

FILED

FOR PUBLICATION

OCT 11 2007

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

ROBERT M. NELSON; WILLIAM
 BRUCE BANERDT; JULIA BELL;
 JOSETTE BELLAN; DENNIS V.
 BYRNES; GEORGE CARLISLE; KENT
 ROBERT CROSSIN; LARRY R.
 D'ADDARIO; RILEY M. DÜREN;
 PETER R. EISENHARDT; SUSAN D.J.
 FOSTER; MATTHEW P. GOLOMBEK;
 VAROUJAN GORJIAN; ZAREH
 GORJIAN; ROBERT J. HAW; JAMES
 KULLECK; SHARLON 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;
 PAUL R. WEISSMAN,

No. 07-56424

D.C. No. CV-07-05669-ODW
 Central District of California,
 Los Angeles

ORDER

Plaintiffs - Appellants,

v.

NATIONAL AERONAUTICS AND
 SPACE ADMINISTRATION, an Agency
 of the United States; MICHAEL
 GRIFFIN, Director of NASA, in his
 official capacity only; UNITED STATES

DEPARTMENT OF COMMERCE;
CARLOS M. GUTIERREZ, Secretary of
Commerce, in his official capacity only;
CALIFORNIA INSTITUTE OF
TECHNOLOGY,

Defendants - Appellees.

Before: B. FLETCHER, REINHARDT and BERZON, Circuit Judges.

Appellants' motion for an injunction pending appeal is granted. Appellants raise serious legal and constitutional questions, and the balance of hardships tips sharply in their favor. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328, 464 U.S. 879 (1983).

Appellants raise various legal and constitutional challenges to appellees' requirement that appellants each complete a questionnaire and execute a waiver for release of information. The questionnaire requires some information to which appellants do not object, such as appellant's name, date of birth, place of birth, and social security number. However, the questionnaire also includes inquiries to which appellants do object, including an inquiry about counseling they may have received. Appellants also object to the general waiver for release of information on the ground that it is overly broad and is not limited to information pertinent to their identity.

Appellees' questionnaire and waiver were adopted to implement Homeland Security Presidential Directive 12 (HSPD-12), which requires the promulgation of a federal standard for "secure and reliable forms of identification." Appellees' interest in obtaining the completed forms for the purpose of investigating the identity of appellants is questionable, as the information that may be obtained goes far beyond that purpose. The waiver for release of information form authorizes appellees to perform a background investigation "to obtain any information relating to activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." Most appellants have worked for the Jet Propulsion Laboratory for over twenty years; none are required to have security clearances, as none have access to classified or secret material. All appellants have been designated "low risk" employees.

Because of the nature of the information subject to which the waiver applies, serious privacy concerns arise. This court has recognized the right to informational privacy. To justify actions infringing upon the right, the government must show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet that interest. *See In*

re Crawford, 194 F.3d 954, 958 (9th Cir. 1999); *see also Whalen v. Roe*, 429 U.S. 589, 598-99 (1977).

The balance of hardships tips sharply in favor of appellants because if appellants do not complete the questionnaires for non-sensitive positions and the waivers for release of information, they are scheduled to lose their jobs before the appeal will be heard. On the other side of the scale, there is no emergency as to appellees' need for the answers to the questionnaires or for the execution of the waiver forms during the less than two months remaining before the case will be argued; it has been more than three years since the Presidential Directive the government is relying upon was issued. Moreover, the need for the information to be collected is questionable in general, given the absence of any apparent relationship between its collection and the production of reliable identification cards for these employees. Accordingly, the injunction granted by this court on October 5, 2007 will continue in effect pending an expeditious appeal.

Appellants' motion for a stay of district court proceedings is denied.

The briefing schedule previously established remains in effect.

The Clerk shall calendar this appeal during the week of December 3-7, 2007, in San Francisco or Pasadena, California.