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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-5669 ODW (VBKx)	Date	January 16, 2007
Title	*Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.*		

Present:	The Honorable Otis D. Wright II, United States District Judge

Raymond Neal	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING in part and DENYING in part Federal Defendants' Motion to Dismiss

I. INTRODUCTION

Pending before the Court is Defendants National Aeronautics and Space Administration's, Administrator of NASA Michael Griffin's, Department of Commerce's, and Secretary of Commerce Carlos M. Gutierrez's (collectively, "Federal Defendants") Motion to Dismiss ("Motion"), filed on November 21, 2007. On December 5, 2007, Plaintiffs filed their Opposition to the Federal Defendants' Motion, to which Defendants timely filed a Reply brief. Having carefully and thoroughly considered the arguments and materials raised in support of and in opposition to the instant Motion, as well as the arguments advanced by counsel at the January 11, 2008 hearing, the Court hereby GRANTS in part and DENIES in part Federal Defendants' Motion.

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. Allegedly, none of the plaintiffs 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 allegedly based on HSPD-12. The PIV standard imposed a background investigation requirement for all employees or contractors seeking to obtain the new form of identification mandating 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"), and 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 [his/her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *See* SF-85 at p.6. After the applicant fills out and signs SF-85, the investigator will send out Form 42, which is an "Investigative Request for Personal Information" that is sent to references, employers, and landlords. Plaintiffs argue that the language and questions found in SF-85 and Form 42 are overly broad and intrusive considering the "low risk" nature of their jobs.[1] On October 22, 2007, Plaintiffs filed a First Amended Complaint ("FAC") with the Court seeking injunctive and declaratory relief. The FAC alleged five substantive claims against the Federal Defendants: (1) Violation of the Fourth Amendment; (2) Violation of Informational Privacy Rights; (3) Violation of Fifth Amendment Rights; (4) Violation of the Administrative Procedure Act; and (5) Violation

[1] The Court takes judicial notice of SF-85 and Form 42 as attached to Plaintiffs' First Amended Complaint.

of Rights Protected by the California Constitution.

In the instant Motion, the Federal Defendants argue that the FAC should be dismissed on the grounds that Plaintiffs lack standing to maintain their claims and that Plaintiffs' claims are not ripe under Federal Rule of Civil Procedure 12(b)(1); and on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

III. DISCUSSION

A. 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 and Form 42 are 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 and Form 42 arguments alone, it appears that Plaintiffs have standing and their allegations regarding SF-85 and Form 42 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 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 alleged "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, when analyzing the Federal Defendants' Motion, the Court will only focus on SF-85 and Form 42. The issue becomes whether the government is justified in seeking the allegedly

broad waiver and asking the specific questions located on the forms. Anything that might happen *after* Plaintiffs sign SF-85 and Form 42 is sent out is not ripe for review.

B. Legal Standard: Motion to Dismiss (12(b)(6))

A motion to dismiss tests the legal sufficiency of the claim stated in the plaintiff's complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1975); *see also* Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion is granted where there is either a lack of cognizable legal theory or the plaintiff fails to allege sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955, 1979 (2007). However, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

C. Analysis

In the instant case, Plaintiffs do not contest the dismissal of the California Constitution claims as to all parties. Therefore, in examining the Federal Defendants' Motion, the Court will focus on claims one, two, three, and four as alleged in the FAC.

1. Plaintiffs' Fourth Amendment Claim Fails

Plaintiffs' contention is that the SF-85 form and waiver required by NASA and Form 42 sent out by investigators 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." U.S. Const. amend. IV.

The Court agrees with Defendants' argument that the Fourth Amendment has not traditionally applied to background checks and questionnaires. In support of their Motion, Defendants point to *Greenawalt v. Indiana Dept. of Corrections*, 397 F.3d 587 (7th Cir. 2005). While *Greenawalt* is not binding on this Court, the Court finds it

persuasive. This is especially true in light of the fact that the Court was unable to find any analogous Ninth Circuit cases.

The facts of *Greenawalt* are very similar to the facts in the case at bar. Plaintiff Kristin A. Greenawalt was required to undergo psychological examination in order to keep her job at the Indiana Department of Corrections. *Id*. at 588. Plaintiff Greenawalt claimed that a test, which lasted two hours and inquired into details of her personal life, constituted an unreasonable search in violation of the Fourth Amendment. *Id*. The Seventh Circuit Court of Appeals held that "the Fourth Amendment should not be interpreted to reach the putting of questions to a person, even when questions are skillfully designed to elicit what most people would regard as highly personal private information." *Id*. at 590. The court noted:

> The implications of extending the doctrine of [Fourth Amendment] cases to one involving mere questioning would be strange. . . . Questioning in a police inquiry or a *background investigation* or even a credit check would be in peril of being deemed a search of the person about whom the questions were asked. Psychological tests, widely used in a variety of sensitive employments, would be deemed forbidden by the Constitution if a judge thought them "unreasonable."

Id. at 590-91 (emphasis added). The court affirmed the dismissal of the plaintiff's Fourth Amendment claim. It reached its conclusion despite acknowledging the fact that "many cases say that the Fourth Amendment is intended to protect privacy." *Id*. at 590.

In their Opposition, Plaintiffs rely on *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), to assert that the Fourth Amendment was implicated when the plaintiffs in that case were required to submit urine samples, which were subsequently tested to reveal "a host of private medical facts about an employee." *Id*. at 617. In support of its ruling, the Supreme Court explained that "[b]ecause . . . the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment." *Id*. Although the Supreme Court in *Skinner* is unclear as to what standards, if any, can be applied to determine what forms of "intrusions" implicate the Fourth Amendment, what

is clear is that the ruling is quite narrow.

If Plaintiffs in the present case are alleging that SF-85's "blanket authorization" is unlimited in scope, thereby allowing Defendants to access personal medical records, and if medical records have actually been sought, *Skinner* would perhaps apply and the Fourth Amendment would be implicated. However, if the authorization is limited in scope to identifying the plaintiffs' past employers, references, landlords, and the like to better assist the defendants in conducting a background investigation, *Skinner* would not apply and the Fourth Amendment is not implicated.

In answering the above quandary, it is critical to look at SF-85 itself. The last page of SF-85 contains the "authorization for release of information." On its face, the release appears fairly broad. The language allows investigators to obtain background information related to specific activities and from "other sources of information." This clause seems to leave the investigation very open ended. However, at this stage when examining the not-yet-performed background check, the issue of ripeness becomes critical. If SF-85 stated that the investigators in fact were going to seek private medical records, Plaintiffs' Fourth Amendment claim might survive a 12(b)(6) motion. However, that is not what we have here. Based on the persuasive Seventh Circuit ruling in *Greenawalt* and the fact that 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," this Court finds that Plaintiffs' Fourth Amendment claim must be dismissed. *See U.S. v. Karo*, 468 U.S. 705, 712 (1984).

2. Plaintiffs Have a Viable Informational Privacy Claim

"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 appears that the Ninth Circuit's reasoning in *Crawford* supports Plaintiffs' informational privacy claim. Plaintiffs argue that certain questions contained in SF-85 and Form 42, as well as the allegedly overly broad release waiver, violate their informational privacy rights. When analyzing Plaintiffs claim, it will be 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." *In re Crawford*, 194 F.3d at 958. However, at this stage in the litigation, the Court need only determine whether Plaintiffs' claim survives a Rule 12(b)(6) motion and not whether the Federal Defendants can meet their burden under the test from *Crawford*. It is enough that Plaintiffs contest the background check as overly intrusive and argue that the questions and forms are not narrowly tailored, considering Plaintiffs' "low risk" status as employees. Therefore, Plaintiffs have a viable informational privacy claim.

3. Plaintiffs' Fifth Amendment Claim Fails

Fundamental to one's Fifth Amendment right is the privilege against compulsory self-incrimination. This Court must examine whether Question 14, found on SF-85, compels unlawful self-incrimination under this privilege. If it does not, Plaintiffs' Fifth Amendment claim must be dismissed pursuant to Rule 12(b)(6).

Question 14 asks whether the Plaintiffs have, in the last year, "used, possessed, supplied, or manufactured illegal drugs." If the answer is "yes," the question seeks information relating to any treatment or counseling related to that involvement. Written into the question is also a use and derivative use immunity against prosecution for the admitted offense. Specifically, SF-85 states, "Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding."

Plaintiffs rely on *Nat'l Treasury Employees Union, et al. v. U.S. Dep't of Treasury ("NTEU")*, 838 F.Supp 631 (D.D.C. 1993) to argue that conferring immunity is not enough, but rather a "right not to answer the question" is required under the Fifth

Amendment. (Plaintiffs' Opp'n at p.25). However, Plaintiffs' reliance on *NTEU* is incorrect because the government defendant in that case conceded that "it ha[d] not provided to the Customs employees criminal immunity for any potentially incriminating responses." *Id*. at 634. Therefore, the plaintiffs in *NTEU* were not afforded the coextensive use and derivative use immunity that is required. The case at bar is distinguishable from *NTEU* because Plaintiffs *are* given use and derivative use immunity. The "right not to answer the question" would be required *only if* immunity is not conferred to the Plaintiffs.

In *Kastigar, et al. v. U.S.*, 406 U.S. 441 (1972), the Supreme Court recognized the fundamental privilege against compulsory self-incrimination. *Id*. at 444. However, equally clear was the Court's holding that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Id*. at 453.

Because SF-85 provides Plaintiffs with criminal immunity for any potentially incriminating response to question 14, Plaintiffs cannot state a claim for unlawful self-incrimination. Accordingly, Plaintiffs Fifth Amendment claim must be dismissed pursuant to Rule 12(b)(6).

4. Plaintiffs' Have a Viable Administrative Procedure Act Claim

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 first argue that Plaintiffs lack standing to bring a claim under the APA. The APA imposes a prudential standing requirement that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be

protected or regulated by the statute or constitutional guarantee in question." *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-40 (9th Cir. 2005) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Defendants' argument that Plaintiffs are not within the "zone of interest" is unpersuasive. Plaintiffs' FAC centers around privacy rights, which are "constitutional guarantees." NASA's implementation of NPR 1600.1, which requires the new background checks, arguably delves into a person's "privacy," therefore, Plaintiffs are within the "zone of interest" by contesting NASA's NPR 1600.1 and DOC's FIPS PUB 201-1 on privacy rights grounds.

Second, Defendants argue that they clearly have the authority to impose the new background check requirement. Whereas Plaintiffs focus solely on HSPD-12, Defendants point to the Space Act and the Federal Information Security Management Act in conjunction with HSPD-12 as sources of authority that allow the Federal Defendants to promulgate background investigation requirements. Taking into account these various other sources of broad power, the Federal Defendants argue that they have the authority to implement the use of SF-85 and Form 42. However, Defendants arguments are better suited for a motion for summary judgment where the Court can consider facts outside of the pleadings. As for the instant motion to dismiss, the Court finds that Plaintiffs sufficiently allege a claim under the APA. Therefore, Defendants Motion with regard to the APA claim is denied.

IV. CONCLUSION

For the reasons stated above, Federal Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. Specifically, Plaintiffs claims for violations of the Fourth and Fifth Amendments are hereby dismissed with prejudice. With regard to

Plaintiffs' APA and informational privacy claims, Defendants' Motion is DENIED. Plaintiffs do not contest the dismissal of the California Constitution claims as to all parties. Therefore, this case will proceed with Plaintiffs' plea for injunctive and declaratory relief under claims two and four as alleged in the FAC.

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