UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
FAX TRANSMISSION

OFFICE OF THE CLERK
FACSIMILE COVER PAGE

DATE: October 3, 2007

TO: **Christy Keeny**
Dan Stormer
Sanjukta Paul **626-577-7079**

TO: **Mark Holscher**
Alexander Pilmer **213-680-8500**

TO: **Robert Newman** **213-487-0242**

TO: **Diane Curran** **202-328-6918**

TO: **Vesper Mei** **202-616-8470**

FROM: Raymond Neal,
Court Clerk to the Hon. Otis D. Wright II

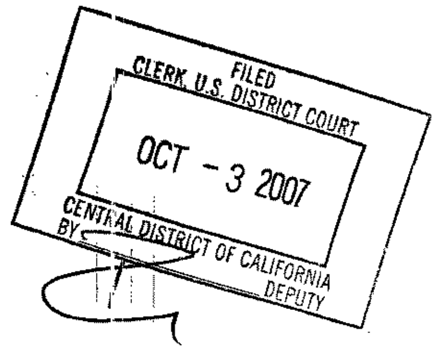
TEL: 213-894-8266 **FAX: 213-894-0101**

Total Number of Pages Transmitted (including this page): 18

RE: **CV 07-5669 ODW(VBKx): Nelson, et al. v. NASA, et al.**

Time sensitive court order attached. Parties of record will also receive the order by regular service.

Priority ✓
Send ✓
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Robert M. Nelson, William Bruce Banerdt, Julia Bell, Josette Bellan, Dennis V. Byrnes, George Carlisle, Kent Robert Crossin, Larry R. D'Addario, Riley M. Duren, Peter R. Eisenhardt, Susan D.J. Foster, Matthew P. Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J. Haw, James Kulleck, Sharon L. Laubach, Christian A. Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P. McElrath, Susan Paradise, Konstantin Penanen, Celeste M. Satter, Peter M.B. Shames, Amy Snyder Hale, William John Walker and Paul R. Weissman,

Plaintiffs,

vs.

National Aeronautics and Space Administration, an Agency of the United States; Michael Griffin, Director of NASA, in his official capacity only; Department of Commerce; Carlos M. Gutierrez, Secretary of Commerce, in his official capacity only; California Institute of Technology; and Does 1-100,

Defendants.

Case No. CV 07-5669 ODW (VBKx)

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This is a privacy rights action brought by 28 plaintiffs who are scientists, engineers, and other personnel employed by California Technical Institute to work at NASA's Jet Propulsion Laboratory pursuant to a government contract. Plaintiffs object to Defendants' implementation of a new security background check.

Plaintiffs allege that the implementation of the new security measures violate: (1) their Fourth Amendment protection from unreasonable searches and seizures; (2) their Fourteenth Amendment right to privacy; (3) the Administrative Procedure Act; (4) the Privacy Act; and (5) the California Constitution. Plaintiffs seek injunctive and declaratory relief. This Court has jurisdiction to hear this action under 28 U.S.C. § 1331.

Currently before the Court is Plaintiffs' Motion for Preliminary Injunction, filed on August 30, 2007. Plaintiffs argue that, if a preliminary injunction is not granted, they will either have to comply with the new security measures or risk losing their jobs. After review of the parties' submissions, the *amicus curiae* briefs and the case file, as well as the arguments advanced by counsel at the hearing, the Court hereby DENIES Plaintiffs' Motion for Preliminary Injunction.

II. FACTUAL BACKGROUND

Defendant National Aeronautics and Space Administration ("NASA") was created by Congress in 1958. Defendant California Institute of Technology ("Caltech") is a non-profit educational institution located in Pasadena, California. The Jet Propulsion Laboratory ("JPL") is an operating division of Caltech, staffed entirely by Caltech employees. Since 1959, Caltech has operated JPL pursuant to a written contract as a NASA Federally Funded Research and Development Center. In

short, Plaintiffs are contract employees for the federal government. JPL's actual physical facilities are also owned by NASA.

The 28 named Plaintiffs are scientists, engineers, and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs. Plaintiffs allege that many of the named plaintiffs have worked at JPL for more than 20 years. None of the plaintiffs allegedly have had prior security clearances nor have they previously worked with classified material of any kind. Plaintiffs further contend that all research data that they generate is in the public domain and their findings are freely shared with the scientific community and the public.

On August 27, 2004, President Bush signed Homeland Security Presidential Directive 12 ("HSPD-12"), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. HSPD-12 directed the Secretary of Commerce to promulgate a Federal standard for "secure and reliable forms of identification" within six months. HSPD-12 defined "secure and reliable forms of identification" to mean identification that is: (a) "issued based on sound criteria for verifying an individual employee's identity;" (b) "strongly resistant to identity fraud, tampering, counterfeiting and terrorist exploitation;" (c) "can be rapidly authenticated electronically;" and (d) "is issued only by providers whose reliability has been established by an official accreditation process."

In response to HSPD-12, in March 2006, the U.S. Department of Commerce ("DOC"), also named as a defendant in this action, promulgated a standard entitled "Personal Identification Verification (PIV) of Federal Employees and Contractors," codified at FIPS PUB 201-1. The sole authority for the PIV standard was based on HSPD-12 and imposed a background investigation requirement for all employees or contractors seeking to obtain the new form of identification. The PIV standard

mandates that "only an individual with a background investigation on record is issued a credential." The PIV standard further specifies that the background investigation required for federal employment will be a "National Agency Check with Inquires," or its equivalent.

On May 24, 2007, NASA incorporated the above-mentioned requirements through a NASA Interim Directive, NPR 1600.1 ("NASA Directive"), that established a new "agency-wide policy for the creation and issuance of federal credentials at NASA." The NASA Directive states that it is being implemented in compliance with HSPD-12 and the PIV standard established by the DOC.

After the NASA Directive was established, JPL personnel were informed that they would have to submit to a background investigation, the extent of which would be determined by their position's risk level. The background investigation is a prerequisite to receiving the required PIV badge.

For "low risk" employees, such as all plaintiffs in this case, the investigation begins with completion of Standard Form 85 ("SF-85"), a questionnaire for non-sensitive positions. SF-85 requires various types of background information to which Plaintiffs do not object, such as name, date of birth, place of birth, social security number, etc. The form also requires information about employment and residential history for the past five years, educational history starting with high school, the names of three individuals who know the applicant well, and a statement as to whether the applicant has used illegal drugs in the past year.

Applicants are also required to sign, as part of SF-85, an "Authorization for Release of Information," which authorizes the agency to collect "any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *See* SF-85 at p.6. Plaintiffs argue that the language in the waiver is

overly broad considering the "low risk" nature of their jobs.

After the waiver is signed, written inquires are then made to educational institutions, former employers, landlords, and references. These inquires are used to verify the applicant's historical information. Plaintiffs allege that the landlords, past employers, etc. are also asked to report any adverse information they have on the plaintiff with respect to "abuse of alcohol or drugs," "financial integrity," "mental or emotional stability," "general behavior or conduct," and "other matters."

The NASA Directive states that if the investigation process yields any "derogatory or unfavorable information," it will be forwarded to the Human Resources Officer for JPL, who will determine "employment suitability." JPL has allegedly posted on an internal website the various grounds upon which "employment suitability" will be determined. The grounds allegedly include "infrequent, irregular but deliberate delinquency in meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit history," "sexual misconduct with impact on job," "sodomy," "attitude," "personality conflict," "absenteeism or attendance problems," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation."[1]

Plaintiffs allege that they have been informed at public meetings and by JPL senior administrators that if they do not have their PIV badge by October 27, 2007,

---

[1] While Plaintiffs allege that JPL's internal policy specifically mentions "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation" as grounds upon which a person can be determined unsuitable for employment, the exhibit Plaintiffs use to support this allegation is devoid of any mention of these particular "grounds." *See* Exhibit R attached to the Penanen Declaration.

they will be barred from the JPL premises and will be deemed to have terminated their employment with JPL. Plaintiffs have until October 5, 2007 to fill out SF-85 and other required documents in order to be eligible to receive their PIV badge by October 27, 2007. Because of this, Plaintiffs allege that they will suffer irreparable harm. Accordingly, Plaintiffs have filed the instant motion for preliminary injunction.

III. DISCUSSION

A. Legal Standard – Preliminary Injunction

In deciding whether to issue a preliminary injunction, a court must balance the plaintiffs' likelihood of success against the relative hardship to the parties. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). A court may appropriately issue a preliminary injunction where the "plaintiffs demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (internal quotation marks omitted). "These two alternatives represent 'extremes of a single continuum,' rather than two separate tests." *Clear Channel Outdoor Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003) (quoting *Walczak*, 198 F.3d at 731). "Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party." *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005).

The district court must also consider whether the public interest favors issuance of the injunction. *Id.* "This alternative test for injunctive relief has been formulated as follows: a plaintiff is required to establish '(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not

granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Shelley*, 344 F.3d at 917-18 (quoting *Johnson v. Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)).

B. Analysis

1. Standing and Ripeness

"Article III of the [U.S.] Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). "In order to ensure that a federal court's Article III power has been properly invoked, the courts have developed several doctrines, including standing, mootness, and ripeness, each of which imposes a different requirement on the substance of a plaintiff's claim." *Lee v. State of Or.*, 107 F.3d 1382, 1387 (9th Cir. 1997) (citing *Allen*, 468 U.S. at 750). These doctrines present threshold questions pertaining to federal court jurisdiction. Thus, "[b]efore the judicial process may be invoked, a plaintiff must show that the facts alleged present the court with a case or controversy in the constitutional sense and that [they are] proper plaintiff[s] to raise the issues sought to be litigated." *Olagues v. Russoniello*, 770 F.2d 791, 796 (9th Cir. 1985) (citations omitted). We are particularly concerned in this case with standing and ripeness.

To establish standing, a plaintiff must demonstrate that he has suffered an "injury in fact" – "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Whether a dispute is ripe depends on 'the fitness of the issues for judicial decision' and 'the hardship to the parties' of withholding review." *Hotel Employees and Rest. Employees Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512-13 (9th Cir. 1993) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967) (*abrogated on other grounds*)). Plaintiffs

bear the burden of alleging the facts necessary to establish standing and ripeness. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

Here, it is first necessary to determine the alleged cause of Plaintiffs' injury or potential injury. It is the "cause" of potential injury or injuries that initially appears intertwined and confusing. However, for the sake of clarity, the Court separates Plaintiffs' grievance into two parts. First, Plaintiffs argue that SF-85 is overly broad and intrusive considering the "low-risk" nature of their jobs at JPL. Second, Plaintiffs argue that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional. The Court feels that by separating Plaintiffs' allegations into these two distinct issues, the standing and ripeness issues can be better analyzed.

First, dealing with the SF-85 argument alone, it appears that Plaintiffs have standing and their allegations regarding SF-85 are ripe for review. "Where only injunctive or declaratory relief is sought, a plaintiff must show 'a very significant possibility' of future harm in order to have standing to bring suit." *Coral Const. Co. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) (quoting *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir.1990). "The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (citations omitted). Here, it is undisputed that if Plaintiffs do not sign the SF-85 waiver by October 5, 2007 they will not receive their identification badges. Without their badges they will not have access to the JPL premises and will thus be deemed to have voluntarily resigned. It appears that this is a concrete injury that is imminent and not hypothetical.

Second, the Court looks to Plaintiffs' attack on JPL's internal policy that explains when someone is "unsuitable" for employment. It is clear that this "policy"

has not caused an "injury in fact." There is also not an imminent injury. It is strictly speculative to allege that JPL's "policy" will ever come into play. In addition, there have been no facts to show that the "policy" is truly a JPL policy or just a list found on JPL's internal website. Accordingly, the Court finds that Plaintiffs do not have standing to attack this alleged policy. And the policy itself is also not ripe for review. Therefore, to streamline this case, the Court will only focus on SF-85 and whether the government is justified in requiring Plaintiffs to sign the form.

2. Likelihood of Success on the Merits

a. Plaintiffs' Fourth Amendment Claim

Plaintiffs' contention is that the SF-85 form and waiver required by NASA are unreasonable searches in violation of the Fourth Amendment. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."

The Court agrees with Defendants' argument that the Fourth Amendment has never applied to background checks. And, if the Fourth Amendment does apply to this case, Plaintiffs have not shown how. Plaintiffs rely on cases addressing whether the search of an employee's body and seizure of bodily fluids through a drug testing constitutes an unreasonable search and seizure. Plaintiffs make no argument that a questionnaire, background check, or authorization to release records constitutes a "search." Plaintiffs bear the burden to demonstrate that a search or seizure has occurred, that they have a "reasonable expectation of privacy" in the information being sought, and that the expectation of privacy is "protectable" in this specific instance. In short, Plaintiffs have not shown the Court how the Fourth Amendment applies.

In addition, even if Plaintiffs were able to show that a background check invokes the Fourth Amendment, the Supreme Court has noted that "we have never

held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *U.S. v. Karo*, 468 U.S. 705, 712 (1984). Here, there has not been an actual invasion of privacy, but only a potential invasion since the government has not yet checked any of the Plaintiffs' backgrounds. Therefore, there is not a likelihood that Plaintiffs' Fourth Amendment claim will succeed on the merits.

b. Plaintiffs' Fourteenth Amendment Claim

Plaintiffs' second claim alleges a "[v]iolation of U.S. Constitution, Fourteenth Amendment." *See* Compl. ¶ 19. However, the Fourteenth Amendment applies only to the states, not the federal government. *See* U.S. Const. amend. XIV, § 1 (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."); *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[the] Fourteenth Amendment . . . applies only to the states."). Here, Plaintiffs allege no conduct by any state or state agency, and they present no argument that the Fourteenth Amendment should apply to the federal government, a federal agency, or a private entity acting pursuant to a federal directive. Plaintiffs concede in their Joint Reply that the Fourteenth Amendment does not apply to the federal government. *See* Joint Reply at p.7. Accordingly, Plaintiffs are unlikely to succeed on the merits of their Fourteenth Amendment claim.

c. Plaintiffs' Claim that Defendants' Privacy Waiver and Background Investigation Policies Violate the Administrative Procedure Act

The Administrative Procedure Act ("APA") requires courts to "hold unlawful and set aside agency action found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(c). In this case, Plaintiffs argue that the DOC and NASA acted as lawmakers by creating a mandate that federal contractors must submit to an extensive background check in order to gain access to federal facilities. Specifically, Plaintiffs

argue that HSPD-12 itself contains no directive or policy regarding a background investigation, but is concerned only with the establishment of a "Federal standard for secure and reliable forms of identification." HSPD-12(2).

Defendants argue that the central purpose of HSPD-12 is to "enhance security" and, in so doing, HSPD-12 granted DOC the discretion to determine the "sound criteria" agencies must use to verify employee and contractor identity. Accordingly, Defendants argue HSPD-12 necessarily authorizes some level of investigation and evaluation of the individual's background.

In addition, Defendants argue that Plaintiffs ignore the fact that NASA has the power to require background investigations via the National Aeronautics and Space Act of 1958 ("Space Act"). The Space Act states:

> The Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate; and if any such investigation develops any data reflecting that the individual who is the subject thereof is of questionable loyalty the matter shall be referred to the Federal Bureau of Investigation for the conduct of a full field investigation, the results of which shall be furnished to the Administrator.

42 U.S.C. § 2455(a). The language of the Space Act clearly gives NASA the authority to implement background investigations as part of the security screening of contractors. Therefore, it appears that Plaintiffs are unlikely to succeed on the merits of their APA claim.

d. Claim that Defendants' Policies Violate the Privacy Act

Plaintiffs claim that Defendants' policy directly violates several sections of the Privacy Act of 1974, codified at 5 U.S.C. § 552a(a)-(q). The Privacy Act requires that a federal agency "maintain in its records only such information about an

individual as is relevant and necessary to accomplish a purpose of the agency." 5 U.S.C. § 552a(e)(1). In addition to "maintaining" information, the Act's "legislative history also reveals a concern for unwarranted collection of information as a distinct harm in and of itself." *Albright v. U.S.*, 631 F.2d 915, 919 (D.C. Cir. 1980). Here, however, SF-85 specifically states that it complies with the Privacy Act. *See* SF-85 at p.2. Thus, until such time Plaintiffs can show that information collected via SF-85 was not properly maintained or gathered, the Court will give deference to an Executive Branch agency's assurance that its SF-85 complies with the Privacy Act.

Further, even if Plaintiffs might have a meritorious claim under the Privacy Act *after* the information is collected, the Ninth Circuit has noted that Congress did not intend to authorize the issuance of injunctions when dealing with certain sections of the Privacy Act. *Cell Assocs., Inc. v. Nat'l Insts. of Health, Dept. of Health, Ed. and Welfare*, 579 F.2d 1155, 1059 (9th Cir. 1978). Here, it appears that Plaintiffs are seeking a civil remedy under 5 U.S.C. §§ 552a(g)(1)(C) and/or 552a(g)(1)(D), which, as the Ninth Circuit has noted, do not provide for injunctive relief. *Id.* Therefore, while Plaintiffs' Privacy Act claim might have merit at a later time, it is not ripe for purposes of a preliminary injunction.

e. Informational Privacy

It appears that Plaintiffs' best claim is one for "informational privacy." While Plaintiffs have not specifically alleged "informational privacy" in their Complaint, they have given the allegation great weight in their papers that support their instant motion. Plaintiffs cite to Fed. Rule. Civ. Pro. 8(f), which provides that "all pleadings shall be so construed as to do substantial justice." Thus, even though it is not clearly pled, the Court will entertain Plaintiffs' "informational privacy" claim here.

"While the Supreme Court has expressed uncertainty regarding the precise bounds of the constitutional 'zone of privacy,' its existence is firmly established."

In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) and *Griswold v. Conn.*, 381 U.S. 479, 483 (1965)). The Ninth Circuit has "observed that the relevant Supreme Court precedents delineate at least two distinct kinds of constitutionally-protected privacy interests: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" *Id.* (quoting *Doe v. Attorney Gen.*, 941 F.2d 780, 795 (9th Cir.1991)).

It is clear that Ninth Circuit precedent supports Plaintiffs' claim for informational privacy, thus, the question before the Court is whether Plaintiffs are likely to succeed with this claim on the merits. "The right to informational privacy, however, 'is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.'" *Id.* at 959 (quoting *Doe v. Attorney Gen.*, 941 F.2d at 796). "Our precedents demand that we 'engage in the delicate task of weighing competing interests' to determine whether the government may properly disclose private information." *Id.* (quoting *Doe v. Attorney Gen.*, 941 F.2d at 796). Relevant factors to be considered include:

> . . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. (citing *Doe v. Attorney Gen.*, 941 F.2d at 796). "This list is not exhaustive, and the relevant considerations will necessarily vary from case to case." *Id.* "In each case, however, the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* (citing *Doe v. Attorney Gen.*, 941 F.2d at 796). "In most cases, it will be the overall context, rather than the particular item

of information, that will dictate the tipping of the scales." *Id.*

Here, the information requested is set forth in SF-85. SF-85 requires various background information to which Plaintiffs do not object, such as name, date of birth, place of birth, social security number, etc. The form also requires information about employment and residential history for the past five years, educational history starting with high school, the names of three individuals who know the applicant well, and a statement as to whether the applicant has used illegal drugs in the past year.

A specific portion of SF-85 that the Court was initially troubled by was the illegal drug use question. However, the government has safeguarded Plaintiffs' Fifth Amendment rights by noting that an applicant's response to the drug use question will not be used against the applicant in any subsequent criminal proceeding. *See* SF-85 question 14. The government's instructions to SF-85 also state that "[g]iving us the information we ask for is voluntary." *See* SF-85 at p.1. Therefore, the Court's analysis as to the first part of SF-85 tips in favor of the government, because the questionnaire itself is relatively non-intrusive. And, there are adequate safeguards in place when dealing with sensitive questions.

The second part of Plaintiffs' argument pertains to page six of SF-85, which contains the "Authorization for Release of Information." Plaintiffs argue that the language contained in the release is overly broad. Plaintiffs specifically object to the following language that the Court has italicized:

> I [a]uthorize *any* investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain *any* information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, *or other sources of information*. This information may include, *but is not limited to*, my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.

When analyzing the language of the release, it is necessary to apply the test

from *Crawford*, which states that "the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 958. Here, the government has shown that it has an interest in "enhancing security" at federal facilities. The Court concludes that this is a legitimate governmental interest. Further, Defendants have declared that a "procedure whereby the government attempts to verify the correctness of the information entered onto the form substantially improves the probability of detecting individuals claiming a false identity." Federal Defendants' Opp'n at 6. Verifying the identity of federal contractors is also a legitimate interest.

The Court must now determine whether the government's actions are narrowly tailored to meet the legitimate interest. The Court is persuaded by the government's position that "[k]nowing the name of an individual does nothing to enhance security unless the agency also verifies that the individual is not connected to activity that poses a security threat." Federal Defendants' Opp'n at 12. Thus, the language in the release referring to "other sources of information" is justified because it allows the government some leeway in conducting its investigation. Indeed, the government notes that the release "must allow the investigators some flexibility to follow up on relevant needs." The Court agrees.

There are also safeguards in place on the face of the release that support the notion that the release is narrowly tailored. The release states: "for some sources of information, a separate release will be needed." This language shows that the release does not cover all sources of information. The Court also reiterates that any potential information that *might* be uncovered as a result of the release is not relevant to the Court's analysis, because hypothetical harms are not ripe for review. Therefore, the Court finds, for purposes of this Order only, that the government's actions are

narrowly tailored to meet its legitimate interest.

Plaintiffs also emphasize that the authorization form is overly broad *as applied* to each of the plaintiffs, because they are "low risk" contractors. However, the Court disagrees with this contention. The release itself is a standard SF-85. It does not seek extensive or overly-sensitive information. The Court also notes that NASA and its facilities require a relatively secure environment. And, while the Court concedes that JPL is not the Central Intelligence Agency, there are still very high-tech and sensitive devices at JPL, such as satellite monitoring equipment, that warrant strict security measures. Plaintiffs' argument that JPL's security has been lax up until now is unpersuasive. Accordingly, the evidence presented by Plaintiffs does not show a likelihood of success on the merits with regard to their informational privacy claim.

3. Possibility of Irreparable Injury to Plaintiffs

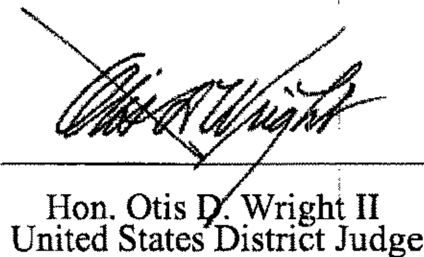
Plaintiffs argue that if a preliminary injunction is not granted, they will either have to comply with the new security measures or risk losing their jobs. Of course losing one's job and livelihood is a great harm. However, "[t]he key word in this consideration is *irreparable*. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (emphasis added). As Defendants point out, any temporary denial of access to JPL does not amount to irreparable harm. Notably, there is an appeals process incorporated into the new security check process where applicants who are denied badges can seek redress from a three-person appeals panel. *See* Exhibit P in support of Plaintiffs' Motion at p.19. If Plaintiffs were to succeed by way of the appeals panel, their access could then be restored, and Plaintiffs could resume working at the facility. Thus, this Court does not provide the only remedy available to Plaintiffs.

The other possible injury that Plaintiffs allege pertains to having to give out their private information. However, unlike other cases in the area of informational privacy, Plaintiffs here are not literally disclosing private information, aside from the illegal drug question discussed above. By filling out SF-85, Plaintiffs are simply giving authorization for the government to perform a background investigation. And at this point the Court is only looking at a facial challenge to SF-85. Anything that *might* arise after an employee signs the authorization form is purely speculative and not ripe for review. Therefore, the argument that Plaintiffs will suffer irreparable harm by signing an authorization form is without merit.

IV. CONCLUSION

For the forgoing reasons, the Court finds that Plaintiffs have not shown either a likelihood of success on the merits or irreparable injury. Therefore, Plaintiffs' Motion for Preliminary Injunction is DENIED.

DATED: October 3, 2007



Hon. Otis D. Wright II
United States District Judge