



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



In the matter of: )  
)  
) ISCR Case No. 15-00853  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O'Connell, Esq. Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

10/03/2018  
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**Decision**  
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MURPHY, Braden M., Administrative Judge:

During college about 15 years ago, while downloading music files through use of an internet file-sharing service, Applicant inadvertently downloaded and viewed a single image of child pornography. He deleted the image. The allegation that he downloaded multiple such images is not established. Applicant's conduct did not constitute sexual behavior under Guideline D. Applicant mitigated resulting security concerns cross-alleged under Guideline E, personal conduct. Applicant's eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) in May 2015, in connection with his employment in the defense industry. (GE 1) On September 8, 2017, following a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline D, sexual conduct, and a cross-allegation under Guideline E, personal conduct. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20,

1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant answered the SOR on October 4, 2017, and requested a hearing. The case was assigned to me on April 27, 2018. On June 6, 2018, a Notice of Hearing was issued scheduling the hearing for July 26, 2018. The hearing convened as scheduled. At the hearing, Department Counsel submitted Government's Exhibits (GE) 1 and GE 2, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through P, all of which were admitted without objection.<sup>1</sup> I left the record open after the hearing to allow Applicant the opportunity to submit additional evidence. Applicant timely submitted documents that were marked collectively as AE Q, and admitted without objection. The transcript (Tr.) was received on August 4, 2018. The record closed on August 8, 2018.

### **Findings of Fact**

In his Answer to the SOR, Applicant partially admitted and partially denied SOR ¶ 1.a. He admitted the cross-allegation at SOR ¶ 2.a, but incorporated his answer to SOR ¶ 1.a. His admissions and explanations are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 36 years old. He and his wife have been married since 2005. They have two young children. Applicant graduated from high school in 2000. He graduated from college in June 2003. He earned a master's degree in 2011. Since June 2003, he has worked for various defense contractors. He has worked for his current employer for the last four and half years. He earns an annual salary of \$123,000. He has held a DOD industrial clearance since late 2003, after he graduated from college. (Tr. 22-33; Answer; GE 1; AE A-AE D)

Under Guideline D, SOR ¶ 1.a alleges that "Between 2000 and 2003, [Applicant] downloaded, from the Kazaa website, approximately 100 images of nude children engaged in sexual acts." Guideline E ¶ 2.a is a cross-allegation.

While in college, when he was about 18 to 21 years old, Applicant used computer "peer-to-peer" file-sharing services to download material from other people's computers. As Applicant explained, this technology allows users to share their computer files with other users of the service voluntarily. During college, Applicant used this file-sharing program (rather than a "website" as alleged), to download music and music videos from other people's computer files. (Tr. 46, 52-53)

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<sup>1</sup> AE A through AE K were submitted with Applicant's Answer to the SOR.

Applicant acknowledged that downloading music files in this manner is illegal, as it likely constituted copyright infringement. However, Applicant's music downloading is not specifically alleged as a security concern. (Tr. 26-27, 46-51)<sup>2</sup> Nonetheless, he pledged not to engage in illegal downloading of any kind in the future. (AE J)

At some point after college, in about 2003, Applicant applied for a job with another government agency (AGA). The background investigation included a polygraph. During the related interview, Applicant was asked if he had ever done anything illegal. Applicant disclosed that he had illegally downloaded music and music videos. Applicant also told the AGA interviewer that between 2000 and 2003, he had also downloaded as many as 100 images of nude children engaging in sexual acts, as alleged. (GE 2 at 6, 9; Tr. 38)<sup>3</sup> Applicant disclosed the incident out of the abundance of caution, and because he wanted to be fully honest with the interviewer. (Tr. 34, 38, 62-63)

At hearing, Applicant explained that when he used the file-sharing service, he would download files in bulk from other people's computers without knowing what was being downloaded. He testified, "I selected the first file and the last file on the list, and downloaded everything" without looking at the content of each individual file before he did so. (Tr. 52-55) These bulk downloads would often yield not only music files and music videos he was looking for, but also other "collateral" material, such as pictures and images. (Tr. 26) Applicant would download the files in bulk and save them but he did not know what they contained until he looked at them later. (Tr. 64-66)

Applicant testified that on one occasion, the files he had captured included about 100 photographic images in "JPEG" format. Even though Applicant was looking for music to download, and not photographs, he clicked on one of the images. (Tr. 38-43) He opened one of the image files "to see what it was. I didn't know if it was the album cover artwork or maybe something else." (Tr. 55, 64-66)

When Applicant clicked on the image file, he found an image of nude children engaging in sexual acts. He testified, "I don't recall exactly what was going on, but I knew it wasn't right and I didn't want to see it." (Tr. 56; GE 2)<sup>4</sup> Once he saw the first image, Applicant deleted all of the other image files that he had downloaded in bulk, without looking at them. (Tr. 38-43, 57-58) There was no indication in the title of any of

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<sup>2</sup> During my questioning of Applicant, I called his attention to the fact that the sole Guideline E allegation (SOR ¶ 2.a) was a cross-allegation of the sole allegation under Guideline D (SOR ¶ 2.a), and did not allege the illegal music downloading as a security concern. (Tr. 46-51) Department Counsel had ample opportunity to correct me on this point, but did not do so. (Tr. 75, 79-80)

<sup>3</sup> GE 2 is the summary of Applicant's personal subject interview (PSI), in February 2014. Applicant authenticated his PSI summary in an interrogatory response in August 2015. In doing so, he made additional explanations concerning the subject matter at issue here, and corrected some other minor discrepancies.

<sup>4</sup> In Applicant's interrogatory response, he said, "I was disgusted that someone would even have something like that and I had absolutely no desire to see it myself. It made me feel dirty and [gave me] a sense of guilt that I even downloaded it unintentionally." (GE 2 at 9)

the image files Applicant downloaded that they contained sexually-related material. (Tr. 55-56)

Applicant had no way of knowing where the image files came from, because the owners of the files he downloaded through the file-sharing service were not identified, except by their internet provider ("IP") address. (Tr. 66) Applicant knew that possessing and distributing child pornography was illegal. He did not report what he saw to law enforcement authorities, and did not tell anyone what he saw. (Tr. 59-60) He did not share the file with anyone else, or otherwise distribute it. (Tr. 67) If he found similar material in the future, he would contact authorities. (Tr. 70) Applicant has never intentionally viewed or downloaded child pornography. He does not view adult pornography. (Tr. 27-28, 34, 44-45, AE N, AE O)

Applicant's intentions were to download music and music videos. He did not intend to use the peer-to-peer file-sharing service to view or download child pornography. (Tr. 27, 63; GE 2; Answer) Applicant continued to use the file-sharing service after that, but was more careful after that to only download music files. He stopped downloading music illegally after he graduated college in 2003, got a job and received a security clearance. (Tr. 60)

Applicant was not hired by the AGA. (GE 1, GE 2) There is no record evidence directly from the AGA about what Applicant actually said in his interview there, in 2003. Nor is there any record evidence from the AGA about any findings they made as a result of their conclusions about what he told them in his interview. There is no record evidence that the DOD clearance Applicant held at the time was affected.

Applicant testified that his wife is aware of the nature of the SOR allegations. (Tr. 38) She has never known him to view or download anything illegal or pornographic. He is a loving husband and an attentive father. Applicant's wife works for a non-profit organization. Applicant volunteers at the organization about 10 hours a week. (Tr. 24-25; AE F, AE P)

Applicant submitted numerous certificates and merit pay awards he has earned for his professional and technical capabilities. He is consistently rated as "exceptional" or "exceeds expectations" in numerous rating categories in his performance reviews. (AE G, AE H, AE I, AE L, AE M)

Applicant provided several reference letters from co-workers and supervisors attesting to his integrity, dedication, professional skill and technical abilities. Several people said he has significant experience protecting and handling classified material, and does so with the highest care. Applicant's pastor attested to his character, integrity, and selflessness. He is a dedicated husband and father. He has the pastor's highest levels of trust and confidence. (AE E) Applicant supplemented the record after the hearing with updated recommendation letters from his references, attesting that they were aware of the allegations in the case, and considered Applicant's actions to be inadvertent, dated, and out of character. (AE Q)

## Policies

It is well established that no one has a right to a security clearance. As the Supreme Court noted in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”<sup>5</sup>

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

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. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, 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 national security eligibility will be resolved in favor of the 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. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon 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. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

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<sup>5</sup> *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

## **Analysis**

Applicant was asked during a polygraph interview with an AGA if he had ever done anything illegal. He disclosed that when he was in college, between 2000 and 2003, he illegally downloaded music and music videos through a peer-to-peer file-sharing service. He also disclosed that he had downloaded images of nude children engaged in sexual acts during this timeframe.

The Government alleged that Applicant downloaded 100 such images. The images Applicant downloaded were part of a “bulk download” of someone else’s computer files. He did not view any of these images beforehand. He did not know what they contained at the time. He opened one of the files later, and when he saw an image of nude children engaging in sexual acts, he was horrified and he deleted it immediately. He also deleted the other estimated 100 images without opening them, so he did not in fact know what they contained. The allegation that Applicant downloaded multiple such images is not established. Applicant consistently stated and testified that his downloading and viewing of a single image of child pornography was inadvertent, since his intent was to download music and music videos.

### **Guideline D: Sexual Behavior**

AG ¶ 12 expresses the security concern for sexual conduct:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant downloaded and viewed a single image of child pornography inadvertently, while seeking to download music. Applicant's conduct did not constitute any form of "sexual behavior." No Guideline D disqualifying conditions under AG ¶ 13 apply. Since no Guideline D disqualifying conditions apply, I need not address the applicability of any mitigating conditions under AG ¶ 14 that might otherwise apply given the dated and isolated nature of Applicant's college-era conduct.<sup>6</sup>

## **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern for personal conduct:

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 or sensitive information. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

(g) association with persons involved in criminal activity.

The single allegation under Guideline D is cross-alleged under Guideline E (SOR ¶ 2.a). As noted during the hearing and as also discussed above, Applicant's illegal downloading of music and music videos through a peer-to-peer file-sharing service while in college is not itself alleged as a Guideline E security concern.

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<sup>6</sup> See, e.g., AG ¶¶ 14(a), (b), and (c).

As also noted above, I have concluded that Applicant was credible when he explained and testified that his downloading and brief viewing of a single image of child pornography a single time was inadvertent. I must consider his intent in weighing the Guideline E AGs as well.

Applicant downloaded and briefly viewed an image of child pornography off of someone else's computer files. In doing so, Applicant associated with individuals involved in criminal activity. AG ¶ 16(g) applies.

Even if Applicant's conduct was inadvertent, it could nonetheless subject him to exploitation, manipulation or duress, as it could affect his personal, professional, or community standing. Thus, AG ¶ 16(e) applies.

As noted above, Applicant's conduct did not constitute sexual behavior, and is therefore not a security concern under Guideline D. Applicant was not charged with any criminal offense, and a security concern under Guideline J for criminal conduct was not alleged. The allegation is therefore not sufficient for an adverse determination under any other single guideline. However, when considered as a whole, Applicant's conduct supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. AG ¶ 16(c) applies.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt on the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant has no history of downloading or viewing child pornography other than a single time, inadvertently, during college many years ago, while illegally downloading music through a peer-to-peer file-sharing service. Applicant no longer downloads music in this fashion. He does not view child pornography. Applicant's action occurred under unique circumstances many years ago, and is unlikely to recur. It does not cast doubt on his current judgment, reliability or trustworthiness. AG ¶ 17(c) applies. AG ¶ 17(g) applies for the same reasons.



Applicant voluntarily disclosed the incident to the AGA interviewer when asked if he had ever done anything illegal. He did so out of the abundance of caution, in the interest of candor. His wife and references are also aware of the incident. Applicant therefore took appropriate steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress, and AG ¶ 17(e) applies.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon 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. I have incorporated my comments under Guidelines D and E in my whole-person analysis. I had the opportunity to observe Applicant's demeanor during the hearing. I believe his testimony that his downloading and viewing of the image was entirely inadvertent. His explanation at hearing was also consistent with his earlier statements, in his SCA, his PSI, and his answer. Applicant's conduct did not constitute sexual behavior. The security concern under Guideline D is not established. The security concern under Guideline E is mitigated because Applicant's conduct occurred many years ago, was inadvertent, and has been appropriately disclosed. There is no likelihood of recurrence. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility for access to classified information.

### **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 E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented, it is clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is granted.

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Braden M. Murphy  
Administrative Judge