



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 11-01033
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah Minster, Esquire, Department Counsel  
For Applicant: *Pro se*

09/28/2012

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

On April 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant enumerating security concerns arising under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a May 10, 2012, response, Applicant denied all allegations and requested a hearing before a DOHA administrative judge. DOHA assigned the case to me on June 7, 2012. The parties agreed to a hearing date of July 10, 2012, and a notice to that effect was issued on June 15, 2012. I convened the hearing as scheduled. Applicant gave testimony and presented no witnesses. Department Counsel offered two documents, which were admitted as exhibits (Exs.) 1-2 without objection. After the hearing, I requested additional information on a topic referenced during the hearing. It was submitted by Department Counsel, received without objection, and accepted into the record as Hearing Exhibit (HE) 1. The transcript of the proceeding (Tr.) was received on July 18, 2012. On July 19, 2012, Department Counsel forwarded without objection a two-page document from Applicant, which was accepted as Ex. A. Based on

a review of the testimony, submissions, and exhibits, I find Applicant met his burden of mitigating the security concerns raised. Clearance is granted.

### **Findings of Fact**

Applicant is a 52-year-old corporate vice president of a defense contractor. He has been with that entity since 2002. Applicant is a graduate of a U.S. military academy and has a degree in engineering. He is married and has three children. He has maintained a security clearance for over 25 years.

In September 2008, Applicant voluntarily sought and underwent the investigation process of another agency for a security clearance. His decision was optional; he was not required by his position to obtain such access and he understood the vetting process of that agency. During the investigation, he was subject to interviews and at least one polygraph examination.<sup>1</sup> He did not take notes during the interviews or polygraph questioning. He never saw or approved for accuracy any version of the final Summary, which he was later provided and ultimately forwarded to DOD for this process. After the conclusion of a polygraph administered on or about September 23, 2008, Applicant was ultimately disapproved for a clearance at the other agency. In July or August 2010, he appealed the other agency's adverse determination. That action is still pending.

The basis for the SOR allegations is the redacted Summary that Applicant provided DOD from the other agency. It is referenced interchangeably as the Summary and the clearance decision statement.<sup>2</sup> It was provided by Applicant to DOHA in response to an interrogatory request. The same allegation is raised under three different guidelines. It states that "between 1998 and 2008, [Applicant] deliberately searched for and viewed sexually explicit images of underage females." The term "sexually explicit" is undefined.

Applicant disputes the accuracy of the Summary. He has consistently admitted that he searched for and viewed sexually explicit images of women on the Internet between 1998 and 2008. He credibly and adamantly denies a number of the comments attributed to him regarding his alleged intentional search for images of underage females. At the hearing, he stated, "I had no specific knowledge that [the models] were over 18. But I had no specific knowledge that they were under 18."<sup>3</sup> He argued that, taken as a whole, the Summary makes no sense.

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<sup>1</sup> A second polygraph was conducted about three weeks later concerning topics that were "more of the same" about viewing pornography, but there is no reference to its content in the present case file. Tr. 25-27.

<sup>2</sup> Tr. 14. As redacted, it appears that the "Case Facts" materials in Ex. 2 (Interrogatories, dated Mar.9, 2012) at 152-154 reflect a summary of information culled from interviews and polygraphs previously administered. The author of the "Case Facts" is not identified. Neither the polygrapher, an interviewer, or an unredacted copy of the Summary was presented at the hearing. All references to the Summary's content herein are from the "Case Facts" section in Ex. 2 (Interrogatories, dated Mar. 9, 2012).

<sup>3</sup> Tr. 23.

The Summary opens directly by stating Applicant has viewed nude images of fifteen, sixteen, and seventeen year old girls. The images allegedly contained underage females posing in different positions as well as engaging in sexual activity with other females, males, or both sexes. This is the only reference in the Summary indicating the models at issue were not appearing by themselves. It does not explain what constituted “sexual activity” or describe the females’ poses.<sup>4</sup>

The Summary states that Applicant determines approximate age by physical development, noting that “a fifteen year old would usually not have any breasts, and have little or no pubic hair.”<sup>5</sup> It is unclear whether this standard was meant for application only to females or to both sexes. No other references are made regarding males. The Summary states that he looked for underage imagery ten-percent of the time he conducted such searches.

The Summary states and Applicant agrees that he viewed images of nude women without detection by his wife or anyone else for a decade. He disagrees that he did so by using “his personal laptop computer when home alone,” noting he never owned a personal laptop.<sup>6</sup>

It further states that Applicant would use Google to search for the name of a “young athletic female, usually runway models, adult film stars, or young movie stars such as the young girl in [a popular family movie franchise]. After these images appear, he continues to click on the images until he comes across nude images of them.”<sup>7</sup> Applicant agreed he searched for such images using this haphazard approach and via links to other websites. The Summary does not identify the “young girl” from the high

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<sup>4</sup> The SOR is phrased with regard to “sexually explicit images” without definition. No definition was offered at the hearing. The Summary does not explain its use of the term “sexual activity” or “sexually explicit images.” 18 U.S.C. Chapter 110 (Sexual Exploitation of Children and Other Abuse of Children) provides some guidance. 18 U.S.C. § 2256 defines child pornography as a visual depiction of a minor engaging in sexually explicit conduct. It specifies that the minor be a person under the age of 18. In addition, 18 U.S.C. §1466(a) finds that it is a depiction of a person under the age of 18 who is engaging in sexually explicit conduct, and is obscene or involves bestiality, sado-masochistic abuse, or intercourse, including actual or simulated genital-genital, oral-genital, anal-genital, or oral-anal intercourse which lacks serious literary, artistic, political, or scientific value. Under these definitions, it appears sexually explicit conduct requires specificity, particularly with regard to the conduct in which the model is engaged. It also requires that the model actually be under the age of 18.

<sup>5</sup> Applicant denied ever having employed such a definition. Tr. 23.

<sup>6</sup> Applicant credibly denies ever having owned a personal laptop computer. The Government argues that because he kept his web searches a secret from his wife for years, he, too, could have kept the existence of a laptop at home and used for these purposes a secret. The Government’s suggested theory is plausible, but not probable. Given the precautions Applicant already took to conceal his pursuit of pornography from his wife, there was no logical reason for Applicant to have increased her level of suspicion by making a costly purchase and concealing something as notable as a laptop computer in their home or vehicle. Performing his searches on the home computer and clearing the history files after his searches would be more than sufficient to disguise his activities from his otherwise unsuspecting wife.

<sup>7</sup> Later, it is noted that Applicant “would look up the names of actors he has recently seen while watching movies or the television.” In its phrasing and focus, the Summary seems to suggest that all such random searches eventually culminated in nude imagery.

school movie, but it is noted that the actresses portraying upperclassman ranged from 17 to late-20s in the 2006 film, then were progressively older in the 2007 and 2008 sequels.<sup>8</sup>

Elsewhere, the Summary states that he “will not go to sites which contain disclaimers stating the individuals depicted on the sites are eighteen years of age or older. Subject indicated he has seen the disclaimer on some sites and has chosen not to proceed to the sites after viewing the disclaimer.”<sup>9</sup>

The Summary reports that Applicant stated he saw a “fifteen year old girl” on the Internet in July 2008. It is not noted whether this model had pubic hair or breasts, or indicate upon what basis he concluded her age. It later states that he has never seen a prepubescent model on the Internet, and noted that he would not feel comfortable viewing such content. In contrast, Applicant has consistently stated that he last viewed nude images on the Internet in June 2008.

The Summary concludes by noting that Applicant has two daughters. It reports that he was occasionally excited by the sight of his teenage daughter’s friends “in midriff tops and short shorts,” and by attractive students he sees pass his house on their way to high school. It does not define the term “excited” with any specificity or explain the significance of these remarks. Of similarly vague relevance is the statement that he had seen his daughter, who lives along with Applicant, her mother, and her siblings, naked.

The Summary is unsigned. There is no indication that Applicant was given the opportunity to review or correct the notes of either the interviewers or polygrapher before the final Summary was comprised. Applicant finds the redacted Summary to be “the most ridiculous thing I have ever seen.”<sup>10</sup>

There is scant use of quoted material in the redacted Summary, little indication of the questions posed to Applicant, and no signature space for either Applicant, the interviewer, the polygrapher, or the author. In response to Applicant’s request for his file, a July 8, 2010, letter from a senior adjudication officer responding to a request for a copy of the investigative file noted that “certain categories of U.S. Government Information, such as polygraph records, are exempt in their entirety from release.” That letter is followed by several pages of boilerplate language concerning the release of information, and instructions as to how one can request a personal appearance. What follows at Ex. 2, page 151, are redacted sections concerning an applicant’s biographical information and current processing, including blank sections for credit report and polygraph information. The Summary’s Case Facts are followed by a section for recommended action, *i.e.*, security disapproval.

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<sup>8</sup> HE-1 (Post-hearing submission, indicating the youngest of the three leading female starlets was 17 when the first film was released).

<sup>9</sup> Merriam-Webster defines “disclaimer” as: “a denial or disavowal of a legal claim, a repudiation.” See <http://www.merriam-webster.com/dictionary/disclaimer> (as of Sep. 23, 2012).

<sup>10</sup> Tr. 21.

Applicant last viewed nude images on the Internet in or just prior to June 2008, when he disclosed his web searches to his wife. He stopped searching for pornography because he felt it was not appropriate, and because he felt if he had to sneak around to view it, he should not be doing it. He also found the searches antithetical to his religious faith.

Applicant submitted a security clearance application (SF-86) on August 25, 2010. On that form, he noted that he had a clearance denied as the result of the polygraph clearance process, and wrote that he had requested review of that determination. During an interview on October 19, 2010, Applicant told Office of Personnel Management (OPM) investigators that “while he had done nothing illegal, being a married, Catholic man with children, he was indeed embarrassed and ashamed of” viewing pornographic images.<sup>11</sup> He also told the OPM investigator that the “female polygraph examiner seemed to take offense to subject’s admission.”<sup>12</sup> Later, at the hearing, he suggested the polygrapher did not understand the Internet search methods for finding images of nude women on the Internet.<sup>13</sup>

Applicant argues that the Case Facts in Ex. 2 (Summary) contain information that was taken out of context or highly embellished,<sup>14</sup> completely untrue,<sup>15</sup> and generally irrational. He pointed to portions that made questionable sense.<sup>16</sup> He takes the allegation and accompanying innuendo in the Summary as a personal affront, particularly the juxtaposition of information regarding his daughter and her friends within the framework of attributed statements purporting to detail his intentional pursuit of sexually explicit images of underage females on the Internet.

While Applicant admits that he disclosed the fact he would search on Google or Yahoo for images of nude women, he stresses he did not conduct such searches on a regular basis. It was only something he did “from time to time, over a ten-year period,”

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<sup>11</sup> Ex. 2 (Interrogatories, Interview, at 140).

<sup>12</sup> *Id.*

<sup>13</sup> Tr. 36-37.

<sup>14</sup> Tr. 11.

<sup>15</sup> Tr. 12.

<sup>16</sup> For example, Applicant pointed to the oddly worded sentence in the Summary that states he “will not go to sites which contain disclaimers stating the individuals depicted on the sites are *eighteen years of age or older*,” (emphasis added) thus implying he avoided sites where the models were of legal age. Tr. 21. The Summary does not explain why a site offering nude images of legal, adult models would need to disclaim its models are of legal age, as opposed to inquiring whether the viewer is of legal age to see them.

and that he had quit looking for such images before the polygraph.<sup>17</sup> He reiterated it would be impossible for him to know the ages of models found on the Internet.<sup>18</sup>

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## Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." <sup>19</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.<sup>20</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to safeguard classified information.

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<sup>17</sup> Tr. 23.

<sup>18</sup> Tr. 23. *See also* 18 U.S.C. Chapter 110, noted above at footnote 4, section on "Congressional Findings," citing to Pub. L. 108-21, Title V, Sec. 501 (Apr. 30, 2003), 117 Stat. 676 ("Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers or has been transferred over the Internet, often in different file formats. . . . An image seized . . . is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child.")

<sup>19</sup> *See also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>20</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>21</sup> Any reasonable doubt as to whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>22</sup>

## Analysis

### Guideline D – Sexual Behavior

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.<sup>23</sup> Here, Applicant admits that he secretly looked for sexually explicit images of females on the Internet between 1998 and 2008. Evidence was presented indicating that Applicant admitted searching for and viewing sexually explicit of underage females during that same time. Such facts are sufficient to raise Sexual Behavior Disqualifying Conditions AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and AG ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*). With disqualifying conditions raised, the burden moves to Applicant to mitigate security concerns.

According to the refuted Summary, Applicant stated that he viewed Internet images of 15, 16, and 17-year-old females on the Internet who were modeling or engaging in unspecified sexual activity. It also notes that he last saw a 15-year-old model shortly before or in June 2008. The Summary does not mention how Applicant knew the legal ages of those models, it does not define with any specificity the type of “sexual activity” in which the model or models were allegedly engaged, nor does it provide a basis for implying the activity at issue was one legally proscribed. Indeed, if anything, his attributed comments begged further inquiry to clarify these points.

The Summary does convey that Applicant “explained a fifteen-year-old would usually not have any breasts, and have little or no pubic hair.” This appears to be his basis for determining the age of the younger models he viewed. At best, this comment is anecdotal. It seems to be based on Applicant’s opinion or belief that Internet

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> AG ¶ 12.

photographs are uniformly accurate representations of their subjects, or on his perception of female maturation. It does not provide a legal measurement of age. Moreover, the Summary later relates that Applicant stated he has *never* viewed, nor would he feel comfortable viewing, “prepubescent women.” Given his description of a 15-year-old girl’s physical attributes, this statement could be viewed as incongruous with his admission that he purposefully risked viewing such girls in that age range while surfing the Internet. Indeed, in order to embrace the Summary as a consistent expression of Applicant’s questioning, one would have to conclude that Applicant defied statistics by haphazardly searching for, and only discovering, images of 15-year-olds with notable busts and pubic hair, while somehow screening out images of what he apparently defined as the majority of 15-year-old females *en route*.

Moreover, it is the legal age of the model, not the belief or illusion that they are or might be underage, that may proscribe viewing nude underage models in a sexual context. Fantasy is not necessarily fact, particularly in the world of legitimate adult erotica and the era of image editing software, where a 30-year-old housewife can believably portray a 17-year-old high school cheerleader. Indeed, it is also a common practice in the general film industry to have actors and actresses well into their 20s playing teenage roles.<sup>24</sup> Here, the images viewed are not available and are not described. There is no evidence of an industry standard outside of adult film requiring Internet posters to certify the ages of their models. There is no evidence Applicant knew any of the models were underage. The fact that Applicant may have thought, guessed, or fantasized that some models were between the ages of 15 and 17 is irrelevant; neither thought, guesswork, or fantasy makes the models underage. Indeed, he was highly credible at the hearing when he stated, “I had no specific knowledge that [the models] were above 18. But I had no specific knowledge that they were under 18.”<sup>25</sup>

Applicant admits, however, that he has surfed the Internet for images of nude women at various times between 1998 and 2008. He has been consistent in his denials regarding intentional searches for images of underage females. It is highly plausible that in conducting broad and random Internet searches for naked females he may have encountered images of females who actually were only approaching 18, were made to appear to be in the 15-17 age range, or who were either posed or in garb intended to suggest the model was in her teen years. Random web surfing, particularly for something of a sexual nature, may well result in unsolicited pop-ups, unintended links, or inaccurate results. Either through the recognition that such Internet surfing was a waste of time or antithetical to his religious convictions, he quit such surfing by June 2008. He disclosed his past Internet searches to his wife, putting her on notice that it was a practice in which he had engaged. He honestly disclosed that he had a clearance denied due to polygraph test failing on his SF-86, thus providing notice to investigators

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<sup>24</sup> In the event the actress alluded to but unnamed as the “young girl” in the family film franchise was the sole 17-year-old playing a leading character, it is noted that the film was the product of a family studio and for a family audience. It is unlikely the producers would have retained a 17-year-old actress for future sequels if she had nude images available on the Internet.

<sup>25</sup> Tr. 23.



that there was an issue concerning his 2008 investigation. He has not revisited pornography or nude sites in over four years. Sexual Behavior Mitigating Condition AG ¶14(b) (*the sexual behavior happened so long ago, so infrequently, or under such circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*) and AG ¶ 14(c) (*the behavior no longer serves as a basis for coercion, exploitation, or duress*) applies.

## **Guideline J – Criminal Conduct**

The concern under this guideline is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.<sup>26</sup> In this case, Applicant admits he actively searched for and viewed images of naked females on the Internet. The Government submitted material reflecting that Applicant admitted to intentionally searching for and viewing images of nude underage females. If true, this is sufficient to raise Criminal Conduct Disqualifying Condition AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

Statutes such as 18 U.S.C. § 2256 note that it is the age of the minor, not the age the viewer believes that model to be, that establishes whether an image is potentially proscribed. As noted in the preceding section, there is no evidence that any of the nude models Applicant viewed were, in fact, underage. The Summary supporting the allegation fails to point to evidence establishing, and articulates no rational basis for concluding, he actually viewed underage females. In disputing multiple admissions attributed to him in the Summary, Applicant credibly denies ever having intentionally searched for or viewed nude underage models on the Internet. At best, his attributed admission was based on fantasy or speculation, not on the actual age of the models, which is the legally determining factor as to whether criminal conduct occurred. Consequently, no disqualifying condition applies.

However, if the Summary were to be construed as completely accurate, the only indication that Applicant committed a criminal offense is his attributed admission that he viewed nude underage females. Apparently, he based this conclusion in terms of his stereotype of physical attributes alone of some of the models he viewed. This, however, does not establish that the models were underage. Indeed, given modern photographic methods and the nature of the Internet, Applicant's admission is based on mere guesswork. As Applicant noted, he had no evidence of any of the models' actual ages. Such factors are sufficient to give rise to Criminal Conduct Mitigating Condition AG ¶ 32(c) (*evidence that the person did not commit the offense*).

Moreover, Applicant ceased looking for all nude imagery by June 2008. He had quit surfing the Internet for such images by June 2008. He did so out of embarrassment

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<sup>26</sup> AG ¶ 30.

and remorse that he was acting in a covert manner behind his wife's back, and in an attempt to become reconnected to his religious convictions. He confessed his past Internet searching for such images to his wife. He disclosed his adverse polygraph findings on his security clearance application. His abuse of the Internet appears to be the only adverse conduct of record in his otherwise respectable life. It seems highly unlikely that he will again use the Internet to search for any such images. In light of these facts, I find that AG ¶ 32(d) (*there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) applies.

### **Guideline E – Personal Conduct**

Security concerns arise from matters of personal conduct because conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.<sup>27</sup> As addressed in the preceding sections, Applicant's covert efforts and pursuit of Internet nudity shows dubious judgment, raises questions concerning his trustworthiness, and made him potentially vulnerable to exploitation, manipulation, and duress. Therefore, Personal Conduct Disqualifying Condition AG ¶ 16(e) (*personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .*) applies. Consequently, the burden shifts to Applicant to mitigate security concerns.

In searching for nude imagery, Applicant's main concern seems to have been keeping his wife unaware of his Internet pursuit. By June 2008, he had disclosed to her the facts surrounding his search for sex-based imagery. He did so as the result of guilt, the acceptance that it was a needless pastime, and in a reaffirmation of his faith. Their marriage has survived. He provided notice of the adverse investigation's results on his SF-86. He provided this process with a copy of the redacted Summary. Even assuming all the contents of the Summary are correct, Applicant has given up searching for such imagery and has not done so in nearly four-and-a-half years. With his wife now apprised of his past transgressions, it is highly unlikely he will ever again take the risks of surfing the Internet for titillation. Based on the foregoing, I find that Personal Conduct Mitigating Condition AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) applies.

Furthermore, the Summary or the underlying investigation is, at best, untidy. The Summary reflects poor effort to reconcile discrepancies, clarify references, or flesh out damning admissions. First, the conflicting information as to whether Applicant saw 15-year-old subjects is discussed above. Second, the attributed admission that he "will not go to sites which contain disclaimers stating the individuals depicted on the sites are

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<sup>27</sup> AG ¶ 15.

eighteen years of age or older” makes little sense. To believe he would eschew such cites simply because of this disclaimer leads to the conclusion that he either avoided cites with this disclaimer or he was solely looking for cites devoted to showing underage models. The latter interpretation conflicts with his attributed statement that he searched for nude images of celebrated athletes, runway models, and stars of adult film, individuals who are almost invariably 18 or older. The former interpretation implies he found some sense in avoiding viewing options where the models were certified as 18 during the ninety-percent of the time he was specifically looking for adult models.<sup>28</sup> It is hard to fathom how one so haphazardly searching for such content should become so selective over a disclaimer declaring that its contents are legal. Moreover, the standard “disclaimer” on such cites is not to warn that the models are of legal age, but to advise that the site’s content is age restricted and to ascertain whether the viewer is 18 years of age or older.<sup>29</sup> Given Applicant’s denials of this statement, it remains unclear if such “disclaimers” regarding viewer restrictive but legal content are commonly used.

Third, the starlets in the high school film noted were between the ages of 17 and over 25 when the film was released in 2006. By 2008, all cast members were over 18, one was nearing 30, and all were under contract to a family studio unlikely to provide on-going support for a wayward starlet. To label any of these women as a “young girl” is misleading. Fourth, the oxymoron created when the Summary states that he would feel uncomfortable “viewing prepubescent women” is worrisome in a Summary meant to accurately convey statements made. Particularly in the absence of quotation marks, the phrase needed clarification. Fifth, unless the interviewer or author perceived potential risk, the references to Applicant’s daughter, her friends, and his home’s proximity to a high school have no relevant nexus to Applicant’s alleged admissions. Their juxtaposition only tend to suggest by innuendo a heightened level of prurient interest. Sixth, the unsigned and redacted Summary’s minimal and selective use of quoted, as opposed to attributed, material is scant and inconsistent. Given the problems with the summary, I find that ¶ 17(f) (*the information was unsubstantiated or from a source of questionable reliability*) applies in part.

## **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the circumstances. The nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c) should be considered. The ultimate determination of whether to

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<sup>28</sup> As noted in the facts above, the Summary states that Applicant only looked for underage models ten-percent of the time.

<sup>29</sup> In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court found that the term “indecent” has no legal meaning in the context of the Internet. Notice is taken that since that time, the software industry has attempted to help police the Internet with regard to indecent or adult content. In matters related to nudity, violence, profanity, or Entertainment Software Board-rated content, the Adult Verification System (AVS) is the system used on the Internet to legally protect against the dissemination of restricted material to minors. It is the standard gateway to such materials and requires evidence that the viewer is an adult. It does not certify the content contained on the website except as being adult in nature.

grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole-person” factors. As a witness, Applicant was highly credible in both his testimony and demeanor. He is a mature and educated man who, in his '40s, admittedly searched for nude female imagery on the Internet. He vehemently denies, however, having intentionally searched for nude images of underage females, despite admissions to the contrary noted in the redacted Summary he provided to the Government. The redacted Summary contains unresolved flaws and unclarified statements. Such matters are worrisome, particularly in the absence of an unredacted version of the Summary, copies of the notes upon which the Summary was based, or testimony from its author. While these flaws may not be sufficient to undermine the report in its entirety, they weaken the presumption that it is an accurate reflection of Applicant’s questioning. It is not immune from a weight and credibility analysis.

Regardless, Applicant occasionally searched for nude Internet images. There is no evidence his searches were an extension of a clinical mania or obsession. He ceased viewing all nude imagery in June 2008. At that time, he confessed to his wife that he had been covertly searching for nude images on the Internet. In doing so, he was humbled and contrite. At the same time, he reconciled with the tenets of his faith. His wife accepted his past transgressions, and the two remain married. He has not searched for or viewed such images in nearly four-and-a-half years. He duly disclosed that he had a clearance that was denied on his SF-86, thus giving notice that issues were outstanding. He willingly provided DOHA with the redacted Summary subsequently used as the basis for the allegations now at issue. There is no indication he will again search for such material. His wife’s knowledge of his past transgressions should help reenforce his commitment to staying away from sexual imagery of any kind.

As previously noted, the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. In light of the Summary, Applicant’s highly credible testimony and demeanor, and the facts as a whole, I have no reservations that Applicant will again search for such content in the future and conclude that related security concerns are mitigated. Clearance is granted.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

## Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant a security clearance. Clearance granted.

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ARTHUR E. MARSHALL, JR.  
Administrative Judge