



From the Desk of the Executive Director

Background Investigations for Research Personnel Working Under Federal Contract—The State of the Issue

In e-mail and other communications to the membership over the past year,¹ I have spoken about security screening procedures being undertaken by the U.S. Department of Education for contract researchers. In early spring 2006, the American Educational Research Association (AERA) first began receiving complaints from several researchers that the Department of Education was requiring contract researchers to undergo intrusive security screening procedures for unclassified research. The background investigations were extensive,² and some researchers, in principle, had refused to go through unnecessary background investigations or had simply not responded to the Department's requests for contractual research. In some instances of ongoing contracts, institutions were shifting personnel who did not wish to participate in such screening.

From the outset, AERA staff sought to determine the authority, scope, and rationale for these procedures. In meetings and exchanges with staff at several federal agencies, we attempted to clarify the applicability of Presidential Directive HSPD-12 as the source of the government's reach to screening contract researchers. Enacted on August 27, 2004, HSPD-12 was issued to create a common identification standard for federal employees and contractors. It is aimed specifically at contractors who have access to federal facilities and federal information systems. However, screening clearances by the Department of Education were being required for contract personnel who had no access to federal buildings or federal information systems.

To get a better understanding of the magnitude and source of the background investigations, AERA conferred with representatives of other professional research societies, including the American Association for the Advancement of Science, the Council on Government Relations, and the Consortium of Social Science Associations. Through the Council on Government Relations, we learned that background investigations were required for research personnel conducting clinical trials under contract for the National Institutes of Health, including personnel who did not have access to federal facilities or information systems. In addition, California Institute of Technology scientists working in the National Aeronautical and Space Agency's Jet Propulsion Labs (JPL)³ were complaining about the intrusiveness of the investigations, and many had refused to submit to the background checks.⁴

In early 2007, some progress was made in clarification of the implementation of HSPD-12. In discussions with officials at the Department of Education, it became clear that the medical

release form did not need to be signed by contractual personnel in moderate-risk positions. The Department indicated that it would add an instruction to this effect so that contracting officials and contractors would be aware that signing a release was not required as a matter of course. As discussion between AERA and Department staff unfolded, however, the appropriateness of HSPD-12 became, even more, the central question. With strong support from the AERA Council and our Government Relations Committee, we sought to examine the rationale of a clearance procedure and consider how best to achieve what are legitimate goals (for example, protecting the confidentiality of data collected by or accessible to contract researchers) without intrusions on the personal privacy of the researchers.

Given that HSPD-12 was limited in its reach to those working in federal facilities or on federal information systems, AERA met with the Office of Management and Budget (OMB) and the Department of Education to determine why it was being applied to wide spectrum of other research contractors. A Department of Education memorandum indicated that any contractor employed for 30 days or more was required to undergo personnel security screening. During this meeting, OMB clarified that our understanding of HSPD-12 was correct but that another federal law applied to the research contracts of concern to us. Officials at OMB noted that, when contractors collect information on behalf of an agency, even on their own systems, the Federal Information Security Management Act of 2002 (FISMA; 44 U.S.C. § 3541, et seq.) applies.

FISMA is intended to strengthen computer and network security within the federal government and affects contractors who access federal information and federal information systems. Although the legislative history of FISMA does not suggest that Congress intended to reach contractors working on their own systems, federal agencies have taken the position that any information collected by the federal government under a federal contract is federal information; in other words, information technology security procedures for agencies "flow" into contractor systems. Although we may not share this interpretation, the absence of a clearly understood and accepted definition of federal information leads us to work out a procedure that comports with FISMA.

The good news is that FISMA itself does not require personnel screenings. Instead, personnel screenings are mentioned only in guidance produced by the National Institute of Standards and Technology (NIST)—the agency responsible for developing

implementation policies for FISMA. The shift from HSPD-12 to FISMA as the legal authority could very well mean that agencies, through the certification and accreditation process, could allow institutions (e.g., colleges, universities, research institutions) themselves to attest to the acceptability of personnel receiving contracts. There is logic in such delegation to institutions given that NIST specifically recognizes agency flexibility in applying the guidelines.

At this stage, the Department of Education has expressed a willingness to entertain an alternative process for information security that meets FISMA law and guidance but is less onerous for researchers. AERA has been asked to provide some options that the Department, as well as OMB, can consider regarding how to provide appropriate protection of personally identifiable information collected by or accessible to contract researchers and, where necessary, to ensure appropriate risk-based screening of personnel working under government research contracts. Two of us on staff—Paula Skedsvold, Director of Education Research Policy, and I—are taking the lead in crafting a draft approach that builds on (a) human research protection procedures (45CFR46) to address issues pertaining to the subjects of study and the information they provide and (b) personnel procedures that reside at the contracting institutions. A first meeting to consider this draft is about to take place. We are hopeful that FISMA can provide more opportunity for academic institutions, research institutions, and research firms to determine what personnel screening needs to be done and how best to do it, while IRBs certify that data protection plans set forth in the research protocol are adequate.

The process thus far has been a deliberative one—where agency officials at the Department of Education and the Office of Management and Budget have been working with AERA to seek solutions. Although in the words of Yogi Berra, “It ain’t over till it’s over,” we hope that these steps auger well for an altered approach and that the New Year will bring good news.

Meanwhile, this column comes with best wishes for 2008 from the AERA Council and all of us on the Central Office staff. We look forward to seeing you at the Annual Meeting in March, if not before.

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NOTES

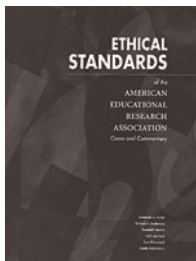
¹I sent an e-mail communication to the membership on April 6, 2007, and reported briefly on this topic as part of the Executive Director’s Report to the Membership (see November 2007 *Educational Researcher*, p. 491).

²For low-risk contract personnel, the investigations included submitting fingerprints; completing detailed questionnaires concerning employers, residences, and education in the prior 5 years; a check of federal databases; and an authorization by the researcher for investigators (often contract personnel hired by the federal Office of Personnel Management) to “obtain *any* information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or *other sources of information.*” Moderate-risk personnel were required to sign an authorization allowing the release of credit information and could be asked to sign a release allowing investigators to contact mental health providers.

³The fact that the JPL scientists worked in a federal lab brought them under the reach of HSPD-12 and, in some respects, distinguishes them from other research contractors who have no access to federal facilities or information systems.

⁴In September 2007, 28 JPL scientists filed suit in U.S. District Court in Southern California in an attempt to block the implementation of HSPD-12. After the lower court denied a preliminary injunction that would have stopped the investigations until the Court reviewed the case, the scientists sought an injunction from the U.S. Court of Appeals for the 9th Circuit. The appellate court issued the injunction pending a ruling on the appeal of the District Court’s order.

Ethical Standards of the American Educational Research Association: Cases and Commentary



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