

Calendar No. 264

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-185 }

SECURELY EXPEDITING CLEARANCES
THROUGH REPORTING TRANSPARENCY ACT
OF 2017

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 3210

TO REQUIRE THE DIRECTOR OF THE NATIONAL BACKGROUND
INVESTIGATIONS BUREAU TO SUBMIT A REPORT ON THE
BACKLOG OF PERSONNEL SECURITY CLEARANCE
INVESTIGATIONS, AND FOR OTHER PURPOSES



NOVEMBER 27, 2017.—Ordered to be printed

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Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 3210]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 3210) to require the Director of the National Background Investigations Bureau to submit a report on the backlog of personnel security clearance investigations, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 3210, the Securely Expediting Clearances Through Reporting Transparency Act, or SECRET Act of 2017, is to require the Office of Personnel Management to report on the backlog of security clearance investigations, and for other purposes.

II. BACKGROUND AND THE NEED FOR LEGISLATION

In order to protect the American people, certain information considered important to national security, also known as classified information, requires protection against unauthorized disclosure.¹ Access to this information is only granted to Federal employees, members of the Armed Forces, or individuals who act for or on behalf of a Federal agency, including contractors, subcontractors, and grantees.² Additionally, access to classified information is limited to individuals in job positions who have a need to access specific classified information in order to perform or assist in a lawful and authorized government function.³ This “need-to-know” requirement is determined by the employing or sponsoring Federal agency.⁴ The Federal agency also determines the level of access required for the job position—top secret, secret, and confidential—depending on “the degree of protection required for information and the amount of damage that unauthorized disclosure could reasonably be expected to cause to national defense.”⁵

To be granted access to classified information, an individual must undergo a background investigation and have a “personal and professional history [which] affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.”⁶ This investigation and subsequent approval or disapproval by a Federal agency to grant the individual access to classified information at the required level must be completed prior to accessing classified information and can also occur at any time afterward to determine whether the individual continues to meet the requirements for access to classified information.⁷ A determination that an individual is eligible for access to classified information is commonly known as a “security clearance.”⁸

During the background investigation for a security clearance, Federal investigators will search for records about the individual and conduct interviews in order to develop a report of investigation.⁹ Interviews can be conducted with the individual, as well as the individual’s family, friends, co-workers, neighbors, and others to verify residency, education, employment, and other information.¹⁰ Investigators may search records from law enforcement entities, courts, creditors, and other entities.¹¹ Once the investigation is complete, the sponsoring agency will receive the completed back-

¹ Exec. Order No. 12968, 60 Fed. Reg. 151, 40245 (Aug. 7, 1995).

² *Id.*

³ *Id.* at 40246.

⁴ *Id.*

⁵ U.S. Gov’t Accountability Office, Personnel Security Clearances: Actions Needed to Ensure Quality of Background Investigations and Resulting Decisions, GAO-14-138T, 8 (Feb. 11, 2014), available at <https://www.gao.gov/assets/670/660832.pdf>.

⁶ Exec. Order No. 12968, *supra* note 1 at 40250.

⁷ *Id.* at 40246.

⁸ 50 U.S.C. § 3341. See also U.S. Dep’t of Defense, Personnel Security Program, 10-11 (Jan. 1987), available at <http://ogc.osd.mil/doha/5200.2-R.pdf>.

⁹ National Background Investigations Bureau, Investigations Process Details, available at <https://nbib.opm.gov/about-us/about-investigations/investigation-process>.

¹⁰ *Id.*

¹¹ *Id.*

ground investigation and determine whether the individual will be granted a security clearance.¹²

Executive Order 12968 mandated that individuals with security clearances undergo periodic reinvestigations “because circumstances and characteristics may change dramatically over time and thereby alter the eligibility of employees for continued access to classified information.”¹³ Federal law requires a periodic re-investigation every five years for a top secret clearance, every 10 years for a secret clearance, and every 15 years for a confidential clearance.¹⁴ In 2008, Executive Order 13467 further subjected individuals with security clearances to continuous evaluation.¹⁵ Continuous evaluation (CE) allows for monitoring to occur beyond re-investigation periods and is:

a vetting process to review the background of an individual who has been determined to be eligible for access to classified information or to hold a sensitive position at any time during the period of eligibility. CE leverages a set of automated records checks and business rules to assist in the on-going assessment of an individual’s continued eligibility. CE is intended to complement continuous vetting efforts.¹⁶

CE is being introduced government-wide in a phased approach, “due to the anticipated workload demands, technical complexities, and the unknown impact to agency workforce requirements.”¹⁷

The Intelligence Reform and Terrorism Prevention Act of 2004 requires all agencies to accept “all security clearance background investigations and determinations completed by an authorized investigative agency or authorized adjudicative agency.”¹⁸ Executive Order 13467 echoed this requirement by mandating that “[e]xcept as otherwise authorized by law, background investigations and adjudications shall be mutually and reciprocally accepted by all agencies.”¹⁹ The National Counterintelligence and Security Center (NCSC) tracks and reports on security clearance reciprocity.²⁰ In fiscal year 2016, five intelligence community agencies reviewed and closed 35,130 reciprocity requests of security clearances, with an 87.2% acceptance rate.²¹ These reciprocity requests took only four days to review and accept the security clearance of another intelligence community agency.²²

In 2016, President Barack Obama established the National Background Investigations Bureau (NBIB), which is housed in the Of-

¹² *Id.*

¹³ Exec. Order No. 12968, *supra* note 1 at 40251.

¹⁴ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 3001, 118 Stat. 3638, 3706. *See also* 50 U.S.C. § 3341(a)(7).

¹⁵ Exec. Order No. 13467, 73 Fed. Reg. 128, 38107 (July 2, 2008).

¹⁶ Exec. Order No. 13764, 82 Fed. Reg. 13, 8119 (Jan. 23, 2017).

¹⁷ *Security Clearance Investigation Challenges and Reforms: Hearing Before the H. Subcomm. on Gov’t Operations of the H. Comm. on Oversight and Gov’t Reform*, 115th Cong. (2017) [hereinafter *House Hearing*1] (statement of William Evanina, Director, National Counterintelligence and Security Center), available at <https://oversight.house.gov/wp-content/uploads/2017/10/ODNI-Evanina-Testimony-Security-Clearance-Investigations.pdf>.

¹⁸ Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 14 at 3707. *See also* 50 U.S.C. § 3341.

¹⁹ Exec. Order No. 13467, *supra* note 15 at 38105.

²⁰ *House Hearing*, *supra* note 17.

²¹ *Id.*

²² *Id.*

fice of Personnel Management (OPM).²³ NBIB serves “as the primary executive branch service provider for background investigations for eligibility for access to classified information; eligibility to hold a sensitive position; suitability or, for employees in positions not subject to suitability, fitness for Government employment; fitness to perform work for or on behalf of the Government as a contractor; fitness to work as a non-appropriated fund employee . . . and authorization to be issued a Federal credential for logical and physical access to federally controlled facilities or information systems.”²⁴ NBIB began operations on October 1, 2016, and currently conducts background investigations for nearly 95 percent of background investigations government-wide and across 100 Federal agencies.²⁵

The current backlog of investigative products by NBIB, as of September 2017, is 707,000, which includes “simple records checks, suitability and credentialing investigations, and more labor-intensive national security investigations.”²⁶ Security clearance background investigations comprise 540,000 of this backlog, with 330,000 for initial investigations and 210,000 for periodic reinvestigations.²⁷ Roughly 134,000 of these are for simple records checks that flow through NBIB on a daily basis.²⁸ According to NBIB, the backlog recently “has begun to stabilize and has even been reduced modestly”²⁹ In fiscal year 2016, background investigations for all initial investigations for security clearances took an average of 123 days for the fastest 90 percent of investigations.³⁰ This average was 108 days for initial investigations for secret clearances and 220 days for initial investigations for top secret clearances.³¹ These processing times are far in excess of a statutory mandate of 40 days or less for 90 percent of all investigations³² and of OPM’s strategic goal of 80 days or less for top secret security clearances and 40 days or less for secret security clearances.³³

This substantial backlog arose from several events that occurred in recent years.³⁴ First, OPM cancelled its contract with its largest investigation services provider, USIS, in 2014 after the Department of Justice filed fraud charges against USIS for allegedly filing 650,000 background investigation reports without performing proper vetting procedures, as required by the contract.³⁵ This termi-

²³The White House, *The Way Forward for Federal Background Investigations* (Jan. 22, 2016), available at <https://obamawhitehouse.archives.gov/blog/2016/01/22/way-forward-federal-background-investigations>.

²⁴Exec. Order No. 13764, *supra* note 16 at 8125–26.

²⁵National Background Investigations Bureau, *About Us*, available at <https://nbib.opm.gov/about-us/>.

²⁶*House Hearing* (statement of Charles S. Phalen, Jr., Director, National Background Investigations Bureau), available at https://oversight.house.gov/wp-content/uploads/2017/10/OPM_Phalen_Testimony_Security-Clearance-Investigations.pdf.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰U.S. Off. of Personnel Mgmt., *Annual Performance Report Fiscal Year 2016*, 46, available at <https://www.opm.gov/about-us/budget-performance/performance/2016-annual-performance-report.pdf>.

³¹*Id.*

³²Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 14 at 3709. *See also* 50 U.S.C. § 3341(g)(2)(i).

³³U.S. Off. of Personnel Mgmt., *supra* note 30 at 37.

³⁴*House Hearing*, *supra* note 26.

³⁵*Id.* *See also* Charles S. Clark, *OPM Terminates Controversial Background Check Contractor*, Government Executive (Sept. 10, 2014), available at <http://www.govexec.com/contracting/2014/09/opm-terminates-controversial-background-check-contractor/93680/>. *See also* Dion Nissenbaum, *U.S. Accuses Security Background Check Firm of Fraud*, Wall Street Journal (Jan. 22, 2014),

nation of USIS's contract resulted in the loss of thousands of field investigators to conduct background investigations.³⁶ In 2015, OPM learned of cybersecurity breaches by foreign operatives that resulted in the theft of information about 21.5 million current and retired federal employees, their family members, and others.³⁷ This data breach caused OPM to cease some functions, like electronic processing, in order to respond to the breach and enhance security.³⁸ Fiscal Year 2016 yielded "a higher than expected volume of fieldwork-intensive investigations" which further exacerbated the backlog.³⁹ Last, revisions to the Federal Investigative Standards⁴⁰ established in 2012 were phased-in beginning in 2014 and "required new investigation types and different coverage requirements" leading to a significant increase in the frequency of periodic reinvestigations.⁴¹

In 2016, Congress passed a provision that required the Department of Defense (DOD) to develop an implementation plan by August 1, 2017, to transfer background investigations for DOD personnel from OPM to DOD.⁴² DOD issued this implementation plan on August 22, 2017, which described a phased transfer over the course of three years.⁴³ Industry stakeholders expressed opposition to this transfer, noting it "will create a parallel process and duplicative regime in the [DOD] that will increase costs and drain resources, cause further delays, hinder process improvements, and undermine efforts to move the government toward true reciprocity across all departments and agencies."⁴⁴

OPM ceased publicly reporting on the backlog of security clearance background investigations pursuant to instruction from the Office of Management and Budget for reporting priority goals quarterly to Performance.gov.⁴⁵ While this is a temporary pause in quarterly reporting, the Committee believes it is essential for NBIB to continue detailed quarterly reporting in order to provide transparency in its efforts to address this substantial backlog. Addition-

available at <https://www.wsj.com/articles/us-accuses-security-background-check-firm-of-fraud-1390447893?mg=prod/accounts-wsj>.

³⁶ *Id.*

³⁷ *Id.* See also U.S. Off. of Personnel Mgmt., Cybersecurity Incidents, available at <https://www.opm.gov/cybersecurity/cybersecurity-incidents/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The Federal Investigative Standards establish the requirements for conducting background investigations. The standards are divided into five tiers, based on the level of risk and sensitivity of the job position, with an Expandable Focused Investigation. An Expandable Focused Investigation focuses investigative fieldwork on potential issues detected but not resolved by information previously collected from the individual or records checks. See U.S. Off. of Personnel Mgmt., Implementation of Federal Investigative Standards for Tier 1 and Tier 2 Investigations (Nov. 4, 2014), available at <https://nbib.opm.gov/hr-security-personnel/federal-investigations-notices/2015/fin-15-03.pdf>. See also U.S. Off. of Mgmt. & Budget, Security and Suitability Process Reform, 11 (Dec. 17, 2008), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/reports/joint_security_dec2008.pdf.

⁴¹ *House Hearing*, *supra* note 26. See also U.S. Gov't Accountability Office, Personnel Security Clearances: Actions Needed to Ensure Quality of Background Investigations and Resulting Decisions, GAO-14-138T, 12 (Feb. 11, 2014), available at <https://www.gao.gov/assets/670/660832.pdf>.

⁴² National Defense Authorization Act of 2017, Pub. L. No. 114-328, §951, 130 Stat. 2000, 2371 (2016).

⁴³ U.S. Dep't of Defense, The Department of Defense Response to the National Defense Authorization Act for Fiscal Year 2017 Section 951: Implementation Plan for Potential Transfer of Background Investigation Responsibility to the Department of Defense.

⁴⁴ *House Hearing* (statement of A.R. Hodgkins, III, Senior Vice President, IT Alliance for Public Sector), available at <https://oversight.house.gov/wp-content/uploads/2017/10/ITAPS-Hodgkins-Testimony-Security-Clearance-Investigations.pdf>.

⁴⁵ Memorandum from Mick Mulvaney, Director, Off. of Mgmt. and Budget, Reducing Burden for Federal Agencies by Rescinding and Modifying OMB Memoranda (June 15, 2017), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-26.pdf>.

ally, the Committee recognizes that the backlog cannot be reduced without government-wide implementation of reciprocity and continuous evaluations. Therefore, it is important that those Federal agencies involved in these operations provide reports to Congress on the progress in implementing these vital practices. It is also critical for Congress to have a comprehensive understanding of the potential costs and effects that could result from bifurcating background investigations between NBIB and DOD before such a transfer is realized.

H.R. 3210 would require NBIB to issue quarterly reports with detailed information about the background investigation backlog, as well as require reports on the implementation of continuous evaluation and on Federal agencies' use of security clearance reciprocity. H.R. 3210 would also require a report to Congress on the Federal government's reviews of sensitive position designations in order to ensure that the responsibilities for job positions are being appropriately assessed for sensitivity, national security, and a need to access classified information.

III. LEGISLATIVE HISTORY

H.R. 3210 was introduced on July 12, 2017, by Reps. Stephen Knight (R-CA-5) and Gerald Connolly (D-VA-11). The Act as amended was passed by the House of Representatives on July 26, 2017, by voice vote. The Act was received in the Senate and referred to the Committee on Homeland Security and Governmental Affairs on July 26, 2017.

The Committee considered H.R. 3210 at a business meeting on October 4, 2017. During the business meeting, a substitute amendment offered by Ranking Member McCaskill on behalf of herself, Chairman Johnson, and Senator Tester was adopted. Both the amendment and the legislation as modified by the amendment were passed by voice vote en bloc with Senators Johnson, Lankford, Daines, McCaskill, Tester, Heitkamp, Hassan, and Harris present.

IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

Section 1. Short title

This section establishes the short title of the Act as the "Securely Expediting Clearances Through Reporting Transparency Act of 2017" or the "SECRET Act of 2017".

Section 2. Report on backlog of personnel security clearance investigations

This section requires NBIB to submit a quarterly report to Congress on the backlog of security clearance background investigations. This report must include information on the size of the backlog for each sensitivity level, and the number of initial investigations and periodic reinvestigations in the backlog for Federal employees, employees of Federal contractors, and Department of Defense employees and employees of Department of Defense contractors. The report is also required to include information on the average length of time required to carry out an initial investigation and a periodic reinvestigation at each sensitivity level and the contributing factors to this processing time. The quarterly report is also

required to include a backlog mitigation plan and a description on improvements to information and data security.

Section 3. Report on security clearance investigations of personnel of the Executive Office of the President

This section requires the Office of Administration of the Executive Office of the President to submit a report to Congress that describes the process for conducting and adjudicating security clearance background investigations for staff of the Executive Office of the President and of the White House. This report is required to be submitted within 90 days of enactment of this Act.

Section 4. Report of duplicative costs

This section requires OMB to submit a report to Congress on the potential cost of duplicating NBIB resources to implement the plan issued under the FY 2017 NDAA to transfer background investigations for DOD personnel from NBIB to DOD. This report shall be issued within 120 days of enactment of this Act.

Section 5. Report on continuous evaluation and reciprocity

This section requires ODNI and OPM to submit to Congress a report on the implementation of continuous evaluations government-wide, including the number of agencies with such programs, a risk assessment of replacing periodic reinvestigations with continuous evaluation programs by 2020, barriers to implementation of these programs, and plans to replace periodic reinvestigations with continuous evaluation programs government-wide by 2020. This section also requires ODNI and OPM to report on Federal agencies' efforts to grant reciprocal recognition of access to classified information, recommendations to improve the background investigation process, and a review of the schedule for processing security clearances under section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004.

Section 6. Review and update of position designation guidance

This section requires the president to review and update guidance to agencies in determining position sensitivity designations and the type of background investigation needed for each position designation. This review is required within 180 days of enactment of this Act and will be required every four years thereafter. Within 30 days of completing such reviews, the president will submit a report to Congress on issues identified with position sensitivity designations and the number of position designations revised as a result of the review.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, October 18, 2017.

Hon. RON JOHNSON,
 Chairman, Committee on Homeland Security and Governmental Affairs,
 U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3210, the SECRET Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL,
 Director.

Enclosure.

H.R. 3210—SECRET Act of 2017

H.R. 3210 would amend current law to require the National Background Investigations Bureau (NBIB), within the Office of Personnel Management (OPM), to provide various reports to the Congress. Those reports would cover information about the backlog in federal investigations for security clearances, the process for conducting security clearances for the Executive Office of the President, and the costs to NBIB and the Department of Defense for such investigations. In addition, OPM and the Director of National Intelligence would be directed to report on the status of modernizing security clearance procedures. Finally, H.R. 3210 would require OPM to review, update, and report on security clearance designations for federal employee and contractor employment positions.

Information from OPM indicates that the information required for H.R. 3210 is already compiled for other efforts. Thus, CBO estimates it would cost less than \$500,000 over the 2018–2022 period to prepare the reports; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 3210 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3210 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 3210 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On July 25, 2017, CBO transmitted a cost estimate for H.R. 3210, as ordered reported by the House Committee on Oversight and Government Reform on July 19, 2017. The two pieces of legislation are similar, although the Senate version would require more reports; CBO's estimates of the budgetary effects of the two bills are the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

Because this legislation would not repeal or amend any provision of current law, it would not make changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.

