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**Tully Rinckey PLLC Associate Nicole A. Smith, Esq. is featured in the Federal News Radio series titled Questioning Clearances.**

**OPM's crackdown on background check fraud leads to jail time -- for some**

**By Jack Moore**

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Two weeks ago, a 34-year-old USIS contractor from South Carolina, became the background investigator to plead guilty to charges stemming from falsifying a report. The charge could carry a penalty of five years in prison. Brian Rapiere's guilty plea garnered numerous headlines coming amid the broader legal woes for the company he worked for — USIS. The Justice Department has accused the company, the government's largest contractor for providing background investigations, of shortcutting more than 665,000 background checks for more than four years beginning in 2008. But it's far from the first time a lone security-clearance investigator has faced tough penalties for falsifying background investigations. Since 2008, the Office of Personnel Management has been on a crusade to root out falsification in background investigations using the courts. Nearly two dozen background investigators for either OPM or one of its contractors have been criminally prosecuted for misconduct ranging from outright falsifying reports, known as "ghostwriting," to performing sloppy checks that failed to adhere to OPM's standards. Many of them have done jail time. But while the civil case joined by the Justice Department, continues to move forward, a criminal case against USIS for the widespread "dumping" of cases alleged in DOJ's complaint, now seems increasingly unlikely. Last summer, Claire McCaskill (D-Mo.), chairwoman of a Senate subcommittee

tasked with contracting oversight, announced the company was under criminal investigation for "systematic failure to adequately conduct investigations." A few months later, The Wall Street Journal

reported a criminal grand jury in D.C. had issued subpoenas for records from company executives. But the government's high-profile entry into the civil suit last October appeared to signal it was backing away from criminal charges. A Senate staff member with knowledge of the initial investigation said it's more likely that if criminal charges were to be pursued, they would've come before the filing in the civil case. "It's certainly a good question why criminal charges weren't ultimately pursued," said the staffer, who provided the information on background. A spokesman for DOJ's criminal division declined to comment. In a statement, a USIS spokeswoman said the activity alleged in the government's civil complaint "is inconsistent with our company values, culture and tradition of outstanding service to our government customers," and the company is fully cooperating with the government's investigation. This story is part of Federal News Radio's series, Questioning Clearances

, examining the security-clearance and background investigation process. OPM gets tough on falsification

OPM has gotten tougher in recent years in its response to individual investigators accused of falsifying records. OPM officials used to handle these infractions internally — pulling an investigator's credentials, for example, and barring him or her from working for the agency. But, as cases of suspected falsification kept popping up, the agency decided to send a stronger message. In 2006, Kathy Dillaman, then the director of OPM's Federal Investigative Service, spoke at the American Federal Contract Investigators Association's annual conference in Fort Myer, Virginia. She told the crowd of background investigators that suspected falsification would be "prosecuted to the fullest extent of the law," recalled Carolyn Martin, a long-time contractor investigator and president of the association. In 2009, Dillaman explained the agency's decision to seek criminal prosecutions to The Washington Post. "Candidly, taking administrative action and firing an individual wasn't stopping or stalling this from happening," she said. Since 2008, courts have convicted 22 background investigators of falsification, most

through plea deals with the U.S. Attorney's Office in Washington, according to records kept by the OPM inspector general. Of those, 11 were contractors, nine of whom worked for USIS — although many contract investigators work for multiple companies at a time. In the most recent case, prosecutors accused Rapier of falsifying more than four dozen reports of investigation between June 2009 and April 2010 by recording that he had interviewed a source or checked a record when, in fact, he hadn't. Under the charge he pleaded guilty to, Rapier faces five years in prison and a fine of \$250,000. As part of the plea deal, Rapier must also pay more than \$173,000 in restitution — OPM's calculation for the cost of redoing many of the cases Rapier worked on. More than half of background investigators convicted of falsifying reports have done jail time — most in the range of three to five months. But as long as the case against USIS remains a civil matter, company officials cited in the Justice Department's complaint as being aware of and directing the fraudulent activity likely won't face the same penalties, said Charles Tiefer, a law professor at the University of Baltimore and a former member of the Commission on Wartime Contracting. There appears to be a double standard, "when those who defraud the government out of a single quality background investigation are criminally convicted," he said, "while those who run a system which deprives the government of hundreds of quality background investigations are not." Still, the civil suit, alone, could wind up being costly for the company. If maximum penalties are imposed, the company could be on the hook for billions of dollars. But a settlement of some sort is more likely, Tiefer said. Pursuing a criminal case against the company, on the other hand, would have been a different matter entirely, he said. "It's harder to convict officials who can say they were sloppy or reckless but they weren't intentionally out to line their own personal pockets," Tiefer said. "The government may have ended up making the judgment that there is the level of 'bad state-of-mind' for civil fraud and yet not the much higher level of 'bad state-of-mind' for criminal fraud." Prosecutors push for tough sentences

A review of many of the court records dealing with background investigators convicted of fabricating investigations reveals federal prosecutors arguing for strong punishments because of the serious nature of the offense — a potential threat to national security — and the need to deter other investigators from cutting corners. During the 2008 trial of George Abraham, a background investigator for Kroll (later

KeyPoint Government Solutions), prosecutors cited at least six instances where the 55-year-old former Marine and police officer allegedly lied about conducting interviews or cutting corners in his investigations. Abraham's lawyer argued that he may have been sloppy in his checks, but he did not deliberately falsify them. In November 2008, a jury disagreed and found Abraham guilty of six felony counts of making a false statement. At his sentencing in February 2009, prosecutors argued Abraham's motive was "simply greed," saying his aim "was to squeeze as many interviews and record checks as possible into as little time as possible, thereby maximizing his income — at the expense of our national security." A "significant period" of incarceration, prosecutors said in court papers, "would send a powerful, salutary message of deterrence to other federal background investigators who might be tempted to follow [Abraham's] corrupt path: If you falsify your reports, you will face sure, swift, and severe punishment." The judge sentenced Abraham to two years and three months in prison. Abraham appealed. Six months later, he died in prison. Some background investigators convicted of falsifying or fabricating their reports have cited workplace pressures as a contributing factor. Former USIS investigator Marcus Travers pleaded guilty last September to lying about conducting an interview, saying it was the result of "the pressure I felt of completing the case," according to court records. He added: "I panicked under the pressure in the situation, and made a huge error in judgment." Travers pleaded guilty to a misdemeanor charge of making a false statement last May and was given a suspended jail sentence, three years probation and was required to make restitution of more than \$78,000. Interviews with nearly half a dozen current and former OPM and contractor background investigators cited stressful work environments, often crushing workloads and pressure to clear cases quickly. The investigators emphasized that was still no excuse for falsifying investigations. Of the time crunch investigators face to close cases, "We've heard hundreds of complaints from our members, who are the boots on the ground, if you will," Martin, president of the investigators' group, said. Investigations on an 'assembly line'?

Faced with a significant backlog of background investigations a dozen years ago, thanks to the military buildup of Iraq and Afghanistan, the need for "cleared" personnel skyrocketed. The Defense Security Service, the small Defense Department

agency tasked with conducting investigations of DoD personnel and contractors, struggled to keep up. At its nadir, it took an average of 18 months for DSS to conduct investigations. In 2005, Congress and the White House agreed to shift the authority for conducting DoD's background checks to OPM, which contracts out about half of its workload to private companies, which currently include CACI and KeyPoint, in addition to USIS. Lawmakers also mandated new timelines for completing investigations: Most new checks would have to be completed in 40 days, including the time the requesting agency needed to adjudicate the case. Nicole Smith worked as a background investigator for USIS for several years starting in 2003, and is now an attorney working on security clearance issues at the Tully Rinckey law firm in Washington. When she first starting working for the company, she said, it wasn't uncommon for investigators to ask for extensions on their "assigned completion dates." As the push for timeliness governmentwide ramped up, the company and investigators, themselves, grew more reluctant to miss a deadline, she said. "I remember at the end of the month what the push was: Get cases in so that USIS would get paid," she said. Smith said she typically worked on anywhere from 14 to 20 cases at any one time, with about two weeks to finish each one before its due date. "Sometimes, it seemed more like an assembly line and you are just kind of pushing through," she said. "You're getting a source, and it might not necessarily be the best source." Testifying before the House Oversight and Government Reform Committee earlier this year, current USIS chief executive Sterling Phillips — who was not at the company when the alleged fraud occurred — said it's in the best interests of the company in both the short- and long-term to "do the job right the first time." "If at any time OPM or the agency that has requested an investigation finds it lacking, it can send a case back to the company at no cost to the government." "The cost to USIS of quality defects and re-work is high," he testified.