U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General *Washington, D.C. 20530*

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MEMORANDUM FOR EARL G. MATTHEWS
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DEPARTMENT OF WAR

Re: Whether Components That Perform Supplemental Clearance Investigations May Conduct the Required Review Hearing if a Clearance Is Revoked or Denied

As part of the formal procedures that govern the security clearance adjudication process, individuals who are denied a clearance or have their clearance revoked are generally entitled "to appear personally and to present relevant documents, materials, and information" before an authority designated by the relevant agency head. Exec. Order 12968, § 5.2(a)(7) (1995). That hearing, however, may not be conducted by "the investigating entity." *Id*

The Defense Counterintelligence and Security Agency ("DCSA") serves as the primary entity that conducts federal background investigations for use in determining individual eligibility for access to classified information. *See* Exec. Order 13869, § 2(c) (2019). DCSA thus is an "investigating entity" that may not conduct the relevant review hearing when a clearance is denied or revoked.

You have informed us that, in addition to relying on the primary DCSA investigation, some intelligence community ("IC") components within the Department of War ("DOW") also conduct supplemental investigations of their personnel. And you have asked whether a component that conducts supplemental investigations is also an "investigating entity" that is prohibited from holding the review hearing. For the reasons detailed below, we conclude that DOW components that conduct supplemental background investigations are also "investigating entit[ies]," and are therefore subject to Executive Order 12968's prohibition on such entities conducting review hearings. In doing so, we do not opine on the operation of clearance adjudication processes outside DOW.

I.

A series of executive orders governs the process by which individuals are granted access to classified information. We describe below three that are relevant to this question.

In 1995, President Clinton established by executive order "a uniform Federal personnel security program" for individuals seeking access to classified information. Exec. Order 12968, pmbl. Executive Order 12968 sets forth, among other things, the eligibility criteria for receiving access to classified information and the standard procedures that must be followed to grant or deny such access. *See, e.g., id* §§ 3, 5.

As part of those standard procedures, individuals who are denied a clearance or are subject to a clearance revocation are generally entitled to partake in a specified review process. *Id.* § 5.2. This review process includes "an opportunity to appear personally and to present relevant documents, materials, and information ... before an adjudicative or other authority, other than the investigating entity, as determined by the agency head." *Id.* § 5.2(a)(7).

In 2008, President Bush designated the Director of National Intelligence ("DNI") to serve as the newly created Security Executive Agent charged with ensuring alignment amongst the clearance policies and procedures of the various agencies. Exec. Order 13467, § 2.3(c)(i)-(vi) (2008). Under the terms of Executive Order 13467, the Security Executive Agent is empowered to designate individual agencies to conduct investigations of clearance applicants and to determine those applicants' eligibility for access to classified information "in accordance with Executive Order 12968 of August 2, 1995." *Id* § 2.3(c)(iv)-(v).

In 2019, President Trump amended Executive Order 13467 to designate DCSA "as the primary Federal entity for conducting background investigations for the Federal Government," replacing a different government entity. Exec. Order 13869, § 2(c). The 2019 amendments provided that DCSA's investigative duties could not be reassigned to "another Department of Defense component or components" without prior consultation with specified officials. *Id* But the Order clarified that certain components that already possessed the authority to conduct their own background investigations could continue to do so:

> [E]xisting designations made by [DNI], as the Security Executive Agent or as otherwise authorized by statute or Executive Order, relating to investigating persons who are proposed for access to classified information or for eligibility to hold a sensitive position, ... shall remain in effect. Nothing in [Executive Order 13467] shall be construed to limit the authority of any agency to conduct its own background investigations when specifically authorized or directed to do so by statute or any preexisting delegation from the President.

Id. § 2(d).

We understand that, prior to the 2019 amendments designating DCSA as the primary investigative entity for clearance adjudications, DNI designated specific IC components within DOW to conduct supplemental investigations of their personnel under the authority provided in Executive Order 13467 and that at least some of those components have continued to perform those supplemental investigations since that time.

II.

Whether a DOW IC component may conduct the required review hearing turns on the answer to two questions: (1) whether the componentthat conducts an individual's supplemental investigation is "the investigating entity" under Executive Order 12968, and (2) whether the preservation of designated agencies' authority to conduct their own clearance investigations after the 2019 designation ofDCSA as the primary entity responsible for background investigations

overrides Executive Order 12968's prohibition on the conduct of review hearings by "the investigating entity." We address each question in turn.

A.

Executive Order 12968 prohibits "the investigating entity" from conducting the review hearing after a clearance denial or revocation. Exec. Order 12968, § 5.2(a)(7). But the Order does not define the term "investigating entity," nor can we glean information about its meaning from its use in other provisions because the term is not used elsewhere in the Order. So, as one would with a statute containing an undefined term, we give the term "investigating entity" its ordinary meaning. *See United States v. Ehsan,* 163 F.3d 855, 858 (4th Cir. 1998).

The natural meaning of the term encompasses governmental components ("entities") that conduct background investigations ("investigating") for the purpose of adjudicating an individual's eligibility for access to classified information under Executive Order 12968. Because the DOW IC components in question conduct clearance investigations governed by Executive Order 12968, they are "investigating entities" that may not conduct the adjudicative hearings required by that Order.

It is true that by referring to "the investigating entity" in the singular, rather than "the investigating entities" in the plural, Executive Order 12968 could be read to contemplate that only one entity would conduct clearance investigations and thereby be prohibited from conducting the required hearing after denial or revocation. But that interpretation "places far too much weight on the use of the singular in a provision that merely defines" the appeals process for clearance denials and revocations "and that says nothing about" clearance investigations involving two or more governmental entities. *AnMed Health v. Becerra,* 628 F. Supp. 3d 219, 236 (D.D.C. 2022); *cf St. Francis Hosp., Inc. v. Becerra,* 28 F.4th 119, 122 (10th Cir. 2022) (noting "the common understanding that the English language does not always carefully differentiate between singular and plural word forms, and especially in the abstract, such as in legislation prescribing a general rule for future application" (quoting 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:34, at 505 (7th rev. ed. 2014))).

It is "simply a matter of common sense and everyday linguistic experience" that, unless context dictates otherwise, singular references in legal texts include the plural form. Antonin Scalia & Bryan A. Gamer, *Reading Law: The Interpretation of Legal Texts* 130 (2012). Indeed, Congress explicitly applied this background principle to the interpretation of federal statutes in the Dictionary Act. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things[.]"); *see also AnMed Health,* 628 F. Supp. 3d at 236 (applying this "common sense practice" to regulatory language).

Context does not caution against reading the singular to incorporate the plural here. In fact, context reinforces the applicability of the principle in these circumstances. One reason investigating entities might be prohibited from conducting the review hearing for clearance revocations and denials is to afford the applicant an adjudicator capable of taking a fresh view of the evidence. *Cf Schweiker v. McClure,* 456 U.S. 188, 195 (1982) ("[D]ue process demands

impartiality on the part of those who function in judicial or quasi-judicial capacities."). If the goal is to provide clearance applicants with "fair and equitable treatment" during the adjudication process, it makes sense that an entity involved in the applicant's investigation should not be tasked with reviewing its own work on appeal. Exec. Order. 12968, pmbl.

For these reasons, Executive Order 12968 is best read as prohibiting IC components within DOW that conduct supplemental investigations of their own personnel from holding the required review hearing for individuals whose clearances have been denied or revoked.

B.

Despite designating DCSA as the primary clearance investigating agency, Executive Order 13869 provides for DOW's IC components to continue conducting supplemental investigations of their own personnel to the extent authorized by statute, preexisting presidential directive, or designation by DNI prior to 2019. Exec. Order 13869, § 2(d). That provision did not, however, purport to override any existing limitations on how clearance eligibility decisions must be made and reviewed. Nor did it otherwise exempt these DOW components from the procedural requirements of Executive Order 12968. Those requirements include prohibiting the investigating entity from participating in the review of its own work.

In fact, DNI designations of agencies to make determinations about applicants' eligibility for access to classified information are explicitly conditioned on those agencies acting "in accordance with Executive Order 12968 of August 2, 1995," Exec. Order 13467, § 2.3(c)(v), which includes the "investigating entity" prohibition, *see* Exec. Order 12968, § 5.2(a)(7). That condition reinforces the conclusion that DOW components authorized to make clearance eligibility determinations and conduct supplemental investigations may not also conduct the required hearings to review clearance denials and revocations.

III.

IC components within DOW that conduct supplemental background investigations of their personnel are prohibited from conducting the review hearing required by Executive Order 12968 after a clearance denial or revocation, because they are an "investigating entity" within the meaning of that Order. In addition, the authority of such components to continue conducting their own supplemental investigations and making their own eligibility determinations after the designation of DCSA as the primary clearance investigating agency does not carry with it the corresponding authority to conduct the required review hearings.

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