

# **12 FAM 250 MISCELLANEOUS INVESTIGATIVE RESPONSIBILITIES**

## **12 FAM 251 POLYGRAPH POLICY**

### **12 FAM 251.1 General**

*(TL:DS-39; 8-15-94)*

Under the Department's polygraph examination policy, an employee of the Department may be asked, after high-level approval, if he or she is willing to take a polygraph examination on a voluntary basis in certain specified circumstances. No individual may be asked if he or she is willing to take a polygraph examination and no polygraph examination may be administered by or on behalf of the Department of State except in accordance with these regulations.

#### **12 FAM 251.1-1 Authority to Use Polygraph Examinations**

*(TL:DS-39; 8-15-94)*

The use of polygraph examinations as set forth in this section of the manual, is in furtherance of the responsibilities of the executive branch under the Constitution and laws of the United States, including those contained in Title 5, of the United States Code, the Foreign Service Act of 1980 (22 U.S.C. 3901), enabling legislation of the foreign affairs agencies, implementing executive orders, regulations, and directives, and the Employee Polygraph Protection Act (29 U.S.C. 2001 et seq.).

#### **12 FAM 251.1-2 Contractors**

*(TL:DS-39; 8-15-94)*

Contractors and employees of contractors are covered by the same regulations and in the same manner as Department employees, to the extent consistent with the Employee Polygraph Protection Act (29 U.S.C. 2001 et seq.). That Act generally prohibits private employers from requesting, directly or indirectly, that their employees submit to polygraph examinations. Although the Act is, by its terms, not applicable to the U.S. Government, the Department should avoid putting contract employees and their employers at an unfair disadvantage. Therefore, requests to ask a Department of State contract employee to take a polygraph examination will not generally be approved unless, in addition to meeting the requirements of these regulations, the request concerns a contractor or employee of a contractor who has access to Top Secret information (29 U.S.C. 2006(b)(2)(B)) or comes under another exemption of the Polygraph Protection Act.

## **12 FAM 251.2 Authorized Uses of Polygraph Examinations**

### **12 FAM 251.2-1 General**

*(TL:DS-39; 8-15-94)*

a. A Department of State official may ask a Department employee or contractor to agree to take a polygraph examination only in accordance with these regulations and only for those purposes set forth either in section 12 FAM 251.2-2 and specifically authorized by the Secretary of State without delegation or in section 12 FAM 251.2-3 .

b. An individual may be asked if he or she is willing to take a polygraph examination for a purpose in section 12 FAM 251.2-2 , paragraphs a through c, or section 12 FAM 251.2-3. An individual may volunteer to take an exculpatory polygraph examination under section 12 FAM 251.2-2 , paragraph d. In the case of examinations under section 12 FAM 251.2-2 , paragraphs a through c, or section 12 FAM 251.2-3 , the individual may be asked if he or she is willing to take the examination, and for those under section 12 FAM 251.2-2 , paragraph d, the examination may be given, only after approval in writing in each specific case by the Secretary, the Deputy Secretary, the Under Secretary for Management, the Inspector General (for examinations under section 12 FAM 251.2-2 , paragraph a, involving criminal investigations conducted by his or her office) or a person whom the Secretary has designated in writing. The authority to designate such a person may not be delegated. The polygraph shall be employed only when the person to be examined has consented in writing to the examination.

c. The person being considered for polygraph examination shall be given timely notification of the date, time, and place of the examination as well as his or her right to obtain and consult with legal counsel. Legal counsel may be available for consultation during the polygraph examination.

d. Except for examinations administered pursuant to section 12 FAM 251.2-2, subparagraph b(1), and section 12 FAM 251.2-3 , individuals shall not be asked if they are willing to take a polygraph examination until such time as all other reasonable investigative steps have been taken. Polygraph examinations shall be considered as supplementary to, not as a substitute for, other forms of investigation that may be required under the circumstances.

e. When an individual is asked whether he or she is willing to take a polygraph examination, he or she shall be advised of the consequences, or lack thereof, of his or her refusal to be so examined. The individual shall also be advised of the scope such examination would assume and provided with a copy of this regulation.

f. Applicants for employment for, voluntary assignment to, or voluntary detail to positions requiring access to specifically designated information in special access programs designated by the Secretary under section 12 FAM 251.2-2 , subparagraph b(1); and personnel applying for voluntary detail to certain positions in the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency as provided under section 12 FAM 251.2-3 ; who are requested and who refuse to take a polygraph examination shall not be selected for or assigned to such position. Such refusal shall be without adverse consequences to their previous position or status.

g. Persons who are requested and who refuse to take a polygraph examination in connection with determining their continued eligibility for access to specifically designated information in designated special access programs, in accordance with section 12 FAM 251.2-2 , subparagraph b(1), or continued voluntary detail to certain positions in the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency, in accordance with section 12 FAM 251.2-3 (including incumbents of positions subsequently determined to require polygraph examination as a condition of access, voluntary assignment or voluntary detail), may be denied access or assignment or detail, provided that the Department shall ensure that such individual is retained in a position of equal grade and pay that does not require polygraph examination.

h. When deception is indicated by the examiner's interpretation of polygraph charts in polygraph examinations conducted under these regulations, an in-depth interview of the subject will be undertaken by the examiner and/or investigator immediately following the running of the chart, to resolve any indication of deception. If the indication of deception cannot be resolved through such means, the subject will be so advised. If it is determined after reviewing the polygraph examination results, that they raise significant questions of deception, additional investigation may be undertaken and the subject shall be given an opportunity to undergo additional examination using the same or a different examiner.

i. In the case of polygraph examinations conducted under the provisions of section 12 FAM 251.2-2 , subparagraph b(1), if such additional examination is not sufficient to resolve significant questions relevant to the subject's clearance or access status, a comprehensive investigation of the subject shall be undertaken, utilizing the results of the polygraph examination as an investigative lead. If such investigation develops no derogatory information upon which an unfavorable administrative action to the subject may be independently based, no Department official may take such action unless approved by the Secretary in specific cases, based upon his or her written finding that the information in question is of such extreme sensitivity that access under the circumstances poses an unacceptable risk to the national security. In such cases:

(1) The Secretary shall notify the subject, in writing, that, although the investigation which followed the indication of deception during the polygraph examination did not in and of itself provide an independent basis for denial of access, a determination to deny such access to the subject had been made, based upon the finding of the Secretary that access under the circumstances poses an unacceptable risk to the national security. After receiving such notice, the subject may request the Secretary to reconsider his or her determination if he or she believes that such reconsideration is warranted.

(2) Copies of the determination as well as the Secretary's notification to the subject shall be retained only by the Secretary's office and the Bureau of Diplomatic Security. This provision does not preclude use of such records in the event of litigation, or informing individuals of the subject's level of clearance.

(3) No notification other than provided for in section 12 FAM 251.2-1 , subparagraphs i(1) and (2), shall be made.

j. No unfavorable action will be taken by the Department solely on the basis of a polygraph examination chart that indicates deception, except as provided in section 12 FAM 251.2-1 , paragraph i. Unfavorable administrative action shall not be taken against a person for refusal to take a polygraph examination, but actions may be taken pursuant to section 12 FAM 251.2-1 , paragraphs f and g.

k. Polygraph examinations administered by Department of State polygraph examiners or pursuant to Department of State authorization shall be conducted only as prescribed by this regulation.

l. The Assistant Secretary for Diplomatic Security and the Inspector General shall deliver quarterly reports to the Secretary of State on the administration of polygraph examination under this regulation. The reports shall include the number of examinations authorized and conducted during the reporting period, and a description of the circumstances under which each examination was authorized and conducted, but shall not include the names of individuals examined.

m. Unless these regulations further limit authority to delegate, the duties and functions prescribed by these regulations shall only be exercised by the named official, his or her superior or a person acting for him or her by delegation during absence.

## **12 FAM 251.2-2 Investigative Cases for Which the Polygraph May Be Authorized**

*(TL:DS-39; 8-15-94)*

a. Criminal Investigations. A polygraph examination may be authorized in a criminal investigation when the following apply:

(1) The crime involves an offense punishable under federal law by death or confinement for a term of 1 year or more;

(2) Investigation by other means has been as thorough as circumstances permit;

(3) Development of information by means of a polygraph examination is essential to the conduct of the investigation;

(4) The person being considered for examination has been interviewed and there is reasonable cause to believe that the person has knowledge of or was involved in the matter under investigation;

(5) The case under investigation is sufficiently important to merit the examination; and

(6) The scope of the polygraph examination is limited to the activities under investigation.

b. Personnel Security Investigations. A polygraph examination may be authorized in connection with personnel security investigations as follows:

(1) Access to specifically designated information in designated special access programs. A polygraph examination may be authorized to assist in determining the initial eligibility (and periodically thereafter on a random basis to assist in determining continued eligibility) of Department employees and contractor personnel who volunteer for assignment to positions in programs carried out jointly with employees of the Intelligence Community. Such positions must require access to specifically designated classified information protected within special access programs which are established pursuant to E.O. 12356 and which the Secretary, without delegation, also specifically designates under this subparagraph for the use of polygraph examinations. Such specific designation shall be based upon the request of the Assistant Secretary for Diplomatic Security, who shall certify in writing, or obtain the certification of an appropriate official of the Intelligence Community, that unauthorized disclosure of the information in question could reasonably be expected to:

(a) Jeopardize human life or safety;

(b) Result in the loss of unique or uniquely productive intelligence sources or methods vital to U.S. security; or

(c) Would compromise technologies, plans or procedures vital to the strategic advantage of the United States. The scope of any polygraph examination administered under this subparagraph shall be limited to the counterintelligence topics prescribed in 12 FAM 251 Exhibit 251.2-2 .

(2) Resolution of certain personnel security investigations. The use of the polygraph may be authorized for Department employees and contractor personnel, when credible derogatory information developed in connection with a personnel security investigation for a Top Secret clearance of a Department employee or contractor causes substantial doubt whether access or continuation of access to classified information is clearly consistent with the interests of national security, and all other efforts to resolve the adverse information have been taken. The scope of a polygraph investigation under this subparagraph shall be restricted to the activities under investigation.

c. Counterintelligence Investigations.

(1) A polygraph examination may be authorized for use in connection with the investigation of an unauthorized disclosure of classified information or other counterintelligence investigation of Department employees and contractor personnel, provided that the following apply:

(a) Investigation by other means has been as thorough as circumstances permit;

(b) Development of information by means of a polygraph examination is essential to the conduct of the investigation; and

(c) The individual being considered for examination has been interviewed and there is reasonable cause to believe that the person has knowledge of or was involved in the matter under investigation.

(2) The scope of a polygraph examination under this subparagraph shall be restricted to the activities under investigation and relevant counterintelligence topics set forth in 12 FAM 251 Exhibit 251.2-2 of this regulation.

d. Exculpation. The use of the polygraph may be authorized for the purpose of exculpation only if the request for such examination was initiated by an employee or contractor who is the subject of a criminal, personnel security, or counterintelligence investigation. The scope of a polygraph investigation under this subparagraph shall be restricted to the activities under investigation. The Department may not offer an examination for the purpose of exculpation.

### **12 FAM 251.2-3 Cases for Which the Polygraph Shall Be Used**

*(TL:DS-39; 8-15-94)*

Voluntary assignment or voluntary detail to intelligence agencies. Polygraph examination shall be required for Department employees and contractor

personnel to assist in determining their eligibility for initial or continued voluntary detail for duty in positions at the National Security Agency, the Central Intelligence Agency, and the Defense Intelligence Agency for which a polygraph examination is required by those agencies. The scope of any polygraph examination administered for details under this section, with the exception of details to the Central Intelligence Agency, shall be limited to the counterintelligence topics prescribed in 12 FAM 251 Exhibit 251.2-2 of this regulation.

## **12 FAM 251.2-4 Limitations**

*(TL:DS-39; 8-15-94)*

a. Any final administrative determination rendered in cases in which a polygraph examination is taken shall not be based solely on the results of an analysis of the polygraph charts except as provided in section 251.2-1, paragraph i, or where the results are exculpatory. Responses to technical questions shall have no probative value.

b. The results of a polygraph examination and record of results shall be considered privileged information and shall not become part of an individual's personnel file. Such results shall be disseminated only in accordance with section 12 FAM 251.3-2, paragraph b, of this regulation. Results of an analysis so disseminated, other than results exculpating the individual, may be used in subsequent investigations only as an investigative lead.

c. No unfavorable administrative action may be based upon an individual's refusal to undergo polygraph examination in connection with the provisions of this regulation but actions may be taken pursuant to section 12 FAM 251.2-1, paragraphs f and g. Refusal to undergo polygraph examination under these provisions shall in no manner affect other personnel actions, including the person's official evaluation report, or eligibility for promotions, awards, or positions that have not been determined to require polygraph examination as a condition of employment, assignment, detail or access.

d. Information concerning a person's refusal to undergo polygraph examination shall, in all cases, be given the full privacy protection provided by law and these regulations. Specifically, information concerning a person's refusal shall not:

(1) Be recorded in the person's personnel file, investigative file, or any other file. As an exception, in criminal cases, a refusal may be recorded in the polygraph examination technical report maintained in DS.

(2) Be communicated to a person's supervisor, and in the case of a contractor employee, a person's employer, unless such action is necessary in support of action to be taken under the provisions of section 251.2-1, paragraphs f and g. In criminal cases, the fact of refusal to undergo polygraph examination shall not be communicated to persons other than those directly in-

volved in the administration, control or conduct of criminal investigations. Nothing in this section 12 FAM 251.2-4 , paragraph d, shall be read to preclude the preparation of the report required in section 12 FAM 251.2-1 , paragraph l.

## **12 FAM 251.3 Conducting Polygraph Examinations**

### **12 FAM 251.3-1 Procedures**

*(TL:DS-39; 8-15-94)*

a. General. Polygraph examinations may be conducted only by certified polygraph examiners employed by the Department of State or by examiners certified to administer polygraph examinations for other U.S. Government offices. Examiners shall meet at a minimum the requirements established by the Department of Defense in Chapter 3 of DOD regulation 5210.48-R for the selection, training, and supervision of polygraph examiners. All examinations shall be conducted only in accordance with and under circumstances and procedures detailed in this regulation.

b. Pretest. Before administering a polygraph examination, the polygraph examiner shall:

(1) Obtain assurance from the person to be examined of his or her voluntary consent to the examination. The consent must be in writing and shall be included and maintained in the polygraph examination technical report.

(2) Ensure that the person to be examined has not been subjected to prolonged interrogation immediately before the polygraph examination.

(3) Interview the person to be examined. During this interview, at a minimum, the examinee shall be informed of the following:

(a) The characteristics and nature of the polygraph instrument and examination, including an explanation of the physical operation of the instrument, the procedures to be followed during the examination, and all questions to be asked during the examination;

(b) If the polygraph examination area contains a two-way mirror, camera, or other device through which the examinee can be observed and if other devices, such as those used in conversation monitoring or recording, will be used simultaneously with the polygraph;

(c) That he or she is privileged against self-incrimination under the Fifth Amendment to the Constitution;

(d) That he or she has the right to obtain and consult with legal counsel and that legal counsel may be available for consultation during the polygraph examination. The examinee also shall be advised that he or she may interrupt or terminate the examination at his or her own volition, or upon advice of counsel, during any phase of the examination.

c. Questions asked during polygraph examination.

(1) All questions asked concerning the matter at issue, except for technical questions necessary to the polygraph technique during a polygraph examination, must be of special relevance to the subject matter of the particular investigation. Questions probing a person's thoughts or beliefs or lifestyle that are not related directly to the investigation are prohibited. Subject matters that should not be probed include religious and racial beliefs and affiliations, political beliefs and affiliations of a lawful nature, and opinions regarding the constitutionality of legislative policies.

(2) When use of the polygraph is authorized pursuant to section 251.2 of this regulation, technical questions utilized in such examinations shall be constructed to avoid embarrassing, degrading or unnecessarily intrusive questions. Additionally, all technical questions to be used during such examinations must be reviewed with the examinee before being posed to him or her for response.

(3) No relevant question may be asked during the polygraph examination that has not been reviewed with the examinee before the examination.

(4) Any modification or change to the standard question topics of Exhibit 251.2-2, must be approved by the Secretary before implementation. The requirement for prior approval does not apply when it is necessary to modify the phrasing of an approved question topic to clarify a response given by the examinee, provided that the substance of the question topic remains unchanged.

d. Examinee fitness.

(1) In all cases, the examiner shall decline to conduct an examination or discontinue testing when he or she doubts that the examinee is physically or mentally fit to be tested. In these instances, the examination shall be discontinued or postponed until appropriate medical, psychological, or technical authorities have declared the individual fit for testing.

(2) Persons who are not in sound physical or mental condition will not be subjected to a polygraph examination. Should the examiner or examinee have any doubt as to the physical or mental fitness of the examinee, the matter shall be referred to medical authorities. An examiner shall not attempt to make a psychological or physical diagnosis of an examinee.

(3) Polygraph examinations shall not be conducted if in the opinion of the polygraph examiner, any of the following conditions inhibit the person's ability to respond. The provisions of section 12 FAM 251.3-1 , subparagraph d(1), shall be followed if any of the following are apparent:

(a) The examinee is mentally or physically fatigued;

(b) The examinee is unduly emotionally upset, intoxicated, or rendered unfit to undergo an examination because of excessive use of sedatives, stimulants, or tranquilizers;

(c) The examinee is known to be addicted to narcotics;

(d) The examinee is known to have a mental disorder;

(e) The examinee is experiencing physical discomfort of significant magnitude or appears to possess physical disabilities or defects that in themselves might cause an abnormal response.

e. Under no circumstances shall polygraph examiners allow themselves to be identified as other than investigative personnel or take any measures that might create a clinical appearance. The polygraph instrument shall not be utilized as a psychological prop in conducting interrogations.

f. A certified polygraph supervisory official shall review the record of polygraph examination in conjunction with other pertinent investigative information to determine whether it is appropriate to request the examinee to undergo a second polygraph examination. Such a request may be made when considered appropriate, regardless of whether the person examined has made significant admissions in connection with the investigation and regardless of whether the results of the examination indicate unusual physiological responses.

g. Determination with respect to further investigation of cases wherein a polygraph examination has been undertaken shall not be made solely by the polygraph examiner.

## **12 FAM 251.3-2 Records Administration**

*(TL:DS-39; 8-15-94)*

a. Storage and retention.

(1) Polygraph examination technical reports may be filed with other materials relating to the investigation in which the examination was authorized and shall be:

(a) Retained in accordance with records retention procedures established by the Archivist of the United States.

(b) Removed before granting persons outside the examining agency access to the related materials.

(2) Polygraph examination results may be filed with other materials relating to the investigation in which the examination was authorized. Additionally, the following apply:

(a) All non-record copies of polygraph examination results shall be destroyed within 3 months from the date of completion of the investigation in which the polygraph examination was authorized.

(b) Record copies shall be retained in accordance with records retention procedure established by the Archivist of the United States.

b. Dissemination.

(1) Except as required by law or otherwise authorized by these regulations, polygraph examination technical reports shall not be disseminated outside the Department. In accordance with the Privacy Act (5 U.S.C. 552a), these reports will not be communicated, without the examinee's consent, to any person, except as otherwise provided in these regulations. Because of the extremely sensitive privacy interests implicated by the creation of these reports, the reports will be exempt from disclosure under the Freedom of Information Act pursuant to exemptions 6 and 7 and others, as appropriate;

(2) Results of polygraph examinations may be made available to the following:

(a) Within the Department, officials responsible for personnel security, counterintelligence and law enforcement;

(b) Appropriate law enforcement officials outside the Department when the examination has been conducted in connection with the investigation of a criminal offense, or reveals criminal activity on the part of the individual examined;

(c) The examinee or his or her legal counsel, upon request, subject to the provisions in Chapter 12 FAM 500 for safeguarding of classified information to the extent applicable;

(d) The National Archives and Records Administration, GSA, upon retirement of the file.

## **12 FAM 251.4 Definitions**

*(TL:DS-39; 8-15-94)*

a. Counterintelligence. Information gathered and activities conducted to protect against espionage and other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or international terrorist activities.

b. Polygraph examination. Includes questioning and other processing of an examinee before the actual use of the polygraph instrument; the use of a polygraph instrument with respect to such examinee; and any questioning or other processing involving the examinee after the use of the polygraph. Specifically, examinations consist of three phases:

(1) Pretest. The pretest phase includes:

(a) The examiner being introduced and obtaining assurance that the person to be examined has consented to take the examination;

(b) The examinee being informed of the nature and characteristics of the polygraph instrument and examination;

(c) The examinee being informed of his or her privilege against self-incrimination in accordance with the Fifth Amendment to the Constitution;

(d) The examinee being informed of his or her right to obtain and consult with legal counsel;

(e) The examiner reviewing with the examinee all questions to be asked during the test.

(2) In-test. The actual administering of the examination and analysis of the charts;

(3) Post-test. Interrogation of the examinee if the charts are analyzed as deceptive or inconclusive.

c. Polygraph examination results. A synopsis of the polygraph examination that normally includes a brief identification and background information, the relevant questions asked, the subject's answers, the examiner's opinions concerning the indication of truthfulness or deception, and any admissions made by the examinee during the examination.

d. Polygraph examination technical report. The complete detailed technical report prepared by the polygraph examiner including pretest preparations, the examiner's notes, examination charts, and other technical details of the polygraph examination.

e. Polygraph instrument. A diagnostic instrument capable of measuring and recording, as a minimum, respiration, electrodermal, blood volume, and heart rate responses to verbal and or visual stimuli.

f. Relevant question. A polygraph question pertaining directly to the matter under investigation for which the examinee is being tested.

g. Technical questions. Refers to any of the following:

(1) Control question. A question used during polygraph examinations which, although not relevant to the matter under investigation, is designed to be used as a baseline against which responses relevant to the investigation may be evaluated.

(2) Irrelevant or neutral question. A polygraph question about which the examinee normally would tell the truth. It does not pertain to the matter under investigation and should have no apparent emotional impact to the examinee.

(3) Symptomatic question. A polygraph question designed to indicate the possible influence of an outside issue that could be of concern to the examinee.

h. Unfavorable administrative action. Includes "Adverse Action" for Civil Service and "Disciplinary Action" for Foreign Service as defined in 3 FAM; and denial, revocation or reduction of security clearance, but does not include actions taken pursuant to sections 12 FAM 251.2-1 (paragraph f), 12 FAM 251.2-1 (paragraph g), 12 FAM 251.2-2 (subparagraph b(1)) and 12 FAM 251.2-3 .

## **12 FAM 252 THROUGH 259 UNASSIGNED**

## **12 FAM 251 Exhibit 251.2-2 COUNTERINTELLIGENCE SCOPE**

When the scope of a polygraph examination authorized under this regulation is limited to counterintelligence areas, questions posed in the course of such examinations shall be limited to those necessary to determine:

WHETHER THE EXAMINEE HAS:

1. Ever engaged in espionage or sabotage against the United States.
2. Knowledge of anyone who is engaged in espionage or sabotage against the United States.
3. Ever been approached to give or sell any classified materials to unauthorized persons.
4. Ever given or sold any classified materials to unauthorized persons.
5. Knowledge of anyone who has given or sold classified materials to unauthorized persons.
6. Any unauthorized contact with representatives of a foreign government.

