DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C 20201

February 27, 2007

Mr. Steven D. Aitken
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Mr. Aitken:

Thank you for the opportunity to comment on the Office of Personnel Management's proposed changes to the suite of Standard Forms 85/85P/86 for initiating personnel security background investigations that are under Paperwork Reduction Act review at OMB.

HHS concurs with the changes to the draft forms with the exception of the Privacy Act notice, and we respectfully submit the enclosed comments on that notice and other aspects of the forms.

Sincerely,

Charles Havekost
Chief Information Officer
and Senior Official for Privacy

Enclosure

cc: Rachel F. Potter

HHS comments on
OPM Draft Standard Forms 86, 85P, 85, and supplements

Privacy Act notice and Instructions

Harmonization of Notices

The Office of Personnel Management (OPM) has significantly changed the Privacy Act notice that has been in use for these forms for 12 years. On the draft SF-86, there is a notice that "The office that gave you this form will provide you a copy of its routine uses." There is an additional notice:

> OPM has published routine uses for disclosing background information in OPM's systems of investigative records. OPM conducts the majority of background investigations and serves as the lead agency for the SF-86. OPM's routine uses follow:

If implemented, the proposed change would require every other agency of government to provide a second Privacy Act notice describing its own Privacy Act authorities, practices, and routine uses, a change to current practice. Two different notices will cause significant confusion for applicants, disharmony among agencies performing the very same government function, and a significant amount of unnecessary new paperwork. When clearances are transferred, new rules would apply to employees, even though the purpose and function of the collection remains exactly the same.

It appears that the draft forms' Privacy Act notices are based on the existing OPM Central-9 system of records. OPM's Central-9 has not been amended with respect to its routine uses since 1993 (58 Fed. Reg. 19154, Apr. 12, 1993), and therefore the routine uses in that notice pre-date the last significant revision of this suite of forms in 1995. They are out of date.

As a central management agency, OPM should draft a Privacy Act notice that takes into account all agencies' needs, incorporating routine uses applicable to all federal agencies, not just OPM. In particular, almost one year ago, OMB provided model language that should make the task straightforward based on an interagency work group chaired by the Department of Labor in 2005. (OMB Memorandum 06-06 for the Chief Information Officers and Senior Officials for Privacy, Feb. 17, 2006). OPM should follow OMB's guidance.

Furthermore, given that the forms are used throughout the federal government, we recommend that OPM consider converting the system of records from which these routine uses derive into a "government-wide" system of records. This would result in less paperwork for other federal agencies, such as the need to create separate systems of records or routine uses for background investigations or to provide a separate piece of paper about the agencies' routine uses to applicants.

Prohibition of additional notices.

Suggesting or permitting agencies to create their own additional Privacy Act notices will invite agencies to add instructions that differ from what is cleared under the Paperwork Reduction Act (i.e. "bootleg" forms), and to add incompatible routine uses. We strongly recommend this language be removed from the instructions and agencies be forbidden to add supplemental

instructions or notices (except as to whether the 7- or 10-year scope applies). Instead, the following language should be substituted for this last sentence of the instructions under "Disclosure of Information":

> The information on this form, and information collected during an investigation, may be disclosed without your consent as permitted by the Privacy Act of 1974 [5 U.S.C. § 552a(b)] and as follows:

Furthermore, we strongly recommend adding a statement to the applicant to the effect that no supplementary information other than what is requested on the form itself is required of the applicant to initiate a background investigation.

Timing of Questionnaire. The SF-85/85P/86 suite of questionnaires should only be presented at the time an applicant has a firm offer of employment that is conditional upon the favorable outcome of a suitability investigation. The instruction to this effect that appeared in the 1995 version of the form, "Complete this form only after a conditional offer of employment has been made for a position requiring a security clearance," has been removed. The change chart provided states that the instruction is "No longer relevant to the use of the form" without further explanation. This instruction should be reinstated in the section titled "Purpose of this Form."

If this instruction is not reinstated and this practice is not followed, background questionnaires might be requested from all applicants, or a larger number than have been made offers. Permitting applicants to submit background investigation forms before having received a conditional offer of employment significantly increases the burden on applicants, agencies and OPM to initiate or carry out investigations on applicants who may never receive offers. Moreover, it increases the risk of inappropriate access to extremely sensitive information, and increase the risk of the use of information for inappropriate decision-making or discriminatory purposes.

OPM/OMB may want to consider adding language that indicates the form should be filled out by applicants with firm offers "or those already employed."

Purpose and HSPD-12. With the advent of HSPD-12, each of the forms should have some language in the Purpose statement to the effect,

> The form will also be used as the basis for a determination about your suitability for access to government buildings, facilities, and systems, and if a favorable determination is made, the identifying information on this form may be used to request a federal badge for you.

Default Scope. The default length of time for the scope of the SF-86 should be 7 years, and the exceptions should be 10 years. This will reduce burden, and ensure compliance with the Privacy Act's requirement that agencies collect only information that is relevant and necessary to carry out their missions (5 USC 552(e)(1)).

Clarity. We recommend removing the term "routine use" from instructions intended for applicants since it is a term of art from the Privacy Act that will merely add confusion.

Technical comments on Specific Proposed Routine Uses

We hope our inclusion of detailed explanations of the reasons for our recommendations on the routine uses will be helpful to OMB, OPM, and anyone else reviewing the Privacy Act notice.

1) The first three routine uses on the draft form significantly overlap; it is unclear how their purposes differ. Each includes the language either to "evaluate qualifications, suitability, or loyalty" or to "make a determination of qualifications, suitability or loyalty." The Authorization Forms Nos. NSN 7540-00-634-4035, NSN 7540-01-317-7372, and NSN 7540-00-634-4036 each permit OPM or another investigating agency to disclose the results of the investigation to the agency that requested it. This eliminates the need for the routine uses, and therefore, these routine uses should be deleted.

2) The fourth routine use is limited to DOD, NSA (which is part of DOD anyway), CIA, and FBI for "intelligence activities." This routine use is too narrow in its recipients and too broad in its purpose, so that it does not give sufficient notice to the individual of the proposed use. The creation of the DNI, DHS, NGA and other intelligence agencies, and our need to cooperate with foreign governments, requires broadening the recipients of data. The eighth routine use on the current SF-86 included all governmental entities and listed the specific national security and intelligence authorities. OPM should follow the language recommend by OMB in Memorandum 06-06 (Attachment A, 10th routine use), but should specify the types of intelligence activities that would be undertaken pursuant to this routine use.

3) The 6th listed routine use is too broad and indicates no nexus between the need for disclosure and the information collected. In 1989, the Third Circuit wrote that "[t]here must be a more concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure." *Britt v. Naval Investigative Serv.*, 886 F.2d 544, 549-50 (3d Cir. 1989). The routine use language also does not conform to language OMB has been advising agencies to use for disclosure to a law enforcement authority that specifically responds to the ruling in *Covert v. Herrington,* 876 F.2d 751 (9th Cir. 1989).

This draft routine use also conflicts with the language of Question 23 on the draft SF-86 (and similar questions) which was crafted so as not to violate applicants' Fifth Amendment rights. Without excepting question 23 from the routine use language, applicants might not be confident that truthful responses will not be used as evidence in a criminal proceeding. This might deter qualified applicants from submitting the questionnaire due to minor drug violations.

The draft routine use is worded so as to pertain only to OPM and not the other agencies who will use this form. Language appropriate to all agencies' use should be substituted.

To correct these problems, OPM should adopt the third routine uses in Attachment A to OMB Memorandum 06-06, the same language that appears on the current form.

4) The seventh routine use inappropriately duplicates disclosures that should be made with written consent (issuance of a clearance, hiring, conducting a security or suitability investigation,

letting a contract, issuing a license, grant, or other benefit). For these situations, written consent is specifically included in the Authorization associated with this suite of forms and includes a long expiration date so as to permit investigations after hiring, such as for retention. Therefore, the seventh routine use should be deleted.

5) In the 8th routine use, substitute the words "the agency" where "OPM" appears to ensure the form is generic for all agencies' use. See OMB Memo 06-06 routine use #4.

6) In the 9th routine use, replace the words "in connection with" with "when necessary to the evaluation of" to solidify the nexus between the data collected and the purpose for the disclosure. OMB recommended language as routine use #11 in Memo 06-06.

7) The 10th routine use only indicates to whom the disclosure will be made, without any purpose, and therefore does not meet the requirements of 5 USC § 552a(e)(4)(D). It does not indicate a nexus between the need for disclosure and the information requested on this form. *See Britt*, 886 F.2d at 549-50. The 6th routine use on the 1995 version of the form has language that is specifically designed for the purpose of disclosing to contractors/etc that meets these requirements. Similar language was recommended by OMB as the 6th routine use in Memorandum 06-06. In addition, both examples make clear that such recipients are required to maintain the records in accordance with the Privacy Act.

8) The 11th routine use duplicates the 14th routine use in part, and is broader in part. This routine use includes disclosures to a party in litigation (presumably for discovery requests) which conflicts with the rulings in *Doe v. Stephens,* 851 F.2d 1457, 1465-67 (D.C. Cir. 1988), and *Doe v. DiGenova*, 779 F.2d 74, 78-84 (D.C. Cir. 1985) that hold an agency may not create a routine use permitting disclosure pursuant to a subpoena since that violates the statutory requirement for a court order in (b)(11). Since discovery requests have even less oversight than subpoenas, routine uses that purport to permit responding to discovery requests for Privacy Act records are not appropriate. The most appropriate method of disclosure in this situation is pursuant to a subsection (b)(11) court order. Although we are aware the ruling in *Osborne v. USPS*, No. 94-30353, slip op. at 6-9 (N.D. Fla. May 18, 1995), may permit discovery routine uses, as a practical matter, the Department of Justice has created a straightforward procedure for this type of disclosure: the parties create a stipulation as to how the records will be disclosed and protected and get the stipulation signed by the judge, at which point it falls under the (b)(11) exception for a court order. Therefore, the 11th routine use should be deleted.

9) The 12th routine use is adequate, but the existing standard forms includes the specific statutory authority for NARA's records management inspections which gives more useful notice. OMB recommended model language as the 5th routine use in Memo 06-06.

10) The 13th routine should be deleted. This draft routine use indicates disclosures are to be made within OPM, which impermissibly duplicates the statutory disclosure exception permitting internal agency disclosures where there is a need for the information in the performance of an employee's mission. 5 USC § 552a(b)(1). We understand OPM is now conducting 90% of background investigations, so OPM has access to 90% of the information on these forms already. The Privacy Act also provides a disclosure mechanism for statistical data in non-identifiable form under 5 USC § 552a(b)(5). If OPM anticipates the need for access to that other 10% of

agency background investigation information in identifiable form, HHS would be pleased to review OPM's recommendation for routine use language that agencies can adopt.

11) In the 14th routine use (for litigation), "OPM" should be deleted the third time it appears in the 4th bullet, and other instances of "OPM" should be replaced with "the agency" to ensure the notice is applicable to all agencies. In OMB Memo 06-06, the first and second routine uses recommend language to accommodate litigation disclosures.

12) The 15th, 16th, and 17th routine uses should be deleted. They duplicate the 14th routine use in part, and otherwise are unnecessary. These agencies are all "adjudicative bodies" before which agencies are authorized to appear, so the part of the routine use permitting disclosure "when requested in connection with appeals/investigations/" is unnecessary. Disclosure for "special studies" duplicates the statutory provision in 5 USC 552a(b)(5) for statistical research, and the other listed disclosures can be made using the law enforcement authority in (b)(7).

Missing Routine Uses

HHS recommends the addition of two routine uses that will be necessary to the conduct of the personnel security mission.

1) The OPM draft does not provide a routine use for circumstances where disclosure is required to another agency's security office but a request by the investigating party is not possible. For example, when an agency learns of a security violation by an employee of another agency, and the employing agency is not aware of the violation so cannot request the records, disclosure could run afoul of the ruling in *Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987). In cases of an existing clearance, contract, license, etc. where the investigated party is suspected of wrongdoing or being unsuitable for some reason, the original written consent may have expired. Another consent is not possible or is undesirable because it will "tip off" the subject. In such cases a routine use is appropriate. The 8th routine use in OMB Memorandum 06-06 was designed for these circumstances and should be adopted. It permits a limited amount of information to be disclosed to the employing (licensing, contracting) agency which can then make a request to follow up by presenting the Authorization obtained at the time of the original initiation of the employment, contract, grant, license, etc.

2) The draft SF-86 does not include a routine use for disclosures about the applicant to witnesses in an investigation. The Authorization also does not permit this type of disclosure. Without such a routine use (or a re-wording of the Authorization that would cover this situation), an investigator cannot disclose in an interview the identity of the subject of the investigation, for what position the applicant is applying, facts needing verification, etc., and investigations will be severely hampered. We recommend adding the 4th routine use originally on the 1995 version of the form which is included as the 7th recommended routine use in OMB Memo 06-06.

Authorization for Release of Information

1) A separate credit authorization is now required by the Fair Credit Reporting Amendments of 1997. Therefore, a third authorization should be drafted that satisfies the requirements of FCRA

and includes the identical last paragraph of the general authorization (copies are equally valid, expiration, etc.). Including a standard credit waiver cleared by OMB under its Privacy Act and PRA authorities will ensure appropriate limitations and uniformity in the use of credit waivers across government. We defer to Federal Trade Commission as to the wording of such a waiver.]

2) A separate authorization is required where an investigator needs access to tax return information. A fourth authorization should be included for the IRS if that is routinely required. The inclusion of either the IRS' standard authorization, or a standard form drafted for the SF 85/86 series cleared by OMB under its Privacy Act and PRA authorities will ensure appropriate limitations and uniformity across government.

3) Based on the foregoing comments, the Authorization should be amended to remove the words "credit bureaus" and "consumer reporting agencies" from the first paragraph. We would leave the words "financial and credit information" since such information might be obtained from entities that are not credit bureaus or consumer reporting agencies.

The Authorization should be further amended in the second paragraph to add the words "credit reporting agencies, credit bureaus, tax authorities" into the list of sources. The words "may be needed" should be replaced with "is required".

4) In the last sentence of the third paragraph, the instructions should not be cagey about an applicant's rights to obtain his or her records. The sentence should read,

> I understand that I may request a copy of my records from my sponsoring agency and the agency that conducted my investigation under the Freedom of Information Act and the Privacy Act.

5) With respect to the medical Authorization, HHS' experience with the HIPAA authorization is that the statement that information "will no longer be subject to the HIPAA Privacy Rule" misleads people to think that their data is no longer subject to any privacy rules (which is inaccurate), and makes them uncomfortable about signing the consent form. Therefore, we recommend the wording of the fourth paragraph read:

> I understand the information disclosed pursuant to this release. . . only as authorized by law. Although the information will no longer be subject to the HIPAA privacy rule, it will be protected by the Privacy Act of 1974.

6) Two minor notes:
On the SF85PS, on the Authorization for Release of Medical Information, it states that three questions are asked below. There actually appear to be only two questions asked with a requested explanation of the first question.

There is inconsistency in the wording on the Instructions to the SF 86, 85P, and 85 in the paragraph entitled: "Final Determination on Your Eligibility." Both SF 86 and 85P use the word "Eligibility" but SF 85 uses "Final Determination on Your Suitability."

Other comments on the Forms

These comments refer to the SF86 unless otherwise indicated.

1) The SSN is requested twice on page 1 -- seems unnecessary.

2) In the Education section, where a degree has been earned, the form asks the applicant to "explain, include mm/yyyy awarded." What kind of explanation is required if one obtained a degree other than to list the date it was awarded? We would think an investigator would want an explanation if a degree was NOT awarded. This is confusing.

3) Under marital status, if one is a widow or widower, it may be tempting to fill in the form under "former spouse" with reference to one's deceased spouse. If that is not the intention of the question, the instruction should say "Do not fill out if your spouse is deceased." Since on the next page the form asks for information about other close relatives that are deceased, one may assume that information is requested on a deceased spouse.

4) Question 26, letter "l" requires the individual to provide a response regarding whether they have violated the "terms of agreement" for a travel or credit card provided by their employer, and to report this information for the last seven years. If they answer affirmatively, it then requires the individual to expand on these answers, providing the month/year, amount involved, account number, etc.

Technically speaking, a cardholder violates the "agreement" every time they do not make payment to the account "upon receipt." To report each individual instance where this occurs would be cumbersome to both the individuals undergoing an investigation, as well as the program and investigative staff responsible for processing the investigation. It is not clear that this information would provide us with the information necessary to determine suitability, as there are many reasons why a cardholder would not, or would be unable to, make a payment as soon as the invoice is received. Many of these reasons would not necessarily exclude them from Federal employment.

We recommend OPM narrow the question to ask about problems where the individual had to be counseled or received disciplinary action for failure to adhere to the terms of the agreement, including misuse of the card (making sure that question covered all card-related issues that would impact the suitability determination not already covered in other questions).

2. Question 27: A similar question should be added to the SF 85P since many of the public trust positions require use of sensitive automated systems.

4) Question 28, involvement in non-criminal court actions. Probably every person who fills out this form has been a party to multiple public record civil court class action law suits (airline litigation, cell phone charges) and many others may be party to major class actions if they ever took Vioxx or smoked cigarettes, etc. This question is too broad, and most people will not be able to answer it completely and truthfully. The instruction should make clear that it is not intended to include class actions unless the individual was the named plaintiff in the suit.

5) On the SF-85PS, there is no indication in the instructions as to the circumstances under which one would be required to fill out the form. Without an indication of those circumstances, applicants could be routinely required to fill out the form, which does not seem to be the intention (or else those questions would have been incorporated into the 85P itself). The form includes the most sensitive types of information, and should be limited in its use. We recommend a statement be added to the instructions explaining, in brief, when the form is appropriate.

6) On the SF-85PS and other forms, it would be useful to indicate that a supplemental sheet is available for answers that do not fit into the space provided.

7) On the SF-85PS, question 3, the word "licensed" is used to refer to social workers, but not other medical professionals. It is not clear why that word is necessary, nor that applicants would always know whether their medical professionals have been licensed, or licensed in the state where the applicant was treated.

Other forms used in conjunction with SF-85/85P/86

1) In HHS' experience, OPM routinely uses the Optional Form 306, Declaration for Federal Employment, OMB Control # 3206-0182, as part of initiating a background investigation. The OF 306 appears to have at least four purposes, one related to suitability, others apparently related to nepotism, proper pay for re-employed annuitants, and eligibility for life insurance. The use of a form with so many different purposes, one of which is overlaps the forms under review, is confusing, increases burden, and increases the risk that inappropriate officials will have access to very sensitive data. Moreover, the OF 306 includes questions similar to, but worded differently, than the questions on the suite of forms under review, increasing the risk that some applicants may provide inadvertently conflicting answers, causing them to appear untruthful when they are not intending to deceive the government. HHS recommends that the OF 306 be included in the current review to determine if there are any questions that should be incorporated into the SF-85/85P/86 forms. Similar or duplicate questions should be eliminated from the OF 306, and other forms should be designed to manage the other personnel determinations for which the OF 306 is now used.

2) HHS is aware that there are other background investigation forms used by agencies, some of which are cleared under the PRA. For example, the Park Police and the Secret Service appear to use forms other than the SF-86. HHS strongly recommends that all agencies be required to use the SF-85/85P/86 suite of forms to increase uniformity across government, which will promote the transferability of employees from one agency to another in accordance with recent OMB directives.

2) In HHS' experience, OPM has been routinely requesting each applicant's résumé as part of the background investigation process, although there are no instructions about this requirement and it is not included in the PRA clearance package. Since each applicant is required to disclose his or her employment history, this is duplicative. Either such instructions should be included and accounted for under the PRA, or the requirement should be dropped.