

1 JENNIFER STISA GRANICK (SBN 168423)  
2 [jennifer@eff.org](mailto:jennifer@eff.org)  
3 LEE TIEN (SBN 148216)  
4 [tien@eff.org](mailto:tien@eff.org)  
5 ELECTRONIC FRONTIER FOUNDATION  
6 454 Shotwell Street  
7 San Francisco, CA 94110  
8 Telephone: 415/436-9333  
9 415/436-9993 (fax)  
10 *Amicus Curiea*

11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
13 **WESTERN DIVISION**

14 ROBERT M. NELSON, WILLIAM BRUCE )  
15 BANERDT, JULIA BELL, JOSETTE BELLAN, )  
16 DENNIS V. BYRNES, GEORGE CARLISLE, )  
17 KENT ROBERT CROSSIN, LARRY R. )  
18 D'ADDARIO, RILEY M. DUREN, PETER R. )  
19 EISENHARDT, SUSAN D.J. FOSTER, )  
20 MATTHEW P. GOLOMBEK, FAROUJAN )  
21 GORJIAN, ZAREH GORJIAN, ROBERT J. )  
22 HAW, JAMES KULLECK, SHARON L. )  
23 LAUBACH, CHRISTINA A. LINDENSMITH, )  
24 AMANDA MAINZER, SCOTT MAXWELL, )  
25 TIMOTHY P. MCELRATH, SUSAN )  
26 PARADISE, KONSTANTIN PENANEN, )  
27 CELESTE M. SATTER, PETER M.B. )  
28 SHAMES, AMY SNYDER HALE, WILLIAM )  
JOHN WALKER AND PAUL R. WEISSMAN, )

Plaintiffs,

v.

21 NATIONAL AERONAUTICS AND SPACE )  
22 ADMINISTRATION, AN AGENCY OF THE )  
23 UNITED STATES; MICHAEL GRIFFIN, )  
24 DIRECTOR OF NASA, IN HIS OFFICIAL )  
25 CAPACITY ONLY, DEPARTMENT OF )  
26 COMMERCE; CARLOS M. GUTIERREZ, )  
27 SECRETARY OF COMMERCE, IN HIS )  
28 OFFICIAL CAPACITY ONLY; CALIFORNIA )  
INSTITUTE OF TECHNOLOGY; AND DOES )  
1-100 )

Defendants.

Case No. CV-07-05669 ODW (VBKx)

**BRIEF OF *AMICUS CURIAE***  
**ELECTRONIC FRONTIER**  
**FOUNDATION IN SUPPORT OF**  
**PLAINTIFFS' MOTION FOR**  
**PRELIMINARY INJUNCTION**

Date: October 1, 2007

Time: 4:00 p.m.

Courtroom: 11

Honorable Otis D. Wright II

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... II**

**STATEMENT OF AMICUS CURIAE ..... 1**

**INTRODUCTION AND SUMMARY OF ARGUMENT..... 2**

**I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FOURTH  
    AMENDMENT CLAIM BECAUSE DEFENDANTS’ BACKGROUND INVESTIGATION IS  
    AN UNREASONABLE SEARCH AND SEIZURE OF EXTREMELY PRIVATE  
    INFORMATION PROTECTED BY THE CONSTITUTION ..... 3**

**II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR  
    CONSTITUTIONAL INFORMATION PRIVACY RIGHTS CLAIM BECAUSE THIS  
    HIGHLY INTRUSIVE INVESTIGATION PROGRAM IS NOT NARROWLY TAILORED TO  
    ADVANCE ANY LEGITIMATE GOVERNMENT INTEREST. .... 8**

**CONCLUSION ..... 12**

**TABLE OF AUTHORITIES**

**CASES**

*AFGE, Local 1533 v. Cheney*, 754 F.Supp. 1409 (N.D. Cal. 1990)..... 4

*Arizona v. Hicks*, 480 U.S. 321 (1987) ..... 5

*Berger v. New York*, 388 U.S. 41 (1967) ..... 5

*Chandler v. Miller*, 520 U.S. 305 (1997) ..... 5

*Doe v. Attorney General of the United States*, 941 F.2d 780, (9<sup>th</sup> Cir. 1991).....8, 9, 11

*Doe v. City of New York*, 15 F.3d 264, (2d Cir. 1994).....9, 11

*Greenawalt v. Indiana Department of Corrections*, 397 F.3d 587 (7th Cir. 2005)..... 6

*In re Crawford*, 194 F.3d 954, (9<sup>th</sup> Cir. 1999).....8, 9, 10

*Katz v. United States*, 389 U.S. 347 (1967)..... 4, 5

*National Federation of Federal Employees v. Greenberg*, 983 F.2d 286 (4th Cir. 1992)..... 6

*Nixon v. Administrator of General Services*, 433 U.S. 425, (1977) ..... 8

*Norman-Bloodsaw v. Lawrence Berkeley Laboratories*, 135 F.3d 1260, (9th Cir. 1998)..... 5

*O'Connor v. Ortega*, 480 U.S. 709, (1987)..... 3

*Olmstead v. United States*, 277 U.S. 438 (1928)..... 4

*Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566 (6th Cir. 2002)..... 6, 7

*Paul v. Davis*, 424 U.S. 693, (1976)..... 1, 9

*Silveira v. Lockyer*, 312 F.3d 1052, (9<sup>th</sup> Cir. 2002).....10

*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, (1989) ..... 5

*Tucson Women's Clinic v. Eden*, 371 F.3d 1173, (9th Cir. 2004) ..... 4,11

*United States v. Westinghouse Elect. Corp.*, 638 F.2d 570, (3d Cir. 1980)..... 10

*Whalen v. Roe*, 429 U.S. 589, (1977)..... 4, 8, 9

*Yin v. California*, 95 F.3d 864, (9th Cir. 1996) ..... 3

**OTHER AUTHORITIES**

Federal Defendants’ Opposition to Plaintiffs’ Motion For Preliminary Injunction ..... 3,11

Plaintiffs’ Motion for Preliminary Injunction .....2, 4, 7, 10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**STATEMENT OF AMICUS CURIAE**

*Amicus curiae* Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect free speech and privacy rights. As part of that mission, EFF has served as counsel or *amicus* in key cases addressing privacy issues and rights as applied to the Internet and other new technologies.

With more than 13,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world, [www.eff.org](http://www.eff.org).

Government ID cards and their associated databases are a major privacy concern for many reasons. EFF and other privacy groups have publicly criticized the HSPD-12 system, its lack of clear policy on background checks and their implementation, and the risk of unnecessarily intrusive background checks of disfavored individuals.

Accordingly, the questions at issue in this action are of great interest to both the public and to *amicus* as a civil liberties organization, and EFF believes that its privacy expertise will aid the Court.



1 this system can properly be evaluated.

2 **I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR FOURTH**  
3 **AMENDMENT CLAIM BECAUSE DEFENDANTS' BACKGROUND INVESTIGATION IS**  
4 **AN UNREASONABLE SEARCH AND SEIZURE OF EXTREMELY PRIVATE**  
5 **INFORMATION PROTECTED BY THE CONSTITUTION**

6 The background investigation challenged in this lawsuit is both a search and a seizure under  
7 the Fourth Amendment. The Fourth Amendment regulates a public employers investigation of its  
8 employees, even where that questioning is not physically invasive, especially where the  
9 information sought includes personal medical and sexual facts. Where there is little justification  
10 for an extensive and intimate background check, as here, the government employer violates the  
11 Fourth Amendment. The SF 85 and NACI procedure are collecting highly sensitive personal  
12 information from and about the plaintiffs. There is no nexus between the private, medical and  
13 sexual information sought and the Defendant's ability to uncover "convicted murderers" or  
14 "suspected terrorists," from among Plaintiffs, veteran employees of the JPL. See Federal  
15 Defendants Opposition to Plaintiffs' Motion For Preliminary Injunction ("Opposition") at 27.  
16 Because Plaintiffs' privacy rights outweigh the Defendants' interests, the background check  
17 violates the Fourth Amendment.

18 The Fourth Amendment protects citizens against unreasonable government searches and  
19 seizures. To be reasonable, a search ordinarily must be based on individualized suspicion of  
20 wrongdoing. *Yin v. California*, 95 F.3d 864, 869 (9th Cir. 1996). Where the government is acting  
21 as an employer, searches and seizures are still subject to the restraints of the Fourth Amendment,  
22 but the fact that the government is not acting in a law enforcement capacity affects the assessment  
23 of what is reasonable under the circumstances. *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987).  
24 For example, when a public employer alleges "special needs" as a justification for a Fourth  
25 Amendment intrusion, courts do not require the employer to get a warrant, but do examine closely  
26 the competing private and public interests advanced by the parties. *National Treasury Employees*  
27 *Union v. Von Raab*, 489 U.S. 656, 665-666 (1989). The employer must show both a compelling  
28 government interest in obtaining personal information about plaintiffs, and that plaintiffs have a  
reduced expectation of privacy. *AFGE, Local 1533 v. Cheney*, 754 F.Supp. 1409, 1419 (N.D. Cal.

1 1990).

2 The information that Defendants seek here is of the most private and protected kind.  
3 Medical and sexual facts are highly sensitive and constitutionally protected categories of  
4 information. *Whalen v. Roe*, 429 U.S. 589, 600 (1977) (constitutional liberty right in non-  
5 disclosure of medical information about prescription drugs). Citizens have a constitutional privacy  
6 right in the non-disclosure of these types of information. *Tucson Women's Clinic v. Eden*, 371 F.3d  
7 1173, 1193 (9th Cir. 2004). The SF 85 form and the NACI background check seek to obtain  
8 information on physical health, mental and emotional health and private sexual practices. *See* P.I.  
9 Motion at 8, citing Declaration of Konstantin Penanen, ¶ 20 and Exhibit R thereto. Plaintiffs have  
10 a strong expectation of privacy in this information and Defendants have an extremely high burden  
11 to prove that its collection of this information is justified.

12 The Defendants' collection of this information is a search and a seizure under Fourth  
13 Amendment law even in the absence of any physical trespass. The Fourth Amendment is triggered  
14 by infringing a reasonable expectation of privacy, not by trespass on a protected place, as  
15 Defendants assert. Prior to 1967, the Fourth Amendment was closely tied to a property interest in  
16 the place searched or the thing seized. *See, e.g. Olmstead v. United States*, 277 U.S. 438 (1928)  
17 (use of a wiretap to intercept a private telephone conversation was not a search for Fourth  
18 Amendment purposes because there had been no physical intrusion into the person's home).

19 The Court rejected the property-based trespass view asserted in both *Olmstead* and the  
20 Opposition in the seminal case of *Katz v. United States*, 389 U.S. 347 (1967). *Katz* held that the  
21 Fourth Amendment had been violated when police recorded a telephone conversation the defendant  
22 was having in a public phone booth. First, the Court noted that the Fourth Amendment protects  
23 people, not places. *Id.* at 351. It rejected the government's assertion that a search or seizure  
24 requires a physical invasion. The Court stated that physical penetration of a constitutionally  
25 protected area, the test asserted by Defendants here, is not the proper inquiry for determining an  
26 unlawful search or seizure. Rather, the Court embraced a more modern interpretation of the Fourth  
27 Amendment based on protecting a reasonable expectation of privacy.

28 Following *Katz*, the collection of intangible information without the consent of the subject

1 can be a Fourth Amendment search without any physical invasion into a protected space. Under  
2 both *Katz* and *Berger v. New York*, 388 U.S. 41 (1967) , wiretapping is a search, even though all  
3 that is taken is the defendant's thoughts, as expressed in conversation. *Katz*, 389 U.S. at 353;  
4 *Berger*, 388 U.S. at 59 (“[A]uthorization of eavesdropping for a two-month period is the equivalent  
5 of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause.”)

6 Further, collection of intangible information can be a seizure under the Fourth Amendment.  
7 While it is often said that the government seizes property only when it “meaningfully interfere[s]”  
8 with a “possessory interest,” *Arizona v. Hicks*, 480 U.S. 321, 324 (1987), this formulation runs  
9 counter to the holdings in both *Katz* and *Berger* in which the Court found communications were  
10 seized upon interception

11 Thus, a Fourth Amendment search and seizure occurs when the government forces a citizen  
12 to provide intimate evidence about himself even in the absence of any physical intrusion. For  
13 example, government employers' drug testing of employees is governed by the Fourth Amendment.  
14 This is true regardless of whether the analysis is performed after a blood draw, which invades the  
15 body, or on urine, which is merely an analysis of a waste product. Urinalysis is subject to Fourth  
16 Amendment restrictions because the testing reveals highly private medical facts, not because the  
17 collection is physically invasive, as Defendants erroneously argue. In *Skinner v. Railway Labor*  
18 *Executives' Ass'n*, 489 U.S. 602, 617 (1989), the Supreme Court stated that, while the process of  
19 collecting urine samples may in some cases involve “visual or aural monitoring of the act of  
20 urination,” “the chemical analysis can reveal a host of private medical facts.” The Court held that  
21 urine testing is a search not only because of a “invasive” collection, but also because of the private  
22 facts disclosed by the testing. *Id.* In *Chandler v. Miller*, 520 U.S. 305 (1997), the Court struck  
23 down on Fourth Amendment grounds a Georgia law mandating drug testing for candidates for  
24 public office, even though the “the testing method the Georgia statute describes is relatively  
25 noninvasive”, because the information was private. *Id.* at 313. Similarly, in *Norman-Bloodsaw v.*  
26 *Lawrence Berkeley Laboratories*, 135 F.3d 1260, 1270 (9th Cir. 1998), the plaintiffs alleged that  
27 their government laboratory employer violated the Fourth Amendment and the Due Process Clause  
28 by testing blood samples obtained during routine physical examinations for sickle cell anemia,



1 syphilis and pregnancy, among other things. The District Court had held that because the initial  
2 full scale physical examination during which medical personnel took the plaintiffs' blood was both  
3 intrusive and justified, the additional analysis was not a Fourth Amendment search. The Ninth  
4 Circuit reversed and remanded, holding that the more intensive testing, though it required no  
5 additional **physical** invasion of the plaintiffs, was nevertheless a Fourth Amendment search  
6 because the **facts** revealed by the subsequent tests are highly personal. *Id.* at 1270. Physical  
7 intrusion is not the key; expectation of privacy in the facts revealed is.

8 Furthermore, the coerced collection of private facts is governed by the Fourth Amendment,  
9 even when the government employer does not disclose those facts to third parties. *Cf.* Opposition  
10 at 29. In *Norman-Bloodsaw*, even though the employer did not disclose the results of the blood  
11 tests to third parties, the Ninth Circuit held that the very performance of unauthorized tests was  
12 itself a constitutional violation. 135 F.3d at 1269.

13 Despite the ruling regarding psychological testing in *Greenawalt v. Indiana Department of*  
14 *Corrections*, 397 F.3d 587 (7th Cir. 2005), other cases support the view that mandatory  
15 questionnaires and other required public disclosures are Fourth Amendment searches or seizures.  
16 In *National Federation of Federal Employees v. Greenberg*, 983 F.2d 286 (4th Cir. 1992),  
17 employees seeking security clearances brought a facial challenge to a questionnaire that included a  
18 drug use question. The court held that the employees had a right to have the constitutionality of the  
19 questionnaire reviewed. Further, the court did not reject out of hand the assertion that the  
20 questionnaire could violate the Constitution, but ultimately found that because the plaintiffs were  
21 making a facial rather than “as applied” challenge, they failed to meet the burden of showing that  
22 the questionnaire could never be reasonable. *Id.* at 292. Further, the questionnaire informed  
23 employees that compliance was voluntary rather than mandatory. Because there was no evidence  
24 that the employer would impose any adverse consequences on the employee’s failure to cooperate,  
25 the challenge also failed.

26 Similarly, in *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566 (6th  
27 Cir. 2002), the court rejected the plaintiffs' claim that a county policy mandating public disclosure  
28 of real estate holdings by employees of certain departments and their family members violated the

1 Fourth Amendment. The court did so, however, not because requiring this kind of testimonial  
2 information was not a search or seizure, but because the plaintiff had no reasonable expectation of  
3 privacy in the particular type of financial information sought by the defendant. *Id.* at 577.

4 In contrast, Plaintiffs here have both a strong expectation of privacy in the information  
5 Defendants are seeking and are challenging the background check procedure as it applies to them  
6 specifically. Both *Greenberg* and *Overstreet* suggest that this claim is entitled to Fourth  
7 Amendment review.

8 The SF 85 and NACI background check constitute a search and seizure under the Fourth  
9 Amendment because a government employer is coercing the disclosure of highly private,  
10 constitutionally protected medical and sexual information about an individual from that individual  
11 as a condition of continuing employment.

12 The search and seizure that constitute the background investigation of Plaintiffs is  
13 unreasonable because the government cannot show that its legitimate need outweighs the highly  
14 protected privacy interest in this information. As set forth in the P.I. Motion, Defendants fail to  
15 justify prying into these long-time employees' personal lives for many reasons. P.I. Motion at 13-  
16 17. First, courts give great weight to the privacy right at stake here in determining reasonableness.  
17 The background investigation here seeks the most protected types of information, including  
18 physical health, mental and emotional health and private sexual practices. *See* P.I. Motion at 8.

19 Second, there is little nexus between the government's asserted need for this intrusion and  
20 the type of information sought. The government argues that it must assess the individual's fitness  
21 to work in a federal government facility to protect national security. But not every government  
22 facility is related to national security and not every employee has the ability to affect national  
23 security. Plaintiffs have been working in a government facility for many years without incident or  
24 cause for any individualized suspicion. They do not have access to classified information or work  
25 on national security matters. Nor is the information that plaintiffs seek to protect here likely to  
26 indicate whether a Plaintiff is a "convicted murderer" or "wanted terrorist suspect." Collecting  
27 identity information and checking criminal history records or terrorism watch lists could reveal this  
28 information. Collecting medical or sexual data does not. Accordingly, the government's highly

1 personal and intrusive background investigations at issue here are unreasonable searches or  
2 seizures under the Fourth Amendment.

3 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR**  
4 **CONSTITUTIONAL INFORMATION PRIVACY RIGHTS CLAIM BECAUSE THIS**  
5 **HIGHLY INTRUSIVE INVESTIGATION PROGRAM IS NOT NARROWLY TAILORED TO**  
6 **ADVANCE ANY LEGITIMATE GOVERNMENT INTEREST.**

7 The background investigation challenged in this case also violates the constitutional right to  
8 informational privacy – the right to avoid disclosure of personal matters to the government. *Nixon*  
9 *v. Administrator of General Services*, 433 U.S. 425, 455 (1977); *Whalen v. Roe*, 429 U.S. 589, 599  
10 (1977). This right “applies both when an individual chooses not to disclose highly sensitive  
11 information to the government and when an individual seeks assurance that such information will  
12 not be made public.” *Planned Parenthood of S. Ariz v. Lawall*, 307 F.3d 783, 789-90 (9<sup>th</sup> Cir.  
13 2002) (citing *Whalen*, 429 U.S. at 599 n. 24; *Norman-Bloodsaw*, 135 F.3d at 1269).

14 Both aspects of the informational privacy right are violated here. As explained in  
15 Plaintiffs’ opening memorandum, the process at issue involves highly intrusive questions that go to  
16 the heart of employees’ personal lives, including questions about their sexual behavior and  
17 emotional health. Because such information clearly falls within the “zone of privacy” protected by  
18 the Constitution, Defendants have the burden to demonstrate a legitimate interest that warrants  
19 infringement upon the right of privacy. *In re Crawford*, 194 F.3d 954, 959 (9<sup>th</sup> Cir. 1999) (citing  
20 *Doe v. Attorney General of the United States*, 941 F.2d 780, 796 (9<sup>th</sup> Cir. 1991)). Only after the  
21 government has met this burden must the court “engage[] in the delicate task of weighing  
22 competing interests” and determine whether the government’s interest is *sufficiently great* and  
23 *narrowly tailored* to compel disclosure. *Id.*

24 Here, Defendants do not articulate a legitimate interest that might justify violating  
25 Plaintiffs’ informational privacy rights. That interest, presumably, is national security. But  
26 Defendants wield this term without explaining how compelling this information from plaintiffs or  
27 their friends and family advances national security. The task of weighing competing interests is  
28 not even necessary because Defendants have utterly failed to demonstrate how disclosure of sexual  
orientation or personality conflict serves the public interest in national security.

1           Rather, the Federal Defendants take an unduly narrow view of the kinds of sensitive and  
2 personal information protected by the Constitution, arguing that informational privacy rights are  
3 limited to information relating to “marriage, procreation, contraception, family relationships, and  
4 child rearing and education.” Opposition at 31-32 (citing *Paul v. Davis*, 424 U.S. 693, 713  
5 (1976)). This view is simply incorrect.

6           First, the cases are clear that the scope of informational privacy is far broader than the  
7 Defendants argue. Courts have firmly recognized the need to protect inherently sensitive  
8 information. See *In re Crawford*, 194 F.3d at 960 (recognizing HIV status, sexual orientation, or  
9 genetic makeup as examples of personal facts where disclosure could “lead directly to injury,  
10 embarrassment or stigma”) (emphasis added); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir.  
11 1994) (“extension of the right to confidentiality to personal medical information recognizes there  
12 are few matters that are quite so personal as the status of one’s health”). Courts have also applied  
13 informational privacy rights analysis to other kinds of information. See *Crawford*, 194 F.3d at 958  
14 (applying informational privacy analysis to social security numbers, names, and addresses);  
15 *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9<sup>th</sup> Cir. 2002) (applying informational privacy analysis to  
16 facts about assault weapon ownership).

17           Second, the argument that the right of informational privacy is limited by the language  
18 quoted from *Paul v. Davis* misreads *Whalen* badly. *Whalen* recognized two different interests  
19 implicated by the right to privacy: the right to withhold certain personal information from the  
20 government (informational privacy), and the right to independence in making important personal  
21 decisions (autonomy privacy). *Whalen*, 429 U.S. at 599-600. The language that the Federal  
22 Defendants quote – “matters relating to marriage, procreation, contraception, family relationships,  
23 and child rearing and education” – refers to the second type of privacy: areas of personal activity  
24 or autonomy where courts have expressly limited the government’s authority to regulate conduct.  
25 *Id.* at 589 n. 26. *Paul v. Davis* does not define the contours of informational privacy.

26           Indeed *Whalen* itself contradicts Defendants’ position, because the Supreme Court  
27 recognized that information about individuals’ drug prescriptions can be protected by the  
28 informational privacy right. Although *Whalen* ultimately found that the state’s interest outweighed

1 the immediate or threatened privacy harm, it nonetheless established that such information—  
2 outside the categories narrowly enumerated by Defendants—enjoys protection. *Whalen*, 429 U.S.  
3 at 600; *id.* at 605 (recognizing “the threat to privacy implicit in the accumulation of vast amounts  
4 of personal information in computerized data banks or other massive government files” arising  
5 from “[t]he collection of taxes, the distribution of welfare and social benefits, the supervision of  
6 public health, the direction of our Armed Forces, and the enforcement of the criminal laws”)  
7 (footnote omitted).

8 Here, Plaintiffs are being required to answer questions on form SF-85, an essential part of  
9 which is a broad privacy waiver, and must submit three references – all part of a process that  
10 supposedly yields information regarding their “suitability.” P.I. Motion, at 8. The government’s  
11 “suitability chart” undeniably shows that the information sought is highly personal—grounds for  
12 “unsuitability” include homosexuality, sodomy, personality conflict, attitude, physical health  
13 issues, emotional issues, and issues relating to friends and relatives. *Id.* Thus, even on the narrow  
14 view urged by Defendants, this suitability investigation intrudes into areas expressly intended to be  
15 “private.”

16 The Federal Defendants’ main defense is that the Privacy Act adequately protects Plaintiffs  
17 against unauthorized disclosure of personal information. Opposition at 32. This argument,  
18 however, addresses only one of the factors that courts in this Circuit must weigh in determining  
19 when such information can be compelled. The relevant factors include:

20 the type of [information] requested . . . the potential for harm in any subsequent  
21 nonconsensual disclosure . . . the adequacy of safeguards to prevent unauthorized  
22 disclosure, degree of need for access, whether there is an express statutory mandate,  
articulated public policy, or other recognizable public interest militating toward  
access.

23 *Planned Parenthood*, 307 F.3d at 790 (quoting *United States v. Westinghouse Elect. Corp.*, 638  
24 F.2d 570, 577 (3d Cir. 1980)) (*Westinghouse* factors).

25 The *Westinghouse* factors that Defendants ignore strongly favor Plaintiffs. The type of  
26 information requested—third party references requested to disclose sensitive, personal information  
27 relating to sexual orientation and medical or psychiatric information, among others, is highly  
28 private. The potential for harm in any subsequent nonconsensual disclosure is great given the

1 sensitive nature of the information sought. See *In re Crawford*, 194 F.3d at 960 (explaining that  
2 disclosure of intimate information such as sexual orientation is a direct harm distinct from potential  
3 harm of loss of property from fraudulent use of social security numbers). Lastly, Defendants fail to  
4 show any degree of need for access to personal information that is relevant to the stated public  
5 interest in national security.

6 Finally, the Privacy Act in itself is not an adequate safeguard against disclosure. Not only  
7 is it unclear how Plaintiffs would know that the Privacy Act had even been violated, legal remedies  
8 for violations of information privacy that have already occurred are no substitute for full-on  
9 physical and information security safeguards against misuse or wrongful disclosure of such  
10 sensitive and personal information. Privacy safeguards must “place strict limits on which state  
11 employees may view and use the record, and for what purpose.” *Doe v. City of New York*, 15 F.3d  
12 at 267.

13 In the cases where courts have cited statutory measures of confidentiality as adequate, these  
14 statutes limit access to government employees on a need-to-know basis and provide specific  
15 security measures. *Planned Parenthood*, 307 F.3d at 788; see also *Tucson Woman’s Clinic*, 379  
16 F.3d at 551-54 (violation of right of privacy where patient information as available to government  
17 employees and private contractors with no need of the information).

18 Mere invocation of the Privacy Act cannot establish the facial legitimacy of the compelled  
19 disclosure of information about one’s sexual history and associational activities. *Id.* at 551-552  
20 (“Even if a law adequately protects against public disclosure of a patient’s private information, it  
21 may still violate informational privacy rights if an unbounded, large number of government  
22 employees have access to the information”).

23 Finally, Defendants have failed to meet their burden to establish a narrowly tailored public  
24 interest justifying infringement on the right of privacy. *Planned Parenthood*, 307 F.3d. at 790 (It is  
25 the state's burden to demonstrate that its use of the information would advance a legitimate state  
26 interest and that its actions are narrowly tailored to meet the legitimate interest.) (internal quotation  
27 marks and citation omitted). As explained above, Defendants have failed to show how disclosure  
28 of sexual orientation or personality conflict advances the public interest in national security.

1 Accordingly, the forced disclosure of this protected information violates the right to informational  
2 privacy.

3 **CONCLUSION**

4 For the reasons stated above, *amicus* respectfully submits that Plaintiffs have a strong  
5 likelihood of success on the merits of their Fourth Amendment and informational privacy claims,  
6 and that the motion for preliminary injunction should be granted.

7 DATED: October 2, 2007

8 By \_\_\_\_\_  
9 Jennifer Stisa Granick (SBN 168423)  
10 Lee Tien, Esq. (SBN 148216)  
11 ELECTRONIC FRONTIER  
12 FOUNDATION  
13 454 Shotwell Street  
14 San Francisco, CA 94110  
15 Telephone: (415) 436-9333 x102  
16 Facsimile: (415) 436-9993  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28