

Chapter 8

Investigative-Reporting Agencies

A common denominator of many record-keeping institutions examined in preceding chapters is their dependence on support organizations to gather and maintain information that has protective value. Credit and inspection bureaus, independent credit-card authorization and check-guarantee services, the Medical Information and Loss Index Bureaus of the insurance industry, all exist to protect their clients from the individual who falsifies or fails to reveal significant information that could alter the credit, insurance, or employment decision to be made about him.

Some of these support organizations are simply clearinghouses that save their clients from having to contact one another directly. Credit-card authorization services and the Medical Information Bureau are prime examples. As explained in Chapters 2 and 5, the information in their files comes from their clients; they do not have their own independent sources. Other support organizations, however, use investigative techniques to gather the information they report about individuals. Although they, too, maintain files, they develop their information initially through interviews and inquiries of neighbors, business associates, employers, and other record-keeping institutions.

The purpose of this chapter is threefold: (1) to describe the practices of the various investigative support organizations so that their relationship to the decision-making processes of their clients may be clearly appreciated; (2) to explain in one place how the Commission's recommendations in other chapters address problems that the activities of investigative support organizations create; and (3) to outline for further study some areas the Commission has not been able to address but considers worthy of examination.

The chapter begins with an overview of the activities of two types of investigative support organizations on which the Commission was able to develop substantial detail: the *inspection bureaus* whose reports are primarily used in insurance underwriting; and the *private-investigative agencies* that principally make background inquiries about individuals for employers. This is followed by a section on investigative services performed in connection with the settlement of insurance claims or for an employer who believes it has internal security problems. Finally, the concluding sections summarize the Commission's recommendations in other chapters which affect the activities of investigative-reporting agencies and suggest problem areas that, in the Commission's opinion, merit further examination.

THE INSPECTION BUREAU: AN OVERVIEW

In insurance underwriting the company and the individual consumer strive for different ends—the individual, to acquire protection at the lowest possible cost; the company, to minimize its risk and control claims and administrative overhead. Moreover, because most insurance is sold through an agent field force that derives its income from commissions, a company wants some kind of independent check on the applicants or insureds and the information about them that agents submit. Inspection bureaus exist in large measure to satisfy these company needs for information about the individual with whom it has or proposes to have an insurance relationship.

The inspection bureau industry, like the credit-reporting business, is a concentrated one. Equifax Services, the industry giant, prepares over 15 million inspection reports each year.¹

Originally insurance companies did their own inspection work. As business grew, however, multiplying the number of necessary inspections, they began to rely more and more on the bureaus. Because an inspection bureau can serve more than one company client in a given geographic area, it saves all its company clients money. Furthermore, when an insurance company orders an inspection report, it is not just purchasing an investigative capability to develop and verify information; it is also purchasing access to an existing reservoir of information on individuals who have previously been investigated, and this too constitutes an important cost-saving factor.

The services inspection bureaus perform are labor-intensive. While credit bureaus may profitably exploit the speed and efficiency of modern information-processing technology, it is hard to see how the computer can replace the inspection bureau field worker who specializes in interviewing neighbors and associates. Inspection bureaus are aware of this and, consequently, place a premium on the productivity of individual investigators. Pay scales are comparatively low. Costs must be kept down lest the companies lose their incentive to use bureau services. The general level of education and training required can be modest.² Inspectors are often part-time students, off-duty policemen, housewives, and retired persons. Advertisements for investigators indicate that to qualify, an individual need only have a high school diploma and a car.³ Obviously, pressures to produce,

¹ Testimony of Equifax, Inc., *Credit Reporting and Payment Authorization Services*, Hearings before the Privacy Protection Study Commission, August 3, 1976, p. 163 (hereinafter cited as "Credit Reporting Hearings").

² The experience level and turnover rate of inspection bureau personnel is a matter of some question. Equifax, Inc., testified that about 64 percent of its field representatives had some college training, with approximately 25 percent holding at least a bachelor's degree, and that the average field representative had almost 12 years of company experience. (Credit Reporting Hearings, August 3, 1976, p. 163). However, a former supervisor with 15 years experience at Equifax asserted in a letter to the Senate Banking Committee that Equifax commonly employed investigators on a part-time basis who lacked the "investigative training for the types of decisions which they must make," a problem which was further complicated by an "extremely high" turnover rate. (Letter from Daniel P. Reiter to the Senate Banking Committee, August 5, 1976.)

³ *Miami Herald*, June 11, 1974, p. 18-e.

coupled with low salary scales, can easily affect the quality of an inspection bureau's product.

TYPES OF INFORMATION COLLECTED

An insurance company generally uses an inspection report to help it answer two related types of questions: (1) whether to grant or continue coverage; and (2) if coverage is to be granted or continued, what is the proper price to charge. That is, in the absence of information it considers derogatory, an insurance company will normally proceed with the coverage requested, concerning itself only with items of information that may affect the premium it will charge. Or, if it has already written a policy, derogatory information in a subsequently provided report may be used as the basis for cancelling or refusing to renew the policy or for altering the premium. Automobile insurance, for example, almost always becomes effective immediately upon filing an application with a company or its agent. However, information in an inspection report the insurer subsequently acquires may cause it to charge the consumer a higher premium than he originally anticipated or cause the insurer to terminate the policy altogether.⁴

Because Equifax Services accounts for a major proportion of the inspection bureau business,⁵ a review of its investigative manuals⁶ and its report forms can offer substantial insight into the kinds of information insurance underwriters consider "adverse." Because of Equifax's dominant position in the inspection industry, a survey of its major reporting services should also afford a good understanding of typical bureau practices.

In addition to extensive questions covering the identity of the individual, details as to his past employment, driving record, finances, insurance history (including special ratings or previous declinations), Equifax inspectors are asked in different reports to respond "yes" or "no," and if "yes," to provide greater detail on questions, such as the following:

- Use alcohol? (If "yes," answer: (1) What? (2) How often? (3) How many? (4) Where? (5) Over what period of time?)
- Use(d) marijuana?

⁴ See Chapter 5 for a discussion of the insurance underwriting process.

⁵ According to the Federal Trade Commission, in 1970 the Retail Credit Company (Equifax, Inc.) produced approximately 26,000,000 consumer reports for credit, personnel, and other purposes, resulting in revenues in excess of \$136,000,000. (United States of America before the Federal Trade Commission, in the matter of Retail Credit Company, Docket No. 8920, initial decision February 10, 1976, p. 10). In his opening statement in 1974 Senate hearings on the credit-reporting industry, Senator William Proxmire (D.-Wisc.) stated that ". . . the Retail Credit Company accounts for over two-thirds of the investigative reporting industry, and other firms within the industry have closely followed the practices and procedures of Retail Credit." (*Credit Reporting Abuses*, Hearings before the Subcommittee on Consumer Credit of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 93d Congress, 2d Session, 1974, p. 1).

⁶ Equifax, Inc., "Property Lines Manual," May 1975; "Life and Income Protection Manual," November 1974; and "Employment Reports Manual," March 1976.

- Use(d) narcotics, sedatives, depressants, stimulants, or hallucinogens?
- How was worth acquired? (Inherited, accumulated, or speculation)
- If other than married, does applicant reside with another person?
- Anything adverse about reputation, life style, or home environment?
- Do any of the following apply? Unfair business practices? Heavy debts? Domestic trouble?
- Reputation of business questionable?
- Any evidence of job instability?
- Personal reputation or associates questionable?⁷

While a "yes" answer to any of these questions is explained on the back of the form, the yes-no portion serves to "flag" items that meet the receiving insurer's concept of "adverse" information. (Inspection bureaus commonly develop different report forms for the different types of insurance each underwrites.)

Arguably, some of the information the inspection bureau's clients consider "adverse," "actionable," "declinable," "pertinent," or "significant," does not indicate an above-average insurance risk. While there are broad areas of overlap between what a community may hold to be negative characteristics and what may constitute a demonstrable risk to an insurer (for example, an alcoholic who is held in low public regard because of his behavior is also avoided by an automobile insurer), there are socially unacceptable traits that may have no bearing at all on risk in a particular line of insurance. A bearded, blue-jeaned resident of a small town might encounter some difficulty if his neighbors were asked to evaluate his "reputation" or "trustworthiness." Yet, the personal characteristics that set him apart may be of no importance in underwriting auto, life, or homeowner's insurance. An inspection report, however, does not make these fine distinctions, nor can it take account of the prejudices or other idiosyncracies of the people who are asked to make such subjective judgments, including, in many cases, the investigator himself.

INFORMATION COLLECTION METHODS

As indicated earlier, the use of personal interviews to gather information about an individual is one of the distinguishing characteristics of an investigative support organization. Inspection bureau field representatives generally interview an applicant's neighbors and business associates or fellow employees, as well as other sources that may be suggested along the way. As to the last, an interview with the applicant himself can be one of the most important sources of leads.

Unless specifically prohibited from doing so by the insurance company, or unless the bureau's own past experience with the applicant

⁷ *Ibid.*

indicates that he will not be cooperative, an inspection bureau may attempt to interview him and some insurance companies require the inspection bureau to do so. Indeed, in some instances an inspection bureau does no more than verify information in the application directly with the applicant.

According to Equifax internal documents, the applicant can provide the following types of information in a direct interview:

- Health: history, attending/personal physicians, height/weight/waist measurement, impairments, smoking.
- Finances: exact income and worth figures or very close estimates. Personal financial statements.
- Occupation: details on employment status, business history, foreign travel, part-time jobs.
- Duties: a precise description of work performed.
- Identity: thorough identification of the applicant.
- Military: past or present connections.
- Spare Time: sports, hobbies, flying, club affiliations.
- Driving: record of accidents and violations.
- Drinking: description of drinking habits.
- Drugs: present or past use.
- Criminal Record: arrests and convictions.
- Other Coverage: amounts and carriers. Previous ratings and declinations.
- Financial Problems: details of problems or tips to same.
- References: name of personal acquaintances, bankers, permission to see accountant; and attorneys.⁸

Inspection bureaus prefer that all interviews be conducted in person. Interviewing by telephone is discouraged, unless the purpose of the interview is to verify information obtained in an earlier investigation. Apparently, however, it is not strongly discouraged since the testimony of several former field representatives before congressional committees indicates that telephone interviews are, in fact, widely used for the simple reason that they save time.⁹

In an April 1975 *New Yorker* article, "Anything Adverse?," the Equifax "Manager Manual" was quoted on the techniques used to elicit

⁸ Equifax, Inc., "Life and Income Protection Manual," November 1974, p. D-20.

⁹ *Credit Reporting Abuses*, Hearing before the Subcommittee on Consumer Credit of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 93d Congress, 2d Session, 1974.

information in an interview. The field representative "must not be afraid to ask personal questions"¹⁰ and "should be sufficiently suspicious by nature to derive satisfaction from tracking down leads and developing the facts."¹¹ To this end:

the top-notch Field Representative should be highly sensitive to the more subtle clues in the remarks of his sources and other behavior, perceiving their implications and adapting his own approach and conversation accordingly A sense of humor [will prove to be] a powerful instrument in the development of a warm, friendly relationship with sources. In fact some of the most pertinent personal information is sandwiched in between homey remarks and other small talk.¹²

According to the Equifax "Field Representative Manual," the interviewer should:

. . . proceed from the impersonal to the personal. People do not readily talk to strangers about the personal reputation and morals of their friends and acquaintances. However, after first talking about impersonal areas (identity, employment, and health), they have less hesitancy to cover more personal matters.¹³

In addition to learning this basic interview strategy, the interviewer is instructed to ask open-ended questions, such as "How is he regarded?" instead of, "Is he well regarded?"; or "How much does he drink?," not "Does he drink?"¹⁴ Because inspection field representatives are in the business of collecting rather than distributing information, all are strongly advised not to transmit to any sources the information acquired from other ones. In many cases, moreover, the name of the client, i.e., the insurance company, is not to be given. Indeed, in some cases, the source being interviewed will not be aware, even in a general sense, of the purpose of the interview.

Record searches are the second method by which inspection bureau field representatives collect information. Many records held by city, county, State, and Federal agencies are open to public inspection. Depending upon the locality, these may include police arrest blotters, civil and criminal court records, motor vehicle accident reports, records of driving convictions, and possibly even welfare rolls or other records concerning contacts with social service agencies.¹⁵ Adverse information obtained from public records is of particular value to an inspection bureau. In addition to being unfavorable and, therefore, valuable to the bureau's clients, such information, in contrast to information obtained from neighbors or associates, does not require

¹⁰ Equifax, Inc., "Manager Manual," as cited by Thomas Whiteside, "Anything Adverse?," *New Yorker*, April 21, 1975, p. 54.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Equifax, Inc., "Field Representative Manual," April 1973, p. 29.

¹⁴ *Ibid.*

¹⁵ Equifax, Inc., "Claim Reports Manual," November 1975, pp. C-15 - C-17.

reverification under the Fair Credit Reporting Act (FCRA) when carried forward from one report to another (except where the report is for employment purposes). [15 U.S.C. 1681l] Further, public-record information alone does not meet the FCRA definition of a "consumer investigative report." [15 U.S.C. 1681k] Thus, a report containing information about anything from character and morals to business reputation and domestic difficulties can be prepared solely on the basis of public records without the individual who is the subject of it receiving the prior notification the FCRA otherwise requires.

Mindful of this, some inspection bureaus are now encouraging their clients to depend more upon information that can be gleaned from public records than on the "subjective information" heretofore gathered from neighbors and associates. As the President of O'Hanlon Reports, Inc., described the current situation to the Commission:

Our business [has changed] drastically in the past three years from a time when subjective reports constituted as much as 80 to 85 percent of our business Today, subjective reports are less than 40 percent . . . and we do everything we can do to accomplish the point of getting the underwriting people and the insurance companies to allow us to make the short-form classification, the short-form dwelling reports, and so on, that do not require subjective information That is the future of the inspection business Use these other reports and stop making everybody liable for all kinds of problems¹⁶

As indicated in Chapter 2, credit reports are an important source of public-record information for inspection bureaus. Most inspection bureaus (like most private investigative firms) are eligible to subscribe to credit bureaus and some of the larger inspection bureaus own one or more.¹⁷ In addition, if the inspection bureau has a signed authorization in hand, it can often get banks and accountants to make or confirm a reasonably accurate estimate of an individual's income. For underwriting life or disability insurance on self-employed individuals, this is particularly helpful as estimates of their income or worth might otherwise be difficult to obtain.

Besides interviews and record searches, inspection bureaus also use their own files as a basic source of information. In fact, in some cases, their own files are the only source they use. To get an investigation started, the insurance company must provide basic identifying information on the individual, and may, in addition, ask the bureau to verify other items the individual himself has already provided on the application form.

Equifax's Chairman told the Commission that at any given time his company will be maintaining files in its local offices on up to 25 percent of a

¹⁶ Testimony of O'Hanlon Reports, Inc., Credit Reporting Hearings, August 3, 1976, pp. 142-43.

¹⁷ Equifax, Inc., and Hooper-Holmes Bureau, Inc., own and operate major credit bureaus. See, for example, Testimony of Equifax, Inc., Credit Reporting Hearings, August 3, 1976, p. 150.

community's inhabitants with the nationwide total of files maintained being in the order of 39 million.¹⁸ Because investigator expenses are the largest single contributor to the cost of preparing an inspection report, a bureau's files are a valuable cost-saving resource. The Fair Credit Reporting Act allows a bureau to report without verifying any information it has gathered through personal interviews within the previous three months, as well as any information it has obtained from public records. Older material must be reverified before it can be included in a current report, but it can also be used as leads to possible new information. This situation, plus the pressures on an investigator to work as quickly as possible, explains why the same adverse information can be reported again and again, and why a report containing false information can create recurring problems for an individual over a period of years.

It also explains why inspection bureaus tend to retain derogatory information in their files. Equifax policy calls for the destruction every thirteen months of reports made to life, auto, and property insurers, unless ". . . serious significant information is involved," in which case company manuals direct that such reports be kept for ten years. Motor vehicle reports are normally kept for five years from the date they are acquired, unless they are seriously unfavorable, in which case they, too, will be kept for ten years.¹⁹ Since the FCRA imposes no time limit on the retention, as opposed to the reporting, of such adverse information, there is nothing other than cost to keep it from being kept in a bureau's files forever.

PRODUCTION PRESSURES: INCENTIVES FOR INVENTION

In February 1974, Mark S. Brodie testified before the Senate Banking, Housing, and Urban Affairs Committee that when he had worked briefly as a part-time Equifax investigator the previous year, his average workload was 15 cases per four-hour day, or about 16 minutes a case. Brodie described a procedure known in his office as "zinging":

A zing means you do nothing. You do not contact the investigatee. One does not go out on the street . . . he utilizes whatever information was supplied by the insurance company, and hopefully, looks up the insured in the phone book to assure that he lives there; then you just fill in the form.²⁰

Another investigator, Dick Riley, who worked fifteen years for Equifax, also testified to the same practice, known in his office as "the crystal-ball

¹⁸ Credit Reporting Hearings, August 3, 1976, p. 171.

¹⁹ Equifax, Inc., "Reference File Information—How to Destroy and Expert Files," (Form 1912), June 1975.

²⁰ *Credit Reporting Abuses*, Hearing before the Subcommittee on Consumer Credit of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 93d Congress, 2d Session, 1974, p. 11.

system," which "consists of quoting old reports, looking at [the information on] an inquiry, and determining that the individual 'looks okay.'"²¹ Of course, "zinging" and "the crystal-ball system" have their pitfalls. Brodie told of one report that cited a source at a certain address which turned out to be a parking lot, and related an incident where an investigator "zinged" a report on an individual who was no longer living. Such practices are flagrant violations of corporate policy, but they apparently do occur.

Perhaps the most controversial aspect of inspection bureau operations is their use of production schedules for measuring the performance of field representatives. Discussions of production schedules usually begin with the proposition that it is impossible to speak of an "average" number of reports that can be completed by a "typical" field representative. Nevertheless, inspection bureaus do establish performance standards for their field representatives and successfully communicate the rewards and sanctions for exceeding or failing to meet them.²²

Equifax has periodically conducted studies to determine the level of effort necessary to complete various types of reports.²³ In testimony submitted to the Commission,²⁴ Equifax representatives stated that regular life and automobile reports, the firm's two basic reporting services, are used to develop comparative measures of the time and effort that can be expended on its other reports and still produce a profit. Exceptions to these measures are allowed if a field representative has a preponderance of more (or less) complicated reports to prepare. Nonetheless, the economics of the firm's reporting services are such as to place constant pressure on management, and thus presumably on each field representative, to complete reports as quickly as possible. For its high-volume, low-cost reporting services, time is money for a firm like Equifax. Hence, the more reports that are produced within a given period of time, the more likely that the firm will be able to turn a profit without having to raise its prices.

In addition to the pressure to keep the number of reports high, critics have also alleged that Equifax keeps track of the amount of adverse information each report contains and that these statistics are translated by Equifax management and field workers into "adverse information quotas." The evidence on this point is confusing, in large measure because discussions of it in public forums have invariably failed to distinguish clearly between pressures to push up the number of reports produced and pressures to keep the *quality* of reports at acceptable levels. At one time Equifax apparently did keep statistics on the gross percentages of "protective" and "declinable" information in reports emanating from each field office. A December 15, 1972 memorandum from the Vice President for Operations, Southern Pacific Region, congratulates regional field office managers for having finished "in the upper third grouping in both total protective and

²¹ *Ibid.*, p. 6.

²² See Supplementary Statement of Retail Credit Company (Equifax, Inc.), *Fair Credit Reporting Amendments of 1975*, Hearings before the Subcommittee on Consumer Affairs of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 94th Congress, 1st Session, 1975, pp. 233-35.

²³ *Ibid.*

²⁴ Written statement of Equifax, Inc., Credit Reporting Hearings, August 3, 1976, pp. 17-18.

percent declinable" in the second round of an intra-company survey called the "Life and Health Quality Profile." In addition, the memorandum went on to extol the "vast improvement" in both life and health and auto reporting "since they [sic] have been keeping this record back to 1968."²⁵ In sworn testimony before the Privacy Commission, however, Equifax representatives stated that "we no longer accumulate statistics concerning 'pertinent' information,"²⁶ and in a subsequent letter to the Commission indicated that they had formally ceased to do so in January 1976,²⁷ approximately eight months before testifying in the Commission's hearings. It has never been established, moreover, that competition among field offices, which the 1972 memorandum suggests the "pertinent information" statistics induced, was ever formally translated into adverse information quotas for individual field representatives. Nor need it have been.

One might well argue that the whole controversy over adverse information quotas misses the point by failing to recognize that adverse information is the inspection bureau's most salable product. Insurance companies have little use for innocuous commentary about applicants and policyholders. They are paying to find out whether there is anything about an individual which would warrant declining him or altering the premium he would otherwise be charged. From their point of view, it makes no difference whether "adverse" information is included in 10 or 30 or even 100 percent of the reports received. What they want is as thorough and accurate an investigation as they can get within the boundaries set by the price they are willing to pay. The proportions are irrelevant; the type of information and its quality are what counts.

It is true, of course, that both insurers and the investigative support organizations which service them share a less than rosy view of human nature. When asked if his firm's credibility would not be jeopardized if the amount of adverse information in its reports went down substantially over a period of time, Equifax's Chairman responded that in all probability it would "because we know the social behavior of our population is not improving that much."²⁸

. . . we know that if . . . [an investigator] works intelligently and carefully and conscientiously, . . . he is going to develop a rather substantial amount of information that we term as pertinent information, pertinent to the risk We have a rather homespun Executive Vice President who said that if you send a man to a blackberry field every day with a bucket and every day he came

²⁵ Equifax, Inc., "L & H [Life and Health] Quality Profile," Memorandum from Russell H. Beckett, Regional Vice President to Managers, December 15, 1972. Cited in *Fair Credit Reporting Act—1973*, Hearings before the Subcommittee on Consumer Credit of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 93d Congress, 1st Session, 1973, p. 877.

²⁶ Written Statement of Equifax, Inc., Credit Reporting Hearings, August 3, 1976, p. 19.

²⁷ Letter from Equifax, Inc., to the Privacy Protection Study Commission, February 23, 1977.

²⁸ Credit Reporting Hearings, August 3, 1976, p. 235.

back with no blackberries, then you would notice that something was wrong.²⁹

Such a statement, while neither proving nor disproving the quota allegation, makes a powerful point: that the underlying assumption of any inspection bureau investigation is that a certain amount of adverse information may be developed. This does not mean that adverse information *will* be developed in every instance but rather that an inspector should find adverse information on at least some applicants, because adverse information is assumed to be there to be discovered. If an inspector consistently finds nothing, or very little, the inevitable conclusion is that he has not done his job, not that the individuals he was assigned to investigate all happen to be sterling characters.

Understanding the natural emphasis of the inspection bureau's product also helps to understand a point made in the introduction to this report: that from a purist point of view, factual inquiries can involve more of an intrusion on an individual's personal privacy than subjective ones. The following February 1972 communication was directed to all Equifax field representatives:

Believe me -

It Makes the Difference

This Doesn't Tell the Story -

"Insured drinks to excess on weekends."

"Drinks to excess on special occasions."

"Drinks to feeling good and drives afterward."

"Drinks a few beers daily."

"Is criticized for being a heavy drinker."

"Used to drink a lot but quit."

We Haven't Done the Job Unless

We've Found Out and Reported -

What he drinks.

How often he drinks - daily, weekly, monthly, 2-3 a year?

How much he drinks -

If daily - how many, and where, and when?

If on weekends - every weekend, or most, or 1-2 a month?

If to excess - feeling good or loud and boisterous or intoxicated?

- how often - daily, weekly, monthly, 1-2 a month, 2-3 a year?

Where he drinks - home, tavern, lounge, club, parties, on the job?

When he drinks - evenings, lunch, on the way home from work?

How long - if he quit, specifically when and why?

²⁹ *Ibid.*, pp. 236-37.

*Does he drive afterwards?**

At first glance, such an exhortation to further prying may seem patently offensive. When one compares the first set of inquiries (deemed inadequate) with the second (considered desirable), however, one realizes that the latter is far more factual in its orientation than the former. Whether an individual would fare better with an insurer if the factual details of his drinking behavior were manifest (the second set of questions), in lieu of purely subjective characterizations of it (the first set), will depend on the company he is dealing with and the type of insurance he is seeking. The important point to grasp, however, is that intrusions on personal privacy of the sort in which inspection bureaus engage usually begin with the criteria we, as a society, accept as proper ones for making decisions about people; and that so long as society countenances certain lines of inquiry by certain types of record-keeping institutions, questions as to how far a line of inquiry may properly go are largely aesthetic. Indeed, if one prefers that decisions be made on the basis of facts rather than subjective evaluations, one should logically prefer that the line of inquiry be quite detailed as a protection against drawing inaccurate inferences.

THE PRIVATE INVESTIGATIVE AGENCY: AN OVERVIEW

While an inspection report can be the sole basis for making an adverse insurance decision, the background investigations that private investigative agencies conduct for employers are just a part of the information that is taken into account in making a decision about an individual. In most hiring situations, the employer will interview the applicant directly, using the private investigator only to verify information to be used in making the decision. In some cases, however, the results of a background investigation can be the determining factor. For example, an employer may engage the services of a private investigative agency to find out if an applicant or employee has an unsavory background or reputation of which the employer is unaware; to see if there is criminal behavior in the applicant's background which may be relevant to the job applied for; or perhaps to check out an employment history that itself raises questions.

Another factor that distinguishes a preemployment investigation from the underwriting investigation conducted by an inspection bureau is that the criteria for accepting an applicant for employment are quite different from those governing insurance decisions. Whereas an insurance company makes a profit by accepting all comers who do not present unreasonable risk, there is a limit to the number of individuals an employer can hire. Hence, the employer must select the "best" candidate from the current pool of available applicants, which means, in turn, that the employer must rely on more information than just what an investigative agency gathers.

The information market that has evolved to meet the specific needs of employers also tends to be much more expensive than the market for

³⁰ Equifax, Inc., "It Makes a Difference," Memorandum from Quality Analysis Division to "Fellow Workers," February 1972.

inspection bureau services. Unless it is performed for a client already on retainer for other services, such as investigations of inventory losses or off-hour security guards, Pinkerton's, Inc., the nation's largest private investigative agency, will not accept a preemployment investigation which involves less than a day's billing. The average time billed by Per-Mar Security, a smaller firm, has been estimated at about a day and a half, and some investigations can run as long as three to four days.³¹ From an employer's point of view, this can be advantageous. If an employer believes a particular individual is likely to do a good job, it does not want him disqualified by inaccurate or incomplete information, even if that means paying extra to assure a careful, thorough inquiry. Yet because the cost of gathering high-quality information can also outweigh its value in decision making, some employers have ceased to engage the services of investigative agencies, while others use them only for highly sensitive or key management positions.

In contrast to the inspection bureau workforce, the workforce of the private investigative agency is a skilled one. Instead of some use of part-time students, housewives, and retired persons, the private investigative agency tends to hire people who have previously worked for government law enforcement and investigative agencies. That is, it employs, on a full-time basis, a well trained individual who is acquainted with standard investigative practices and knows how to access public, as well as private, sources of information.³² Moreover, because of the background of their employees, many private investigative firms do not require training programs for their new investigators, whereas most inspection bureaus provide basic instruction in interviewing and record-searching techniques.

Inspection bureaus also do a certain amount of preemployment work, although most of their reports, perhaps as many as 50 percent, are on applicants for employment in the insurance industry. Equifax Services, for example, does enough preemployment investigations to justify a separate division of the company. However, the reports it prepares are generally similar to its inspection reports, and the information in them is drawn from the same types of sources, including the same company files.³³ Equifax's instructions to investigators preparing preemployment reports parallel those to its field representatives preparing inspection reports, except for the extra stress they place on employment history and their observation that the applicant usually is not interviewed. Preemployment reports prepared by inspection bureaus also tend to be much cheaper than the ones prepared by private investigative firms, suggesting that they play a different role in the hiring decision or are ordered on a different level of applicant or employee. Thus, in the remainder of this section, the focus is on the more expensive private investigative report, save for a few instances in which comparisons with inspection bureau practices seem important enough to be noted.

³¹ Testimony of the Wackenhut Corporation, *Private Investigative Firms*, Hearings before the Privacy Protection Study Commission, January 26, 1977, p. 213. (Hereinafter cited as "Private Investigative Hearings").

³² Testimony of the Wackenhut Corporation, *Private Investigative Hearings*, January 26, 1977, p. 40.

³³ *Credit Reporting Hearings*, August 3, 1976, p. 247.

TYPES AND METHODS OF INFORMATION COLLECTION

Although preemployment reports emphasize past employment experience more than an insurance inspection report does, they lay stress on the same categories of "adverse" or "derogatory" information. Private investigative firms seek information on drinking habits, associates, drug use, personal habits, possible criminal behavior, personal reputation, and other items that might not show up in the records of a previous employer, or be volunteered by an applicant. Pinkerton's, Inc. testified that in a neighborhood check, they examine "primarily reputation and character." "We would even describe a house," said one witness, "whether it is well maintained, the grass is cut, depending upon the type of position."³⁴ Although they said they would not ask specific questions about sexual activities or preference, Pinkerton witnesses also said they would specifically inquire about current and past drug use and alcohol consumption.³⁵

In its operations manual, one major private investigative firm directs its investigators to keep the following "basic and fundamental" points of inquiry in mind at all times:

- (1) Character - general traits; reputation as to sobriety; honesty; trustworthiness; reliability; discretion; or lack of such qualities.
- (2) Associations - types of persons, groups, or organizations, or movements with which person has been affiliated, with particular concern as to whether his associations have been undesirable in any way.
- (3) Qualifications and ability - specific inquiry concerning qualifications and ability is essential.³⁶

Beside compiling information through interviews, private investigative agencies also make inquiries of other record keepers. Included in one private investigative firm's list of "general sources of information" are the following: banks; collection agencies; small loan companies; savings and loan associations; land title companies; Federal narcotic agencies; postal authorities; the Internal Revenue Service; the Immigration and Naturalization Service; the Securities and Exchange Commission; the Department of Justice; the Department of Health, Education, and Welfare; State Comptrollers and tax offices; local school authorities; universities and other education facilities; and probation officers.³⁷ Although access to some of these records must be conditional upon obtaining the written authorization of the subject of the investigation, this is not explicitly provided for in the firm's manual. Moreover, it is widely alleged that because of the previous

³⁴ Testimony of Pinkerton's, Inc., Private Investigative Hearings, January 26, 1977, p. 157.

³⁵ *Ibid.*

³⁶ Until recently, investigators were also instructed to examine "loyalty," which was defined as, "actions or statements reflecting person's loyalty to employer; also, attitude and allegiance to the United States." The identity of this private investigative firm has been kept confidential at its request.

³⁷ The identity of this private investigative firm has been kept confidential at its request.

government employment of so many of their investigators, private investigative agencies are able to circumvent established authorization procedures.

The best example of this is the access which they are generally assumed to have to the centralized criminal history files maintained by State and local criminal justice agencies. The three private investigative firms which testified before the Commission all asserted that they have access to such files only where the law permits. However, Sorrell Wildhorn, a Rand Corporation analyst who has conducted the most far-reaching independent study of private investigative agencies to date, told the Commission that many private security executives freely admit to having access to “. . . the records of public law enforcement agencies . . . in jurisdictions in which policy or statutes prohibit such access.”³⁸ It is said that to keep an employer from knowing about such practices, investigators commonly report the criminal history information as though it had been obtained from a police blotter or court records.³⁹

Finally, the Wackenhut Corporation told the Commission that it used to maintain extensive files at its Coral Gables, Florida, headquarters on possibly “subversive” political activity, and other related information, and that these files were checked in the course of all background investigations, including preemployment investigations. The files, which Wackenhut no longer holds but to which its investigators still have access, were based on a collection of information, known as the “Barz Lag List,” which Wackenhut purchased in February, 1966. Barz Lag, a retired naval officer, had monitored House of Representatives Internal Security Committee hearings and similar proceedings to sort out “derogatory-type” information on individuals for black-listing purposes.⁴⁰ Wackenhut purchased the Barz Lag material partly at the urging of some of its employer clients and partly out of its own desire to corner the private-sector market for such information. Subsequently, Wackenhut supplemented the Barz Lag files through an extensive newspaper clipping and general information-gathering program. Local offices, including the Washington, D.C., branch, were instructed to clip newspaper reports of political demonstrations or unrest—such as the civil rights and anti-Vietnam war protests of the late 1960’s—as well as other events which might be of future interest. Patterned after the central files of the FBI, the information was indexed by individual and by subject, allowing a quick central-file check in the course of each background investigation the firm conducted. For a time, this file capacity was considered a major asset in marketing Wackenhut investigative services. However, when few employers expressed interest in it, Wackenhut donated it to the Church League of America, a political group which claims to hold “the largest and most comprehensive files on subversive activity, with the single exception of the FBI.”⁴¹ Today Wackenhut continues to use the Church League files when there seems to be a need to do so, but they are apparently not much in

³⁸ Private Investigative Hearings, p. 237.

³⁹ *Ibid.*

⁴⁰ Testimony of the Wackenhut Corporation, Private Investigative Hearings, January 26, 1977, pp. 44, 63-89.

⁴¹ The Church League of America, *What is the Church League of America?* undated, p. 4.

demand. Pinkerton's and Per-Mar both testified that they have never maintained files of this nature, nor have their preemployment background reports ever contained information on political activities.⁴²

Apparently employers, unlike insurers and credit grantors, are not much interested in sharing information about applicants and their backgrounds. This was demonstrated by a Wackenhut witness who testified that Wackenhut once considered establishing a central databank that employers could use to check out applicants and current employees:

. . . we felt that there was a need on the part of business and industry to have a central index where they could secure information regarding the background of the individuals involved in various types of criminal as well as subversive activities; and we at one time contemplated setting up a procedure whereby, for example, we might accumulate information on individuals who are employed in the retail field, or people employed in the transportation industries, and provide a central index of information regarding those persons.⁴³

The plan was abandoned, however, for lack of employer interest. The employers contacted were neither prepared to contribute information to the databank nor to pay for the service it would make possible. Apparently, the employer's desire for a high-quality, thorough, investigation, tailored to its specific needs, is a real one; and high-quality investigations cannot be reliant on a central databank. Moreover, there are more employers than insurers, and thus a much less concentrated demand for reports on applicants. Indeed, Wackenhut, the nation's third largest private security firm, testified that it currently maintains only about 70,000 files containing information on subjects of investigations done for clients.⁴⁴ Pinkerton's, Inc., the country's oldest and largest security firm, and Per-Mar Security, a much smaller firm, both testified that they do not centrally index reports done by local branch offices, nor do they retain investigative reports very long.⁴⁵ In fact, Pinkerton's testified that unless a preemployment report is needed for litigation or possible prosecution, it is destroyed as soon as the client pays the bill.⁴⁶

On the other hand, private investigators doing preemployment work do have access to the information reservoirs maintained by the support organizations that service insurers and credit grantors. Employers, like insurers, view an individual's credit history as an important indicator of trustworthiness and responsibility; and credit bureaus, as a rule, have not

⁴² Testimony of Pinkerton's, Inc., Private Investigative Hearings, January 26, 1977, p. 147; and testimony of Per-Mar Security, Inc., Private Investigative Hearings, January 26, 1977, p. 196.

⁴³ Testimony of the Wackenhut Corporation, Private Investigative Hearings, January 26, 1977, p. 43.

⁴⁴ *Ibid.*, p. 24.

⁴⁵ Testimony of Pinkerton's, Inc., Private Investigative Hearings, January 26, 1977, p. 144; and testimony of Per-Mar Security, Inc., Private Investigative Hearings, January 26, 1977, p. 191.

⁴⁶ Testimony of Pinkerton's, Inc., Private Investigative Hearings, January 26, 1977, p. 144.

been reluctant to share information in their records with insurers and employers who are willing to pay for it. Hence, private investigators and inspection bureau representatives both rely on credit-bureau records in writing their reports, and as leads to further sources of investigation.

Moreover, for some reason, private investigative agencies will not identify a credit bureau as the source of information in a preemployment report. One major firm's investigative manual says that:

Information obtained from Dun and Bradstreet and from various credit bureaus should be treated as coming from a confidential source and should not be reported in the language of the credit agency. This information should be reported in the language of the investigator, disguising its origin.⁴⁷

One consequence of this, of course, is to make it impossible for either the employer or the applicant to trace an error back to its source.

There is also some evidence that private investigative agencies have access to inspection bureau files. A senior employee of one of the larger investigative agencies told the Commission staff that it is not uncommon for an investigator to establish a "source" relationship with an inspection bureau, but again always disguising the source.

INVESTIGATIVE SERVICES IN ADVERSARY SITUATIONS

In addition to conducting underwriting and preemployment investigations, inspection bureaus and private investigative agencies both provide special investigative services to assist insurers in the settlement of certain types of claims. Private investigative agencies may also offer extensive "loss prevention" services to employers. In both instances, experienced and highly trained investigators are assigned to the case; and in some cases mechanical surveillance devices may be used.

Transfer to the "special investigations" claims unit is considered a promotion for the inspection bureau field representative, and the reports they prepare are carefully checked before they are delivered. Claims settlement and loss prevention investigations are adversary situations which may lead directly to a court room, so the evidence standards of both client and investigator are high. Moreover, the potential savings to the insurance company or employer are great. Fraud is estimated to be involved in hundreds of millions of dollars worth of insurance claims each year. While even the most complete investigation rarely results in a prosecution for criminal fraud, a good investigation can frequently force a fraudulent claim to be dropped or produce a much-reduced settlement. Similarly, it is estimated that well over three-fourths of all business inventory shortages are the result of theft by employees. Theft from retail establishments alone amounted to an estimated \$7.2 billion in 1976.⁴⁸ Thus, even a very expensive investigation can turn out to be cost-effective.

Where large amounts of money are at stake, investigators may use

⁴⁷ The identity of this private investigative firm has been kept confidential at its request.

⁴⁸ U.S. Department of Commerce, *Cost of Crimes Against Business*, O.B.R.A., 1976.

unusual techniques. In a personal injury case, standard investigative practice is to conduct an "activities check," which may involve covert surveillance of the individual, possibly photographic surveillance. Along these lines, investigators working for a company with theft or other problems may place an "intelligence agent" undercover in the company's work force to observe the activities of other employees. Whether or not this produces direct results, the sense that it may be going on can have a desirable inhibiting effect.

Pretext interviews in claims investigations are another routine practice. Wackenhut witnesses described how one such interview might be conducted:

Well you might, for example, call up and ask the lady of the house, who apparently is the claimant in connection with the matter, what type of detergent or soap she might use in laundering her wash, and she would tell you. And you would indicate to her without even disclosing what company you are with and who you represent that you would like to come out on Monday morning or whenever she does her washing in order to take some pictures of her using that product. And, then you would appear on the scene and she would wash. And, you would have a person who has a serious back injury who is claiming a large amount of money from the insurance company, who proceeds to wash and hang up her wash on the washing line. That might be one example.⁴⁹

Because of the importance of medical-record information in claims settlements, Equifax Services Claims Department maintains special card files on "medical sources." A source card generally indicates the most opportune times for obtaining information from the doctor, whether an authorization is commonly required, the doctor's attitude toward insurance companies, and so forth.⁵⁰ Of the 11,000 hospitals accredited in the United States and Canada, Equifax estimates that its agents are able to make a personal review of the records in all but 1,200, the 1,200 being known in the business as "problem hospitals."⁵¹

An extreme example of the use of pretexts to gain access to medical records without authorization was provided in testimony by the Denver, Colorado, District Attorney during the Commission's Medical Records Hearings in Los Angeles.⁵² Factual Service Bureau, Inc., (FSB) a private investigative agency headquartered in Chicago but with offices scattered around the country, was said to have made the unauthorized acquisition of medical-record information for use in investigating and settling third-parties insurance claims its "bread and butter" business. According to the evidence presented to the Commission, this was apparently done by phoning a hospital records room, pretending to be a doctor, or by paying a strategically

⁴⁹ Private Investigative Hearings, January 26, 1977, p. 54.

⁵⁰ Equifax, Inc., "Claim Reports Manual," November 1975, p. B-3.

⁵¹ *Ibid.*, p. C-11.

⁵² Testimony of Dale Tooley, *Medical Records*, Hearings before the Privacy Protection Study Commission, June 11, 1976.

placed hospital employee to spirit the records out. FSB also claimed to be able to acquire records from the "IRS and financial sources," creating the impression that it could penetrate both.

Although aspects of Factual Service Bureau's *modus operandi* are described in several parts of this report, two points are important here. First, while the Commission realizes that the type of practices in which Factual Service Bureau engaged are rarely, if ever, used in underwriting or preemployment background investigations, and further that they are not typical even in most claims investigations, the fact that there was any kind of market for such a service should be a matter of great concern. Second, it must be understood that the reports Factual Service Bureau prepared were not subject to any of the requirements of the FCRA by virtue of the fact that they were developed in connection with claims investigations which the Act does not reach.

COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT

At the time it was enacted, the primary objective of the FCRA was to improve the accuracy, timeliness, and completeness of the information credit bureaus, inspection bureaus, and private investigative firms report to their clients. To this end the Act made it possible for the subject of an investigation to review and challenge information in the report that results from the investigation. Implementation of these provisions, however, has not been without its problems; and the Act today remains a much less effective protection for the individual consumer than he needs. The reasons why this is so in the credit area are explained in detail in Chapter 2, and the chapters on insurance and employment record keeping (Chapters 5 and 6) highlight similar problems in those areas.

Based upon the testimony it has taken and the analysis of the extent to which the FCRA comports with the Commission's three recommended policy objectives regarding intrusiveness, fairness, and expectation of confidentiality, the Commission has concluded that additional legislative action is clearly needed. While the practices of investigative-reporting agencies have certainly changed significantly over the past six years, and although it appears that the practices of some inspection bureaus and private investigative firms now meet not only the objectives of the Act but also the objectives of the Commission's recommendations, this is not universally so, nor has the process by which it has sometimes come about been a reassuring one.

This is sharply illustrated by the experiences of one Commission witness who sought to challenge the information in an inspection bureau report which prompted cancellation of his auto insurance.

The Millstone Case

In August 1971, journalist James C. Millstone moved from Washington, D.C. to St. Louis, Missouri, to assume the post of news editor for the *St. Louis Post Dispatch*. He asked his insurance agent to place automobile

insurance for him. A policy with Firemen's Fund took effect on November 15. A few days later, Millstone received a form notice that a personal investigation would be made in connection with the new policy. On December 20, Firemen's Fund informed Millstone's agent that the policy would be canceled as a result of information turned up in an inspection report prepared by O'Hanlon Reports, Inc.

Because the agent was willing to vouch for him, and because of Millstone's standing in the community, Firemen's Fund was shortly thereafter persuaded to ignore the report and reinstate Millstone's policy. However, getting the report itself cleaned up was not so easy. On December 22, 1971, Millstone went to the St. Louis office of O'Hanlon Reports. The office manager told him that he was entitled to know what was in his own report, but that O'Hanlon was by law allowed 10 days to produce the information. When Millstone protested, the manager called O'Hanlon's New York Headquarters and let Millstone speak to one Kenneth Mitchell. Mitchell told Millstone that the file was in the mail from St. Louis to New York and would be made available as soon as possible. As it later came out in court, however, Millstone's file was actually in the St. Louis office when he visited it and was only mailed to New York after he left.

Six days later, when Millstone returned to the St. Louis office, the manager read from a single sheet the purported contents of Millstone's file. The disclosure sheet, prepared by David K. Slayback, Vice President of O'Hanlon, said in part:

The file shows that you are very much disliked by your neighbors at that location [Millstone's Washington residence] and were considered to be a "hippy type." The file indicates that you participated in many demonstrations in Washington, D.C., and that you also housed out-of-town demonstrators during demonstrations. The file indicates that these demonstrators slept on floors, in the basement, and wherever else there was room on your property. The file shows that you were strongly suspected of being a drug user by neighbors, but they could not positively substantiate these suspicions. You are shown to have had shoulder-length hair and a beard on one occasion while living in Washington, D.C. The file indicates that there were rumors in the neighborhood from three previous residences in Washington, D.C. prior to living at the 48th Street, N.W. location.⁵³

This disclosure was read to but not shown or given to Millstone for his own examination.

Shocked, Millstone disputed virtually all of the information disclosed to him and demanded an explanation of several of the allegations. The office manager told Millstone he had no further information and could not answer Millstone's questions. He said that his instructions from the New York office were to read the disclosure sheet and note any item disputed by Millstone. The actual report from which the disclosure was abstracted was

⁵³ *Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269, 271 (1974).

neither produced nor quoted. The manager, however, called New York once again; and this time Millstone spoke to David Slayback. Slayback defended the method and propriety of the disclosure process and refused to expand on the statement that Millstone was strongly suspected of being a "drug user."

Slayback directed the manager of O'Hanlon's Silver Spring, Maryland, office, which had conducted the original investigation, to reinvestigate. The Silver Spring office took approximately three days to do so and report back to New York. A further abstract was prepared. The abstract based on the reinvestigation contained new charges and led to another series of meetings and telephone calls between O'Hanlon representatives and Millstone. In each conversation and meeting, Millstone asked to see his file but was refused.

Eventually, Millstone sued O'Hanlon. During the pre-trial discovery process, Millstone learned about critical comments concerning his wife contained in his file, but never previously disclosed to him, as well as additional derogatory allegations about himself.

One of the documents Millstone introduced as evidence at the trial was the handbook O'Hanlon issued to each branch office manager. The manual states in part:

The important thing is to NEVER check the files in the presence of the consumer . . . prior to the time of your appointment with the consumer, you will have received the Statement of Disclosure from the Home Office. At the time of your appointment ANY and ALL information you may have relating to the consumer, such as copies of files, a copy of your statement, index cards, etc., are to be in your desk drawer out of SIGHT of the consumer. You are not to show anything or acknowledge that you have anything other than the Statement of Disclosure.

Actual disclosure will be accomplished by reading the Statement of Disclosure to the consumer. The Statement is to be read word for word at your normal reading speed. It is not to be read slow enough for anyone to copy down word for word, nor is it to be read so fast that the consumer will not understand what you were saying. Part or all of the Statement of Disclosure may be reread if the consumer indicates he did not understand what you were telling him. The consumer and/or the person with him may not have a copy of the Statement, nor may they be allowed to read the Statement or touch it.⁵⁴

It was disclosed that an O'Hanlon employee, Alexander Mayes, conducted the original investigation of Millstone. Mayes claimed to have spoken to four former neighbors of the Millstones on the block where they had lived in Washington, D.C. Of the four, one refused to speak to Mayes and two told him that they knew of trouble in the neighborhood but that they knew nothing firsthand and that they did not wish to be involved. All of the data in the Mayes report were purported to have come from one

⁵⁴ *Ibid.*, 272, 273.

neighbor, "McMillan," who was deceased at the time of the Millstone suit. Mayes averaged approximately 70 to 80 reports a week and spent from 10 to 30 minutes on each insurance investigation.

Millstone's character, reputation in the community, working and personal habits, and his family relationships were testified to by character witnesses of national reputation at the trial. These witnesses were entirely supportive of Mr. Millstone and contradicted the O'Hanlon report allegations totally.

The court found that Mayes had "knowingly included false information in the report," and further that O'Hanlon's,

methods of reporting on consumers' credit backgrounds as shown at the trial were so slipshod and slovenly as to not even approach the realm of reasonable standards of care imposed by the statute [FCRA].⁵⁵

Millstone was granted \$2,500 in actual damages, \$25,000 in punitive damages, and \$14,000 in attorney's fees. The decision was appealed by O'Hanlon, but finally upheld in January 1976.⁵⁶

While Mr. Millstone's experience by no means typifies the treatment of all or even a sizeable minority of the individuals investigated by inspection bureaus and private investigative agencies, it shows why the FCRA needs to be strengthened substantially. Only a small percentage of inaccurate information reports result in litigation, and many cases that go to court are settled before judgment. The Millstone case was filed in April 1972, within months after the Act took effect, and has established legal precedents of wide-reaching effect. Yet the case was not settled until the U.S. Court of Appeals rendered a decision four years later. Meanwhile, the inspection bureau vigorously fought each step of the way and apologized to Mr. Millstone only in August 1976 during its testimony before the Privacy Protection Study Commission.

Many consumers are still not aware that legal recourse is available to them and many who are will nonetheless try to cope with the damage done rather than bring suit. Litigation is expensive, uncertain, protracted, and possibly demeaning as one attempts to document one's own reputation. Further, as the *Millstone* case illustrates, some inspection bureaus, in complying with the access and dispute requirements of the FCRA first developed policies which discouraged all but the most persistent, and which had the effect of obscuring the actual content and sources of information in a report unless the aggrieved individual was willing to go to court. Only recently did they start allowing an individual to see and copy a corrected inspection report upon request, and some still do not allow the individual to do even that.

THE COMMISSION'S RECOMMENDATIONS

The activities of the investigative support organizations described in

⁵⁵ *Ibid.*, 275.

⁵⁶ 528 F.2d. 829 (8th Cir., 1976).

this chapter present a number of special privacy protection problems. In part because of the broadly worded authorization forms that applicants for insurance and employment are often asked to sign, the crucial role these organizations can play in the decision-making processes of insurers and employers is poorly understood by the public. As indicated in the chapters on the insurance and employment relationships, blanket, open-ended permissions for unnamed third parties to make almost any kind of inquiry about an individual tend to obscure the fact that an inspection bureau or private investigator, rather than the insurer or employer, may actually do the information gathering and perhaps retain the results for subsequent reporting to others. Moreover, the information gathered and reported may often disguise its source, thereby making it impossible to tell whether an individual's presumed confidential relationship with a record-keeping institution, such as a credit grantor, an insurer, a medical-care provider, or his employer, is, in fact, being honored.

Furthermore, in the insurance area, the economic incentive to assure that the information in an inspection report is accurate, timely, and complete has traditionally been weak. Although inaccurate or false information can lead a company to turn down an applicant who would otherwise qualify for average or even preferred rates, it takes a large number of policies lost as a result of inaccurate inspection reports to more than make up for a \$50,000 claim settlement that might have been avoided if information developed by an inspection bureau report had been used as the basis for declining or refusing to renew. Clearly a service which will help a company avoid even a few substantial claims or which tends to raise premium income even a small amount is quite valuable. Indeed, it can make a great deal of difference to an insurer in terms of earnings and competitive position, thereby directing attention away from the fact that it can also be a cause of considerable unfairness to some unknown number of individuals whose reports contain inaccurate information.

Finally, to the extent that inspection bureaus rely on information in their own files in making reports, they can play a gatekeeping role that significantly affects an individual's ability to establish relationships with a large number and variety of record-keeping institutions. Where adverse information is kept on file for many years, an individual may never be able to avoid having certain lines of inquiry made about him, and thus never be able to escape the subjective judgments of others as to whether he still has the questionable characteristics that were once reported about him. While this may not have the same "chilling effect" on an individual as government inquiries about aspects of an individual's private life are reputed to have, it presents at least the danger of permanent, inescapable stigmatization.

In recognition of these problems, the Commission has made recommendations regarding the insurance and employment relationships which, if adopted, will markedly alter the role that investigative support organizations play in them. The recommendations would redistribute responsibility for the practices of inspection bureaus and private investigative agencies by requiring their users to exercise reasonable care in selecting and evaluating them, and, in addition, levy access and correction requirements on users

which parallel those that would apply to report preparers. Equally important, the Commission's recommendations would enlarge the population of individuals entitled to the protections afforded by the FCRA, change the Act's access and correction requirements to make them better serve the interests of the individual, and regulate, to some degree, the investigative techniques that may be used by insurers, employers, and investigative support organizations that serve them.

REDISTRIBUTION OF RESPONSIBILITY

The Fair Credit Reporting Act establishes liability for the accuracy, timeliness, and completeness of investigative reports, but currently places it exclusively on the inspection bureaus and investigative agencies that prepare them. The user of a report bears no responsibility for the conduct of the investigative support organization that put the report together, nor is it under any obligation to inform the support organization when it discovers an error. Indeed, the likelihood that it will discover an error is low, since the FCRA only allows an individual to check and, if necessary, correct the copy of an investigative report that the support organization retains. The Act gives him no parallel right with respect to the same report in the hands of the insurer or employer user. The user's responsibility is limited to notifying the individual that a report may be requested, describing, upon request, the scope of the investigation, and, if an adverse decision results, notifying the individual of the name and address of the inspection bureau or private investigative agency that prepared the report.

The Commission's solution to this problem is to place the insurer and employer in a position of joint responsibility with the investigative support organization. While accountability for the contents of a report would remain with the organization that prepares it, the user would be liable if it repeatedly did business with any support organization that consistently engaged in objectionable practices. Moreover, by requiring the user, as well as the preparer of a report, to disclose its contents to the individual whom it concerns and to cope with certain types of deficiencies in it that the individual may allege, the user is given a strong incentive to deal only with support organizations that produce reports of high quality.

Some investigative support organizations currently have contracts with their users that make the user who discloses the contents of a report to its subject the liable party in any law suit that may result. The effect, of course, is to keep the user from disclosing anything to the individual, and the Commission's recommendation would therefore make such contracts null and void. Finally, the Commission's "expectation of confidentiality" recommendations and proposed authorization requirements are worded in such a way as to compel support organizations to live by the same ground rules on third-party access to reports as the insurers and employers who use them. In practical terms, this means that a report prepared on an individual for one purpose will no longer be useable for another purpose without his authorization, thereby giving him some control over the circulation of

information about him which has been generated in service of markedly different record-keeping relationships he maintains or seeks to establish.

SCOPE OF THE FCRA

A second shortcoming of the FCRA is that its protections do not reach every individual who is the subject of an underwriting or preemployment investigation—notably any individual whom an insurer or employer investigates on its own or who is investigated in connection with a job for which he has not applied. The Commission has heard of no plausible rationale for preserving such a distinction and thus, through judicious wording of its various recommendations affecting the FCRA, has eliminated it.

ACCESS AND CORRECTION REQUIREMENTS

Perhaps the most blatant weakness in the FCRA is the impracticality of its provisions aimed at giving an individual a way of getting inaccurate, incomplete, or obsolete information in an investigative report corrected, amended, or deleted. As was evident in the *Millstone* case, requiring only that the “nature and substance” of a report be revealed to the individual effectively deprives him of his corresponding right to challenge its content. Thus, in its insurance and employment recommendations, the Commission proposes that the FCRA be amended to allow an individual to “see and copy” a report about himself, whether in the hands of the preparer or the user and regardless of whether they happen to be the same organization (as when an insurer or employer conducts its own investigation of an individual). In conjunction with this change in the Act, the Commission also recommends that the individual be able to receive a copy of a report in the mail, and, for reasons discussed in the chapter on the employment relationship, that an employer automatically send an applicant or employee a copy of any background report prepared on him. (Note that the Commission’s recommendation on applicant interviews in the course of preparing underwriting reports could also be satisfied by mailing the applicant a copy of the report.)

Of equal importance is the corollary obligation the Commission’s recommendations would place on an insurer or employer to propagate corrections, amendments, disputes, and deletions of information in a report back to the support organization from whence the information came. So, also, the Commission’s recommendations that would prohibit the use of information concerning previous adverse insurance decisions, and the disclosure by insurance institutions and support organizations of information concerning an individual’s health which has not been obtained from a medical-care provider or from the individual himself, or from his spouse, parent, or guardian, should serve to reduce the amount of damaging gossip in inspection bureau reports.

INVESTIGATIVE TECHNIQUES

Finally, the Commission has recommended Federal legislation that would (1) outlaw the use of pretext interviews in all insurance (including claims) and preemployment investigations; (2) prohibit an employer from using polygraph or other truth verification equipment to gather information from an applicant or employee; and (3) make it a criminal offense to seek to acquire medical-record information from a medical-care provider through false or misleading representations.

AN AGENDA FOR FURTHER STUDY

If accepted, the Commission's recommendations should go a long way towards improving the practices of inspection bureaus and private investigative agencies. There are, however, a number of problem areas that deserve further study.

In the employment area, particularly, further study is needed of the access which private investigators are alleged to have to computerized criminal histories maintained by public law enforcement agencies. If there is indeed a "buddy system" which facilitates unauthorized access to such records, it should be exposed and dealt with responsibly. Additional examination is also needed to assure that "blacklists" and reports concerning an individual's political beliefs and associations are not being used in making employment decisions. In this regard, the activities of organizations like the Church League of America need to be studied further.

The loss prevention services and background investigations for parties other than employers which many private investigative agencies offer their clients are still another category of activities that merits examination. The Commission has not been able to look at possible uses of private investigators to monitor union activity or the activities of individuals whose political views conflict with those of their employer or of any other investigative agency client. Finally, the effectiveness of requiring a private investigator to have a signed authorization in hand before he can acquire information in records maintained by an institution with whom an individual has a legally enforceable confidential relationship will be a crucial question for the future.

Adoption of the Commission's recommendations regarding investigative reporting agencies will involve some sweeping changes in current practice. The record of the last 10 years does not suggest that those changes will be easily wrought. Hence, in recognition of the impact that investigative-reporting activities can have on the lives of many individuals, the Commission believes that continued monitoring is not only advisable; it is essential.