personal autonomy. If employed by a large, private-sector employer, he enters into a relationship where the employer's expectations, rules, and enforcement procedures define his specific rights and responsibilities. This is a market relationship, legally regulated only at certain points in the interest of public safety, health, and welfare.³ As the Senior Vice President for Human Resources of the Equitable Life Assurance Society testified before the Commission:

Historically . . . [the employee-employer] relationship has been seen essentially as a contractual tie, subject to moderation, to be sure, by negotiation with a union. Yet, with only 25 percent of employees in the United States organized, this moderating concept

³Clark Kerr, "Managing the Managers—The Distribution of Power in American Industrial Society," in Stephen D. Kertesz and M. A. Fitzsimons (eds.), *What America Stands For* (Notre Dame, Indiana: University of Notre Dame Press, 1959), p. 90.

has not worked as expected. The efficacy of the contractual relationship between individuals is, traditionally, based on bargaining and negotiating by equally powerful, or at least independent parties. But, it is more and more being recognized that this assumption hardly applies to the current model of large-scale institutional employment. Many categories of workers are wholly dependent upon non-union organizations. Most people do not bargain for the position potentially available to them within a bureaucracy; they adhere to the terms . . . that are set by the organization In sum, people with a given employment status . . . must adhere to many terms of employment set by the organization they work in if they are to work at all.⁴

This understanding underlies much of the Commission's analysis and recommendations.

HISTORICAL RELATIONSHIP BETWEEN THE EMPLOYER AND EMPLOYEE

Prior to the economic and social changes that have been broadly labelled the "industrial revolution," work and employment were carried out within a well-defined and clearly understood framework of law and custom. The authority and responsibility of the employer and the cooperation and obligation of the worker were based on traditional relationships between social classes and reflected in laws that specified the conditions of apprenticeship, fixed wages, and prohibited the use of certain equipment.⁵

The early Nineteenth Century saw a major change both in the role that social class played in the employee-employer relationship and in the legal framework that hitherto had governed the relationship. As summarized by Philip Selznick:

The emphasis shifted from obligation to freedom of choice. To stress that the employment relation was a contract was to emphasize (a) the limited nature of the commitment made by the parties to each other and (b) the high value to be placed on the freedom of individuals, whatever their station, to enter contractual relations and define for themselves the meaning of the bargain Contract became a device for entering legally unsupervised relations.⁶

While the law no longer reflected the traditional relationship between employer and employee, actual practice was slow to change. In part this was due to the continued presence of middlemen, such as subcontractors and foremen who operated in the context of the traditional relationship. Under

⁴Testimony of Equitable Life Assurance Society of the U. S., *Employment Records*, Hearings before the Privacy Protection Study Commission, December 10, 1976, pp. 105 - 06. (hereinafter cited as "Employment Records Hearings")

⁵See J. L. and Barbara Hammond, *The Rise of Modern Industry* (New York: Harcourt, Brace and Company, 1926).

⁶Philip Selznick, *Law, Society, and Industrial Justice* (New York: Russell Sage Foundation, 1969), p. 131.

the padrone system, for example, the "padrone" or leader of groups of immigrant laborers hired out the men, rented them living accommodations, paid for necessary transportation, and sold them supplies of food. This system flourished in the 1890's but lasted well into this century.⁷ Hiring by the foreman at the plant gate also remained accepted practice. This was usually based upon personal acquaintance or intercession, although occasionally letters of reference or of introduction might be offered. As Reinhard Bendix has noted:

Personal relations and personal arbitrariness prevailed under these conditions of labor management. All the decisions concerning wages, hours, discipline, and generally the organization of production were enmeshed in a web of personal loyalties.⁸

Growth in the size and complexity of work organizations has been a major force for change in the employee-employer relationship, and in the record-keeping practices that facilitate it. The characteristic organizations of our century are massive private corporations and large government agencies. As one commentator has observed:

. . . the huge "trust" which gave our grandparents nightmares was Mr. Rockefeller's Standard Oil Company. Every one of the eleven companies into which the Supreme Court split the "octopus" in 1911 is today larger than the original Standard Oil Company ever was—in capital, in employees, in production. Yet only four of them rank among the major American, let alone the major international, oil companies today.⁹

Large-scale organizations stress rational decision making in an objective, impersonal setting. In the employment context, this usually involves the following:

1. Equal treatment for all employees.
2. Relying on expertise, skills, and experience relevant to the position.
3. No extraorganizational prerogatives of the position, that is, the position belongs to the organization, not to the person.
4. Introducing specific standards of work and output.
5. Keeping complete records and files.
6. Setting up and enforcing rules and regulations that serve the interests of the organization.

⁷John R. Commons and John B. Andrews, *Principles of Labor Legislation* (New York: Harper & Brothers Publishers, 1920), p. 46.

⁸Reinhard Bendix, *Work and Authority in Industry* (New York: John Wiley & Sons, Inc., 1956), p. 56.

⁹Peter Drucker, *Concept of the Corporation* (New York: The John Day Company, 1972), p. xiv.

7. Recognizing that the rules and regulations are binding upon managers as well as employees.¹⁰

The personnel management specialty developed as part of the general process of bureaucratization. Its development was shaped by two trends, both of which remain important today. The first, welfarism, was the modern form of paternalism. It reflected the interest of employers in taking positive steps to reduce their costs, while complying with newly passed workmen's compensation laws. Dale Beach suggests that the passage of such laws was a prime force in the "creation of such positions as safety engineer, safety director, company physician, industrial nurse, and medical director."¹¹

The second, and perhaps dominant, influence was "scientific management." This method of rationalizing the employment, development, and utilization of workers rendered the traditional image of the worker and employer obsolete. Scientific management spelled the end to personal contact as the foundation of the employment relationship. As Bendix notes "the worth of the workingman was now determined by 'tests' which ascertained his present and potential abilities, in order to place him where he would do the 'highest class of work' of which he was capable."¹²

PERSONNEL MANAGEMENT AND PERSONNEL RECORD KEEPING

Historians of personnel management see welfarism and scientific management as the principal factors in the establishment of the employment office—the forerunner of the modern personnel office.¹³ The core functions of these new offices were recruitment, selection, job placement, and record keeping. In some cases, welfare, training, and complaints and grievance program administration were included. An early example was the Social Department established by Henry Ford in 1914. Alan Nevins has described the work of the Department as follows:

Each worker was expected to furnish information on his marital status, the number and ages of his dependents, and his nationality, religion, and (if alien) prospects of citizenship. Did he own his home? If so, how large was the mortgage? If he rented a domicile, what did he pay? His social outlook and mode of living also came under scrutiny. His health? His doctor? His recreations? The investigator meanwhile looked about sharply, if unobtrusively, so that he could report on "habits," "home condition," and "neighbor-

¹⁰See Charles Perrow, *Complex Organizations* (Glenview, Illinois: Scott, Foresman, and Company, 1972), p. 4.

¹¹See George Ritzer and Harrison M. Trice, *An Occupation in Conflict: A Study of the Personnel Manager* (Ithaca: New York State School of Industrial and Labor Relations, 1969), p. 7.

¹²Bendix, *op. cit.*, p. 279.

¹³See Ritzer and Trice, *op. cit.*

hood" All this information and more was placed on blue and white forms.¹⁴

The Ford Social Department was a substantial operation; 50 investigators were hired to visit the homes of factory employees. Although its intent was to help workers with personal problems, the effect was to provide the employer with a great deal of information about workers visited under the program.

The shortage of labor during World War I, the Army's successful use of personnel tests, a growing appreciation of the high cost of labor turnover and the attendant benefits of careful selection and placement, the growth of unionism, and new government legislation all served to increase the importance of the personnel department, and the size and scope of its record-keeping activities. In some firms personnel departments were charged with the operation of employee representation plans in the hope that employee interest in trade unions could be discouraged. Where unions were established, industrial relations departments were often integrated into personnel departments. Grievance and arbitration procedures necessitated records to support management positions regarding adverse actions, wage and hour legislation, variable contributions for worker's compensation, unemployment insurance, income-tax withholding, and social security contributions.

Furthermore, as references, records of previous employment, education, and in some cases, test scores, began to play a role in establishing the employment relationship, credentials inevitably replaced custom and personal acquaintance as the primary factor in judging an applicant's suitability for employment. Because credentials might be altered or forged, employers also began to check their validity, and to inquire about an individual's dependability through background and credit investigations.¹⁵ The modern applicant or employee was now confronted with a suitability judgment based on his record, and the composition of the record and the manner in which it was used were increasingly beyond his control.

The striving for rationality in the modern work organization has always been an important force limiting the collection and maintenance of information about applicants and employees. The Inland Steel Company, among others, testified before the Commission that each item in its automated data bases is economically justified to the people who design and run the company's computer systems. The day-to-day operation of the personnel office also supports such limits by aiming for uniform, consistent interpretation and application of organizational rules and procedures. There is no guarantee, however, that the personal interests, views or beliefs of employers and managers will not influence actual data collection and use practices. Nor are criteria of relevance and need based upon organizational interests and goals a guarantee that enough consideration will be given to

¹⁴Alan Nevins, *Ford: The Times, the Man, the Company* (New York: 1954), p. 554. We are indebted to an unpublished manuscript dated October 7, 1976, of David J. Seipp of the Harvard University Program on Information Resources Policy for this quotation.

¹⁵Letter from the Associated Credit Bureaus, Inc. to the Privacy Protection Study Commission, March 8, 1977.

the personal privacy interests of the individual. Hence, the legal setting as it provides standards or practical limits relevant to the protection of personal privacy in the employment relationship is important.

THE LAW AND THE COURTS

Most Federal and State government employees, and employees of private firms who are part of a bargaining unit represented by a labor union, are protected from arbitrary discharge or discipline by established due process procedures. These procedures put the protection of personal privacy in a very special setting, on one hand, because they include a right of access to all relevant information during arbitration of disputes and, on the other hand, because they establish a framework of rights and obligations that can be used to keep an employer from retaliating against an individual who seeks to assert his privacy interest in records the employer maintains about him. Over three-quarters of all private-sector employees, however, do not have such protections. Their relationship with an employer is governed by a loose but consistent body of common law which some have referred to as the "law of employment." In effect, the law of employment "denies any right to the employee who is arbitrarily treated in a plant without a union or a contract."¹⁶ It is based on the twin principles of employment at will and mutuality of obligation. With respect to the first, "the law has taken for granted the power of either party to terminate an employment relationship for any or no reason."¹⁷ The second principle is that one party to the employment contract cannot be constrained or limited in the absence of constraints or limitations on the other. Because in our society any limitation on the ability of the *employee* to terminate the relationship is held to be inimical to his personal freedom, the common-law principle of mutuality of obligation has served to keep courts from restricting the right of the *employer* to discharge an employee at will.

Courts have consistently upheld the legality of arbitrary discharge, and denied claims for damage where the reasons given for the discharge were based upon false information in the personnel folder or a mistake by the employer's medical staff; where the employee was arbitrarily discharged the day before qualifying for a pension; where there was malice on the part of the employer; or where the firm did not follow its own published disciplinary and appeal procedures.¹⁸

Its analysis of this situation led the Commission to two conclusions. First, a private employer today may demand that applicants and employees supply detailed information about any aspect of their lives, submit to tests

¹⁶Derek Bok, "Discussion of Current Confrontations in Labor Law," *Proceedings of the Nineteenth Annual Winter Meeting, Industrial Relations Research Association* (Madison, Wisconsin: The Association, 1966), p. 104.

¹⁷*Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) quoted in Clyde W. Summers, "Individual Protection Against Unjust Dismissal, Time for a Statute," *Virginia Law Review*, Vol. 62, No. 3 (April, 1976) p. 481.

¹⁸Case citations may be found in Summers, *ibid.*, pp. 481-582.

and examinations, and authorize the employer to acquire whatever records it wants about them from other organizations.¹⁹ Individuals may, of course, refuse to consent or submit, but anyone who needs a job will be under great pressure to comply. Second, absent collective bargaining, there is no general legal framework in the private sector that could accommodate disputes about recorded information. Federal employees had such a framework before the Privacy Act of 1974, but most employees in the private sector do not.²⁰

LABOR LAW

Labor law deals with the legal status and internal operation of trade unions, the responsibility of employers with regard to unions and union members, and the contractual and other relations between the employee and the union. Since the 1930's, national policy has encouraged the formation and operation of labor unions. For the purposes of this analysis, two aspects of labor law stand out.

First, labor law imposes limited but important restrictions on the right of the employer to discharge at will. The National Labor Relations (Wagner) Act declared that it was an unfair labor practice for employers covered by the Act to encourage or discourage membership in any labor organization by discrimination in hiring or tenure or any other condition of employment. Both the Act and National Labor Relations Board case law effectively prohibit the *use* of a blacklist and the *collection* of information about union affiliation through the questioning of prospective employees or the inclusion of such questions on application forms. [29 U.S.C. 151 *et seq.*] The Wagner Act also makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he files charges or gives testimony under the Act.²¹

Second, labor law provides the framework for a system of industrial jurisprudence that has three primary implications for the protection of personal privacy: (1) it provides an opportunity for privacy protections to be negotiated as part of a collective bargaining agreement; (2) it allows an aggrieved employee to contest management actions relating to him; and (3) it establishes case-law precedents that not only provide extensive protection against unjust discipline, but also establish a recognized system of procedural fairness which includes the right of *access* to all relevant information.²² Although privacy issues are only infrequently the subject of

¹⁹Kenneth Walters, "Employee Freedom of Speech," *Industrial Relations*, Vol. 15, No. 1 (February, 1976), p. 38.

²⁰Lawrence E. Blades, "Employment at Will v. Individual Freedom," *Columbia Law Review*, Vol. LXCII (December 1967), p. 1405.

²¹The absolute right of the employer to discharge an employee for any or no reason was repudiated when the Act was upheld in *NLRB v. Jones & Laughlin Steel Company*, 301 U. S. 1 (1937).

²²Section 203(a) of the Labor Management Relations (Taft-Hartley) Act of 1947 declared that national policy is to encourage the arbitration of labor disputes.

contract negotiations, matters such as employment application procedures and requirements for physical examinations are occasionally included.²³ Thus, the value of the collective bargaining process for privacy protection lies in its potential for negotiating access, correction, and disclosure rights into contracts with increasing frequency in the future. The grievance procedure is also important with respect to the protection of personal privacy because it greatly increases the likelihood that management decisions will be based on objective and relevant information and gives the individual the right to know all evidence against himself, the right to confront and examine witnesses, and the right to compel employers to produce evidence and witnesses.²⁴ Although these rights are limited to formal actions against employers, and to the records directly relevant to such actions, they do protect the employee when he is most likely to need protection.

Non-union employees have neither negotiating status nor legally recognized hearing mechanisms to protect their interests in the records their employers maintain about them. While most employers would not fire an employee simply for asking to see his employment records, an employer would be within the law in doing so. Moreover, such an employee could be informally labelled as a troublemaker, thus limiting his opportunities for future advancement or, worse still, reinforcing doubts that had been raised previously about his suitability. An employee is most likely to want to review and validate his records when his job is threatened, but that is also the time when the risk of incurring his employer's displeasure is greatest.

PROTECTIVE LABOR LEGISLATION

Protective labor legislation is a complex patchwork of law and regulation. Worker's compensation was perhaps the first modern legislation to regulate the employment relationship. The first such law was passed in New York in 1910 and 40 States had one by 1920. Other early laws regulated child labor and hours of work for women, children, and, in a few occupations, men. Major Federal regulation of wages and hours was initiated in 1938 with the passage of the Fair Labor Standards Act. Recently, two major pieces of protective legislation have been passed: the Occupational Safety and Health Act of 1970 (OSHA) [29 U.S.C. 651 *et seq.*] and the Employee Retirement Income Security Act of 1974 (ERISA). [29 U.S.C. 1131 *et seq.*] Both impose specific record-keeping and reporting requirements on employers. Their current and potential impact on personal privacy will be discussed below.

Most protective labor legislation is concerned with special categories of persons: student workers, veterans, minorities, and the handicapped or disabled. Perhaps the most important legislation of this type deals with equal employment opportunities for minorities. Beginning in the 1940's,

²³See, for example, Milton Derber, W. Ellison Chalmers, and Ross Stagner, "Collective Bargaining and Management Functions: An Empirical Study," *The Journal of Business of the University of Chicago*, Vol. 31, No. 2 (April, 1958), pp. 107-20.

²⁴Summers, *op. cit.*

States passed laws prohibiting racial and religious discrimination in employment and by 1972 most States had such laws. With the passage of Title VII of the Civil Rights Act in 1964, and of the Equal Employment Opportunity Act [42 U.S.C. 2000e] in 1972, employment discrimination based on race, color, religion, sex, or national origin was prohibited by Federal law.

In addition, a handful of statutes protect employees from adverse action based on the exercise of certain of their citizenship rights; prohibit, restrict, or regulate the use of certain types of information-gathering techniques; or prohibit adverse action based on information received from a third party. State laws prohibiting discharge for accepting jury duty or for voting are examples of the first type of statute. Restrictions on the use of truth verification devices and the provisions of the Federal Fair Credit Reporting Act regulating the use of consumer reports made for employment purposes are examples of the second. The 1968 Consumer Credit Protection Act's prohibitions on discharge because of garnishment of wages for any one indebtedness exemplify the third. [15 U.S.C. 1601 et seq.]

From a privacy protection viewpoint, protective labor legislation is significant for four reasons. First, it subjects failures to hire and, in some cases, to promote or take other personnel actions to administrative or legal review, which usually involves a right of access by the individual to relevant records.

Second, protective labor legislation sometimes limits the type of information that can be collected and used or the information collection techniques that can be employed. For example, the laws of several States prohibit questions concerning general or specific physical disabilities on the forms employment applicants are asked to fill out. Third, some protective labor legislation greatly increases the amount of recorded information employers must maintain about their employees. And fourth, like industrial jurisprudence protections, the protections such legislation creates are not available to many employees. Only those individuals specifically covered by the legislation are protected, and then only to the extent that an adverse action occurred *because* of membership in the protected category.

EMPLOYER RECORDS ABOUT EMPLOYEES

Today's employer keeps many records on his employees. Some are directly related to the employment relationship, such as performance evaluations, promotion tables, payroll records, grade and skill classifications and leave records. Others are only tangentially related. These include health benefit and claim records, medical records, pension records, counseling program records, and educational, life insurance, and home-loan records.

Early in this century, managers began to perceive that expenditures on employee "welfare" were in a sense investments in a company's future. Although legislation was necessary to generalize this new found concern for worker health and safety, it became apparent that a safe workplace was economically sound. While some of the early benefit programs were aimed at increasing worker dependence and thus fending off trade unionism,

employers found that they also bolstered employee morale and increased production. If an employer could help an employee with his off-the-job problems, the employee would become a better worker.

Organized labor at first opposed employer-provided fringe-benefit programs. Now, however, unions include medical insurance and other fringe benefits as major points in their contract negotiations. From the employee's point of view, moreover, group health and life insurance programs have become a virtual necessity, just as the corporate medical department has become a place to get good, free medical care, and credit unions located on company property have become convenient sources of financial services.

The size and structure of a company influences management's control over how records about applicants and employees are maintained and used. In small organizations, such records may be kept informally. The various data items about an individual may be mingled in one file, and the custodian of the file may perform a number of loosely related record-keeping functions. When a business is large enough to hire different people to perform particular functions—e.g., personnel, operational managers, benefit clerks, physicians and nurses, and security officers—records associated with these functions are generally held in separate record-keeping systems. Managers of very large corporations may in fact find it difficult to keep track of all of the firm's record-keeping systems.

Some corporations, though large and geographically diverse, have a policy of centralized records management. They control the maintenance and use of all records, including personnel records, through specific written guidelines and inspection or periodic auditing of all record-keeping units. Other large corporations have decentralized records management. Central management may establish policies and general guidelines regarding the handling of records in component units, but it does not inspect or audit and thus cannot vouch for the component units' compliance with corporate policy.

A brief description of the major categories of records kept about applicants and employees shows the extent to which the workplace has become a repository of personal information.

RECORDS CREATED IN HIRING

Application Forms. The first personnel records established by most employers are employment applications. These forms are the primary, though not exclusive, source of information about all applicants, blue collar as well as management. The Commission's review of application forms indicates that virtually all ask name, address, and Social Security number, and inquire about employment and educational history. Many no longer ask about sex and age, and virtually none ask an applicant's race. Questions about age, sex, and race are not prohibited, but the use of those three items in making hiring decisions generally is. Some companies also do not ask about criminal convictions and type of discharge from military service, but many do. However, if an application asks for dates of previous employment,

which most do, the reasons for any extended absence from the work force are likely to emerge.

The Commission did not review any applications that asked for arrest-record information, but the literature indicates that some employers do ask applicants about arrests.²⁵ The Equal Employment Opportunity Commission (EEOC) has ruled that an employer may not collect arrest-record information that is not directly related to the prospective job, but there is confusion about how the ruling is to be interpreted.

Some application forms seek references, and some employers hire a firm to do background checks on applicants. When this is done, the Fair Credit Reporting Act requires that the applicant be told that an investigation may be undertaken and that the employer must, upon request, apprise the applicant of the nature of the investigation. Some application forms also ask the employee to sign a statement authorizing the employer to order a background check.

Detailed medical information is rarely requested on an employment application, but many applications notify the individual that a preemployment physical is a condition of employment, and some ask him to consent to a physical examination.

Companies doing contract work for Federal agencies like the Department of Defense (DOD) and the Energy Research and Development Administration (ERDA) usually warn applicants that jobs may be contingent on security clearances. The security clearance forms the applicant completes and all reports on clearances are maintained in the files of the Federal agency which is a party to the contract and, under Federal rules, are not available to the employer. These investigations are generally done by the Defense Investigative Service for DOD contracts and by the Civil Service Commission for ERDA contracts. The subject's right of access to these forms and reports is governed by Federal statutes and regulations, including the Privacy Act of 1974.²⁶

Background Checks. When an employer wants information on an applicant other than what the applicant supplies, it may order a background check. These reports are done by the employer's organization or by an outside firm that specializes in preparing them. If an outside firm does the check, it may retain a copy of the report it submits to the employer.²⁷ A background check may be limited to verifying the basic employment and education information provided on an application, or may involve credit

²⁵Written statement of American Civil Liberties Union, Employment Records Hearings, December 9, 1976, p. 5; and testimony of Sorrell Wildhorn, Rand Corporation, *Private Investigative Firms*, Hearings before the Privacy Protection Study Commission, January 26, 1977, p. 237. (hereinafter cited as "Private Investigative Hearings") 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).

²⁶5 U.S.C. 552a

²⁷As discussed in Chapter 8 of the Commission's final report, some investigative firms, such as Equifax, Inc., retain a copy of the report they submit to an employer, while others, such as Pinkerton's, Inc., destroy their copy of the report as soon as the bill for services is paid.

checks, criminal-record checks, military-record checks, and inquiries of neighbors and co-workers as to political activity, life style, character, family relationships, and sexual preference.

References. An employer's file on an applicant will also contain letters of reference when these are part of the preemployment process, although witnesses testified before the Commission that their use is decreasing.

Interviewer Evaluations. Some companies have evaluation forms for applicant interviews conducted by the personnel department, trained recruiters, or the potential supervisor. These forms have scales for rating applicant characteristics, such as personality, articulateness, appearance, and general sense of well-being. They are usually kept in the applicant's file.

Medical Records. Several types of medical records are kept on employees, including the results of preemployment and annual physicals, emergency treatment, and ongoing health-care records. If there is a corporate medical department, it will maintain these records; otherwise, the physician conducting the examination will usually keep them.

Medical questionnaires are filled out by an applicant at the time of, or in lieu of, the preemployment physical examination. Some ask for details about mental as well as physical health. One large corporation has a 25-page, 185-item questionnaire that applicants and employees are required to fill out before submitting to a compulsory physical examination.²⁸ Most questionnaires are briefer but contain check lists of medical conditions, including nervous organic malfunction, drug or alcohol use, "women's problems," surgery, chronic or acute disease, respiratory trouble, urinary trouble, medicines taken, hearing and vision problems, chronic absenteeism, and past history of insurability. Companies usually require the applicant to sign a statement authorizing an investigation of medical conditions the medical department may discover. These statements typically authorize hospitals and private physicians to disclose to the medical department any information it may request. Some medical forms have a general waiver to be signed by the applicant or employee which allows the company to use medical-record information for whatever purpose it sees fit, while others ask the applicant to affirm his understanding that information given to the medical department will not be used elsewhere within the company. Where an examination is performed, notes relating to it are kept in the employee's medical file.

Other records generally kept on employees by medical departments include treatment records relating to illness on the job, certification to return to work after an absence, records of voluntary physical examinations or ongoing medical treatment, incident reports describing accidents, records concerning exposure to toxic substances, and records generated by alcohol and drug treatment and psychiatric counseling programs. These last are usually kept in the medical department or in files maintained by the programs themselves and are not generally available within the company. Such functional separation, however, is voluntary, since Federal regulations governing the use and disclosure of alcohol and drug abuse treatment

²⁸Submission of Exxon Corporation, Employment Records Hearings, December 17, 1976.

records [42 C.F.R. Part 2] do not apply to most programs run by private-sector employers.

Tests. Many employers administer skill tests. Some also give personality and intelligence tests as part of a hiring or promotion assessment. When tests are given, the scores are usually kept in a separate filing system controlled by the department or person administering the tests. The EEOC requirement that tests not be racially biased is said to have reduced the amount of testing of *applicants* in recent years.²⁹

RECORDS CREATED AFTER HIRING

The following information is routinely collected shortly after an employee begins to work and may be updated on a regular basis during the period of employment.

Demographic Data. If the employer has not asked about age, sex, race, and Social Security number on the application, it will do so after an individual is hired. This is necessary in order to comply with numerous Federal reporting requirements, including Title VII of the Civil Rights Act and the Internal Revenue Service requirement that income be reported by Social Security number. After hiring, an individual may also indicate his desire to participate in affirmative action programs for Viet Nam veterans or handicapped persons.

Basic Payroll and Employment Information. When an employer offers benefit programs such as life insurance, health insurance, pensions, and disability insurance, an employee must fill out the requisite forms soon after reporting to work. These forms generally list dependents to be covered by insurance and elicit other information necessary to calculate deductions from the paycheck. The employee is also required to fill out whatever forms are necessary to deduct withholding tax. All of this information must be updated from time to time. Benefits information may be held in the personnel file or kept in a separate benefits file. Names of designated beneficiaries are recorded either in the personnel file or in the benefits file. The employee may also fill out a union dues check-off form and a payroll savings plan form.

Time, Attendance, and Classification Information. Records are maintained on leave accrued, tardiness, job grade and skill classifications, seniority list and position, rate of pay, grievance, discipline and awards and probation records.

Personal Information. After hiring, some companies ask employees certain personal questions. These might include eligibility for bonding, proneness to litigation, indebtedness, aliases, second jobs, and name and relationship of people with whom the employee resides. This information is usually retained as part of the manually retrievable personnel record.

Verification Documents. An employee is often asked to supply certain official documents, such as birth certificate or naturalization papers to verify information he has provided on his application. These documents are

²⁹Staff interview with Chesapeake and Potomac Telephone Company, November 18, 1976.

usually returned to the employee, although copies may be made and kept in the manual personnel folder.

Skills Inventory and Training Program Records. Many companies collect information from employees describing their skills and abilities, as well as their desires for placement within the company. Information on training or education completed during employment is also recorded. This information is generally given voluntarily by employees who are seeking advancement or new challenges in their work. It is kept either in the manual personnel file, or in a computerized system for resource planning, and is available to managers trying to fill vacant positions.

Insurance Claims. When a company is either self-insured or administers the claims filed under its employee insurance programs, it will maintain detailed information about each claim submitted. The form for submitting a health-insurance claim, for example, typically contains space for diagnostic and treatment information to be filled in by the employee's or dependent's physician or hospital. If the company is small, or if the claim is handled by a small regional office of a large company, the form and supporting documentation could be held in the employee's personnel file. Large companies or large units of companies usually have a separate benefits or audit section that maintains claim records apart from the personnel file. Claim information kept in automated form is generally payment, not diagnostic, information. Sometimes an insurance company that administers a group health plan for an employer will periodically send the employer a list of each employee's claims, including the diagnosis and the identity of the family member treated. Insurance claim forms generally include a statement the employee must sign authorizing the processor of the claim to seek any information it deems necessary to satisfy itself as to the claim's legitimacy.

Security Records. Large companies generally have security departments or security units in the personnel department that investigate alleged or suspected misconduct by company employees. In small companies there may be a lone security officer or a contract with a private investigative firm to perform security services. An investigation may include on- and off-the-job surveillance, as well as interviews with the suspect and his fellow workers. The results of the investigation may be turned over to company management or to law enforcement authorities, or both, and the suspect's name will necessarily be in any record so transferred. The records generated by an investigation are usually maintained by the security department, apart from the company's personnel files, and the individuals to whom the records pertain have no access to them.

Performance Evaluations. Many companies have formal procedures for evaluating their white collar employees, and some companies have them for evaluating hourly workers. At regular intervals, the employee and his supervisor review the employee's work, attitudes, and expectations. The supervisor indicates how he thinks the employee is doing, either in written narrative or by rating (e.g., unsatisfactory, satisfactory, or outstanding) the employee's ability to use knowledge, to communicate with others, to work independently, to be tactful and helpful, to be productive, and so on. Often there will be a description of the employee's duties and goals, and for higher

level jobs, these are frequently worked out together by the supervisor and the employee. Some evaluation forms also have space for the employee to react to the supervisor's comments and some contain an additional rating sheet or space for comments which the supervisor can fill in without the employee's knowledge. Performance evaluation forms are generally held in the manual personnel file, but sometimes coded summaries are put into a computer-based record-keeping system.

Promotion Tables. Many companies maintain charts or listings in which one or more possible successors are identified for each position in the current hierarchy. The chart usually shows the name of the incumbent, his coded retirement date, and the coded earliest probable promotion date. Also included in the code are length of service and readiness for promotion. A supplemental listing might include one, two, or more potential candidates for each position, with similar information about each one.³⁰ These lists are frequently compiled and updated on an annual or semi-annual basis. To the Commission's knowledge, no company allows an employee access to the information about him in a promotion table.

THE ROLE OF RECORDS IN EMPLOYMENT DECISION MAKING

Employment and personnel records serve a number of purposes. Here the focus is on their use in decision making about individual applicants, employees, and union members rather than on their use in making decisions about groups of individuals. That is, the Commission's focus is on the use of employment and personnel records in deciding whether to hire, fire, place, transfer, promote, demote, train, discipline, and provide full or partial benefits, rather than on their use in deciding whether to modify a compensation plan, a recruitment policy, or an affirmative action program.

A major difficulty in any attempt to order and describe the manner in which records influence individual employment decisions is that there are great differences among industries, firms and unions, and categories of employees. The size of the firm and the level of the employee will obviously affect the degree of firsthand acquaintance with the individual and, therefore, the importance of a record. The character of the industry is also an important factor. For example, industries with elaborate skill and task differentiations, "tall" organizational structures, and complicated technologies are likely to make both more, and more complicated, employment decisions. There is also wide variance among employers, even within the same industry, as to the systems of records maintained and used for various employment decisions, and in some cases the number of applicants may be a determining factor.

Unions represent something of a special case. Industrial unions have rudimentary record systems that are often supplied by the employer rather than created by the union. Even in craft unions the number of records kept about union members and the uses made of them are quite limited. Further,

³⁰Dale Yoder and Herbert G. Heneman, Jr., eds., *ASPA Handbook of Personnel and Industrial Relations*, Vol. 4, Planning and Auditing PAIR (Washington, D.C.: Bureau of National Affairs, 1976), p. 213.

the Labor-Management Reporting and Disclosure Act [29 U.S.C. 401 *et seq.* (1959)] stipulates that

no member may be fined, suspended, or expelled for any reason other than nonpayment of dues unless certain conditions have been met. The member must be served with written specific charges, given a reasonable time to prepare his defense, and afforded a full and fair hearing.³¹

Thus, the union member is guaranteed that in any adverse action against him by his union, he will have access to all relevant records.

To the Commission's knowledge, no systematic analysis of how employee records affect employment decisions has ever been made. After an extensive survey of the literature, one writer characterized employment decision making as a "black box" problem: an individual can find out what information was available, and can know the outcome, but he may not know what decision processes produced the outcome.³² Indeed, few business analysts are willing to make summary statements about the decision processes used in a particular company, much less those which seem "general" or "typical" of American business and industry. Nevertheless, with these major reservations in mind, some general statements can be made about the role records play at key decision-making points in the employment cycle.

SELECTION AND PLACEMENT DECISIONS

Some firms, particularly when hiring large numbers of persons for routine jobs, will select individuals, and after hire, will determine where to place them. When hiring an individual is contingent on his suitability to perform a particular function, however, the decision to hire is an inextricable part of the placement decision. Thus, for instance, a medical problem that would prevent an individual from working in high places would preclude hiring him if the only opening involved climbing or construction on tall buildings.

In their typical form, selection and placement procedures involve a sequence of data-gathering steps in support of increasingly selective decision making which eliminates all candidates except those considered most suited for employment or for placement in a particular position. Leon Megginson has diagrammed a typical selection procedure, which is shown in Figure A.³³

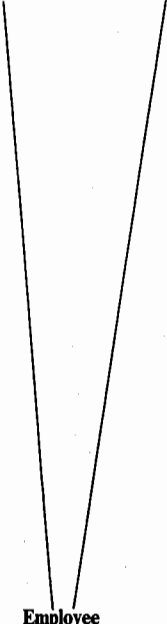
Most hiring procedures will not involve every stage in Megginson's diagram. Whatever combination of them seems most suited to finding a

³¹Glenn W. Miller, *Government Policy Toward Labor: An Introduction to Labor Law* (Columbus, Ohio: Grid, Inc., 1975), p. 401.

³²Michael Baker, "The Use of Organization Records in Decisions About Job Applicants and Employees," unpublished memorandum to the National Bureau of Standards, Project on Personnel Practices, Computers, and Citizens Rights, July 11, 1976.

³³L. C. Megginson, *Providing Management Talent for Small Business* (Baton Rouge, La.: Division of Research, College of Business Administration, Louisiana State University, 1961), p. 108.

Figure A: Employment Selection Procedure

STAGE IN PROCEDURE	SELECTION CRITERIA	Available Potential Personnel From Inside or Outside Company
Preliminary Screening From Records, Data Sheets, etc.	Lacks adequate educational and performance record	
Preliminary Interview	Obvious misfit from outward appearance and conduct	
Intelligence Test(s)	Fails to meet minimum standards	
Aptitudes Test(s)	Failure to have minimum necessary aptitude	
Personality Test(s)	Negative aspects of personality	
Performance References	Unfavorable or negative reports on past performance	
Diagnostic Interview	Lacks necessary innate ability, ambition, or other qualities	
Physical Examination	Physically unfit for job	
Personal Judgment	Remaining candidate placed in available position	

SOURCE: L. C. Megginson, *Providing Management Talent for Small Business*. Baton Rouge, La.: Division of Research, College of Business Administration, Louisiana State University, 1961), p. 108.

candidate for a particular type of job is the procedure that will be used. It may be as short as the completion of a single application form and, perhaps a brief interview, or as long and detailed as the procedure in the diagram. At each stage however, the focus is on disqualifying factors, the objective always being to shrink the size of the candidate pool.

Recorded information can be crucial in such a process if the candidate is otherwise unknown to the employer. Any adverse information the applicant provided about himself or that the employer develops in the course of checking on what the applicant provides may serve to eliminate the applicant. According to a 1976 survey by the Bureau of National Affairs' (BNA) Personnel Policies Forum, a prospective employer does not verify all of the information provided on an application form. BNA found that companies most often verified an applicant's previous employment record (93 percent); military service record (13 percent); medical history (17 percent); and arrest record (17 percent). Some of the companies surveyed (10 percent) checked on applicants' credit. Although most verification was done by phone, information was not infrequently verified by mail or through the use of an outside agency. Uncovering negative information or finding that the applicant failed to provide accurate information was enough to justify rejecting an otherwise qualified applicant. Although the survey did not specifically examine the question, it would seem logical to assume that the more frequently written information is verified, the greater is the weight an employer attaches to it in the hiring process.³⁴

Testing may also be used to develop information about individual applicants and employees. Surveys indicate that the number of employers that use tests to help choose among applicants has been halved over the last 15 years. The BNA survey found that tests of skill, ability, intelligence, or personality were given to prospective employees by 42 percent of the responding companies.³⁵ Some major employers, such as the American Telephone and Telegraph Company, still rely heavily on test results in making hiring and placement decisions because they recruit from a largely unskilled applicant pool, and then spend a great deal of time and money training those selected.

Truth verification devices, such as the polygraph, represent a special form of testing that is sometimes used in the selection process, especially in the retail industry. The test assesses whether an applicant responds nervously to any of the questions put to him, and while such negative information may not automatically disqualify an applicant, he will assuredly be called upon to explain why he reacted the way he did, often while still attached to the polygraph device.

Some sort of personal interview accompanies most, if not all, hiring, and some placement decisions. As noted above, an individual may be hired on the basis of a short application and a brief interview, but for many jobs, the interview will come only after he has surmounted a number of other hurdles. Some organizations have tried to increase the utility of their

³⁴Mary Green Miner, *Selection Procedures and Personnel Records* (Personnel Policies Forum No. 114), (Washington, D.C.: Bureau of National Affairs, September 1976).

³⁵*Ibid.*, p. 8.

interviewing by standardizing the format of the interview and of the interviewer's report. Other companies rely on open-ended interviews or on a combination of the structured and open-ended procedures. The selection or placement decision may be made by the interviewer or on the basis of the interviewer's oral or written report. Almost any aspect of the applicant's personal background and work and educational experience may be included in such a report.

According to a recent Conference Board study, over 70 percent of all firms require a physical examination for some or all new employees.³⁶ As with other selection and placement techniques, actual practice varies by type of industry, company size, and the kind of job for which application is being made. Medical history questionnaires are becoming widely used for distinguishing applicants whose health problems appear to warrant a physical examination from those whose health seems satisfactory. With fewer examinations to give, firms can concentrate more on the employability of persons with histories of conditions such as drug use, back problems, pulmonary problems, current or past emotional problems, communicable diseases, and alcoholism.

While there were marked variations from one company to another, the Conference Board concluded that medical examinations are used in selection and placement:

1. To identify and eliminate job candidates having disabilities or diseases that would prevent them from performing their required work, or that would pose a significant threat to their health or that of other workers.
2. To permit selection, from among candidates who are not so disqualified, of those judged to present the least risk of unstable attendance, costly illness, poor productivity, or short tenure This is the most socially controversial aspect of preemployment health screening.
3. To place new employees in jobs for which their health best suits them, or to avoid unsuitable placement. In a sophisticated application of this concept, Westinghouse has developed a "medical placement code" by means of which medical findings are matched systematically to particular job health specifications
4. To identify health conditions calling for immediate attention. Some companies send new employees to outside specialists for examination and pay for treatment of certain disorders that these examinations disclose.
5. To establish baseline measures for (a) future evaluation and care of the employee's health and (b) protection of the company against future compensation claims for conditions that existed at the time of employment.
6. To introduce the employee to, and establish his confidence in,

³⁶Seymour Lusterman, *Industry Roles in Health Care* (New York: The Conference Board, Inc., 1974).

a medical facility with which he will have an ongoing relationship.³⁷

In summary, then, the selection process relies heavily, but not exclusively, on recorded information. On balance, it seems to focus more on eliminating candidates on the basis of negative information than on selecting them on the basis of positive information. There appears to be less transfer of information between third-party sources and employers than in other areas the Commission examined, but the recorded information rapidly built up through application forms, interview schedules, and medical history forms is available to the employer for use throughout its relationship with the employee.

DEVELOPMENTAL DECISIONS: TRANSFER, PROMOTION, DEMOTION, AND TRAINING

Decisions to transfer, promote, demote, or train an employee all concern his development within the firm, and thus, can be considered together in terms of the role records play in them. Once again, there is wide variation among firms and industries and types of jobs.

In most firms, promotion and transfer opportunities for blue collar employees depend primarily on seniority, and records documenting this are crucial in a nearly automatic decision process. White collar employees performing routine tasks are usually upgraded or transferred based on simple, objective information. The move into the ranks of management, by both white and blue collar employees, is obviously a crucial one. For this move the decision is seldom based solely on recorded information, but managers frequently seek out first hand knowledge of the individual and his abilities. The Kaiser Aluminum and Chemical Corporation's policy on the selection of salaried employees is illustrative:

For a supervisory position, the following qualifications will be considered by the Selection Committee in evaluating candidates. (For non-exempt salaried positions, the factors will vary somewhat, but the stress will remain on *demonstrated prior experience or competence* in the same or closely related areas as the jobs in question.)

- A. Prior successful experience as a supervisor in either:
 1. A temporary supervisory or leadman position in the Chalmette Plant in which performance was systematically observed and evaluated, or
 2. A supervisory position in some other organization in which an evaluation of performance can be obtained.
- B. Prior successful performance in an hourly position (or non-supervisory salaried job) as documented by performance appraisals made by supervisors and any other relevant evidence of performance and work motivation, e.g., quality

³⁷*Ibid.*, p. 31.

- and quantity records of work output, if any; absenteeism and tardiness data; physical condition as it applies to the requirements of the supervisory job; data on conduct as an employee, such as commendations, warning notices, or records of other disciplinary actions.
- C. Any other evidence of unusual ability, initiative or potential for supervision, which may be demonstrated either on or off the job, such as:
 1. Ideas and suggestions submitted for improvement of work methods or production processes.
 2. Informal leadership of the work crew.
 3. Self-development efforts, including undertaking additional formal education or training.
 4. Ability to communicate.
 - D. Apparent supervisory judgment, technical know-how and knowledge of supervisory practices as determined in a panel interview with the Selection Committee. This interview provides an opportunity for all Committee members to become acquainted with each candidate. The primary purpose, however, is to enable the Committee to determine how the individual might handle typical supervisory problems and operating or technical difficulties if he were a supervisor.³⁸

In such a procedure, a strong record would be a necessary but not a sufficient criterion for selection. The committee process, which includes an interview of the candidate, not only serves to balance subjective considerations but also provides firsthand acquaintance with the applicant by those who can be trusted with this decision.

Further up the organizational pyramid, the situation becomes more complex. First of all, firms differ as to the criteria considered important. As George Odiorne points out:

The two largest firms in the country in sales and profit have diametrically opposed policies with respect to the promotion of college men into managerial positions. In AT&T, the college man enjoys a distinct edge. In General Motors, where results are primary guides to internal selection, a vast majority of managers are not college graduates, including at this writing, the president.³⁹

Second, some firms rely more heavily than others on informal contacts. As Alan Westin has noted:

Some circulate the full or almost full personnel folder to the managers making the promotion decisions. Some supplement that folder with detailed evaluative reports prepared by ex-managers or

³⁸Dale Yoder and Herbert G. Heneman, Jr., eds., *ASPA Handbook of Personnel and Industrial Relations*, Vol. 1, Staffing Policies and Strategies, (Washington, D.C.: Bureau of National Affairs, 1974), p. 433.

³⁹George S. Odiorne, *Personnel Administration by Objectives* (Homewood, Illinois: Richard D. Irwin, Inc., 1971), p. 269.

associates of the employee under consideration. Other organizations limit the record review to a relatively small portion of the total record—jobs held, appraisals, relevant special skills, etc.,—but then use interpersonal contacts by telephone or meetings to get primary judgments from managers.⁴⁰

Two additional factors should be noted here. First, some firms have developed elaborate programs, sometimes called skills inventories, to help assess employee qualifications for specific vacancies.⁴¹ In large firms, this information may be computerized, and the initial selection decision made by computer. Second, while over three-fourths of all business organizations have personnel appraisal programs, their actual effect on promotion decisions varies widely.

At the executive level, it can also be difficult to divine the reasons for, and, thus, the career consequences of job shifts, relocation, and training. In a study of a nationwide industrial firm with over 50,000 employees,⁴² Fred H. Goldner found that it was often difficult to determine whether a move was a demotion, a lateral transfer, or a promotion. He found that “the various mechanisms that obscure demotions, and so cushion their shock, also contribute to the vagueness of criteria for promotion.” Goldner suggests that management is reluctant to give specific reasons—by citing negative incidents from a person’s record, for example—because doing so may further reduce the individual’s effectiveness or make his later promotion harder. Vague promotional criteria, such as fitting in with other executives, also make the reasons for an adverse decision difficult to specify.

Consideration for promotion or transfer may result in additional information being collected about an employee. Some firms require a physical examination when screening for senior positions. If internal or governmental conflict-of-interest regulations apply to the prospective position, extensive disclosure of personal financial affairs may be required. Alan Westin found that prior to selecting an employee for foreign assignment, some firms thoroughly review his health condition, family problems, and financial status. In some cases, special payments are needed to deal with an employee’s personal situation, and communicating these arrangements to an overseas manager can involve elaborate consultation.⁴³

DISCIPLINE

Relevant portions of an individual’s employment record are used frequently in disciplining him. In grievance proceedings the absence of a

⁴⁰Alan F. Westin, “Information Flows and Organizational Practices Relating to the Personnel Function, With Regard to Privacy Issues,” unpublished memorandum to the Privacy Protection Study Commission, January 11, 1977.

⁴¹Submission of Manufacturer’s Hanover Trust Co., “Skills Inventory Form,” Employment Records Hearings, December 16, 1976.

⁴²Fred H. Goldner, “Demotion in Industrial Management,” *American Sociological Review*, Vol. 30, No. 5 (October 1965), pp. 714-25.

⁴³Alan F. Westin, “Information Flows and Organizational Practices Relating to the Personnel Function, With Regard to Privacy Issues,” unpublished memorandum to the Privacy Protection Study Commission, January 11, 1977.

record is tantamount to a confession of guilt on the part of the employer. Even where there is no union, there is usually some kind of grievance procedure in which records can be used to justify a supervisor's action. The records used in disciplinary proceedings usually flow from conduct of the employee that is unsatisfactory to his supervisor. The supervisor documents such conduct in order to provide counseling for the employer to help him improve, or, in more extreme situations, to bring disciplinary proceedings against him. Normally, the employee will be notified of management's concern about his conduct. Some companies have formal probation procedures that precede the ultimate disciplinary action of firing an employee.

Manufacturer's Hanover Trust Company, for example, instructs its supervisors as follows:

When disciplinary actions short of discharge must be undertaken, they should not be viewed as punishment but rather as constructive and cautionary measures that will help a staff member to succeed. These actions follow a standard procedure intended to assure fair and impartial treatment while preserving the dignity of the individual.

As policy, each staff member is to be frankly and promptly informed of unsatisfactory performance and, whenever possible, be given the opportunity to improve before a release is recommended. The decision to release an employee is shared jointly by the supervisor, the area supervisor and the Personnel Department—an additional process intended to insure both fairness and compliance with applicable laws and regulations.⁴⁴

The procedures required of each supervisor include: prompt confrontation of the offending individual, detailed and accurate fact gathering, careful documentation of the event "should further action be required," consideration of mitigating and aggravating circumstances such as personal problems, work record, and length of service, and counseling of the individual. If there is no significant improvement in conduct a three step disciplinary procedure is invoked including warning, probation, and dismissal. The first stage involves an interview with the individual. The second involves written notice on a form designated for that purpose, followed by an interview. The final stage occurs only after the supervisor gets approval from the area supervisor. The affected individual must then have an exit interview with the Personnel Department to assure that he understands the reasons for his dismissal. A complete record must be made of details leading to dismissal and filed with the Personnel Department.⁴⁵

A record maintained by some other organization may occasionally trigger disciplinary action. For example, an employee may be convicted of a crime or simply arrested; screening for a routine personnel action may

⁴⁴Submission of Manufacturer's Hanover Trust Co., "Personnel Manual and Guides for Disciplinary Action," pp. 16-21, Employment Records Hearings, December 16, 1976.

⁴⁵*Ibid.*

reveal that an employee has given the employer false information about himself; or his pay may be garnished more frequently than his employer is willing to tolerate. It would appear, however, that when information from *outside* the firm causes problems for the employee, it is seldom because the employer is routinely seeking it,⁴⁶ and how the employer responds is likely to depend more on the position of the employee within the company than on the actual offense. One large study found that both employees and personnel managers see the legitimacy of discipline for off-the-job behavior as varying with the position of the employee, the company's relationship with the community, and the nature of the company's product or service.⁴⁷ Length of time with the firm and work history are also factors a company is likely to take into account.

THE ADMINISTRATION OF EMPLOYEE BENEFITS

Most employee benefit decisions are routinely made and involve few problems from the standpoint of personal privacy. The employee is, for example, eligible for so many weeks vacation with pay based upon so many years continuous service. He might receive two weeks pay at half the normal rate during participation in military reserve or guard duty. Full reimbursement for tuition and books for an authorized education plan might be automatically payable on receipt of proof of payment. Employee and family health insurance plans usually have an established set of payment criteria and are administered by a special section of the employer's personnel department, or directly by the outside insurer.

There are, however, some important benefit programs that may require an employer to collect a great deal of personal information about its employees and reach decisions on eligibility for benefits in a manner that presents privacy protection problems. Eligibility for payment of sick leave and for long- or short- term disability benefits are two examples. In both cases an employer directly evaluates the medical record of an employee to determine eligibility, and frequently will require a physical examination as a condition of payment and return to work. These decisions are often controversial, particularly since the employer directly bears the cost of lost employee work-days or higher insurance rates. To resolve such conflicts, one Michigan company established detailed procedures for obtaining a physician's certificate of health. They require the employee to go first to a physician on a company approved list at company expense. If this proves unsatisfactory, the employee could go to his personal physician, and if that report was not acceptable to the company, the two physicians could choose a third to make a final decision.⁴⁸

Some of these problems were discussed by the Communications Workers of America, whose representatives testified that the decisions of a company medical department, based upon records to which the individual

⁴⁶Baker, *op. cit.*

⁴⁷Howard M. Vollmer, *Employee Rights and the Employment Relationship*, (Berkeley and Los Angeles: University of California Press, 1960), pp. 117-20.

⁴⁸"Personnel Policy Briefs," September 15, 1975.

had no access without going to arbitration, could have a tremendous impact on an individual's position and pay. For example, a decision by the medical department that a telephone company repairman could no longer safely climb telephone poles could directly result in a job demotion with loss of pay or in layoff until the medical condition was corrected.⁴⁹

SEPARATION

The separation decision can result from several circumstances, most of which involve record keeping about the separated employee. An individual's employment may be terminated because of compulsory retirement, voluntary departure, layoff, disability, or discharge for cause. When a person is retired, an automatic record-based decision is made that his duration of service and age meet the criteria for separation. In the case of a layoff, an individual's seniority record is important and, in the union context, the rule of last-in, first-out applies.

When there is a discharge for cause, the documentation of an employee's specific unacceptable conduct, such as chronic tardiness or insubordination, is usually used as the basis for the decision to fire, although in some instances the stated reasons may not be as important as the undocumented ones, such as a general dislike of the employee or sense that he "doesn't fit." As with the hiring or promotion process, the role of subjective judgment in firing an individual is virtually impossible to assess. Termination for disability involves decisions based on medical records that are sometimes in conflict. Careful documentation is important, both to make an accurate initial determination and to withstand possible administrative or court actions brought by an employee who disagrees about the terms of payment or the judgment of disability.

When a person leaves a firm voluntarily, his departure usually generates a record documenting his reasons for leaving. Termination records which indicate a person's function in the organization, pay, benefit status, accrued leave, and other information are useful for decisions that may have to be made after departure. Sometimes sex and race discrimination suits are brought under Equal Employment Opportunity programs, or there may be disagreements as to an individual's entitlements at time of separation. Records frequently are created to protect the employer's position in regard to these matters.

In summary, employment decisions, unlike credit, insurance, and medical decisions, do not flow as a matter of course from recorded information, and thus it is virtually impossible to say for sure that an adverse employment decision was based on a record. It may even be difficult at times to determine whether a decision is adverse. In some cases, the records of several people are compared in arriving at decisions about an applicant or employee, so that a record pertaining to him cannot alone explain the decision. Moreover, there are occasions when the possibility of having to

⁴⁹Testimony of Communications Workers of America, Employment Records Hearings, December 9, 1976, pp. 94 - 97.

make a particular decision generates the creation of a record that would not otherwise be kept.

FORCES FOR CHANGE

Forecasting the future is never an easy task, but divining the direction of employment-related record keeping is particularly difficult because of the external forces that impinge so heavily upon it. Governmental action, technological change, evolving managerial viewpoints and techniques, perspectives and goals of business firms and labor unions, market factors, changes in the composition and character of the work force, can all have an effect. Nonetheless, effective policy must be future-oriented, and thus some assessment of likely trends must be attempted.

GOVERNMENTAL ACTION

The blurring of boundaries between public and private institutions that has shaped the nation's economic life over the last three decades is not likely to be reversed. More frequent and extended interaction with government inspectors, auditors, and contract monitors makes it likely that records will be required to support an ever larger range of decisions, including personnel decisions. This will probably make managers more careful about what goes into records.

The main focus of legislative and regulatory intervention affecting the employment relationship appears to be in the area of general welfare of employees rather than labor-management relations *per se*. The Equal Employment Opportunity Act [42 U.S.C. 2000 *et seq.* (1972)] and the Occupational Safety and Health Act (OSHA) [29 U.S.C. 651 *et seq.* (1970)] suggest the path this trend may take. The perception that an individual's rights and liberties need more protection in his relationships with private-sector institutions is becoming widespread. Fair information practice legislation, such as the Fair Credit Reporting Act [15 U.S.C. 1681 *et seq.* (1971)] and the California law that permits employees to have access to their personal records [California Labor Code Sec. 1198.5] reflect this disposition.

In addition, some protective labor legislation, such as the Employee Retirement Income Security Act (ERISA) [P.L. 93-406, 88 Stat. 829 (1974)] underscores the increasing importance of the employer's role as provider of social and economic benefits. Yet neither the actual requirements imposed by such legislation, nor the regulations issued by government agencies to implement it, account for its overall impact on the collection, use, and disclosure of information about employees. For example, the Equal Employment Opportunity Commission (EEOC) has not required employers to create or maintain any specific records on individuals.⁵⁰ The Commission's actions in pursuit of its statutorily defined objectives, however, have forced employers to create records in order to demonstrate compliance.

Under EEOC regulations, if employers do make records, they are

⁵⁰Testimony of U. S. Equal Employment Opportunity Commission, Employment Records Hearings, December 17, 1976.

required to keep them for six months or, if a charge of discrimination or an action has been filed, until final disposition. EEOC does not require reports on the composition of the employer's workforce, but recommends that, if possible, the information necessary to compile these reports be collected through visual survey. No data on specific individuals is included in the required reports. If individually identifiable records that include information on race, sex, or other characteristics are kept for the purpose of preparing EEOC reports, EEOC recommends that this information be kept separate so as to reduce the chance that it will influence personnel decisions.⁵¹

If an affirmative action program is required, as under the Rehabilitation Act [29 U.S.C. 701 *et seq.* (1973)], Federal Contract Compliance Regulations [E.O. 11246 as amended], or the Age Discrimination in Employment Act [29 U.S.C. 621 *et seq.* (1967)], or is voluntarily undertaken out of a sense of corporate responsibility, records are essential for program management. This may, of course, include statistical data on interviews, referrals, and other such items as well as information on individual employees. The Inland Steel Company and the Nabisco Company have both indicated that EEOC regulations were a motivating force in their development of automated personnel record-keeping system. The General Motors Corporation submission to the Commission states that:

Regulations implementing the Rehabilitation Act of 1973 and the Vietnam Era Veteran's Readjustment Assistance Act of 1974 require the preparation of affirmative action programs affecting handicapped individuals, disabled veterans, and veterans of the Vietnam Era. These affirmative action programs necessitate maintaining internal files with respect to individuals covered under these Acts, including information on the positions for which covered individuals were considered; and, if the individual was rejected for hiring, promotion, or transfer, the reasons therefore.⁵²

The knowledge that this information could be used for Equal Employment Opportunity suits may also serve to make management reluctant to share personnel planning information with employees. Representatives of the Cummins Engine Company testified before the Commission that the fear of suit is one of the factors contributing to its reluctance to disclose to an employee any information that would imply that he could or would be promoted.⁵³

The Commission foresees that government involvement in selected aspects of the private-sector employment relationship will increase. The impact on employment record-keeping practices will be mixed, but the overall effect will probably be continuous reinforcement of the incentive to make, keep, and use records about employees. Barring a fundamental

⁵¹*Ibid.*, p. 972.

⁵²Letter from the General Motors Corporation to the Privacy Protection Study Commission, November 15, 1976, p. 13.

⁵³Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 67.

reconceptualization of governmental policy affecting the private-sector employment relationship, it seems likely that incremental changes will perpetuate existing trends. Thus, for the future as in the present, the important task is to eliminate and guard against dangers inherent in existing policy and practice.

The Equal Employment Opportunity Act and similar State laws have reduced the collection of certain items of information, such as race, sex, religion, psychological test scores, and arrest history, from applicants as a result of the fact that the use of these items in making a hiring decision may subsequently be shown to have an illegal adverse impact on a protected class of persons.

The long-term impact of some of this legislation is still not clear, however. Currently the Occupational Safety and Health Act (OSHA) appears to be one of the laws most likely to raise significant fair information practice concerns. It provides in part that where standards have been promulgated with reference to specific health hazards:

Where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. [15 U.S.C. 636(b)(7)]

Results of these examinations or tests must be furnished to the employee's physician at the employee's request. They can also be made available to a prospective employer pursuant to authorization by the employee. This raises the prospect that an employee's medical records might follow him from job to job.⁵⁴ Some workers have already declined to take the physicals employers are required to make available, and it has been suggested that one reason for their refusal is their fear of the consequences of having a known disability documented in their records.

Experience with Worker's Compensation shows that this is not a hypothetical problem,⁵⁵ but currently there is no way of protecting applicants and employees exposed to toxic substances from the economic consequences of decisions about their employability, or suitability for promotion.⁵⁶

⁵⁴Letter from Ford Motor Company to Privacy Protection Study Commission, January 14, 1977.

⁵⁵The National Commission on State Workmen's Compensation Laws documented this. As summarized by Nicholas Ashford in his policy analysis of occupational safety and health, "a previously injured worker may be unable to find employment because of employer's fears that he will be reinjured, leading to a high workmen's compensation claim." Nicholas A. Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (Cambridge, Mass: The MIT Press, 1976), p. 417.

⁵⁶Testimony of Dr. Norbert Roberts, Exxon Corporation, Employment Records Hearings, December 1976, p. 787.

GROWTH OF FRINGE BENEFITS

The past quarter century has seen tremendous growth in health insurance, pension, and supplementary unemployment insurance programs for workers in the private sector. With regard to health insurance plans, one recent study notes that they have been brought "to a level at which many companies are approaching total assumption of health care costs for employees and their dependents"⁵⁷ Private pension plans have been in operation for over 100 years. Beginning in 1950, however, their number greatly expanded. It is estimated that there were about 2,000 plans in operation in 1950. In that year, however, a major new plan was announced by General Motors, and as Peter Drucker has commented:

. . . because of its innovative approach and its timing, the GM plan had totally unprecedented impact. Within one year after its inception, 8,000 new plans have been written—four times as many as had been set up in the 100 years before.⁵⁸

By 1973, there were about 50,000 plans covering some 30 million nongovernmental employees. About 65 percent of all private-sector non-farm workers were employed in establishments offering pension plans.⁵⁹ Overall the result has been for the employment relationship to absorb still another aspect of a worker's life in a way that increases his dependence on his job and expands the amount and types of information about him that ends up in his employer's files.

The ERISA legislation, which to a large extent served to codify the standard provisions of the largest and most important pension plans, may be a portent of future developments. In addition to establishing pension program standards, ERISA is intended to assure that benefit plan participants get what they are entitled to.⁶⁰ It provides, for example, that the maximum requirement for vesting is ten years, thus assuring the employee of this pension even if he quits, is laid off, discharged, or stops contributing for some other reason.

Medical services and health and accident insurance are increasingly provided to employees and their families. As elsewhere, limitations on the kind of information gathered in these contexts are few because almost any personal information may be related to the individual's health, and because the expected confidentiality of the patient-physician relationship serves to legitimate probing inquiries. For example, when asked by the Commission why General Electric includes on its "Medical Record Form" items such as denial of rating for life insurance; and military discharge because of a physical or medical condition, or *other unfitness*, company representatives said that those two items

⁵⁷Seymour Lusteran, *op. cit.*

⁵⁸Peter Drucker, *The Unseen Revolution*, (New York: Harper and Row, 1976), p. 7.

⁵⁹Donald R. Beld, "Prevalence of Private Retirement Plans," *Monthly Labor Review*, Vol. 98, No. 10 (October 1975), pp. 17-20.

⁶⁰Sandra Fleming, "ERISA and the Employee's Right to Know," *Personnel Journal*, June 1975, p. 346.

as well as many other questions on the Form, are designed to elicit information which *may provide clues* to our doctors in making appropriate medical examinations and evaluations of the medical condition of a person . . . (emphasis added)⁶¹

In the employment context, the provision of medical services and the processing of medical benefit claims raise acute privacy protection concerns. Indeed, the most acrimonious charge of unfair information use made during the Commission's employment and personnel hearings centered on medical information, albeit as related to actual or suspected environmental hazards in the workplace.⁶²

In practice, corporate and professional ethics tend to discourage abuse. Yet, so long as there are no absolute barriers to any employer's use of its employee medical and insurance claims records, and as long as employers are in some cases *required* to use such records, a privacy problem of potentially major proportions exists. For example, Department of Defense Industrial Security regulations require employers to report any information that would reflect on the reliability of employees who work on classified projects.⁶³ Information on employees and their dependents in medical treatment or insurance claims files is not excluded from this requirement.

MANAGEMENT AND PERSONNEL MANAGEMENT

In large organizations with highly specialized divisions of labor and well-established standards and procedures governing performance in the workplace, personnel management strives for rational ways of making selection, assignment, and promotion decisions. Fair and equal treatment is a major objective of personnel offices throughout the country.

It has been widely suggested, however, that this tendency is counter-productive for organizations in rapidly changing environments with highly skilled and educated workers, and with tasks that require constant development of new systems and products. The role of personnel management in such "post-bureaucratic" organizations is changing. Setting up temporary project-type organizations—firms within a firm—is a way of operating whose popularity is growing. Staffing is crucial in this type of organization, and standard personnel department placement techniques are often irrelevant in such situations. Thus, authority for personnel decisions may be increasingly transferred to the project manager whose principal concern is fitting the individual with the necessary skills into the work team.

There is a strong trend in management away from formal, rule-bound relationships and toward the encouragement of openness and the development of commitment. The implications of this trend for the protection of

⁶¹Letter from the General Electric Company to the Privacy Protection Study Commission, January 19, 1977.

⁶²Testimony of the Oil, Atomic, and Chemical Workers of America, Employment Records Hearings, December 1976, pp. 826 - 32.

⁶³Department of Defense *Industrial Security Manual for Safeguarding Classified Information*, (DOD 5220.22-M), par. 6b(1).

personal privacy are, however, unclear. While a focus on commitment, teamwork, and adaptability tends to create a consultant market for behavioral scientists, this does not mean that the pressures on management to justify its past and present decisions on the basis of detailed records will cease to grow. On the one hand, the so-called "behavioral approaches" to management tend to stress "the importance of collecting accurate, timely data about aspects of the organization not normally closely monitored—evidence as to employee job satisfaction, the accumulation of specialized knowledge and skills, signs of interdepartmental conflict, and the like."⁶⁴ Yet, on the other hand, their net effect may be to focus decisions concerning employees more sharply than at present on work-related matters.

TECHNOLOGICAL DEVELOPMENTS

In recent years, the capabilities of computer-based personnel systems have increased tremendously. The private organizations reporting to the Commission differed considerably in the extent to which they have automated their personnel files and in the way they use them. In general, technological innovations in information storage, transfer, and display do not appear to have increased the amount of information about individual employees that is collected, maintained, or disclosed. Indeed, the Commission's inquiry indicates that the information to be maintained in automated systems is usually carefully screened for cost effectiveness. In addition, the emphasis on accuracy and timeliness of information in automated systems, and the practice of providing a print-out of the record for verification by the employee, have been positive factors from a privacy protection viewpoint.

Computer technology, however, promises to remove many limitations on record-system development in the near future. Cost will always be a consideration, but improved computer capabilities, micrographics, and new duplication and transmission techniques promise to make the capture, transmission, and retrieval of information more and more economical in comparison with manual processes, and more readily available in highly selective formats to geographically separated users. Although these technical capabilities will not in themselves present privacy protection problems, trends and developments associated with them may pose problems that do not exist today. The types of records maintained in easily retrievable form will expand, and it seems likely that behavioral science data concerning employee attitudes and values will have an enhanced role in personnel decision making. Having information on employees instantaneously available at many locations may centralize some decisions now made locally; it will certainly raise the significance of need-to-know criteria in any policy governing disclosure of records within a firm. Automation of files will also increase the capability of organizations to respond to external requests for information for purposes other than those for which the information was originally collected.

⁶⁴George Strauss, R. E. Miles, and C. C. Snow, "Implications for Industrial Relations," *Organizational Behavior: Research and Issues* (Madison, Wisc: Industrial Relations Research Association, 1974), p. 198.

In sum, the Commission subscribes to the view that information abuse does not flow automatically from advanced information technologies, and that better protections for personal privacy have often resulted from computerization.⁶⁵ Yet, it also has reason to believe that ready access to large amounts of recorded information tends to create incentives to use that information for purposes that are inconsistent with the purposes for which it was originally collected. Thus, capabilities of information-processing technologies to be available in the 1980's make it imperative that responsible policies and practices governing the use of information generated in the employee-employer relationship be developed promptly.

GENERAL RECOMMENDATIONS

As in the other record-keeping areas it studied, the Commission 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 (FCRA) to further regulate 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 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

⁶⁵See Allan F. Westin and Michael A. Baker, *Databanks in a Free Society*, (New York: Quadrangle/The New York Times Book Company, 1972).

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.⁶⁶ 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 are 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, if not impossible, task for any government agency to effectively oversee 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 independent entity the Commission recommends in Chapter 1 of its final report might give further consideration to this matter.

It should be noted that there are no legal barriers or conflicts with

⁶⁶John Hutchinson, *The Independent Union* (New York: E. P. Dutton, 1972), p. 359. Secretary of Labor A. Folberg testified before the House Committee on Education and Labor in 1961 that: "Experience has shown that employee suits, if provided as a means of enforcement, are seldom pursued. . . . Individual employees, lacking financial resources, can easily be initiated and subjected to reprisals and discouraged from taking effective action."

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 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 matching practice with policy. The Commission's hearing record illustrates this variety.

Some large corporations have developed comprehensive fair information practice policies through review of record-keeping policies and practices that they have systematically communicated to their employees.⁶⁷ In March 1976, General Electric selected a team to study the collection, use, disclosure, and retention practices of four of its 50 payroll locations (which account for approximately 30 percent of its workforce). The team was directed

to identify, by file and data elements, the types of personal information kept in company records; to measure the current company practices related to privacy and confidentiality against the requirements of proposed legislation; to evaluate the cost of proposed privacy legislation; [and] to submit recommendations for General Electric activities relating to privacy.⁶⁸

IBM, in a 1971 company-wide study, identified all employment records and reviewed the company's practices and procedures regarding them. At the corporate level alone, it uncovered 100 record-keeping systems. This was followed in 1973 by a study of its personnel management practices which led it to develop a training program for line managers. As a part of the training program, moreover, managers were encouraged to raise issues for company consideration in formulating an internal privacy protection policy.⁶⁹

The Cummins Engine Company undertook a detailed study of its employee record-keeping practices in 1974 to determine whether the company was doing an adequate job of placing and promoting minorities and women. The study highlighted some important record-keeping prob-

⁶⁷See, 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," Employment Records Hearings, December 9, 1976; and Submission of International Business Machines, "Four Principles of Privacy," Employment Records Hearings, December 10, 1976.

⁶⁸Testimony of General Electric, Employment Records Hearings, December 9, 1976.

⁶⁹Written statement of I.B.M., Employment Records Hearings, December 12, 1976, p. 8.

lems, including the difficulty of relating recorded information to an employee's progress within the company, the presence of a great deal of obsolete information in employee records, and the ease with which individuals within the company, such as potential supervisors, could gain access to the contents of employee records. As a direct result of the study, Cummins decided to automate its employee records to improve their quality and accuracy, and began to formalize its thinking on how to protect employee privacy. The company identified all employee record systems and file control numbers, listed all data items, evaluated their appropriateness and uses, and determined whether they were currently available to employees.

Cummins testified before the Commission that it now requires company personnel:

- To collect only that information which the company needs to carry on its business responsibilities, or which is required by law.
- To insure that the employee understands the purpose for which information is collected and stored.
- To inform the employee about how information is stored, accessed, and disseminated.
- To protect the privacy of the information and to release it only on a right-to-know basis or with the written consent of the employee.
- To inform the employee what the procedures are for reviewing, correcting, or amending information.
- To eliminate obsolete, inaccurate, or irrelevant information.⁷⁰

Other employers that have undertaken such systematic reviews indicate that they are absolutely necessary to the formulation of a responsible privacy protection policy. In fact, the Equitable Life Assurance Society of America has a privacy task force to study its employee record-keeping practices on an ongoing basis and to recommend changes. This task force was the outgrowth of a previous study of the information contained in the Equitable's employment records.⁷¹

Clearly, the first step for employers that 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. So far only a few employers have invited employee participation in revising their policies and practices. The Cummins Engine Company was the one witness before the Commission

⁷⁰Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 10.

⁷¹Submission of Equitable Life Assurance Society, Employment Records Hearings, December 9, 1976.

that said it had consulted its employees' union in developing its Human Resources Information Center.⁷² 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 countries. Among organizations that now have 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. 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. 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.**

Having initiated such a program, an employer should be in a position to 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

Some corporations have issued statements of policy or principle that

⁷²Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 70.

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.⁷³

The statement of principles developed by the Equitable Life Assurance Society covers all the firm's individually identifiable records, so that employees are considered on an equal level with customers and shareholders. The statement reads as follows:

In recognition of the rights of all individuals, it will be our policy and practice to so conduct our business as to protect the rights of privacy of all those customers, agents, and employees associated with us. We shall do this in ways that are reasonable and consistent with good business practices, with the rights of individuals as our ultimate guideline.

In the on-going pursuit of this principle, we shall:

1. request and use only that information which is pertinent to the effective conduct of business;
2. consider personal information collected and maintained to be of a confidential nature, recognizing our responsibility to provide adequate safeguards to maintain that confidentiality;
3. refuse to make available, without the knowledge of the individual, personal information outside The Equitable or its subsidiaries, except to provide routine service or as required by law;
4. make available to employees and agents, upon proper request, any information we maintain on them, recognizing our obligation to protect the privacy of the source of the information;
5. make available to policyowners and applicants, upon proper request, any information we maintain on them, recognizing our obligation to protect the privacy of the source of the information, and in the case of medical information, supplying that through the individual's designated physician;
6. correct or delete any information found to be inaccurate, thus recognizing the importance of using timely and accurate information so that action adverse to an individual is not based on erroneous data;
7. expect all employees and agents to conform to our well-established ethical standards as to the confidentiality of personal information held by The Equitable.⁷⁴

⁷³See, for example, testimony of the Inland Steel Company, Employment Records Hearings, December 10, 1976, pp. 332, 373.

⁷⁴Submission of the Equitable Life Assurance Society of the United States, "Privacy Principles, General Operating Policy No. 29," March 19, 1976, Employment Records Hearings, December 9, 1976.

The firm has communicated these principles to all employees through the employee newspaper.

The widely publicized IBM principles have also been circulated among employees. They are more general than the Equitable ones, resembling as they do the principles set forth in *Records, Computers, and the Rights of Citizens*, the 1973 report of the Department of Health, Education, and Welfare's Secretary's Advisory Committee on Automated Personnel Data Systems.⁷⁵ The IBM principles affirm that:

1. Individuals should have access to the information about themselves in record-keeping systems. And there should be some procedure for individuals to find out how this information is being used.
2. There should be some way for an individual to correct or amend an inaccurate record.
3. An individual should be able to prevent information from being improperly disclosed or used for other than authorized purposes without his or her consent, unless required by law.
4. The custodian of data files containing sensitive information should take reasonable precautions to be sure that the data are reliable and not misused.⁷⁶

The Cummins Engine Company has approached the formulation of its policy from a different direction. Cummins began by instituting privacy protection procedures and from there is moving toward enunciating policy.⁷⁷ Other companies have developed policies and practices to deal with some privacy protection concerns but not others. For example, the Procter and Gamble Company has published its third-party disclosure procedures, and the Manufacturer's Hanover Corporation, its corporate statement on the confidentiality of records about individuals.⁷⁸ The Ford Motor Company has had specific policies on maintaining and releasing personnel information to outside sources for twenty years.⁷⁹

By and large, however, employers have not thought of privacy safeguards in terms of a coordinated policy and have not been aggressive in informing their employees of the policies they do have. Ford, for instance, testified that it had long had a policy of allowing employees to have access

⁷⁵U. S. Department of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens*, (Washington, D.C.: U. S Government Printing Office, 1973), p. 41.

⁷⁶Submission of I.B.M., Employment Records Hearings, December 10, 1976.

⁷⁷Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, p. 11.

⁷⁸Submission of the Procter and Gamble Company, "Release of Information about Present or Former Employees," November 16, 1976; Submission of Manufacturer's Hanover Corporation, "The Standards We Live By," Employment Records Hearings, December 16, 1976.

⁷⁹Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 517.

to their records, but discovered, in reviewing its practices, that its employees, for the most part, were unaware of it.⁸⁰

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.

Several witnesses supplied the Commission with material about amending application forms and background checks as a result of their record-keeping policy and practice reviews. The J.C. Penney Company, for example, recently revised its employment application form, eliminating, on the grounds that the items are unnecessary, maiden name, date of birth, alien status, criminal convictions (except for specific offenses), leisure activity, military discharge information, physical or mental condition, and references.⁸¹ IBM, in the course of its record-keeping review, eliminated from its application forms date of birth, Social Security number, spouse's employment, relatives employed by IBM, type of military discharge, and previous address. It also stopped using background checks and preemployment personality tests.⁸²

Procter & Gamble decided a number of years ago that the information obtained in background checks was not significant enough to justify its cost, and thus limits its checking on applicants today to occasionally verifying school references. In addition, Procter and Gamble does not ask for arrest, conviction, or military discharge information, nor does it give preemployment physical examinations.⁸³ The practice of Aetna Life and Casualty Company is similar,⁸⁴ and the Cummins Engine Company no longer asks for information about arrests, convictions, and military discharges either. However, Cummins testified that it does rely heavily on references as a substitute for background checks.⁸⁵ Equitable Life Assurance testified that its privacy task force is principally responsible for deciding which items of information should be

⁸⁰*Ibid.*

⁸¹Submission of J.C. Penney Company, Employment Records Hearings, December 10, 1976.

⁸²Testimony of I.B.M., Employment Records Hearings, December 10, 1976, p. 288.

⁸³Procter and Gamble, Staff Interview, November 16, 1976.

⁸⁴See "Employment Records & Personal Privacy: Corporate Policies and Procedures," McCaffery, Seligman and von Simpson, Inc., November, 1976, p. 65.

⁸⁵Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, pp. 12 - 13, 23.

collected or maintained, and that controversies that arise are ultimately settled by the president of the company.⁸⁶ IBM testified that it is easier to determine what is *not* relevant than what is. After establishing relevance guidelines, IBM introduced the topic into its management training program. IBM also encourages employees to comment on the company's relevance determinations as a way of refining the uses made of the information it collects.⁸⁷

- (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.* It appears that few employers systematically inform applicants or employees about uses of the information that is collected about them. Application forms, medical questionnaires, statements authorizing background checks, and insurance claim forms generally do not explain the employer's need for such information. Some would argue that the need is self-evident, but that cannot be assumed.

The Commission learned of companies that do inform applicants and employers about information uses. The IBM Preliminary Health Questionnaire carries the following notice:

Medical History —In order to expedite the employment process, the preliminary health questionnaire will ordinarily be reviewed by an IBM employment representative and referred to a member of the IBM medical staff when there is a question of a health problem which could possibly interfere with your satisfactory job performance. Should you prefer to have this questionnaire reviewed *only* by a member of the IBM medical staff, please inform the IBM employment representative. . .⁸⁸

In addition, the questions about specific medical conditions are preceded by a note which says that while a "yes" answer does not disqualify an individual, it may require work restrictions that could affect job assignment. The questionnaire further indicates that the information will be held in confidence and will be used only to communicate work restrictions to line management and to the personnel department, and then only in coded form.

General Electric's medical-history form states that the purpose of the medical examination is primarily to determine the capacity of the applicant to work safely.⁸⁹ The J.C. Penney Company requires all persons under 30 to be tested for possible drug use. The form for this purpose states:

⁸⁶Testimony of Equitable Life Assurance Society, Employment Records Hearings, December 9, 1976, p. 114.

⁸⁷Testimony of I.B.M., Employment Records Hearings, December 10, 1976, pp. 300-01.

⁸⁸Submission of I.B.M., Employment Records Hearings, December 10, 1976.

⁸⁹Submission of General Electric, Employment Records Hearings, December 9, 1976.

J. C. Penney considers drug abuse to be of significant risk to its Associate population. Fortunately, few applicants are involved in these social problems.

We appreciate your cooperation in this test, which is applied equally to everyone in the most high risk age group. Please sign this statement and cooperate with this test, which is obtained in our Medical Department.⁹⁰

IBM's employment application includes a detachable portion with questions about criminal convictions, the accompanying explanation noting that criminal history is only one factor considered in making an employment decision, and that it is evaluated in terms of the nature, severity, and date of the offense.⁹¹ The instructions on the "Employee Profile" generated by the Cummins Engine Company's Human Resources Information Center (HRIC) tell employees that profile information routinely goes to the personnel unit, and to supervisors considering the individual for a job transfer, but that specified items of information, such as Social Security number, race, sex, marital status, date of birth, citizenship, dependents, and beneficiaries, appears only on the subject's copy. There is also a statement that employees who have questions about the use or dissemination of any information in the profile, or about the Human Resources Center itself, should contact the appropriate personnel unit or the HRIC.⁹² In formalizing such procedures for explaining to individuals how records about them are used, an employer clarifies and limits the employment relationship. Further, to the extent that internal information use conforms to the descriptions given to employees, a "need-to-know" policy on internal access will inevitably emerge.

- (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.*

Where a category of employment records is not shared with applicants and employees as a matter of policy, prevailing practice appears to be for employers not to inform employees that such a category of records even exists. Some employers indicated that, in their opinion, employees have no legitimate interest in knowing that there are certain records used for management planning, such as evaluations, of employee potential, or records associated with security investigations. However, even those who argue that not

⁹⁰Submission of J.C. Penney, "Drug Screen Report," Employment Records Hearings, December 10, 1976.

⁹¹Submission of I.B.M., Employment Records Hearings, December 10, 1976.

⁹²Submission of Cummins Engine Company, "Employee Profile," Employment Records Hearings, December 9, 1976.

every record on an employee should be available to him to see and copy would find it hard to justify keeping secret any of the *categories* of employee records the employer maintains. To defend secrecy of that sort is, in effect, to defend the concept of a record-keeping system whose very existence may be concealed, and thus to adopt 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 defended.

The other five obligations are discussed in detail later in this volume, but are set out here because they are essential to a comprehensive fair information practice policy. They are:

- (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 they are not a cause of unfairness in decisions made on the basis of them; and (c) disclosed within and outside 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, including 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 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's or employee's background, medical history, credit worthiness,

and reputation. As the Commission argued in several places in its final 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* 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 some 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 1974.⁹³

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.⁹⁴ 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.⁹⁵

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.⁹⁶ Use of the polygraph has often been the subject of collective-bargaining negotiations and has even inspired employees to strike. The

⁹³*Privacy, Polygraph, and Employment*, Report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 93rd Congress, 2nd Session, November 1974, p. 3.

⁹⁴*Ibid.*, pp. 9-14.

⁹⁵*The Use of Polygraphs and Similar Devices by Federal Agencies*, Report of the Government Operations Committee, U.S. House of Representatives, 94th Congress, 2nd Session, 1976, p. 61.

⁹⁶*Ibid.*, p. 38.

Retail Clerks International Association, with more than 700,000 members, urges its locals to include anti-polygraph provisions in all contracts.⁹⁷

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.⁹⁸ 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 using the polygraph or other truth-verification equipment to gather information from an applicant or employee.

The Commission further recommends that Congress implement this recommendation by a statute that also bans the manufacture and sale of these truth-verification devices for use by employers. 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 of the Commission's final report.)

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

⁹⁷Testimony of the Retail Clerks International Association, Employment Records Hearings, December 17, 1976, p. 109.

⁹⁸Joseph F. Kubis, "Comparison of Voice Analysis and Polygraph as Lie Detection Procedures," Report for U.S. Army Land Warfare Laboratory, August, 1973, p. 6.

private investigative firms repeatedly said that extensive information about an applicant can be developed without resorting to such ruses.⁹⁹ Accordingly, in keeping with the posture it took on pretext interviews in connection with insurance underwriting and claim investigations,¹⁰⁰ 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.

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.¹⁰¹ Accordingly, to establish the

⁹⁹Testimony of Pinkerton's Incorporated, Private Investigative Hearings, January 26, 1977, p. 156; testimony of Wackenhut Corporation, Private Investigative Hearings, January 26, 1977, pp. 53-54.

¹⁰⁰See Chapter 5 of the Commission's final report, pp. 189 - 90.

¹⁰¹See, e.g., *Milton v. Missouri Pacific Ry. Co.*, 193 Mo. 46, 91 S.W. 949 (1906); *Inscoc 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 G. 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).

responsibility of an employer that 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 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 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.

While irrelevant information can be a significant cause of unfair treatment in employment, especially in hiring, it is also true that the kind of information needed for reaching a hiring decision varies significantly from employer to employer, job to job, and industry to industry. Some life-style information that employers currently collect might be considered to fall in this category. Some people feel strongly that sexual preference should never be asked, others feel that marital status should be taboo, while still others

object strenuously to the collection of information about social activities, drinking, or use of marijuana.

Today, large private-sector employers do collect less information on applicants than formerly and are more careful than they used to be about how they collect it. Until recently, however, privacy concerns were not a prime motivation for limiting what is collected. The Fair Credit Reporting Act, a fair information practice statute, has been a limiting influence on both the amount and manner of collection, but employers testifying before the Commission stated that Equal Employment Opportunity Commission rules have been the primary motivating force. For example, EEOC rules prohibiting the use of previous arrest as the basis for denying jobs or promotions to blacks and women have all but halted the collection of that one item of information prior to making a hiring decision.¹⁰² The Age Discrimination in Employment Act of 1967 has had a similar impact on asking age or birth date. Although many of these items are asked after hiring—for payroll-related purposes or to prepare for statutory compliance reviews—they are not routinely available throughout the employing organization.

Medical history is the one area where there appears to be more information collected today than in the past. Detailed questions about illnesses and conditions, bodily functions, mental disorders, the physical and mental health of relatives, and past health insurance claims are common on medical-history forms today. Corporate medical directors contend that a vast amount of information about an individual is needed to provide clues to existing and potential health problems, some of which could be job-related.¹⁰³ According to one study, however, corporate physicians sometimes expand the definition of "job-related" to include the likelihood of making substantial health insurance claims.¹⁰⁴ Furthermore, examining physicians sometimes verify information with others who have given medical care to the individual. Although the individual must authorize such inquiries, an applicant or employee is not likely to refuse to do so.

The American Civil Liberties Union has expressed concern about the intrusion on personal privacy that acquiring medical information about job applicants or employees presupposes, and has suggested the following guidelines for such inquiries:

- The inquiry should be directly related to ability to perform work efficiently.
- Medical information that has proven irrelevant in the past should not be sought.
- Inquiries should be restricted to current conditions where possible.
- Inquiries about recurring chronic conditions or other historical information should have a time limit (this is particularly

¹⁰²Staff interview with General Electric, November 5, 1976.

¹⁰³See, for example, testimony of Dr. Norbert Roberts, Exxon Corporation, Employment Records Hearings, December 17, 1976, pp. 770-71.

¹⁰⁴Seymour Lusteran, *op. cit.*, p. 32.

significant regarding alcoholism, drug abuse, mental disorder, or cancer).

- Inquiries should be made with knowledge of the job applied for so that they relate to the job.
- Inquiries should not be vague and broad.
- Employers should guarantee that all medical information will be held in strict confidence.
- Employees should be allowed to refuse to answer questions without being suspected of concealment.
- Standards adopted for medical questionnaires should also apply to conversation with the physician.
- Companies should be discouraged from buying standard forms.¹⁰⁵

Some companies, especially those that have begun doing medical screening within the last ten years, rely heavily on medical questionnaires.¹⁰⁶ The so-called "Flynn Law"¹⁰⁷ forbids an employer in New York State to deny anyone employment because of a medical problem, unless the problem currently interferes with the individual's capacity to perform the job. This has encouraged some employers to stop collecting medical-history information on applicants or new hires and to require physical examinations only of persons applying for physically demanding jobs. The J. C. Penney application only asks the applicant to indicate if he believes that he has a limiting medical condition that would bear on job performance. If the applicant so indicates, then he will be given a physical examination.¹⁰⁸

Other States have similar laws which could have an impact on the collection of medical-history information.¹⁰⁹ For example, Maryland has recently enacted a law prohibiting an employer from asking an applicant about psychiatric or psychological conditions or treatment that do not bear directly on the applicant's fitness to do the job for which he is applying.¹¹⁰

Limiting the collection of medical-history information to those situations where a certain state of health is essential to doing a particular job would seriously cut back on the total amount of information in an employer's files. Some corporations are limiting the collection of medical-history information in the preemployment process. Procter and Gamble, for example, does not use medical-history information in making hiring decisions and does not require periodic physicals.¹¹¹ IBM no longer asks questions about mental health history on its medical questionnaires.¹¹²

In general, employers today are less reliant on third-party sources (other than medical sources) than they were in the past. Corporations use

¹⁰⁵American Civil Liberties Union, "Report on Intrusive Questions on Physical Examinations," 1976.

¹⁰⁶Seymour Lusteran, *op. cit.*, p. 33.

¹⁰⁷New York Executive Law No. 296.

¹⁰⁸Testimony of J. C. Penney, Employment Records Hearings, December 10, 1976, pp. 460-461.

¹⁰⁹See, for example, Connecticut Labor Law, 31-126.

¹¹⁰Article 100, Section 95A of the Annotated Code of Maryland.

¹¹¹Staff interview with Procter and Gamble, November 16, 1976.

¹¹²Staff interview with I.B.M., October 28, 1976.

references less frequently than formerly because past employers have become reluctant to discuss the details of an applicant's job performance. Background checks are also less widely used than they were prior to passage of the Fair Credit Reporting Act. At the same time, however, the amount of information collected *after* an individual is hired has been increasing. Skills inventories, and formal performance evaluations, as well as the wide range of benefits and services employers provide, have generated many additional records about employees. Insurance claims and medical services, in particular, involve detailed information about employees.

ARRESTS, CONVICTIONS, AND MILITARY DISCHARGES

The cost of collecting information tends to limit what employers collect, but cost is not an effective deterrent when the item is easily obtained. 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. Notable among the records that can be so misinterpreted are arrest, conviction, and military discharge records.

USE OF ARREST INFORMATION

Arrest information raises perplexing questions of fairness. Although the Commission's record indicates that some employers no longer use arrest information in their employment decisions, many still do.¹¹³ 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 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

¹¹³Written 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).

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.¹¹⁴ 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 applicant to be of good moral character, the definition of good moral character being left to administrative boards or the courts to determine.¹¹⁵ 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

¹¹⁴See, for example, California Labor Code Sec. 432.7(e)(1) and (2).

¹¹⁵See, 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.

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 recommended limitations on collection of arrest record information impose on employers and licensing bodies an obligation not to collect it from any source. Compliance depends on the good faith of employers. If an employer goes to the local police department, it may be able to get at least partial records if the individual is known to the particular departments and the department is allowed to disclose the information. Also, where time gaps result in a person's employment history on account of incarceration pending trial, a skilled interviewer might, by careful questioning, be able to get an applicant to admit that he had been arrested for certain offenses and had spent time in jail. Several witnesses testified to this practice.¹¹⁶

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 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 Law

¹¹⁶Testimony of J.C. Penney Co., Employment Records Hearings, December 10, 1976, pp. 495-496; testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 591; testimony of Rockwell International, Employment Records Hearings, December 17, 1976, p. 959.

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, because central record keepers have little authority over the law enforcement agencies that contribute information to the systems. Often the systems are incapable of making fine-grained distinctions between an arrest with pending disposition and one that has been recently dismissed.

The FBI, which has probably the most sophisticated criminal justice information system yet developed, maintains and disseminates criminal histories on individuals subject to the following restrictions: (1) only "serious" offenses are listed; (2) juvenile convictions are excluded unless the juvenile has been tried as an adult (there is no arrest information obtained on juveniles); (3) any person may review his own criminal file, but challenge for completeness and accuracy must be done through the local agency that contributed the information; (4) records are disseminated to various government agencies, and for various purposes authorized by Federal and State statute (this could include employment if a State law so specified); and (5) arrests over a year old which have not resulted in disposition cannot be disclosed unless there are additional charges, or subsequent arrests pending.¹¹⁷ Even this system, however, is not equipped to confine disclosures to those the Commission's recommendations would permit.

While the Commission has not found a solution to this problem, it 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 systems' 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:

¹¹⁷28 C.F.R. 20.30 *et seq.*

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;¹¹⁸ others have reworded their application forms to inquire only about convictions relevant to the positions for which an individual has applied. For example, the J.C. Penney Company now asks an applicant to list only convictions for crimes involving a breach of trust.¹¹⁹ Other employers specify felonies only or exclude traffic offenses, and some ask applicants to list only felonies committed during the past five years.¹²⁰

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.

¹¹⁸Staff interview with Cummins Engine Company, November 4, 1976.

¹¹⁹Submission of J. C. Penney Company, "Application Form," Employment Records Hearings, December 10, 1976.

¹²⁰See, for example, Submission of International Business Machines, "Application Form," Employment Records Hearings, December 10, 1976.

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 to use conviction information may recur, as when an employee is being considered for bonding or a position of trust. For the same employer 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.¹²¹ Conviction information, in other words, is not available for use in decision making except when its use 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 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 discharges 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

¹²¹See, 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.

supposed to know what the SPN codes mean, many have found out as a result of leaks from the agencies authorized to have them.)¹²²

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 discharges 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 discharges 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. Additional steps should also be taken to assure that SPN code keys stay strictly within the DOD and the Veterans Administration.

Of course, issuing new DD-214s and tightening code key disclosure practices will not resolve the problem if employers can continue to require that discharges 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 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.¹²³

Military Discharge Records. Many employers ask applicants about dates of service in the armed forces and the nature of discharge. They view military service as any other employment and wish to learn what they can about it. They are particularly concerned to know whether an applicant was a serious discipline problem or committed illegal acts while in the military.

There are five types of discharge: 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. The discharge board recommends whether the individual should be discharged and the type of discharge. The discharge authority can take no action more severe than what the board recommends.

Bad-conduct and dishonorable discharges are given only after a full court martial. An attorney for veterans with service-related legal problems

¹²²*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.

¹²³Letter 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.

testified that the procedures for giving general and other-than-honorable discharges lack adequate due process, that the procedures vary from service to service, and that the process circumvents Congressional intent by allowing vast numbers of other-than-honorable discharges without statutorily based courts martial. He recommended that there be two types of discharge, honorable and dishonorable, and that the latter always require a court martial.¹²⁴

In practice, it appears that employers tend to disregard the distinction between the administrative discharge and discharges resulting from courts martial.¹²⁵ 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.¹²⁶

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 comparable, however, 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.

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

¹²⁴Testimony of David Addlestone, Employment Records Hearings, December 16, 1976, pp. 610-16.

¹²⁵See, for example, testimony of the Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 585.

¹²⁶Letter from the Deputy Assistant Secretary of Defense to the Privacy Protection Study Commission, January 18, 1977.

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 discharges 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 discharges 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 conduct preemployment and prebonding background checks routinely; others do so only for certain categories of employees, such as executives, managers, or technical people, or persons dealing with money or securities. Some employers have their own background investigators, but many hire an outside firm.

Some corporations, like IBM and Procter and Gamble which once used background checks regularly, have abandoned the practice altogether.¹²⁷ Other corporations like the Cummins Engine Company have never used them.¹²⁸ In 1975, the Ford Motor Company conducted 1,194 preemployment investigations,¹²⁹ and Manufacturers Hanover Trust Company whose policy calls for an outside check on anyone who has held more than three jobs within the past ten years, contracted with an investigative firm for about one hundred.¹³⁰

A background check may do no more than verify information provided by an applicant, or it may be used to collect public-record information, such as criminal history. It may, however, seek out additional information on previous employment, life-style, and personal reputation. The information sought could be intensely personal. The practices of private investigative firms are discussed in detail in Chapter 8 of the Commission's final report. 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.

¹²⁷Staff Interview with Procter and Gamble, November 16, 1976; testimony of I.B.M., Employment Records Hearings, December 10, 1976, p. 312.

¹²⁸Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, pp. 11-12.

¹²⁹Letter from Ford Motor Company to the Privacy Protection Study Commission, January 14, 1977.

¹³⁰Staff interview with Manufacturers Hanover Trust Co., November 29, 1976.

The scope of 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 preemployment investigations by providing ways for him to keep track of what is going on and to 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 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 for other types of 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, however, 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 inquiry. 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's practice deviated from those described in its notice. 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 an applicant or employee when an employer or investigative firm used third-party sources or collection techniques other than those stated in its 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's 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 of the Commission's final report), 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.¹³¹

Nonetheless, many employers' job application forms still include a statement which the applicant must sign, authorizing the employer to acquire information from organizations or individuals with which the applicant has a confidential relationship.¹³² Or, as described in Chapter 8 of the Commission's final report, 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

¹³¹See, 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 1, 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. 517-18, 599.

¹³²See, for example, submission of General Electric Company, "Application for Employment," and "Statement of Claim for Weekly Sickness and Accident Benefits," Employment Records Hearings, December 9, 1976.

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;**
- (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

If a record is to be used to make a decision about an individual applicant or employee, fairness demands that he be able to see, copy, and correct or amend it. Although a right to see, copy, and request correction or amendment of an employment record can be 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, a well considered access policy, consistently carried out, is strong evidence of an employer's commitment to fair information 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.

Although not legally required to do so, a growing number of firms permit and even encourage their employees to review their employment records. Only one employer, the Manufacturers Hanover Trust Company, testified before the Commission that it does not allow such access. It offered as reasons for not doing so that its employees had shown no interest in seeing their employment records; that most of the information in the records had been obtained directly from the employee or with his authorization; and that if the company were to institute an access policy, employees would have to take valuable work time to travel to the site where the records are kept.¹³³ This contrasts, however, with the testimony and written submissions of firms such as General Electric, IBM, Caterpillar Tractor, Cummins Engine, Eastman Kodak, and Koppers, all of which said that they permit a substantial amount of employee access as a matter of policy.¹³⁴

In 1976, a Bureau of National Affairs Study found that of the 106 manufacturing and 53 non-manufacturing firms surveyed, 60 percent of the former and 57 percent of the latter allowed employees to inspect at least part of their personnel records, although in some cases this inspection had to be in the presence of a supervisor.¹³⁵ These figures are comparable to the results of an informal survey conducted by the Associated Industries of Missouri in the St. Louis Metropolitan Area. That survey found that approximately 50 percent of the firms queried allowed employees to review the information in their personnel records.¹³⁶ Only 26 percent of the 103 firms responding to a 1975 survey conducted by Congressmen Edward I. Koch and Barry M. Goldwater, Jr., indicated that they currently "permit any person to inspect his file and have copies at reasonable cost to him." However, the lower percentage indicating that they permitted access was probably due in part to the way the question was worded. Indeed, an additional 29 percent responded that they could easily implement an access policy.¹³⁷

The Caterpillar Tractor Company provides an example of this type of change. The *Caterpillar Public Affairs Bulletin* of August 4, 1975, notes that "administration of an employee record-keeping system which permits employee review would present a host of employee/labor relations considerations" and that access rights granted under a Privacy Act would have a major impact as "records traditionally considered confidential by the

¹³³Testimony of Manufacturers Hanover Trust Co., Employment Records Hearings, December 16, 1976, pp. 693-95.

¹³⁴Testimony of General Electric, Employment Records Hearings, December 9, 1976, pp. 234-235; testimony of Cummins Engine Co., Employment Records Hearings, December 9, 1976, pp. 14-18; testimony of I.B.M., Employment Records Hearings, December 10, 1976, p. 289; letter from Kodak to the Privacy Protection Study Commission, October 13, 1976; letter from Koppers to the Privacy Protection Study Commission, November 3, 1976; letter from Caterpillar Tractor Co., "Public Affairs Bulletin," December 9, 1975.

¹³⁵Mary Green Miner, *op.cit.*

¹³⁶Letter from Associated Industries of Missouri to the Privacy Protection Study Commission, October 13, 1976.

¹³⁷Complete results from this survey are available through the offices of Congressman Barry Goldwater and Congressman Edward Koch.

Company would become available for employee inspection." The company position, as subsequently submitted in response to the Koch-Goldwater survey, however, was to support permitting an employee to inspect his employment records, provided a company representative is present when the individual is given access and also that no copies are given to the employee.¹³⁸

The Boeing Company's access policy is similar: if an employee requests specific information from those employment records held in his administrative personnel folder:

any document retained in the personnel folder may be removed and shown to the employee. The folder itself cannot be made available to the employee however.¹³⁹

Such control procedures on employee access to employment records are common in companies that allow access, although the specific limitations vary greatly. In general, four categories of records are *not* available to employees: (1) records that could lead to complaints of unfair treatment; (2) industry security and claim records; (3) medical records and psychological tests and evaluations; and (4) records obtained from third parties under a pledge of confidentiality.

As to the first category, most employers that expressed a view to the Commission were of the opinion that allowing access to information on supervisory estimates of promotion potential, company promotion planning, or plans for future assignments or salary adjustments would not be advisable because of the danger that they would create false hopes. Similarly, access to actual test scores or peer ratings might raise questions about unfair treatment in relation to co-workers.

Access to industry security and claim records also tends to be denied as a matter of policy, because in both cases the company is, at least potentially, in an adversary relationship with the employee. The usual reason for refusing access to medical records and psychological tests and evaluations is that the diagnostic and evaluative information in them must be interpreted by a professional if it is to be properly understood by the individual. However, at least one large company, Eastman Kodak, permits direct access to medical records.¹⁴⁰

References are an important example of records obtained under a pledge that the material in them will not be disclosed to the applicant or employee. Most employers rely on references less today than formerly, but the Commission found that in at least one area—academic tenure decisions—they are considered as important as ever and their disclosure to the individual to whom they pertain is still strongly opposed on the grounds that such disclosure would undermine the objectivity of the peer review

¹³⁸Caterpillar Tractor Co., letter to Congressman Edward Koch, October 15, 1975.

¹³⁹Letter from Boeing Co. to Privacy Protection Study Commission, November 22, 1976.

¹⁴⁰Kodak Corp., Medical Procedure C-D5 "Policy on Handling Medical Data," August, 1976.

process and force judgments to be made on the basis of informally obtained, and thus presumably less reliable information.¹⁴¹

Although the Commission did not extensively review union attitudes on the access issue, it got the impression that unions are not very concerned about their members' access to the records employers maintain about them. The United Auto Workers, in a letter to the Commission, indicated that requests by its members for access to or correction of their employment records are rare, and are handled by union representatives informally. There are a few contract provisions relating to employment records—notably provisions regarding disciplinary notations in employees' files, notations on rating forms regarding rehireability, and access to records of physical examinations required by OSHA—but the subject seldom comes up in union-management negotiations.¹⁴²

An analysis of contract provisions concerning employee access to employment records contained in agreements between the United Communications Workers of America and the Bell System companies found that 41 percent of the contracts gave employees the right to inspect their employment records. Another six percent provided the right to initial the employment record upon inspection and to be advised of new entries into it. Three percent of the contracts provided for once-a-year inspection and another three percent provided for monthly inspection. Forty-seven percent of the contracts made no provision for access.¹⁴³

Employee access to medical records has been a concern to some unions. The Communications Workers of America testified that the Chesapeake and Potomac Telephone Company's refusal to permit access to employee medical records, either by the union or by the employee himself, was a significant problem. The union argued that medical-record information can play a crucial role in promotion, transfer, and other important personnel actions, and that negative information from the medical record was the source of most suspensions and dismissals.¹⁴⁴

A representative of the Oil, Chemical, and Atomic Workers International Union stressed the need for access to company medical records to assure that employees are informed about conditions potentially hazardous to their health.¹⁴⁵ This Union and its Local No. 8-74 took to arbitration a dispute with ARCO Polymers, Inc., over employee access to the results of blood tests the company performed. As a result, the company is now

¹⁴¹See, 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.

¹⁴²Letter from United Auto Workers to the Privacy Protection Study Commission, May 5, 1977.

¹⁴³Submission of Communications Workers of America, Employment Records Hearings, December 9, 1976.

¹⁴⁴Testimony of Communications Workers of America, Employment Records Hearings, December 9, 1976, pp. 93-96.

¹⁴⁵See Testimony of Oil, Chemical, and Atomic Workers of America, Employment Records Hearings, December 17, 1976, pp. 826-29.

. . . required to give to the employee's doctor, upon proper written authorization, the results of the blood tests performed on such employees so a determination may be made whether the types of tests given are sufficient and whether they should be given more frequently.

Further, upon written authorization, the company must

provide the Union with blood analysis results, limited to current tests. Such information, upon proper authorization by employees, shall be made available at reasonable times and place for inspection and copying if it so desires . . .¹⁴⁶

Many companies maintain that employees really have very little interest in seeing their records. For example, General Electric testified that although its employees are aware of its many information systems, they have shown little interest in reviewing the information in them.¹⁴⁷ In a written submission, the Mohasco Corporation, with some 16,000 employees, stated that "there is no known instance of any employee expressing curiosity or interest about the contents of his or her employment or personnel records."¹⁴⁸

Nonetheless, most of the employers that testified before the Commission have instituted some type of systematic record review procedure, usually in connection with the operation of their automated record-keeping systems. General Electric, for example, testified that employee interest in assuring the accuracy of computer-generated data is high:

. . . the principal source of employee-generated requests for corrections stems from data that are furnished the employee from the output of a system—for example, paychecks and W-2 statements. We have found our employees to be excellent auditors in discovering any errors in output from these systems.¹⁴⁹

IBM went even further, stating that "our automated system depends on employee review to assure . . . accuracy . . ."¹⁵⁰

Inland Steel Company testified that in establishing its computerized personnel system, it conducted a face-to-face verification review with each of its employees to assure an accurate data base at the starting point, and since then the employee has been sent a copy of the entire record in the automated personnel system each time there has been a change in his work history. According to Inland's testimony:

. . . the system has been designed to provide an employee with a

¹⁴⁶Award in the matter of arbitration between ARCO Polymers, Inc., and O.C.A.W. International Union, Local 8-74, File No. 14-73, May 16, 1974.

¹⁴⁷Testimony of General Electric, Employment Records Hearings, December 9, 1976, pp. 234-35.

¹⁴⁸Letter from Mohasco Corp. to the Privacy Protection Study Commission, October 27, 1976.

¹⁴⁹Testimony of General Electric, Employment Records Hearings, December 9, 1976, p. 235.

¹⁵⁰Testimony of I.B.M., Employment Records Hearings, December 10, 1976, p. 294.

written copy of his personnel record and the actions taken on his behalf. In this fashion, it is expected that employees will continually update any information that is in error on their files so as to make our records completely accurate.¹⁵¹

Even Manufacturers Hanover Trust, which opposed allowing employees to request access to their personnel records, relies on its employees to update the information in its automated skill inventory system once each year. And as to its other automated personnel records, the supervisor receives a print-out each time a significant change occurs and is responsible for assuring the accuracy of all information pertaining to those under his supervision.¹⁵² Manufacturers Hanover Trust procedures also call for the employee to be shown his performance appraisal, to sign that he has seen it, and to sign any probation notice he receives. The latter details the reasons for the probation action.¹⁵³ Most large firms handle performance evaluations and disciplinary actions in a similar manner.

Indeed, an affirmative records review program is highly compatible with modern management approaches. Many employers do, in fact, share performance evaluations with their employees as guidance on how to improve performance.¹⁵⁴ The employee's interest in these records is obvious, since negative evaluations can deny him 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.

Insofar as evaluations of an employee's *potential*, however, the testimony suggests that the pertinent records frequently are *not* shared with employees.¹⁵⁵ The Commission finds it difficult to justify the difference in treatment. Performance evaluations and evaluations of potential are intimately related. When 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

¹⁵¹Testimony of Inland Steel Co., Employment Records Hearings, December 10, 1976, pp. 285-86.

¹⁵²Testimony of Manufacturers Hanover Trust Company, Employment Records Hearings, December 16, 1976, p. 661.

¹⁵³*Ibid.*, pp. 665-66.

¹⁵⁴See, 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. 131-32; and testimony of J. C. Penney Company, Employment Records Hearings, December 10, 1976, pp. 464-65.

¹⁵⁵Testimony of Manufacturers Hanover Trust Company, Employment Records Hearings, December 16, 1976, p. 653.

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 should be told that their employer maintains security records, a general right to see, copy, and request correction of such records could seriously handicap security investigations. Access should be allowed, however, 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. Yet, as the Commission has already emphasized at several points, 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.

In the private sector, employment records are considered the property of the employer to be used as a management tool of the firm. In a letter to the Commission, the Association of Washington Business took that position explicitly:

Upon entering into employment, every individual implicitly surrenders a certain amount of "privacy" to the employer which thereafter must be regarded as the employer's information. We do not accept as valid the contention that information about an individual is intrinsically the "property" or "right" of that individual.¹⁵⁶

Associated Industries of Missouri was even more blunt. The "personnel record," is "company property."¹⁵⁷ Standard Oil of Indiana argued that the five principles of the DHEW Secretary's Advisory Committee report ignore company proprietorship over information. According to its submission:

Individuals get salaries for work that is done well . . . or not so. We believe employers have the right to record related observations and to maintain confidentiality of these observations.¹⁵⁸

Collective bargaining has been one important means of limiting the employer's common-law property interest in employment records. When the employee-employer relationship is defined by collective bargaining, access

¹⁵⁶Letter from the Association of Washington Business to the Privacy Protection Study Commission, November 22, 1976.

¹⁵⁷Letter from Associated Industries of Missouri to the Privacy Protection Study Commission, October 13, 1976.

¹⁵⁸Letter from Standard Oil Company (Indiana) to the Privacy Protection Study Commission, October 18, 1976.

to records is an obvious topic for contract negotiation and the resulting provisions are binding on the parties.¹⁵⁹ As indicated earlier, however, fair information practices have rarely been the subject of collective bargaining.

The common-law basis of the employer's property interest has also been modified by statute. Federal and State laws that require records to be disclosed to government agencies are an obvious example. The Maine and California laws that require employers to permit employees to inspect their own personnel files are another. These modifications, however, are limited and do not change the basic status of the records. Moreover, the recently enacted California statute offers an interesting example of problems that are not solved by simply legislating access to employment records. The statute reads:

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.¹⁶⁰

Despite its simplicity and clarity, this statute has not been widely used. The Shell Oil Company wrote the Commission that:

Within the States of California and Maine, where legislation in the area has been promulgated, we have had requests from an estimated 1 to 2 percent of our employees to review personal data maintained by the Company.¹⁶¹

And Rockwell International testified that after nearly a year under the California law, less than one-tenth of one percent of its 35,000 California employees had asked to see their records.¹⁶²

Nor has the statute been rigorously enforced. In January 1976, an interim Policy and Procedure Memorandum was published as a guide for the State of California Division of Labor Standards in enforcing the law, but no further policy guidance has been forthcoming, and it would appear that making failure to comply a misdemeanor, punishable by a minimal fine, is not a remedy likely to goad large corporations into compliance.¹⁶³

As noted earlier, there were differences within the Commission as to whether a right of access to employment records need be a right without a remedy, and thus a right that should not be legislated. However, because

¹⁵⁹See testimony of United Auto Workers, Employment Records Hearings, December 16, 1976, pp. 719 - 27.

¹⁶⁰California Code Sec. 1198.5

¹⁶¹Letter from Shell Oil Co. to the Privacy Protection Study Commission, October 14, 1976.

¹⁶²Testimony of Rockwell International, Employment Records Hearings, December 17, 1976, p. 915.

¹⁶³Interim Policy and Procedure Memorandum, California Department of Industrial Relations, March 1977.

employers do have discretion to determine which records they will make available to their employees, and because depriving them of that discretion could markedly change the character of the employee-employer relationship in directions the Commission does not consider itself competent to evaluate, the Commission concluded that employers must 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, the investigative-reporting agency should be informed 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 doing so.

The Commission's recommendations on the insurance relationship (in Chapter 5 of its final report) would give the subject of an underwriting investigation a right to see and copy the resulting report in two places: at the office of the insurer that ordered it, and at the office of the firm that prepared it. Hence, the Commission did 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 the Commission's recommendation on adverse underwriting decisions (*Insurance Recommendation (13)*) 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.¹⁶⁴ 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 idea 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 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

¹⁶⁴See Chapter 8 of the Commission's final 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, p. 162; 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.

procedural protections needed to assure 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 nonmedical 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 of its final report. That is, *when an employer's relationship to an applicant, employee, or former employee is that of a medical-care provider*,¹⁶⁵ the Commission recommends:

¹⁶⁵The term "medical-care provider" includes both "medical-care professionals" and "medical-care institutions." A "medical-care professional" is defined as "any person licensed or 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

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.

When the employer's relationship to an applicant, employee, or former employee is *not* that of a medical-care provider, however, 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 of the Commission's final report, 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 of the Commission's final report, the statute should encompass 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 with the recommendation on access in Chapter 5 of its final report. Accordingly, the Commission recommends:

limited to, hospitals, skilled nursing facilities, home-health agencies, clinics, rehabilitation agencies, and public-health agencies or health-maintenance organizations (HMOs)."

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 of the Commission's final report) 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. After the claim is settled the recommendation would not apply to any record compiled in relation to 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 (see Chapter 5 of the final report), and that it may affect a substantial number of individuals, given the proportion of the work force currently insured under employer-provided or employer-administered group plans. Thus, while the Commission hopes that employers will voluntarily adopt *Recommendations (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 the Commission recommends for insurance records maintained by insurance institutions.

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 the Commission recommends for other types of records about individuals. For example, when an individual requests correction or amendment of a record, the employer should notify the 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. 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 it recommends should 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;
- (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 of its final report should be voluntarily adopted by employers that 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

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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. Records developed about an employee are not specific to each decision to be made about him or to each function involving him. The number of records kept on employees is substantial (General Electric counted 700 systems in one location)¹⁶⁶ and it is difficult to know what they all contain, let alone to track their flow systematically within the organization. Furthermore, employment records are often kept at several different locations and the information in them grows and changes over time.

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 unauthorized retrieval of information stored in a common data base easier than it is currently.

For efficiency reasons, employers tend to limit the internal flow of information to those having a need for it. "Need-to-know" policies, however, vary. One employer requires that placement recommendations from the medical department be transmitted in code only, while another permits the physician and the supervisor to talk over the placement. One employer does not allow anyone other than an employee's immediate supervisor to have access to his performance evaluations, while another permits a number of top-level managers to see them.

Prior to establishing its Human Resources Information Center, the Cummins Engine Company reviewed the flow of individually identifiable records on its employees and asked managers to explain why they needed certain items of information. As a result, the number and type of information transfers permissible within the corporation were drastically reduced.¹⁶⁷ Rockwell International testified that in examining managers' requests for lists of employees' names and information such as date of eligibility for service awards and birth dates, it found that many of the requests could be considered unnecessary invasions of employee privacy.¹⁶⁸

PERSONNEL AND PAYROLL RECORDS

As personnel planning and management systems become more

¹⁶⁶Testimony of General Electric, Employment Records Hearings, December 9, 1976, pp. 56-58.

¹⁶⁷Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1976, pp. 56-58.

¹⁶⁸Testimony of Rockwell International, Employment Records Hearings, December 17, 1976, pp. 943-44.

elaborate, so have the personnel files and payroll records an employer keeps on its employees. Today, the payroll record is a collection of other records relating to benefits, leave, deductions, job classifications, and other factual information about an employee's relationship to the workplace. Not all employees expect personnel and payroll records to be held in confidence within the employing organization, but out of consideration for those who do, the Commission believes that an employer should limit the use of such records to whatever is necessary to fulfill particular functions. As IBM testified, the payroll department may need to know a person's charitable deductions, but a manager does not.¹⁶⁹

Hence, 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.¹⁷⁰

Security departments usually work with personnel departments in the course of investigating incidents involving employees.¹⁷¹ 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.¹⁷² Because security records maintained apart from personnel records can have little impact on personnel decisions about an employee, and because 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 is hard to justify. If, however, information in the security record of an employee is to

¹⁶⁹Testimony of I.B.M., Employment Records Hearings, December 10, 1976, p. 289.

¹⁷⁰See, 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.

¹⁷¹See, 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.

¹⁷²See, 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.

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 a medical examination 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.

Corporate medical departments frequently are the primary source of medical assistance to employees and, as such, may provide care that is not directly related to employment. This situation allows physicians to collect two types of information on applicants and employees: (1) information necessary to answer management's questions about capacity to perform work; and (2) information developed in the course of ongoing medical care or voluntary physical examinations.

It is the dilemma of the occupational physician that the ethics of his profession presume a confidential relationship with his patients, while at the same time he cannot serve the company that employs him without sharing some medical-record information with management. In its Code of Ethical Conduct for Physicians Providing Occupational Medical Services, the American Occupational Medical Association recognizes that the corporate physician serves two masters. The Code, adopted in September, 1976, states that corporate physicians should "avoid allowing their medical judgment to be influenced by any conflict of interest," and

treat as confidential whatever is learned about individuals served, releasing information only when required by law or by overriding public health considerations, or to other physicians at the request of the individual according to traditional medical ethical practice; and should recognize that employers are entitled to counsel about the medical fitness of individuals in relation to work, but are not entitled to diagnoses or details of a specific nature.

All of the corporate witnesses in the Commission's hearings on employment and personnel records testified that medical records are maintained separately and, as a general rule, are unavailable to employers. Several, however, indicated that diagnostic codes are routinely shared with management and that occasionally detailed medical-record information is also disclosed to management.

Before a person can begin working for a company he frequently must fill out a medical questionnaire or take a physical examination. After evaluating the information collected, the physician usually informs the personnel office or line management of any recommended work restrictions. This is generally done through work restriction codes like the following ones used by the Ford Motor Company:

- A - No restriction
- B - Work suitable for small stature or light weight
- C1 - Work with no eye hazards
- C2 - No heavy lifting or excessive bending
- C3 - Ground level work
- C4 - Work in clean atmosphere
- C5 - Dry work
- C6 - Sitting work
- C7 - Part-time sitting work
- C8 - Special work (described in detail)
- D - Not qualified for any work¹⁷³

Two witnesses before the Commission—Manufacturer's Hanover Trust and Exxon—testified that they prefer not to use codes. Manufacturer's Hanover Trust personally recommends limits to the prospective supervisor, who decides if anyone else needs to know. The medical director may also show the record to the supervisor if he considers it in the individual's interest to do so.¹⁷⁴ Exxon's doctors simply tell management "yes" or "no" regarding a job placement decision without stating the reasons.¹⁷⁵

When accidents or illnesses occur on the job, the medical staff shares medical-record information with others. The Ford Motor Company testified that to protect against future health problems in a plant "incident reports" are routinely shown to the safety director, including reports containing diagnostic and treatment information. Ford testified further that if a person were brought to the medical department for emergency treatment and the doctor discovered a chronic disabling condition that might affect the individual's safety, or the safety of others on the job, the doctor, without revealing the diagnosis, would routinely send a coded report to management indicating the need for a change in job assignment.¹⁷⁶ The Commission found only one corporation, ALCOA, that claims it does not share medical-record information with management, even if the failure to do so might endanger other employees.¹⁷⁷

The Equitable Life Assurance Society posed the conflict inherent for corporate physicians where an employee's supervisor asks the physician to

¹⁷³"Employment Records and Personal Privacy: Corporate Policies and Procedures," McCaffery, Seligman and von Simpson, Inc., November, 1976, p. 105.

¹⁷⁴Testimony of Manufacturers Hanover Trust Co., Employment Records Hearings, December 19, 1976, pp. 702-03.

¹⁷⁵Testimony of Exxon Corp., Employment Records Hearings, December 17, 1976, pp. 807-08.

¹⁷⁶Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, ppp. 587-88.

¹⁷⁷McCaffery, Seligman and von Simpson, Inc., *op. cit.*, p. 51

examine the employee because the supervisor suspects an emotional impairment, describing it as a "difficult judgment . . . if [the physician] is dealing with an employee on a confidential basis, of separating his previous knowledge and the request of the supervisor."¹⁷⁸ Other corporate witnesses testified that they considered it their responsibility to be actively involved in helping employees to resolve their emotionally based medical problems.¹⁷⁹

Suspected drug or alcohol abuse presents the same dilemma. Frequently, the supervisor will tell the physician that the employee's deteriorating performance should be looked into as a possible health problem. Generally, corporate physicians would then place the employee in a treatment program and confer with the supervisor as to the employee's progress so that the manager can decide whether to retain or fire him.

When a corporate medical department provides voluntary physical examinations or on-going medical care, the internal disclosure problem is intensified. One corporation, the Aetna Life and Casualty Company, is attempting to deal with it by segregating the records of its voluntary medical program from those of its compulsory program.¹⁸⁰

The Commission believes that great care should be taken to insulate the traditional confidential relationship between physician and patient from the usual work-related responsibilities of a corporate medical department. It recognizes that such a policy is difficult to enforce and can work only where management understands and respects the need to keep the compulsory and voluntary functions of the medical department separate. Nonetheless, it believes such a policy is essential and accordingly 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.

¹⁷⁸Testimony of Equitable Life Assurance Society of the U.S., Employment Records Hearings, December 9, 1976, pp. 127 - 28.

¹⁷⁹See, for example, testimony of Cummins Engine Co., Employment Records Hearings, December 9, 1976, pp. 29-32.

¹⁸⁰McCaffery, Seligman and von Simpson, *op. cit.*, pp. 71 - 70.

INSURANCE RECORDS

Large private-sector employers generally participate in two types of health insurance programs: work-related benefit programs, such as sick leave pay, short- and long-term disability, and Worker's Compensation; and insurance offered as a service, such as medical and dental insurance, or major medical insurance. The claim records from both types of programs 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. 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. This use of benefit records in personnel decisions presents special problems from a privacy protection point of view.

Employers offer their employees four basic types of group medical insurance plans. In two of them, the employee submits claims directly to the insurance company, but in one of the two the employer gets back certain utilization information that may include individually identifiable data on the amounts paid to specific employees, the date of payment, the general type of treatment (surgical, abortion, psychiatric care, venereal disease), and the cause of treatment.

In the third type of plan the employee submits his claim to the employer who processes it and sends it on to the insurance company for reimbursement. The employer may or may not get back utilization information, but it can, and usually will, keep a copy of the claim information the employee submits. In the fourth type of plan the employer is the insurer, and thus pays the claim itself, keeping all of the information pertaining to the claim in its files.

The administration of benefits under short- and long-term disability insurance programs usually requires information transfers between the benefits department and the medical department, as the corporate physician generally decides in the first instance whether a person is entitled to payment. Both types of disability insurance are carried by employers to provide employees with compensation during periods of extended or permanent inability to work on account of medical conditions whether they occur on or off the job. In making his decision, the corporate physician generally relies on the opinion of the employee's private physician. However, if there is a conflict, he initiates the employer's procedure for resolving the matter, such as seeking additional medical opinions. In the course of these determinations records pass between the benefits department and the medical department.¹⁸¹

There are also information transfers between both private and corporate physicians and management involving claims for Worker's

¹⁸¹Testimony of Ford Motor Co., Employment Records Hearings, December 16, 1976, p. 573; testimony of Inland Steel Co., Employment Records Hearings, December 10, 1976, p. 389; testimony of E. I. Dupont de Nemours and Company, Employment Records Hearings, December 17, 1976, p. 798.

Compensation, a mandatory program providing compensation to employees for work-related injuries. The procedures for verifying Worker's Compensation claims vary from State to State. Worker's Compensation, like short- and long-term disability insurance, involves making decisions about an employee's ability to continue working. In addition, employers are legitimately concerned with preventing fraud under these programs, since in many States the rate which the employer pays is based directly on the amount of claims filed by its employees. Privacy problems arise when information to determine eligibility for Worker's Compensation is used to make other types of judgments about employees, such as when a supervisor makes a promotion decision on the basis of it.

Although testimony before the Commission indicates that most employers guard service, disability, and Worker's Compensation claim information carefully, there is some evidence that some information intended only for the benefits department does flow elsewhere within the corporation.

E. I. Dupont de Nemours testified that its medical department receives claim forms to determine if certain areas of the plant are responsible for an unusually large number of claims, thus allowing it to identify potential occupational health and safety problems. Inland Steel indicated that its personnel department routinely sees the diagnostic part of a claim form before it is put in a confidential file in the benefits section.¹⁸²

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 claim records completely, fairness demands that the claim process be walled off from other internal functions of the employing organization. The records associated with short- and long-term disability insurance should also be insulated from 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 claim 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

¹⁸²Testimony of Inland Steel Co., Employment Records Hearings, December 10, 1976, p. 365; and testimony of E. I. DuPont de Nemours and Company, Employment Records Hearings, December 17, 1976, pp. 798 - 99.

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 to third parties. 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.

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, data processing 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 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 and to whom.

EMPLOYER DISCLOSURE PRACTICES

Increasingly, employers are taking steps to restrict their disclosures of information in employment records to third parties. However, while business policy and practice has been to provide some measure of confidentiality to the information in employee files, it remains clear that whatever confidentiality exists for employment and personnel records is the product of voluntary action on the part of the employing organization. As Mordechai Mironi asserts in his legal study of the confidentiality of personnel records:

The central problem with present information dissemination policies is the unpredictability or uncertainty of the employee's rights and the total dependency of the employee upon the employer's good will, personal value system or present pattern of interests.¹⁸³

Generally, an employer knows what it automatically discloses, and its procedures strive to minimize the administrative costs of making disclosures. Accordingly, most employers do provide information on their employees in response to some outside requests without subpoena or an authorization signed by the employee. The Equitable Life Assurance Society maintains a log on all disclosures of employee information,¹⁸⁴ but the Equitable procedure is not a common one. Employers usually assume that employees are aware of these disclosures since, in most instances, they are made pursuant to requests clearly initiated by the employee, such as when an employee authorizes a creditor, bank, or landlord to verify his wages or the fact of his employment.

Employers often disclose the following types of information automatically: the fact of employment; the date the employee was hired (and for past employees the date of termination); the job title or position held; and, less frequently, wage and salary information. These sorts of factual information can be considered directory information. Many employers will not provide or verify wage and salary information without the employee's authorization, and some are adamant in their belief that doing so violates their employees' legitimate expectation of confidentiality. With unionized employees, however, salary information is either posted in the workplace or clearly laid out in the bargaining agreement according to the job performed and individual seniority, so its publication for all employees to inspect does not represent a violation of expected confidentiality. The Commission's hearing record

¹⁸³Mordechai Mironi, "The Confidentiality of Personnel Records: a Legal and Ethical View," *Labor Law Journal*, May, 1974, p. 275.

¹⁸⁴Testimony of the Equitable Life Insurance Society of the U.S., Employment Records Hearings, December 9, 1976, p. 110.

indicates that Social Security number and home address are not generally considered directory information, although some employers may verify it.¹⁸⁵ Some employers will also disclose a past employee's "reason for leaving" or indicate whether they would rehire the individual.

Frequently employers that have no face-to-face contact with the outside requestor will only *verify* directory information. For example, the Personnel Department of the Northwestern Mutual Life Insurance Company will verify the salary, address, and phone number of their employees for stores, credit bureaus, loan associations, and banks, but will not volunteer such information to a requestor.¹⁸⁶ Northwestern Mutual believes that limiting telephone disclosures to verifying information already provided by the employee assures its personnel department, at least to some extent, of the legitimacy of the requesting party. Such a procedure also tends to reduce the administrative costs of making disclosures.

Other employers, if given the name of an employee, will volunteer directory information over the telephone to unidentified third parties because they see this disclosure as a service to their employees. The difference between "verifying" and "volunteering" information is important, although both policies allow disclosure without notice to, or authorization by, the employee.

The Inland Steel Company's policy regarding the disclosure of directory information is of particular interest. On a regular basis, it provides the East Chicago Credit Company with a list of recently hired and terminated bargaining-unit employees (roughly 80 percent of the Inland work force). Requests that Inland verify bargaining unit employees' dates of employment and wage information are referred to the credit company. According to Inland, this procedure has reduced its administrative costs, and has also resulted in faster response to outside inquiries to the benefit of its employees.¹⁸⁷

Aside from directory information, most employers do not disclose information in employee files to third parties, except to unions in the context of a grievance or arbitration, to law enforcement authorities, or as required by law. Prospective employers regularly seek evaluative material on the performance of past employees, but employers do not release their internal records of performance evaluations, the results of skills or psychological tests, or findings, codes or responses interpreting these results to outside requestors. Employers have little interest in providing detailed performance

¹⁸⁵Ivar Berg and James Salvate in their paper "Record-keeping and Corporate Employees," (p. 193) found that between one-third and three-quarters of the companies responding to the 1954 and 1964 Conference Board Studies disclosed the home address of their employees, which is in sharp contrast to the testimony corporate witnesses presented to the Commission. However, Berg and Salvate note that the largest companies disclose this information significantly less often than smaller ones, which may account for the discrepancy. The Commission has found no company that discloses home address information to third parties.

¹⁸⁶Letter from Northwestern Mutual Life Insurance Co. to the Privacy Protection Study Commission, October 15, 1976.

¹⁸⁷Testimony of Inland Steel Co., Employment Records Hearings, December 10, 1976, pp. 235, 350-51.

ratings on past employees, and are reluctant to disclose negative information, even in confidence, for fear of being sued by a former employee.¹⁸⁸

Employers' responses vary when the request for references on a past employee is accompanied by a signed authorization of the individual. In this instance, some employers will provide a more detailed history of job positions and perhaps salary. If directly questioned, they may also disclose whether they would rehire the individual.

Some employers disclose personnel record information to Federal investigators performing security clearances on former employees who have applied for government jobs. The Civil Service Commission testified that while employment-record information is harder to obtain today than in the past, if the individual signs an authorization an employer will usually honor it.¹⁸⁹

IBM's policy on disclosure to third parties outside the corporation seems uniquely responsive, both to the needs of the employee, and to the employer's desire for clearly limited liability for disclosure to prospective employers. Realizing that an employee or former employee may be under pressure to authorize a prospective employer to request information about him from IBM, it releases or verifies information only when authorized by the employee before he leaves IBM. In any case, IBM will only disclose job history from a past employee's final five years at IBM, with no evaluative material whatsoever.¹⁹⁰

Although there may be other cases, the Commission has found only two instances where disclosures of information to prospective employers may occur regularly. According to the Manufacturer's Hanover Trust Company, specific acts of dishonesty or breach of trust by former employers are, as a courtesy, commonly reported to other financial institutions that are considering hiring an individual. Manufacturer's Hanover testified, however, that it will not describe the reason for terminating an employee to any prospective employer other than a bank.¹⁹¹

Another case is in the transportation industry. Pursuant to Department of Transportation regulations, trucking companies must inquire about a driver's employment record from trucking firms that have employed him during the preceding three years. The regulation stipulates that "the investigation may consist of personal interviews, telephone interviews, letters or any other method of obtaining information that the carrier deems appropriate." Each file maintained on a driver by the company employing him must include a record of contacts with past employers indicating "the past employer's name and address, the date he was contacted, and his comments with respect to the driver." [49 C.F.R. 391.23(c)] This regulation has resulted in an information flow far greater than in other industries. For example, the policy of the Eastern Express, Inc., a large Indiana firm

¹⁸⁸See Lawrence A. Wangler, "The Employee Reference Request: A Road to Misdemeanor?," *The Personnel Administrator*, Nov-Dec 1973, pp. 45-47.

¹⁸⁹Testimony of the U. S. Civil Service Commission, Employment Records Hearings, December 10, 1976.

¹⁹⁰Testimony of I.B.M., Employment Records Hearings, December 10, 1976, p. 290.

¹⁹¹Staff Interview with Manufacturers Hanover Trust Co., November 16, 1976.

employing 1,200 drivers, is to send previous employers a detailed questionnaire covering areas such as courtesy, trustworthiness, and reliability, as well as the required questions on accidents and traffic record. According to Eastern, most companies send out similar questionnaires, and many will complete and return them.¹⁹²

The Commission has found no evidence of employers disclosing medical-record or insurance-record information to anyone outside of the employing organization without the authorization of the individual to whom it pertains. Medical departments must comply with statutes that require that specified medical information, such as tumors or certain communicable diseases, be reported to designated Federal and State authorities. In complying, however, they act as any doctor or hospital would.¹⁹³ Medical departments also comply with union requests for medical records in disputes about disability or Worker's Compensation, but this is usually with the individual's authorization. Federal law provides that requests for medical information pursuant to security clearances for Federal jobs or contracts always be accompanied by an authorization signed by the individual.¹⁹⁴

When a medical department is approached by insurance companies or other third parties for the disclosure of medical-record information, it generally will not release the information without the employee's authorization. In interviews with Commission staff, the Exxon Corporation and the New York Telephone Company both stated that they never disclose medical-record information to insurance companies on the grounds that the individual's authorization for such disclosures is inherently coerced.¹⁹⁵

All employers must report certain information to government agencies. Statutes and regulations require regular disclosure of wage and salary information to the Internal Revenue Service, Social Security Administration, and State and local tax authorities. As a rule, employers do not tell employees about these disclosures. Because many occur automatically, employers may assume that employees are aware of them, or have no objection to their being made. In any case, employers have little or no control over them.

Some statutes require that employers maintain certain records in case a specified government agency asks to see them in the course of investigating the employer. The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance may request access to records when investigating alleged discrimination in violation of the Civil Rights Act of 1964, as amended, or Executive Order 11246. State Fair Employment

¹⁹²Staff interview with Eastern Express Inc., December 6, 1976.

¹⁹³Testimony of E. I. Dupont de Nemours, Employment Records Hearings, December 17, 1976, pp. 775-76; testimony of Exxon Corp., Employment Records Hearings, December 17, 1976, pp. 774-76; testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 588.

¹⁹⁴Testimony of Exxon Corp., Employment Records Hearings, December 17, 1974, pp. 753, 758, 759, 799; Testimony of E. I. Dupont de Nemours, Employment Records Hearings, December 17, 1976, p. 816.

¹⁹⁵Gilbert H. Collings, M.D., Medical Director, New York Telephone Company, staff interview, November 19, 1976; Submission of Exxon Corporation, Employment Records Hearings, December 17, 1976.

Practice Boards may request similar information to enforce State laws. Such records are also used by Federal officials checking on compliance with the Age Discrimination in Employment Act [29 U.S.C. 850.6, 29 U.S.C. 626], the Vietnam Era Veterans Readjustment Act [41 U.S.C. 60-250, 38 U.S.C. 2012], and the Rehabilitation Act [41 U.S.C. Part 60-741], which provides employment opportunities for the handicapped. Wherever possible, employers disclose the information requested in aggregate form but, in many instances, a complete examination of employee and applicant files is required. Payroll information is available to inspectors for the Wage and Hour Division of the U.S. Department of Labor as well as similar State authorities. These inspections are more frequent than civil rights compliance investigations, but involve far less information.

Government statutes and regulations also require employers to report certain types of incidents noted in employment records and to make the complete files on specific employees available for inspection. For example, the Occupational Safety and Health Act (OSHA) [29 U.S.C. 651 *et seq.*] requires an employer to report all employee injuries due to industrial accidents. The Occupational Safety and Health Administration requires that each injury be reported by date of occurrence, name, sex, and Social Security number of the employee, as well as the nature of the injury and diagnosis. In addition, its staff, when making a safety inspection or investigation, may examine records on an individual employee's exposure to toxic substances and other health hazards. The regulations of the Bureau of Narcotics and Dangerous Drugs (BNDD) mandate that all employers processing narcotic substances report any significant loss or theft of a controlled substance. Abbott Laboratories, a major drug processing company, interprets this regulation to mean that it must report the names of any employees it suspects of involvement in any loss of drugs, and in the course of an official investigation makes virtually all information in its files available to BNDD inspectors.¹⁹⁶

Another disclosure to government officials pursuant to statute and regulation occurs when private-sector employers hold classified government contracts. According to the Department of Defense Industrial Security Manual, private contractors responsible for classified defense materials are required to report any adverse information about their employees or ex-employees who hold a security clearance or are in the process of obtaining one. Thus, all functions of the organization, including the medical and insurance claims benefit departments, are required to be alert to adverse factors. Rockwell International, a major defense contractor, testified that it should report any information it has concerning a mental or nervous disorder, or drug or alcohol use. However, Rockwell International asserted that no Federal agent had access to its employment records in the last five years and that information given to DOD has never come from an employee's claim.¹⁹⁷ As Rockwell is the only major defense contractor that testified on this issue, it is difficult to determine the extent to which private-

¹⁹⁶Staff interview with Abbott Laboratories, November 9, 1976.

¹⁹⁷Testimony of Rockwell International, Employment Records Hearings, December 17, 1976, pp. 947-49.

sector contractors have made disclosures to the DOD from medical or insurance claim files.

Individually identifiable information also flows to the government when, pursuant to the Employee Retirement Income Security Act of 1974, the Pension Benefit Guaranty Corporation takes an employer's pension plan into trusteeship. At that time, the Corporation (1) takes all records from the employer regarding the pension plan; (2) if pension plan records are incomplete or inaccurate, examines an employer's personnel files to determine the status of individual participants; and (3) interviews the individual employee participants to determine eligibility. [29 C.F.R. 2604 *et seq.*] Once the government takes a plan into trusteeship regular contact with the employer is terminated and the plan is run by the Corporation. Currently, there are about 6,000 participants in plans under trusteeship, and long-run estimates project 50,000 to 60,000.¹⁹⁸

Salary information, job classification, seniority, home address, and other information determined by union contract is routinely reported by employers to collective bargaining units. Companies provide unions with a computer print-out of this information about employees on an annual or semi-annual basis. This listing will include unionized employees, as well as non-union employees working in "open shop" positions covered by union contract.

Information from employment records is also disclosed to representatives of an employee's collective bargaining unit during contract negotiation, arbitration, or a grievance or dismissal action. By law, an employer must in good faith and upon request furnish the collective bargaining unit all information relevant for collective bargaining, or the processing of grievances, including information concerning test results, medical files, payroll and attendance records, and any background or investigative materials. It is a violation of the National Labor Relations Act [29 U.S.C. 158] for an employer to refuse to provide this information. Legally, an employee's authorization is not required. The standard of "relevance" has been broadly interpreted and, as determined by case law, includes the employment records of employees who are not active members of the union but work in a union shop. Often the employer is required by the contract to provide the union with information from an employment record, even over the employee's objection.

Employers are commonly served with subpoenas for two different types of information held in their employee files. One type is for information on a particular employee. The Internal Revenue Service frequently subpoenas employee records for use in determining tax liability. The second type of information desired requires an employer to produce records on an entire class of employees, such as women and blacks, or all employees in a particular job classification.

In responding to subpoenas requesting records about particular individuals, employers rarely have a direct interest in the matter at issue, and few bother to assess or challenge the scope and legitimacy of the

¹⁹⁸Staff interview with Office of General Counsel, Pension Benefit Guarantee Corp., February, 1977.

subpoena. Many will readily comply with it. When an employer has a direct interest, however, such as when the subpoena seeks records concerning a class of employees, the employer is likely to contest.¹⁹⁹ At least one company testified that in matters involving the Equal Employment Opportunity Commission it attempts to limit as much as possible the amount of information released and to release as much as possible in anonymous form.²⁰⁰

An employer will sometimes notify an employee that it has been served with a subpoena for records about him, but many do not.²⁰¹ And, even those employers that usually inform employees about subpoenas in time to challenge them may not do so when the subpoena calls for information on large numbers of employees. In these instances, employers see the burden of providing notice to many employees as being too great, or the period for compliance too short, and the employees' interest too indirect.

The Commission dealt with the problem of providing notice to individuals whose records are subpoenaed by the government in Chapter 9 of its final report. It recommended that as a general rule the duty to notify an individual that records about him have been subpoenaed should fall on the government. However, when the individual whose records are subpoenaed is not a target of the investigation or likely to become publicly implicated in the proceeding, the Commission concluded that the government need not notify him.

An employer also discloses records to law enforcement authorities when it is a party-in-interest in an investigation. An employer is a party-in-interest when an offense or misconduct by an employee results in damage to or loss of the employer's property, injury to other employees, to or a threat to the safety or morale of the workplace. In these instances, employers may allow law enforcement officers to inspect, without notifying the employee, any files or records relevant to the investigation. For example, information in Harvard University personnel files was made available to law enforcement authorities without a subpoena when there was a theft of property from a campus museum. Employee involvement in the crime was suspected, and information in the personnel files was used in the course of the investigation.²⁰²

Serious crimes occur every day at offices and plant locations, including robbery, assault, rape, and even murder. In the interest of continued safety for employees, it is not unusual for employers to work hand-in-hand with public law enforcement officers in the investigation of these incidents.

¹⁹⁹Testimony of Rockwell International, Employment Records Hearings, December 17, 1976, p. 910; testimony of Cummins Engine Co., Employment Records Hearings, December 8, 1976, p. 19.

²⁰⁰Testimony of Ford Motor Co., Employment Records Hearings, December 16, 1976, pp. 541-43.

²⁰¹Testimony of Manufacturers Hanover Trust Co., Employment Records Hearings, December 16, 1976, p. 654; testimony of Equitable Life Assurance Society of U.S., Employment Records Hearings, December 9, 1976, p. 124; testimony of General Electric Company, Employment Records Hearings, December 9, 1976, pp. 258-60.

²⁰²Testimony of Harvard University, Employment Records Hearings, December 16, 1976, p. 878.

Testimony of major employers, including the Equitable Life Assurance Society, the Inland Steel Company, and the Ford Motor Company confirmed that this is so.²⁰³

Finally, some employers may provide information to law enforcement authorities in their role as "good citizens" of their community. In such situations, employers tend to take the position that the law enforcement agency could get a subpoena anyway, so why cause it unnecessary inconvenience. Other concerns may also be involved. Equitable Life Assurance also testified about an incident in which it volunteered information about an employee that served to eliminate him as a suspect. Requiring a subpoena or notifying the individual would have upset him, the company argued, and would have unduly publicized the incident.

Four examples from the Commission's hearing record demonstrate the different factors that can affect an employer's response to law enforcement requests for information.

- In 1972, the Cummins Engine Company decided not to honor law enforcement requests for information that are not made pursuant to a valid subpoena. The one exception is a request to verify the fact and dates of employment, and the last job title. Cummins, which treats all third party requests the same way, has encountered no significant difficulty as a consequence of this change in policy.²⁰⁴
- Equitable Life Assurance requires that all law enforcement requests be screened through the company's legal department, but it does not require a subpoena in all cases. Its reasons have a great deal to do with its geographic location. As an Equitable Senior Vice President testified:

. . . we have a situation of . . . a large population in the center of an urban area, where the area experiences very severe problems of drug traffic, for example, very high frequencies of theft in these buildings, and the whole security problem. We have large numbers of young people, many young girls working for us. The security problem in our situation in the center of a large city like New York or any other large city seems to me to require an attitude and a cooperation with law enforcement authorities that perhaps, fortunately, in Cummins' headquarters, they don't have to cope with.²⁰⁵
- IBM separately evaluates each law enforcement request and responds accordingly. An IBM Vice President testified:

²⁰³Testimony of Equitable Life Assurance Society, Employment Records Hearings, December 9, 1976, p. 123; Testimony of Inland Steel, Employment Records Hearings, December 10, 1976, p. 390; Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, pp. 540-41.

²⁰⁴Testimony of Cummins Engine Company, Employment Records Hearings, December 9, 1974, pp. 55-54.

²⁰⁵Testimony of Equitable Life Assurance Society, Employment Records Hearings, December 9, 1976, p. 125.

We have found that it is very difficult to have policies on each of the possible circumstances that might come up. We have trained our management people . . . to make judgments based on the circumstance, and the reasonable necessity of the request . . .²⁰⁶

- The Inland Steel approach is the more typical one. Its policy is to "accept the legitimacy of law enforcement inquiries at face value," and to provide sufficient information to meet these requests. Inland does not require a subpoena because of the administrative difficulties such a policy would create. Instead, it has found it much simpler to sit down with the law enforcement officer and answer his questions about the contents of the record.²⁰⁷

The experience of the Ford Motor Company may shed light on how to resolve the law enforcement access issue. Ford, whose law enforcement disclosure policy is similar to Inland Steel's, found that the information it was providing to law enforcement officials was not extensive. According to the Manager of the Ford Security Department, 90 percent of the law enforcement requests involve nothing more than verifying the fact that the individual is employed, the plant location at which he is employed, dates of attendance, and home address. According to Corrigan, Ford receives requests from law enforcement only 10 to 15 times a month, and, on the average, only one or two requests each month are for information other than that listed in Ford's testimony.²⁰⁸ If most law enforcement information needs could be met by defining a special category of factual information as available to law enforcement, requiring a subpoena for all other information might not present an unrealistically heavy administrative burden. This would provide an added measure of protection for employees, while still not placing unnecessary burdens on either law enforcement authorities or the employer.

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. As indicated earlier, Chapter 9 of the Commission's final report, on government access to records

²⁰⁶Testimony of IBM, Employment Records Hearings, December 10, 1976, p. 308.

²⁰⁷Testimony of Inland Steel, Employment Records Hearings, December 10, 1976, p. 353.

²⁰⁸Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 592.

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 it receives. That is, "directory information" 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 necessarily disclose all of these items.

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, payroll and personnel 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. When law enforcement authorities need more extensive information, they can obtain it by means of a subpoena or other legal process. Indeed, requiring them to do so would reinforce realistic expecta-

tions of confidentiality for employment records without unduly burdening either law enforcement authorities or employers, and 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 discussed above, an employer must fulfill the obligations set by its collective bargaining contract. When an employer retains an outside agent or contractor to collect information about an employee or group of employees, the employer must also 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.

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. The Commission's recommendations on access to records by government agencies call for some constraints even on access to records maintained by a record-keeper with whom the individual does not have a confidential relationship. 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 volume, and in its final report, 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 the Commission recommends in its final report 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 volume derives from the Occupational Safety and Health Act which mandates that an employer provide medical surveillance of employees known to have been exposed to certain hazardous environments or substances. 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 Commission's hearings showed that some employers have already established procedures for exchanging medical surveillance records of workers known to have had such exposures.²⁰⁹

The central problem with these disclosures from one employer to another is that the use of medical surveillance records as a measure of employability is not a use for which the information is collected and thus is inherently unfair. Accordingly, the Commission recommends:

Recommendation (34):

That the 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 or 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

²⁰⁹Letter from C. Hoyt Anderson, Director of Personnel Relations and Research Office, Ford Motor Company to the Privacy Protection Study Commission, January 14, 1977.

safeguard the records the employer keeps about them, the voluntary approach recommended in this volume will prove unsuccessful. Thus, future commissions 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.²¹⁰

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 they are based, apply equally to Federal, State, and local governments and their employees.

²¹⁰Testimony of Ford Motor Company, Employment Records Hearings, December 16, 1976, p. 528.