

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

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	2:06-cv-2649-GEB-GGH
Plaintiff,	)	
	)	
v.	)	<u>ORDER</u>
	)	
THE STATE OF CALIFORNIA, and	)	
EDMUND G. BROWN, JR., in his	)	
capacity as Attorney General for	)	
the State of California,	)	
	)	
Defendants.	)	
_____	)	

Defendants move to amend the Rule 16 Scheduling Order so that they can seek leave to join as Defendants the Central Valley Chapter of 7th Step Foundation, Inc., Bart Blackburn, James Doe, Ronald Roe, and George D. Turner ("Central Valley Parties").<sup>1</sup> Plaintiff and Defendants cross move for summary judgment on all claims and Plaintiff seeks a permanent injunction. Oral argument on the summary judgment motions was held on July 23, 2007.

---

<sup>1</sup> All references to "Rules" are to the Federal Rules of Civil Procedure.

BACKGROUND

1  
2 On November 21, 2006, the United States filed this action  
3 on behalf of the Office of Personnel Management ("OPM") asserting  
4 federal law (specifically, 5 U.S.C. § 9101) requires Defendants to  
5 disclose an individual's complete criminal history record information  
6 ("CHRI") to OPM and its contract investigators conducting background  
7 investigations for employment, contracting and security clearance  
8 purposes. (Pl.'s Compl. at 1, 2.) Defendants counter that permanent  
9 state court injunctions ("the injunctions") forbid Defendants from  
10 disclosing all of the requested information, arguing that the  
11 injunctions prohibit Defendants from releasing any record of an arrest  
12 that is later deemed a "detention" under state law, any record of an  
13 arrest when the arrestee subsequently completed a diversion program  
14 under state law, or any record of an arrest which did not result in a  
15 conviction.<sup>2</sup> Second, Defendants argue that disclosure of these  
16 records is prohibited by federal law and violates the arrestee's right  
17 to privacy in the United States Constitution and the California  
18 Constitution. Finally, Defendants argue that § 9101 does not  
19 authorize disclosure of CHRI to contract (as opposed to OPM)  
20 investigators. (Defs.' Answer ¶¶ 40-42.)

21 OPM is a federal agency authorized to conduct background  
22 investigations for the Federal Government. (Decl. of Kathy Dillaman  
23 in Supp. of Pl.'s Mot. for Summ. J. ("Dillaman Decl.") ¶ 3.) In 2006,  
24 OPM performed 1.8 million background investigations. (Id. ¶ 5.) As a

---

25  
26 <sup>2</sup> The injunctions were issued in a series of orders granting  
27 summary adjudication, and in the final ruling, in Central Valley Chapter  
28 of the 7th Step Foundation, Inc., v. Younger, No. 497394-6 (Cal. Super.  
Ct. Alameda, July 29, 1985). See id. (Nov. 18, 1982 order granting  
permanent injunction); id. (Nov. 22, 1982 order granting permanent  
injunction); id. (June 7, 1984 order granting permanent injunction).

1 result of the large number of investigations that must be completed,  
2 OPM uses private contractors to perform 75 percent of them. (Id. ¶  
3 4.) These contract investigators must obtain an appropriate OPM  
4 clearance, complete OPM approved training, and comply with security  
5 requirements specifying how records are stored and handled. (Decl. of  
6 Joyce Tincher-Harris in Supp. of Pl.'s Mot. for Summ. J. ("Tincher-  
7 Harris Decl.") ¶¶ 9, 11.) Before OPM conducts a background  
8 investigation, the applicant signs a release form stating that the  
9 applicant authorizes representatives of OPM to obtain the applicant's  
10 CHRI. (Decl. of John Czajkowski in Supp. of Pl.'s Mot. for Summ. J.  
11 ("Czajkowski Decl.") ¶ 4.)

12 In April 2006, Defendant California Department of Justice  
13 ("CA DOJ") sent OPM a letter explaining that California law only  
14 allows disclosure of CHRI to public officials and prevents CA DOJ from  
15 disclosing any CHRI to OPM's private contractor investigators. (Pl's.  
16 Compl. Ex. 1.) This letter also states that California law only  
17 allows the disclosure of arrests "that have resulted in convictions  
18 and arrests [that are] pending adjudication." (Id.) Defendants,  
19 therefore, adopted the policy that discloses only incomplete CHRI  
20 ("summary CHRI") to OPM staff, and have refused to disclose any CHRI  
21 to OPM's private contract investigators. (Czajkowski Decl. ¶¶ 8, 11.)  
22 OPM declares Defendants' refusal to provide complete CHRI to their  
23 contract investigators has caused significant delays in the background  
24 investigative process. (Id. ¶ 10.)

#### 25 DISCUSSION

##### 26 I. Motion to Amend the Rule 16 Scheduling Order

27 Defendants seek amendment of the provision in this action's  
28 Rule 16 Scheduling Order which provides that "[n]o further . . .

1 joinder of parties or amendments to pleadings is permitted, except  
2 with leave of Court, good cause having been shown." (Order, Mar. 7,  
3 2007, at 1.) If their motion to amend is granted, they also seek  
4 leave under Rule 20 (permissive joinder of parties) to join the  
5 Central Valley Parties as Defendants. (Defs.' Mot. to Amend at 1-2.)

6 Defendants assert good cause exists to amend the Rule 16  
7 Scheduling Order because they could not reasonably foresee the  
8 necessity of joining the Central Valley Parties when they filed a  
9 Joint Status Report on February 26, 2007. (Defs.' Mot. to Amend at  
10 5:24-25.) Defendants assert that it did not "bec[o]me apparent to  
11 Defendants that the Central Valley [Parties] might seek to still  
12 enforce the injunctions in state court" until May 2007, when the  
13 Central Valley Parties stated that they would "insist upon compliance  
14 with the injunctions" irrespective of the ruling ultimately issued in  
15 this action. (Defs.' Mot. to Amend at 6:9-12; Decl. of Hiren Patel in  
16 Supp. of Defs.' Mot. to Amend ("Patel Decl.") ¶¶ 3-4.)

17 Plaintiff counters that good cause does not exist because  
18 the injunctions have been in place since 1985 and Defendants have  
19 known about the injunctions since the commencement of this action.  
20 (Pl.'s Opp'n to Mot. to Amend at 2:23-25.) Defendants rejoin, even  
21 though they knew about the injunctions, they only became aware joinder  
22 was necessary once the Central Valley Parties indicated they would  
23 seek to enforce those injunctions. (Defs.' Reply in Supp. of Mot. to  
24 Amend at 2:26-28.)

25 To amend the provision in the Rule 16 Scheduling Order  
26 prescribing "[n]o further . . . joinder of parties or amendments to  
27 pleadings is permitted," Defendants "must first show 'good cause' for  
28 [the] amendment under Rule 16(b)." Johnson v. Mammoth Recreations,

1 Inc., 975 F.2d 604, 608 (9th Cir. 1992). Rule 16(b)'s "good cause"  
2 standard focuses on the diligence of the party seeking the amendment.  
3 Id. at 608-09. "If that party was not diligent, the inquiry should  
4 end." Id. at 609. A diligence inquiry under this standard is whether  
5 the movants discharged their obligation "to collaborate with the  
6 district court *ab initio* in fashioning" a workable Rule 16 Scheduling  
7 Order for the case which would not have to be amended. In re San Juan  
8 Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 229 (1st Cir. 1997);  
9 Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999).

10 If Defendants were aware, or should have reasonably been  
11 aware, when they submitted their Joint Status Report, of circumstances  
12 that could lead to a request to join parties, they should have asked  
13 that said joinder be allowed under the more liberal joinder standard  
14 in Rule 20 or that amendment to the pleadings be allowed under the  
15 more liberal amendment standard in Rule 15.

16 Parties anticipating possible amendments . . .  
17 have an 'unflagging obligation' to alert the Rule  
18 16 scheduling judge of the . . . timing of such  
19 anticipated amendments in their status reports so  
20 that the judge can consider whether such  
21 amendments may properly be sought solely under the  
22 Rule 15(a) standard, and whether structuring  
23 discovery pertinent to the parties' decision  
24 whether to amend is feasible. See Veranda Beach  
25 [Club Ltd. P'ship v. W. Sur. Co.], 936 F.2d  
26 [1364,] 1371 [(1st Cir. 1991)]; 3 Moore's Federal  
27 Practice at § 16.36[3][c] ("Addressing these  
28 matters assertively early in the pretrial period  
. . . [is] essential to coherent case development  
planning, and can avoid the delays and the  
wasteful repetition of discovery events that are  
often occasioned by amendments made later in the  
pretrial period.").

26 Jackson v. Laureate, Inc., 186 F.R.D. at 608. Under such  
27 circumstances, failure to make this request in their Joint Status  
28 Report would constitute, at a minimum, "carelessness [which is not]

1 compatible with a finding of diligence and offers no reason for a  
2 grant of relief." Id. (quoting Johnson, 975 F.2d at 609).

3 The Deputy Attorney Generals essentially are acting as  
4 permanent corporate counsel for the State of California and actually  
5 stand in the shoes of the Attorney General. See People v. Birch Sec.  
6 Co., 86 Cal. App. 2d 703, 707 (1948). Defendants stated as their  
7 second affirmative defense in their answer, filed January 10, 2007,  
8 that "Defendants are bound by a permanent injunction forbidding  
9 disclosure, for purposes of evaluating applications for employment or  
10 licensing, of arrests that were deemed 'detentions,' or which resulted  
11 in a successful diversion or for which there is no disposition."  
12 (Defs.' Answer ¶ 40.) Therefore, Defendants' argument that they were  
13 unaware until May 2007 that the injunctions could be enforced is  
14 baseless given this affirmative defense. It is evident that  
15 Defendants were aware of the details of the injunctions, to which they  
16 assert they are bound, even before this federal action was filed, and  
17 their contrary assertions are belied by the record. Since Defendants  
18 have failed to show that good cause justifies the amendment they seek,  
19 their motion to amend is denied.<sup>3</sup>

20  
21 <sup>3</sup> Defendants' argument that joinder of the Central Valley  
22 Parties is warranted to prevent contradictory rulings against Defendants  
23 is also unavailing. (Defs.' Mot. to Amend at 2:13-23.) Preventing  
24 contradictory rulings is not a proper basis for a Rule 20 motion. Even  
25 if the Central Valley Parties are necessary to prevent inconsistent  
26 obligations under Rule 19(a)(2)(ii), the Advisory Committee Notes to the  
27 1966 Amendment state that a plaintiff's "undue delay in making the  
28 motion can properly be counted against him as a reason for denying the  
motion." The Court declines to act *sua sponte* under Rule 19 since the  
Central Valley Parties' interests have not been shown to be threatened  
and no party has made a timely motion for joinder under Rule 19.  
Further, the Central Valley Parties are not necessary parties under Rule  
19(a)(2)(i) because their interests are "adequately represented by  
existing parties to the suit." Wash. v. Daley, 173 F.3d 1158, 1167-68

(continued...)

1 II. Motions for Summary Judgment

2 A. Requirement for Complete CHRI

3 Plaintiff seeks summary judgment on its claim that  
4 Defendants' policy of denying OPM information regarding nonconviction  
5 arrests or arrests later reclassified as detentions, and the state  
6 laws upon which this policy is based, are preempted by federal law  
7 prescribed in Chapter 91 of the United States Code, Access to Criminal  
8 History Records for National Security, codified at 5 U.S.C. § 9101  
9 ("Chapter 91"). Plaintiff argues "[f]ederal law expressly requires  
10 states to provide full and complete CHRI to OPM investigators, and any  
11 state law to the contrary is preempted by federal law. . . ." (Pl.'s  
12 Mot. for Summ. J. at 20:18-19.) Plaintiff requests that Defendants be

13 permanently enjoined from refusing to comply with  
14 any such request by OPM staff and/or contract  
15 background investigators for CHRI made pursuant to  
16 5 U.S.C. § 9101[; and that] Defendants [be]  
17 permanently enjoined from directing or encouraging  
18 any California criminal justice agency from  
19 refusing to fully comply with such request for  
20 CHRI by OPM staff and/or contract background  
21 investigators made pursuant to 5 U.S.C. § 9101.

22 (Pl.'s Proposed Order at 3:6-11.)

23 Defendants rejoin that their policy is not preempted because  
24 Chapter 91 does not require disclosure of arrests later classified as  
25 detentions under California Penal Code sections 849(c), 849.5 and  
26 11115, and that Chapter 91 is limited by the arrestee's right to  
27 privacy guaranteed by the California Constitution and the United  
28 States Constitution. (Defs.' Mot. for Summ. J. at 4-5, 11:23-12:20,  
8:22-9:3; Tr. of Oral Argument at 10.) Defendants also argue that

---

27 <sup>3</sup>(...continued)  
28 (9th Cir. 1999).

1 California Labor Code section 432.7 bars employers from asking for  
2 nonconviction arrest information. (Defs.' Mot. for Summ. J. 4:24-  
3 5:4.)

4 In determining whether a federal statute preempts  
5 state law, our sole task is to ascertain the  
6 intent of Congress. . . . We must begin with the  
7 presumption that Congress did not intend to  
8 preempt state law. . . . If we have any doubt  
9 about congressional intent, we are to err on the  
side of caution, finding no preemption, "for the  
state is powerless to remove the ill effects of  
our decision, while the national government, which  
has the ultimate power, remains free to remove the  
burden."

10 Malabed v. N. Slope Borough, 335 F.3d 864, 869 (9th Cir. 2003)  
11 (quoting Beveridge v. Lewis, 939 F.2d 859, 863 (9th Cir. 1991))  
12 (other internal citations omitted). "Congressional intent to preempt  
13 state law must be clear and manifest." Williamson v. Gen. Dynamics  
14 Corp., 208 F.3d 1144, 1150 (9th Cir. 2000).

15 "Preemption may be found if, on the face of the federal  
16 statute, Congress expressly stated an intent to preempt a state law."  
17 N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 592 (3d Cir.  
18 1985) (citing Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458  
19 U.S. 141, 152-53 (1982)). Congress prescribes in 5 U.S.C. §  
20 9101(b)(4) that Chapter 91 "shall apply notwithstanding any other  
21 provision of law or regulation of any State or of any locality within  
22 a State or any other law of the United States." This clause clearly  
23 expresses Congress's intent that Chapter 91 preempt any contrary state  
24 law. When, as here,

25 we are presented with the task of interpreting a  
26 statutory provision that expressly pre-empts state  
27 law[,] we must . . . identify the domain expressly  
28 preempted . . . by that language. Although our  
analysis of the scope of the pre-emption statute  
must begin with its text, . . . our interpretation  
of that language does not occur in a contextual  
vacuum. [Rather,] our analysis of the scope of

1 the statute's pre-emption is guided by . . . [an]  
2 understanding of congressional purpose. . . .  
3 Congress' intent, of course, primarily is  
4 discerned from the language of the pre-emption  
5 statute and the "statutory framework" surrounding  
6 it. . . . Also relevant, however, is the  
7 "structure and purpose of the statute as a whole,"  
8 . . . as revealed not only in the text, but  
9 through the reviewing court's reasoned  
10 understanding of the way in which Congress  
11 intended the statute and its surrounding  
12 regulatory scheme

13 to enable the Federal Government to access criminal history records  
14 for national security and other sensitive purposes. Medtronic, Inc.  
15 v. Lohr, 518 U.S. 470, 484-86 (1996).

16 The text of Chapter 91 makes it pellucid that Congress, in  
17 the text of the statute and in the regulatory scheme, intended Chapter  
18 91 to supersede and be the supreme definition of what constitutes  
19 CHRI. Chapter 91's regulatory scheme prescribes:

20 Upon request by the head of a covered agency,  
21 criminal justice agencies shall make available  
22 [CHRI] regarding individuals under investigation  
23 by that covered agency for the purpose of  
24 determining eligibility for any of the following:  
25 (A) Access to classified information. (B)  
26 Assignment to or retention in sensitive national  
27 security duties. (C) Acceptance or retention in  
28 the armed forces. (D) Appointment, retention, or  
assignment to a position of public trust or a  
critical or sensitive position while either  
employed by the Government or performing a  
Government contract.<sup>4</sup>

5 U.S.C. § 9101(b)(1). "The term [CHRI] means information collected  
by criminal justice agencies on individuals consisting of identifiable  
descriptions and notions of arrests, indictments, information, or  
other formal criminal charges, and any disposition arising therefrom,

---

<sup>4</sup> OPM is a "covered agency" within the meaning of Chapter 91.  
5 U.S.C. § 9101(a)(6)(D).

1 sentencing, correction supervision, and release." Id. § 9101(a)(2).  
2 Section 9101(a)(2)'s definition of CHRI is unambiguous.

3 Accordingly, the California policy of providing only  
4 "summary CHRI" to OPM violates Chapter 91's command to provide  
5 complete CHRI as defined in § 9101(a)(2).<sup>5</sup> Therefore, California laws  
6 are expressly preempted to the extent that, when a request is made for  
7 complete CHRI pursuant to the authority of OPM under Chapter 91, they  
8 purport to prohibit release of complete CHRI to OPM.<sup>6</sup> "This situation  
9 presents the quintessential case of the Supremacy Clause in action."  
10 Forest Park II v. Hadley, 336 F.3d 724, 732 (8th Cir. 2003) (citing  
11 U.S. Const. art. VI, cl. 2).

12 Further, Defendants have not shown that Chapter 91 is  
13 unconstitutional based on Defendants' argument that it violates an  
14 arrestee's federal constitutional right to privacy.<sup>7</sup> "While the  
15

---

16 <sup>5</sup> An arrest that has later been reclassified under California  
17 law as something other than an arrest constitutes a "disposition arising  
18 therefrom" and therefore falls squarely within § 9101(a)(2)'s meaning of  
19 CHRI.

20 <sup>6</sup> Defendants' argument that they are bound by the injunctions  
21 forbidding the release of complete CHRI is misplaced. First, the  
22 injunctions issued before Chapter 91 was enacted in December of 1985 and  
23 therefore they do not address this prescribed federal law. Second, even  
24 if this ruling conflicts with the state injunctions, Defendants' remedy  
25 would be to seek to have those injunctions vacated. See Brunzell  
26 Constr. Co. v. Harrah's Club, 253 Cal. App. 2d 764, 772 (1976) (noting  
27 that the court has inherent power to vacate or modify its injunction  
when the "the law has been changed, modified or extended, or where the  
ends of justice would be served. . . ."); Holmes v. Cal. Nat'l Guard, 90  
Cal. App. 4th 297, 319 (2001) ("[T]he trial court's ruling is open to  
possible misinterpretation in ways which could lead its injunctions to  
encroach on areas clearly preempted by federal law. In order to avoid  
such potentially serious pitfalls of misinterpretation, we therefore  
hold that the language and scope of the trial court's rulings must be  
explicitly limited" to conform with federal law.).

28 <sup>7</sup> Defendants also make a conclusory argument that the  
(continued...)

1 Supreme Court has expressed uncertainty regarding the precise bounds  
2 of the constitutional 'zone of privacy'" it has recognized that an  
3 individual has an "interest in avoiding disclosure of personal  
4 matters." In re Crawford v. United States Tr., 194 F.3d 954, 958 (9th  
5 Cir. 1999). This interest is "sometimes referred to as the right of  
6 'informational privacy.'" Id. The right to informational privacy,  
7 "is not absolute; rather, it is a conditional right which may be  
8 infringed upon a showing of proper governmental interest." Id. at 959  
9 (quoting Doe v. Attorney Gen., 941 F.2d 780, 796 (9th Cir. 1991)). A  
10 "delicate task of weighing competing interests [is involved when]  
11 determin[ing] whether the government may properly [seek] private  
12 information" concerning an applicant for federal employment. Id.  
13 (internal quotations omitted). "[T]he government has the burden of  
14 showing that its use of the information would advance a legitimate  
15 state interest and that its actions are narrowly tailored to meet the  
16 legitimate interest." Id. (internal quotations omitted). Relevant  
17 factors in this analysis include:

18           the type of record requested, the information it  
19           does or might contain, the potential for harm in  
20           any subsequent nonconsensual disclosure, the  
21           injury from disclosure to the relationship in  
22           which the record was generated, the adequacy of  
23           safeguards to prevent unauthorized disclosure, the  
24           degree of need for access, and whether there is an  
25           express statutory mandate, articulated public  
26           policy, or other recognizable public interest  
27           militating toward access.

28 \_\_\_\_\_  
          <sup>7</sup>(...continued)

California constitutional right to privacy prevents disclosure of  
complete CHRI under Chapter 91; however, that argument is unsupported  
and woefully inadequate to counter the express preemption provision  
prescribing that California law prohibiting compliance with Chapter 91  
is preempted.

1 Id. (quoting Doe v. Attorney Gen., 941 F.2d at 796).

2           Here, the government has a legitimate interest in  
3 determining the suitability of individuals seeking access to  
4 classified information and employment in sensitive national security  
5 positions. Arrest records advance that interest because "arrest-  
6 related information tends to reveal behavior and sometimes patterns of  
7 behavior," and "may indicate involvement in criminal or dishonest  
8 activities." (Czajkowski Decl. ¶ 11.) Chapter 91 is narrowly  
9 tailored to meet the government's interest in that it limits the types  
10 of government jobs that require CHRI for background checks, and it  
11 requires an agency to receive written consent for the release of CHRI  
12 from an individual under investigation. 5 U.S.C. § 9101(b)(1)(A)-(D),  
13 (c). Further, adequate safeguards are in place to prevent  
14 unauthorized disclosure of CHRI. Federal employees and contract  
15 investigators must themselves be cleared for access to CHRI and  
16 numerous security standards govern how CHRI is stored and handled.  
17 (Tincher-Harris Decl. ¶¶ 9, 11.) Finally, Chapter 91 is, of course,  
18 an express statutory mandate from Congress that CHRI be made  
19 available.

20           These factors outweigh the potential harm an individual  
21 might face if his or her CHRI was disclosed subsequently, such as  
22 "denial of schooling, employment and professional licensing  
23 opportunities." (Defs.' Mot. for Summ. J. at 10:20-23.) Accordingly,  
24 the United States Constitution does not limit the preemptive effect of  
25 Chapter 91.

26           B. OPM's Contract Investigators

27           Plaintiff also seeks summary judgment on its claim that  
28 Defendants must disclose CHRI to OPM's contract background

1 investigators, arguing that "[b]oth express preemption and conflict  
2 preemption apply in this matter, rendering defendants' policy and  
3 practice of denying full and complete CHRI to OPM . . . contract  
4 investigators preempted by federal law. . . ." (Pl.'s Mot. for Summ.  
5 J. at 18:11-13.) Defendants rejoin that California Penal Code  
6 sections 11105(c)(4) and 13300(c)(4) prescribe that CHRI may only be  
7 released to public officers, and that "§ 9101 does not require the  
8 disclosure of this information to OPM's private contractors." (Defs.'  
9 Mot. for Summ. J. at 12:23-25.)

10 1. Express Preemption

11 Chapter 91 provides that "[u]pon request by the head of a  
12 covered agency, criminal justice agencies shall make available  
13 [CHRI]." 5 U.S.C. § 9101(b)(1). Defendants do not dispute that  
14 requests for CHRI are being made by the head of OPM. Defendants  
15 argue, however, that Chapter 91 does not require disclosure of CHRI to  
16 contract investigators. (Defs.' Mot. for Summ. J. at 12:23-25.)

17 To decide this issue, Congress's intent is discerned.  
18 Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit  
19 Servs., Inc., 448 F.3d 1092 (9th Cir. 2006). The legislative history  
20 of Chapter 91 evinces that Congress intended to authorize private  
21 contract investigators to have access to CHRI. Congress enacted  
22 Chapter 91 after the Subcommittee on Investigations of the Senate  
23 Committee on Governmental Affairs held four days of hearings on  
24 "Federal Government Security Clearance Programs." See Pub. L. 99-169,  
25 Title VII, § 801(a), Dec. 4, 1985, 99 Stat. 1008; see also Federal  
26 Government Security Clearance Programs Hearings Before the Permanent  
27 Subcomm. on Investigations of the Senate Comm. on Governmental  
28 Affairs, 99<sup>th</sup> Cong. (1985) ("1985 Hearings"). During the hearings,

1 Congress clearly considered and approved that many background  
2 investigations under Chapter 91 would be conducted by contract  
3 investigators. Congress was informed at the 1985 Hearings that the  
4 Department of State employed contract investigators, and that OPM was  
5 also planning to employ contract investigators. 1985 Hearings at 198,  
6 202, 255-57, 284, 287-90, 967. The OPM Director at the time  
7 testified:

8 [M]ost importantly in a major change [of] policy,  
9 we have been moving to a concept of a corps of  
10 permanent investigators consisting of OPM  
11 employees supplemented by an expanding contractor  
12 relationship with outside investigators, many of  
13 them previous OPM investigat[ors]. This measure  
14 is the only way we can meet the recurring surges  
15 and declines in work load without significant  
16 disruptions. . . . I have commenced solicitation  
17 of proposals from private contractors to perform  
18 part of the investigations and transcription  
19 workload.

20 Id. at 198, 256.

21 Senators also expressed approval of the cost savings that  
22 resulted from contracting out background investigations. Senator Nunn  
23 observed "we heard testimony yesterday that the State Department had  
24 contracted out their investigative services at a cost of approximately  
25 \$900 per personnel case." Id. at 287-88. The Senate Committee also  
26 generated the following written question for OPM: "Should other  
27 civilian agencies contract out [their background investigations] like  
28 the State Department to get the same quality [of] work cheaper and  
faster than with OPM?" Id. at 681. The Committee's final report on  
the 1985 Hearings, Federal Government Security Clearance  
Investigations, noted that

[t]o meet uneven demand, the Office of Personnel  
Management and the Department of State have  
instituted plans of contracting with experienced  
outside investigators who can be called upon

1 during surge periods, thus delivering adequate  
2 investigative products without unnecessarily  
3 expanding the federal workforce. All agencies  
4 responsible for conducting personnel security  
investigations should examine the feasibility of,  
and consider following this procedure during surge  
periods.

5 132 Cong. Rec. S199-01 ¶ 20.

6 Congress enacted Chapter 91 partially in reaction to state  
7 and local governments' frequent refusal to make CHRI available. 1985  
8 Hearings at 3, 9, 188, 270-73, 419, 446. Congress knew that contract  
9 investigators were conducting background investigations and would  
10 continue to do so in the future. Therefore, Congress intended that  
11 CHRI be made available to contract, as well as government,  
12 investigators upon request by the head of a covered agency. If  
13 Congress had intended otherwise, it could have easily specified in  
14 § 9101(b)(1) *to whom* criminal justice agencies shall make CHRI  
15 available. California laws that deny contract investigators access to  
16 CHRI are therefore preempted by Congress's express intent that Chapter  
17 91 be the supreme law in the United States and that it "shall apply  
18 notwithstanding any other provision of law. . . ." 5 U.S.C. §  
19 9101(b)(4). "[T]he principal problem with these statutes [is that]  
20 they fly in the face of the Constitution's Supremacy Clause." Forest  
21 Park II v. Hadley, 336 F.3d at 732.

22 2. Conflict Preemption

23 "Even if there were no express pre-emption in this case,"  
24 the state laws at issue would be preempted because they conflict with  
25 federal regulations. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133,  
26 142 (1990) (applying both express preemption and conflict preemption).  
27 Plaintiff argues that Defendants are also required to make CHRI  
28 available to OPM contract investigators because California law

1 authorizing the release of CHRI only to "public officers" conflicts  
2 with the Federal Acquisition Regulations ("FAR") 48 C.F.R. § 1.000 et  
3 seq. and is therefore preempted. (Pl.'s Mot. for Summ. J. at 27:14-  
4 19.) Defendants rejoin that California law does not conflict with the  
5 FAR because it allows CHRI to be released to OPM officials who can  
6 conduct background investigations on their own. (Defs.' Mot. for  
7 Summ. J. at 13:12-17.)

8 The FAR prescribe that "[u]nless specifically prohibited by  
9 another provision of law, authority and responsibility to contract for  
10 authorized supplies and services are vested in the agency head. The  
11 agency head may establish contracting activities and delegate broad  
12 authority to manage the agency's contracting functions to heads of  
13 such contracting activities." 48 C.F.R. § 1.601. The FAR include  
14 several other provisions requiring OPM to determine that contractors  
15 are "responsible" and "otherwise qualified and eligible." Id.  
16 §§ 9.103(b), 9.104, 9.104-1(d). Pursuant to these sections of the  
17 FAR, the Director of OPM has established acquisition plans for  
18 background investigation contracts and has established necessary  
19 contractor qualifications and contract terms. (Decl. of Linda  
20 Springer in Supp. of Pl.'s Mot. for Summ. J. ¶¶ 5-7; Tincher-Harris  
21 Decl. ¶¶ 9-10.)

22 The enforcement of a state law may be preempted "when  
23 compliance with both state and federal law is impossible, . . . or  
24 when state law 'stands as an obstacle to the accomplishment and  
25 execution of the full purposes and objectives of Congress.'" Capital  
26 Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984) (citing Fl.  
27 Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) &  
28 quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). "[S]tate

1 statutes may not interfere with the implementation of a federal  
2 program by a federal agency. Federal law is supreme." Forest Park II  
3 v. Hadley, 336 F.3d at 732. Valid "[f]ederal regulations have no less  
4 pre-emptive effect than federal statutes."<sup>8</sup> Fidelity Fed. Sav. & Loan  
5 Ass'n, 458 U.S. at 153.

6 The California laws Defendants argue are at issue here  
7 improperly attempt to "second guess" OPM's determination of contractor  
8 responsibility by refusing to make CHRI available to contract  
9 investigators and insisting that only government officials are  
10 qualified to handle such information. United States v. Virginia, 139  
11 F.3d 984, 988 (1998) (holding that a Virginia regulatory scheme which  
12 required the Federal Bureau of Investigations ("FBI") to register its  
13 contract background investigators "frustrate[d] the objectives of the  
14 [FRA] by allowing the state to 'second-guess' the FBI's responsibility  
15 determination and by giving the state licensing board 'a virtual power  
16 of review over the federal determination of "responsibility."');  
17 Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 188-190 (1956) (holding  
18 that the Armed Services Procurement Act, which also requires  
19 government agencies to award contracts to a "responsible bidder,"  
20 preempted an Arkansas law requiring government contractors to be  
21 licensed by a state board because "[s]ubjecting a federal contractor  
22 to Arkansas contractor license requirements would give the State's  
23 licensing board a virtual power of review over the federal  
24 determination of 'responsibility' and would thus frustrate the

---

27 <sup>8</sup> Defendants do not challenge the validity of 48 C.F.R. § 1.601,  
28 the validity of which was implicitly recognized by the Fourth Circuit in  
United States v. Virginia, 139 F.3d 984, 986 (4th Cir. 1998).

1 expressed federal policy of selecting the lowest responsible  
2 bidder." ).

3           The California DOJ asserted in its April 2006 letter to OPM  
4 that because "the [California Penal Code] does not make any provision  
5 for contract employees to obtain state or local summary criminal  
6 history information, OPM's contract investigators are not authorized  
7 to receive or have access to California state or local summary  
8 criminal history information." (Pl's. Compl. Ex. 1.) California  
9 DOJ's assertion that OPM's contractors must be authorized by the state  
10 to receive CHRI "runs afoul of the Supreme Court's holding that  
11 federal contractors cannot be required to satisfy state  
12 'qualifications in addition to those that the [Federal] Government has  
13 pronounced sufficient.'" United States v. Virginia, 139 F.3d at 990  
14 (quoting Leslie Miller, Inc., 352 U.S. at 190). Accordingly,  
15 California laws that deny contract investigators access to CHRI are  
16 preempted by the FAR.

17           C.       Permanent Injunction

18           Accordingly, pursuant to the Supremacy Clause of the United  
19 States Constitution (Article VI, Clause 2), the following permanent  
20 injunction enters against each Defendant forthwith:

21           Defendants shall immediately upon request made under 5  
22 U.S.C. § 9101 by OPM and/or any of its contract background  
23 investigators, provide full and complete CHRI to OPM and/or its  
24 contract background investigators, which shall include any arrest,  
25 including an arrest that is, or has been, subsequently reclassified as  
26 something other than an arrest under California law. Further,  
27 Defendants are enjoined from refusing to comply with any such request.  
28 Defendants are also enjoined from directing or encouraging any

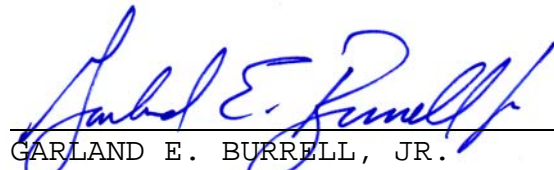
1 California criminal justice agency to refuse full compliance with any  
2 request for CHRI made under 5 U.S.C. § 9101 by OPM and/or its contract  
3 background investigators. To the extent Defendants have in the past  
4 made any such communication, Defendants shall rescind and withdraw  
5 that communication from any such California criminal justice agency.

6 CONCLUSION

7 For the stated reasons, Defendants' motion to amend the Rule  
8 16 Scheduling Order is denied, Defendants' motion for summary judgment  
9 is denied, Plaintiff's motion for summary judgment is granted, and the  
10 above stated permanent injunction enters against each Defendant. The  
11 Clerk of the Court shall enter judgment in favor of Plaintiff and  
12 close this action.

13 IT IS SO ORDERED.

14 Dated: November 7, 2007

15   
16 \_\_\_\_\_  
17 GARLAND E. BURRELL, JR.  
18 United States District Judge  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28