Employment Background Investigations: How Far Can The Government Go?

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Human resources directors should heed the lessons of the recent decision by the U.S. Court of Appeals for the Ninth Circuit in the Nelson v. NASA *case: Threatening to terminate employees for not acquiescing to "over broad" governmental background investigations may be considered a violation of the employee's constitutional rights.*

In this era of heightened national security, employers typically have an interest in obtaining information about the backgrounds of their employees. However, this interest must be carefully balanced against the employee's right to privacy. In a closely watched case, the United States Court of Appeals for the Ninth Circuit, which includes California, recently curtailed the ability of government employers to conduct overly broad background checks on "low risk" contract employees.[1] Relying on the constitutional right to informational privacy, statutory mandates, and case law precedents, the Ninth Circuit in *Nelson v. NASA* struck down a request for background information that it found was not narrowly tailored to serve a legitimate government interest. This decision sends a strong message to employers and human resources executives: in the Ninth Circuit, privacy matters.

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Published in the May 2008 Privacy & Data Security Law Journal.

THE FACTS

The *Nelson* case involved the Jet Propulsion Laboratory ("JPL"), a research laboratory run by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). A group of scientists, engineers, and administrative support personnel at JPL ("JPL employees") sued NASA, Caltech, and the Department of Commerce (collectively, "NASA"), challenging NASA's requirement that "low risk" contract employees such as themselves submit to in-depth background investigations.

According to the Ninth Circuit, NASA's new policy required that every JPL employee undergo a National Agency Check with Inquiries ("NACI"), the same background investigation required of government civil service employees, before he or she could obtain an identification badge needed for access to JPL's facilities. The NACI investigation requires the employee to complete and submit Standard Form 85 ("SF 85"), which asks for (1) background information, including residential, educational, employment, and military histories, (2) the names of three references who "know you well," and (3) disclosure of any illegal drug use within the past year, along with any treatment or counseling received for such use. This information is then checked against four government databases. Finally, SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information." Each of the applicants' references, employers, and landlords is sent an "Investigative Request for Personal Information" ("Form 42"), which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "gener-

al behavior or conduct," or "other matters." The recipient is asked to explain any adverse information noted on the form. NASA and the federal Office of Personnel Management then determine whether the employee is "suitable" for continued access to NASA's facilities. The exact nature of this suitability determination is not clear.

NASA, like all other federal agencies, has conducted NACI investigations of its civil servant employees, but not of its contract employees, since its inception in 1958. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor. These changes were not made applicable to JPL employees until January 29, 2007, when NASA modified its contract with Caltech to include the requirement. Caltech initially opposed the change, but NASA invoked its contractual right to unilaterally modify the contract and directed Caltech to comply immediately with the modifications. Caltech adopted a policy — not required by NASA — that all JPL employees who did not successfully complete the NACI process would be deemed to have voluntarily resigned their Caltech employment.

As one might expect, on August 30, 2007, the JPL employees filed suit in a federal district court in California alleging, both individually and on behalf of the class of JPL employees in nonsensitive or "low risk" positions, that NASA's newly imposed background investigations were unlawful. The JPL employees asserted three claims: (1) NASA and the Department of Commerce violated the Administrative Procedure Act ("APA") by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations violated their constitutional right to informational privacy; and (3) the investigations constituted unreasonable searches prohibited by the Fourth Amendment to the U.S. Constitution. On September 24, 2007 the JPL employees also moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007 would be terminated.

THE DISTRICT COURT DECISION

The district court denied the JPL employees' request for a preliminary injunction. It found that the challenges to the suitability determination were speculative and not ripe for judicial review. The district court also rejected the JPL employees' APA claim, finding statutory support for the investigations in the National Aeronautics and Space Act of 1958 (the "Space Act"), which allows NASA to establish security requirements as deemed "necessary in the interest of the national security."[2] The district court found the SF 85 questionnaire implicated the constitutional right to informational privacy, but that it was narrowly tailored to further the government's legitimate security interest. The district court also rejected the JPL employees' Fourth Amendment argument, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment. After concluding that the JPL employees had little chance of success, the district court found that they could not demonstrate irreparable injury because any unlawful denial of access from JPL could be remedied afterward through compensatory relief. The JPL employees appealed to the Ninth Circuit.

THE NINTH CIRCUIT DECISION

On appeal, the Ninth Circuit's motions panel granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low risk employees. The panel further found that "[t]he balance of hardships" tipped "sharply" in favor of the employees, who risked losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relied] was issued." A three-judge panel of the Ninth Circuit agreed.

APA CLAIM

The Ninth Circuit panel considered the JPL employees' claim that NASA violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. NASA argued that it had authorization for the program in three statutory and regulatory sources: The Homeland Security Presidential Directive 12 ("HSPD 12"), the Federal Information Security Management Act ("FISMA"), and the Space Act.

The Ninth Circuit found that both HSPD 12 and FISMA failed to authorize the broad background investigations NASA had imposed on the JPL employees. According to the circuit court, HSPD 12 created a federal policy of establishing a mandatory governmentwide standard "for secure and reliable forms of identification" issued by the federal government to its employees and contractors (including contractor employees). However, the Ninth Circuit pointed out, many of the questions in SF 85 and Form 42 sought much more information than that which would "securely and reliably identify the employees." Similarly, the Ninth Circuit found that FISMA gave the Secretary of Commerce authority to prescribe standards and guidelines pertaining to federal information systems,[3] but NASA's NACI requirement "was hardly limited to protecting those systems." Rather, as the Ninth Circuit noted, the background investigations were required of all JPL employees, whether or not they had access to information systems, and therefore could "not be entirely justified, if at all, by FISMA." Moreover, the Ninth Circuit found support for its findings in NASA's own declaration that "the decision to require at a minimum a NACI for NASA contractor employees dates back to the 2000 to 2001 timeframe," well before either FISMA was passed in 2002 or HSPD 12 was issued in 2004.

The Space Act, the Ninth Circuit decided, also failed to justify requiring these open-ended investigations of "low risk" contract employees. The Space Act authorizes the NASA Administrator to "establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security."[4] Though the district court found that this language gave NASA the authority to implement background

investigations as part of the security screening of contractors, the Ninth Circuit strongly disagreed, finding that the district court "ignored the statute's limiting language that the security programs established be "deem[ed] necessary in the interest of the national security." Citing the United States Supreme Court in *Cole v. Young*,[5] decided two years before the Space Act was passed, the circuit court explained that when the Supreme Court considered a statute that gave certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security," "that 'national security' was not used in the [statute at issue] in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities." Therefore, according to the Supreme Court, "[i]t follows that an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position…."[6] Thus, the Ninth Circuit decided that because JPL employees did not occupy "sensitive" positions, they were "low risk" employees, and as such the district court had erred when it concluded that they were unlikely to succeed on their APA claim.

INFORMATIONAL PRIVACY CLAIMS

Although the Ninth Circuit agreed with the district court's conclusion that the requested information in this case was sufficiently private to implicate the right to informational privacy, it found that the district court "underestimated the likelihood that [the JPL employees] would succeed on their informational privacy claim." The circuit court underscored the fact that it had "repeatedly acknowledged" that the constitution protects an "individual interest in avoiding disclosure of personal matters."[7] This interest, according to the Ninth Circuit, included "a wide range of personal matters, including sexual activity,[8] medical information,[9] and financial matters."[10] Under its decision in *Crawford* — a case holding that the public disclosure of Social Security numbers may implicate the right to informational privacy in "an era of rampant identity theft" — the Ninth Circuit noted that the burden fell on the government to demonstrate "that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest."[11]

Here, the circuit court considered the forms at issue and found that the SF 85 required the applicant to disclose any illegal drug use within the past year, along with any treatment or counseling received. The Ninth Circuit pointed out that the Supreme Court had made clear[12] that an individual's reasonable expectations of privacy in his or her medical history included information about drug use, and, by analogy, drug treatment or counseling. Form 42 inquiries distributed as part of the NACI, were, according to the Ninth Circuit, "even more probing" as they solicited "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," and "other matters." The Ninth Circuit found that these "open-ended questions" were designed to elicit a wide range of adverse, private information that was "not generally disclosed by individuals to the public," and, accordingly, they had to be deemed to implicate the right to informational privacy.

Considering the breadth of Form 42's questions, the circuit court held that "it is difficult to see how they could be narrowly tailored to meet any legitimate need, much less the specific interests that [NASA had] offered to justify the new requirement." Asking for "*any* adverse information about this person's employment, residence, or activities" may solicit some information relevant to "identity," "national security," or "protecting federal information systems," but the circuit court found that "there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests." Instead, the Ninth Circuit court noted that the "form invites the recipient to reveal *any* negative information of which he or she is aware. Thus, the Ninth Circuit held that there "is nothing 'narrowly tailored' about such a broad inquisition."

Moreover, the Ninth Circuit drew a parallel to its decision in *Thorne* and noted that there was a "lack of standards governing the inquiry."[13] The government's questions in *Nelson* arose from SF 85's "extremely broad authorization," allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. NASA, the circuit court stated, "have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer." The Ninth Circuit was particularly concerned by Form 42's "open-ended and highly private questions [that] are autho-

rized by this broad, standardless waiver and do not appear narrowly tailored to any legitimate government interest." For these reasons, the Ninth Circuit decided that the district court erred in finding that the JPL employees were not likely to succeed on their informational privacy claim.

Of particular interest to private employers and human resources managers faced with similar government directives is the Ninth Circuit's admonishment of Caltech, which had argued that, as a private actor, it should not be held liable for constitutional violations that arose from the government-imposed background investigations. The Ninth Circuit agreed with Caltech that there was a "presumption that private conduct does not constitute government action."[14] However, when a "sufficient nexus," such as the "willful participation in a joint activity by the private entity and the government"[15] existed, the circuit court declared that the presumption was rebutted. The circuit court was sympathetic to Caltech up to the point where it "established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment." Though the Ninth Circuit's decision did not necessarily "render Caltech liable as a governmental actor," it raised "serious questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation program, even though it was not so initially." Caltech's "threat to terminate noncompliant employees" was, according to the Ninth Circuit, "central to the harm [the JBL employees] face and creates the coercive environment in which they must choose between their jobs or their constitutional rights." Thus, employers and human resources managers in the private sector would be well advised not to become overzealous in advancing governmental policies that may violate the constitutional rights of employees.

CONCLUSION

The *Nelson* decision was a huge victory for government contract employees, and it struck a blow to the Homeland Security Presidential Directive 12, already under review by a House Committee on Oversight and Government Reform after a Government Accountability Office report

finding that the program was incurring high costs but providing little benefit to date.[16] The Ninth Circuit made clear that the government's extending the National Agency Check with Inquiries investigation to "low risk" contract employees was going too far. Such a "broad inquisition" of these employees, in the view of the Ninth Circuit, was "standardless" and not narrowly tailored to serve any "legitimate government interest."

Human resources leaders would be wise to heed the lessons of the *Nelson* case. Though the government does indeed have a legitimate interest in protecting its citizens from the potential dangers of sensitive information falling into the wrong hands, at least in the Ninth Circuit, the government does not have unfettered access to background information on employees working in "low risk" positions. Moreover, private employers who threaten employees with termination for not acquiescing to "over broad" governmental investigations may very well be considered government actors and thus liable for violating the constitutional rights of employees.

The Ninth Circuit reversed and remanded the district court decision in the *Nelson* case. In response, NASA petitioned the court to re-hear the decision of the Ninth Circuit's three-judge panel *en banc*. On April 10, 2008 the Ninth Circuit denied NASA's petition for *en banc* review. The Ninth Circuit then issued a mandate giving effect to its decision in the case. Shortly thereafter, the Ninth Circuit recalled the mandate stating that it had been "issued in error."[17] It is unclear what the final outcome of this case will be. As Robert M. Nelson, a Senior Research Scientist at JPL and the lead plaintiff in the case, was quoted as saying: "Our attorneys remind us that the judicial system involves a very deliberate process. We will remain patient and let the judicial activity run its course."[18] Stay tuned.

NOTES

1 *Nelson v. NASA*, No. 07-56424 (9th Cir. 2008).
2 42 U.S.C. § 2455(a).
3 40 U.S.C. § 11331(a)(1) (2002).
4 42 U.S.C. § 2455(a) (1958).
5 *Cole v. Young*, 351 U.S. 536 (1956).

[6] *Id.* at 551.
[7] *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999).
[8] *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy).
[9] *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality").
[10] *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of Social Security numbers may implicate the right to informational privacy in "an era of rampant identity theft").
[11] *Crawford*, 194 F.3d at 959.
[12] *Skinner v. R.R. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).
[13] *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983).
[14] *Citing Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999).
[15] *Id.* at 843.
[16] *http://governmentmanagement.oversight.house.gov/story.asp?ID=1833.*
[17] Order of the Ninth Circuit Court of Appeals issued April 28, 2008.
[18] *See http://hspd12jpl.org/press.html.*