



# Supreme Court: "Public Employers May Ask Comprehensive Background Questions Of Employees"

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In a rare unanimous decision, the Supreme Court held on January 19, 2011 that NASA's background inquiries of its contract employees regarding drug treatment or counseling and other negative "general behavior or conduct" of its contract employees were tailored to the government's interests in managing its workforce and therefore did not violate the employees' right to informational privacy. The Court ducked the issue of whether such information is actually protected by any Constitutional right to privacy, leaving that question open for another day. *Nelson v. NASA*.

## Low-Risk Employees Challenged NASA's Request For Behavioral Information

As part of the 2004 Homeland Security Presidential Directive, NASA began requiring that "low-risk" scientists, engineers, and administrative support personnel submit to in-depth background investigations. Twenty-eight employees who worked at the Jet Propulsion Laboratory in Pasadena, California, a multi-billion-dollar federal research facility operated by the California Institute of Technology under a government contract, challenged the background investigation.

Many of the contract employees had worked at the lab for decades without ever being the subject of a government background check because they were not involved with classified or military activities and did not have security clearances. The Jet Propulsion Lab produces satellites, rockets, spacecraft and telescopes utilized by NASA.

NASA required that all employees with access to the Jet Propulsion Lab undergo the same background investigation that it requires of its civil service employees. The first challenged form, SF-85, requested residential, educational, employment, and military histories; the names of three references that "know you well"; and whether the applicant has used, possessed, supplied or manufactured illegal drugs. Any applicants who answered "yes" to the drug-related questions were then asked to provide information regarding the types of substances, the nature of the activity, and any other details relating to their involvement with illegal drugs, including treatment or counseling received. The employees challenged the request for information regarding treatment or counseling as violating their right to informational privacy.

After completion of the SF-85, the government ran the employee's information through FBI and other federal-agency databases. The Government also sent an inquiry, Form 42, to each of the

employee's references and former landlords requesting any adverse information about "honesty or trustworthiness," "violations of the law," "financial integrity," "abuse of alcohol or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters" that may have a bearing on the applicant's suitability for employment at a federal facility. The employees also challenged these broad, general inquiries into their personal information.

The employees filed a lawsuit shortly before the deadline for submitting to the background investigation. They asked for a preliminary injunction on the basis that any employee who refused to submit the questionnaire would be denied access to the lab and thus terminated. A federal district court denied their request, finding that the employees had little chance of success because the inquiries were narrowly tailored to meet the government's security interest. The U.S. Court of Appeals for the 9th Circuit reversed in part, finding that a Constitutional right to privacy protected the employees from the inquiries into their drug treatment and the broad, general questions to their references.

### **Supreme Court Rules That The Background Investigation Was Reasonable**

The Court ruled in favor of NASA and recognized that when the government acts as an employer, it has more discretion to deal with citizen employees because of its interest in the security of its facilities, managing its internal operations, and employing a competent, reliable workforce to carry out its business. The Court concluded that both SF-85 and Form 42 were reasonable, employment-related inquiries that further those governmental interests.

The drug treatment or counseling question must be viewed in the context as a follow-up question to separate illegal-drug users who are taking steps to address and overcome their problems from those who are not. Similarly, the Court held that the open-ended inquiries into the employee's general behavior or conduct are reasonably aimed at identifying capable employees who will faithfully conduct the government's business. The Court also noted that these types of inquiries are commonplace in the private sector and for the government's civil service employees.

Finally, the Court recognized that the collected information is protected by The Privacy Act, which requires written consent before the government may disclose an individual's records and imposes criminal liability for willful disclosures. This protection would allay any privacy concerns on behalf of the employees.

The Court limited its decision by avoiding the question of whether the information was actually protected by a Constitutional right to privacy. Instead, the Court recognized that 30-year-old precedent created a broad Constitutional interest in avoiding disclosure of personal matters, but declined to limit, expand or even address the contours of that right. Instead, it assumed for this purpose of this ruling that the information elicited by the background investigation was protected by that Constitutional interest.

### **What This Means For You**

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THIS case was closely watched because it could have been the Court's first ruling on the scope of the right to informational privacy since 1976. Instead, the Court provided no clarity on that issue, focusing its ruling narrowly on whether the background investigation was tailored to a government interest. The Court does not seem inclined to set out any bright-line rules regarding the type of information that is protected from government collection, and we are unlikely to receive any guidance any time soon.

The Court's decision confirms that public employers may act similarly to private employers by requesting a broad range of background information from employees or applicants, as long as the inquiry is related to the employer's interest in employing a competent, reliable workforce. Public employers do not have to use the least-intrusive means to garner background information to serve their interest in managing their employees and broad, open-ended questions can serve that interest.

As with all confidential information of employees, both private and public employers should take steps to protect information collected in a background investigation from disclosure.

For more information contact your Fisher Phillips attorney.

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