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DEPT. OF TRANSPORTATION
DOCKETS

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

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In the Matter of NORTHWEST AIRLINES, INC.))))))	Docket OST-04-16939- 5
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ANSWER OF NORTHWEST AIRLINES, INC.

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Dated: February 27, 2004

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

In the Matter of

NORTHWEST AIRLINES, INC.

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) **Docket OST-04-16939-1**
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Dated: February 27, 2004

ANSWER OF NORTHWEST AIRLINES, INC.

The Electronic Privacy Information Center ("EPIC") in its January 20, 2004 complaint alleges that, in the aftermath of September 11, 2001, it was "unfair" or "deceptive" for Northwest Airlines to use the information that passengers voluntarily provide when they purchase travel, as part of a controlled, government-sponsored study of how computer processing of such information might improve public safety on airlines. The Minnesota Civil Liberties Union ("MCLU") essentially echoes these charges in its complaint of January 29, 2004.

The research opportunity presented to Northwest Airlines by NASA's Ames Research Center in the wake of the worst terrorist attacks in national history (attacks which are not even referenced in EPIC's complaint) was an appropriate instance of industry and government cooperation that was necessary and widespread in response to the terrorism of September 11. The complaints are disturbingly lacking in context, and the legal claims are meritless. Northwest Airlines categorically denies that its actions were "unfair," "deceptive," or in any manner violated 49 U.S.C. § 41712, for the following reasons:

First, in the aftermath of the terrorist attacks of September 11, 2001, the public,

the government, and Northwest Airlines all reacted to the critical need for enhanced security. The airline industry, including Northwest Airlines, responded to both the public and the government in researching and developing more effective measures to protect the public, and Northwest Airlines' cooperation with the Ames Research Center was an appropriate part of that broad public response.

Second, Northwest Airlines' cooperation with the Ames Research Center was in no way an "unfair" or "deceptive" commercial activity. EPIC and MCLU attempt to transform their generalized concerns over privacy into an unfair practices claim, but that transformation defies the more modest scope of the statute, 49 U.S.C. § 41712(a), which derives from the Civil Aeronautics Act of 1938. There is no basis in Department regulations or precedent, or any other federal law, for the type of affirmative privacy obligations advocated by EPIC and MCLU. Further, there is no general "public policy" in favor of such rights. Passengers have no inherent right or expectation of total privacy in the information provided when traveling on commercial airlines—particularly after September 11. The *only* relevant basis for privacy protection is Northwest Airlines' privacy policy, which does not support EPIC's and MCLU's allegations. The plain meaning of the policy is an assurance that customer information will not be commercially exploited and that it is secure from hackers. Northwest Airlines fulfilled those promises, but it did not promise that it would not share information with the government. The type of total privacy that EPIC and MCLU interpret from the policy conflicts with the plain terms of the policy, the requirements of federal law and the expectations of customers.

Finally, EPIC and MCLU should not have standing to wage public policy battles through the formal complaint process by alleging only hypothetical injuries. The

Secretary should not automatically delegate his discretion to initiate formal proceedings to any group that wishes to complain about the practices of the airline industry. Only persons alleging actual, concrete injury should be permitted to file formal complaints and compel a docketed proceeding. The allegations made by EPIC and MCLU should be treated as only an informal complaint.

BACKGROUND

EPIC's complaint provides not one word about the events of September 11, 2001, or their repercussions for the public, the government and the airline industry. Shortly after the attacks, FAA Administrator Jane Garvey appropriately identified September 11 as fundamentally altering the airline industry in the United States:

The nature of the threat facing America has changed. What we faced on September 11 was a new phenomenon—hijackers taking over commercial flights for the sole purpose of turning them into human-guided terrorist bombs of massive explosive power. *Given the events of last week, assumptions underlying aviation security have fundamentally changed.*¹

The events of September 11 altered the attitudes of the public and lawmakers, as reflected in opinion polls and the legislation that was passed in response. Northwest Airlines worked with government officials to implement sweeping changes in security, and also to think creatively about new measures to protect the public.

A. The Government Responds To The Attacks Of September 11.

At 9:45 a.m. on September 11, 2001, all airborne aircraft were told to land at the nearest airport—the first time in U.S. history that all civil aircraft in the United States

¹ Statement of Jane F. Garvey, Administrator, FAA, Before the Subcommittee on Aviation, Committee on Transportation and Infrastructure (Sept. 21, 2001) (emphasis added).

were grounded.² The national airspace was not reopened until 11:00 a.m. Eastern Daylight Time on Thursday, September 13, 2001. However, Secretary Mineta “caution[ed] everyone that a system as diverse and complex as ours cannot be brought back up instantly. We will re-open airports and resume flights on a case-by-case basis, only after they implement our more stringent levels of security. This phased approach will assure the highest levels of safety, which remains our primary goal.” Secretary Mineta further “announced a series of heightened security measures, including a ban on curbside luggage check-in and off-airport passenger check-in. Before being allowed to re-open, airports must clear their terminals of people and conduct thorough searches. Once re-opened, airports will feature an increased presence of law enforcement officers, restricted access beyond the screening area and other restrictions.”³

As FAA Administrator Garvey summarized in testimony on September 21, 2001, the FAA immediately “substantially increased the required security measures for U.S. airports and U.S. air carriers and foreign carriers with flights to the U.S.” The litany of measures ranged from the aforementioned ban on curb-side check-in to implementation of a Federal Air Marshal Program.⁴ The FAA also received assistance from other agencies, including skilled personnel from outside the FAA for the Air Marshal Program.⁵

² *See id.*

³ Statement of U.S. Secretary of Transportation Norman Y. Mineta (Sept. 13, 2001).

⁴ *See* Statement of Jane F. Garvey, Administrator, FAA, Before the Subcommittee on Aviation, Committee on Transportation and Infrastructure (Sept. 21, 2001).

⁵ Statement of Jane F. Garvey, Administrator of the Federal Aviation Administration, Before the Senate Committee on Government Affairs on Aviation Security Post September 11 (Nov. 14, 2001).

To study and develop new security measures, the FAA invited the public's assistance in developing more effective security measures. The "FAA issued an announcement that appear[ed] on [its] web site requesting information about any product or technology that could be helpful in improving aviation security."⁶ Administrator Garvey emphasized that

[e]very measure is important and must work together to create a seamless web of security. And, most important, we must stay as committed to this task tomorrow—and into the future—as we are today. The FAA—the Department of Transportation—cannot do this alone. Each of us—airlines and airports—has obligations to fulfill. In the words of one airline CEO, "There is a moral imperative to do the right thing."⁷

On October 25, 2001, the FAA convened its security subcommittee of its Research, Engineering & Development Advisory Committee to review submissions for new security measures. John Klinkenberg, vice president for security at Northwest Airlines, served as the chairman of this subcommittee.

By this point, the Department of Transportation and the FAA had made numerous sweeping changes to enhance the public's security in the immediate aftermath of September 11, all of which affected the security experience of passengers and airline and airport personnel. Passengers could expect multiple identification requirements at checkpoints and departure gates, hand searches of carry-on baggage and stricter limits on the contents of carry-on items, thorough use of hand wands at departure gates, more rigorous screening of checked baggage, and other security measures. Aircraft and airports were also subject to heightened security requirements, such as daily searches of

⁶ Statement of Jane F. Garvey, Administrator, FAA, Before the Committee on Transportation and Infrastructure Subcommittee on Aviation (Oct. 11, 2001).

⁷ Jane F. Garvey, Administrator, FAA, "The New World of Aviation," National Press Club, Washington, DC (Oct. 17, 2001).

aircraft, background checks of airport and airline employees were imposed, and passenger vehicles entering airport grounds were searched.

Congress also moved swiftly to tighten security at airports.⁸ On November 19, 2001, Congress passed the Aviation and Transportation Security Act, Pub. L. 107-71. Among its many new requirements, the Act created the Transportation Security Administration and federalized the screening of passengers and luggage at airports. It also broadened the authority for regulation of airline and airport security programs, including authority for “emergency procedures” to be issued “without providing notice or an opportunity for comment and without prior approval of the Secretary.” *See* 49 U.S.C. § 114(1)(2). Almost exactly one year after Congress passed the Aviation and Transportation Security Act, Congress passed the Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002).

B. The Ames Research Center Sought Assistance From Northwest Airlines To Study Computer Processing Of Airline Passenger Flight Information.

The Ames Research Center was founded on December 20, 1939, as an aircraft

⁸ A comprehensive Los Angeles Times poll following the attacks found that “[n]early two in three said Tuesday’s events left them shaken. Concern was focused sharply on the nation’s airports; more than eight in 10 criticized security there ... *[n]inety-five percent of those asked said they favor new security measures at the nation’s airports.*” Mark Z. Barabak, *U.S. Keen to Avenge Attacks; Americans say way of life has changed forever*, L.A. Times, at A1 (Sept. 16, 2001) (emphasis added). In addition, 61% of Americans said that “erosion of some civil liberties” to fight terrorism “was a necessary sacrifice”; 54% said “the government should be allowed to tap telephone lines and monitor cell phone conversations”; “[n]early seven in 10 said law-enforcement officers should be allowed to randomly stop people who fit the theoretical description of a terrorist.” *Id.* EPIC’s general allegations that “[p]ublic opinion surveys consistently show that many Americans today are ‘concerned’ or ‘very concerned’ about the loss of privacy,” and that “[g]overnment use of airline passenger information is a particularly important issue,” EPIC ¶¶ 7-8, are not accurate statements of public opinion in the immediate aftermath of September 11, which is the relevant context for EPIC’s complaint.

research laboratory by the National Advisory Committee for Aeronautics. In 1958, Ames became part of NASA. The airline industry, including Northwest Airlines, has an historic relationship with researchers at Ames because it has long provided critical research and testing on numerous aspects of air travel.

As officials at NASA have publicly explained,⁹ following the terrorist attacks of September 11, 2001, NASA, “with the best of intentions and in conjunction with the Federal Aviation Administration (FAA), undertook exploratory studies to determine how the agency could contribute to addressing the challenge of aviation security.” Researchers wanted to determine if “computer techniques developed by NASA to detect anomalies in large volumes of scientific and engineering data could be used to assist in threat detection.” The researchers thought they might be able to process “large quantities of airline passenger information and possibly find anomalies that could lead to characterizing a subset of the flying public who might include terrorists.” The “focus” was directly tied to the events of September 11; they hoped to find techniques to “identify those passengers that clearly were not a threat, so that airline resources would focus on passengers where there was some doubt.” Exhibit 2.

⁹ On January 27, 2004, NASA Assistant Administrator for Legislative Affairs, D. Lee Forsgren, responded to an inquiry from Senator Gordon Smith of Oregon about the research Ames undertook with data from Northwest Airlines. That response is attached to this Answer at Exhibit 2.

To undertake such research, in December of 2001 researchers from the Ames Research Center requested passenger data from Northwest Airlines. As NASA has explained, Northwest Airlines is “known throughout the aviation industry as a leader in aviation security, having worked with the Federal Aviation Administration (FAA) to develop the first Computer Assisted Passenger Prescreening System (CAPPS I).” *Id.*

When the researchers from Ames Research Center approached Northwest Airlines in December 2001 with their desire to study whether computer techniques could be used to analyze passenger information, Northwest Airlines concluded that it was appropriate to provide data directly to Ames for such a study. The federal government was searching for technological solutions to improve aviation security, and Northwest Airlines was committed to the same goals. Northwest Airlines continues to believe that assisting with the Ames study, and with the broader federal efforts to search for new technology, was entirely appropriate.

The research at Ames Research Center was terminated in late 2002, and the data has been returned to Northwest Airlines. NASA has stated publicly that while the data was at the Ames Research Center, the computer CDs “were kept in a secured lab with limited access” when in use, or “in a locked file cabinet in a locked office.” *See* Exhibit 2. Access to these secure locations required a personal identification number, and the building itself was secured. “No copies of the data were made” by NASA. *Id.*

C. The Allegations Of The Complaints.

Northwest Airlines addresses the specific allegations by EPIC below (Section III). EPIC generally alleges, based upon Freedom of Information Act disclosures by NASA and newspaper accounts, that Northwest Airlines “disclosed passenger data to NASA ... [t]he disclosed data detailed passenger travel from October to December 2001 ... DOT

statistics indicate that more than 10.9 million passengers traveled on [Northwest Airlines] flights during that time.” EPIC ¶ 30. EPIC further alleges that NASA’s study of the passenger data “is a data mining study.” EPIC ¶ 23. EPIC’s primary legal contention is that Northwest Airlines’ alleged “disclosure of passenger personal information to NASA was a violation of its public privacy commitments and constitutes an unfair and deceptive practice of critical public interest and importance,” the relevant statute being 49 U.S.C. § 41712. EPIC ¶ 41. The allegations of MCLU are similar.¹⁰

The “public privacy commitments” EPIC identifies are portions of Northwest Airlines’ privacy policy for online travel reservations at www.nwa.com. EPIC highlights that the policy “assures passengers that they will be in ‘complete control of ... the use of information [they] provide to Northwest Airlines,’” and that Northwest Airlines “has ‘put in place safeguards to ... prevent unauthorized access or disclosure’ of the information it collects.” EPIC ¶ 14. The MCLU complaint does the same. The precise quotation, obscured by EPIC’s ellipses, is that customers using www.nwa.com are “in complete control of [their] travel planning needs.” Exhibit 1 (2001 Internet Privacy Policy). The policy states further that Northwest Airlines “do[es] not *sell* individual customer names or other private profile information to third parties” (emphasis in original), and that Northwest Airlines protects against computer hackers by way of particular “encryption technology” and “security standards.” Northwest Airlines makes no representations that information will not be shared with the government. In the Internet “Usage Agreement,” of which the Internet privacy policy is a part, Northwest Airlines affirmatively cautions

¹⁰ The complaint by MCLU does not provide numbered paragraphs or page numbers. Since MCLU’s complaint is substantially the same as EPIC’s, and EPIC has provided paragraph numbers, Northwest Airlines will refer only to the numbered

that performance of the Agreement is subject to "Northwest Airlines' right to comply with law enforcement requests or requirements." Exhibit 1 at 6-7.

RESPONSE TO THE COMPLAINTS

I. Northwest Airlines' Cooperation With Scientists At The Ames Research Center Was In No Way An "Unfair" Or "Deceptive" Commercial Practice In Violation Of Section 41712(a).

The complaints invoke 49 U.S.C. § 41712(a). That provision, part of the Civil Aeronautics Act of 1938, concerns "an unfair or deceptive practice or an unfair method of competition." 49 U.S.C. § 41712(a). The Department has defined "unfair" practices as those that are "deceptive, illegal under any statute, or offensive to a well-established public policy." *Board in Air Florida, Inc. v. Eastern Air Lines, Inc.*, Order 81-1-101 (January 21, 1981).

The privacy rights advocated by EPIC and MCLU do not exist in the rules, precedent or practices of the Department. There is similarly no applicable right to privacy imposed by any other federal law. Indeed, passengers have no inherent right or expectation of total privacy in the information they provide when traveling on commercial airlines. The *only* basis for any right to privacy on the part of customers of Northwest Airlines is from Northwest Airlines' own Internet privacy policy. The plain meaning and purpose of Northwest Airlines' privacy policy is to assure online consumers that Northwest Airlines will not exploit their personal information for commercial gain, and to assure consumers that their information is safe from hackers. Northwest Airlines has fulfilled those promises. There is no representation that Northwest Airlines will not provide information to the government, as is required by law in some circumstances. The

(continued...)

paragraphs in the EPIC complaint and refer only generally to MCLU's complaint.

complaints have no foundation in existing law or any promises made by Northwest Airlines, and especially in the aftermath of September 11, the claims by EPIC and MCLU should be rejected.

A. There Is No Basis In The Department's Regulations Or Precedent For The Right To Privacy Espoused By The Complaints.

EPIC and MCLU cite no relevant Department precedent for the type of total privacy rights that they advocate. The Department's regulations under 49 U.S.C. § 41712 regarding unfair and deceptive practices list only the following covered acts: unrealistic flight scheduling, the passing off of carrier identity between carriers, oral flight confirmations, and price advertisements. 14 CFR § 399.81-84. None involves privacy claims or the disclosure of passenger information to the government.

The Department's typical enforcement of 49 U.S.C. § 41712(a) is against false or deceptive advertising or other unfair means of competition. For example, the Department orders referenced in EPIC's complaint (EPIC ¶ 10 n.5) involve deceptive advertisements regarding an airline's on-time performance, price discounts, one-way fare promotions requiring round-trip purchase, and taxes and fees not being counted in an advertised price. *See Aloha Airlines, Inc.*, 99-11-5 (Nov. 9, 1999), *Northwest Airlines*, 99-8-23 (Aug. 26, 1999), *Frontier Airlines, Inc.*, 99-6-1 (June 1, 1999), *Carlson Travel Group, Inc.*, 98-6-21 (June 19, 1998), *City Bird Airlines*, 97-12-23 (Dec. 18, 1997). The few Department cases that invoke 49 U.S.C. § 41712 and even mention the term "privacy" deal with an airline's non-compliance with a regulation regarding the stowing away of wheelchairs on flights. *See, e.g., Airtran Airways*, Order 2003-10-12 (Oct. 8, 2003).

Juxtaposed against the absence of any express privacy right in the Department's regulations or precedent are the mandatory disclosure requirements imposed upon

airlines. Federal law at times requires the provision of passenger information to federal authorities. Under current regulations, “[e]ach air carrier, foreign and domestic, operating a passenger flight in foreign air transportation to the United States” must provide to the Bureau of Customs and Border Protection “a passenger manifest and a crew manifest,” including “data elements ... that describe each passenger and crew member on a flight.” 19 CFR § 122.49a. *This is precisely the data that EPIC and MCLU claim cannot be disclosed.*

Congress has not imposed any affirmative privacy obligations on airline passenger data, and Congress knows how to do so. Congress has protected customer information at financial institutions, 15 U.S.C. § 6821, customer information with telecommunications carriers, 47 U.S.C. § 222, the privacy of subscribers to cable television, 47 U.S.C. § 551, and the privacy of video renters, 18 U.S.C. § 2710.

B. Northwest Airlines Has Not Violated Any Federal Trade Commission Standard For “Unfair” Practices.

In the absence of any statute, regulation or precedent applied by the Department, EPIC relies upon purported Federal Trade Commission (“FTC”) practice for some of its assertions, EPIC ¶¶ 35-36, and MCLU has also filed a complaint with the FTC. The FTC’s test for unfairness involves essentially two factors: (1) whether the practice violates established public policy; and (2) whether the practice substantially injures consumers. EPIC ¶ 35; FTC Policy Statement on Unfairness (1980), <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>. To demonstrate something of a “public policy” in their favor, the complaints look to general public expectations, notably unrelated to air travel, EPIC ¶ 7, and MCLU invokes “Supreme Court precedents” and

“public policy.”¹¹ There is no established “public policy” supporting the expansive privacy rights EPIC and MCLU advocate.

Expectations of privacy in air travel have always been low because expectations of security are so high. Passengers expect screening, disclosures, and restrictions on personal effects that are not imposed upon other modes of travel because passengers know that such measures keep them safe. After September 11, expectations of privacy have diminished further, as more searches, disclosures and restrictions have been imposed. A reasonable person does not expect privacy in his personal information, personal effects, or behavior on an aircraft or in an airport because he or she knows that the price of privacy is diminished public safety.

Such expectations are longstanding and the reason why government agents at airports can undertake security measures that would be an unlawful search or seizure in other contexts. *See City of Indianapolis v. Edmund*, 531 U.S. 32, 47-48 (2000) (referring to the “public safety” need for “border searches or searches at places like airports and government buildings” as “particularly acute”); *United States v. Sokolow*, 490 U.S. 1, 8-9 (1989) (explaining that police were properly aware that the defendant had paid \$2,100 in cash for two airplane tickets from a roll of \$20 bills, and was flying from Honolulu to Miami for only 48 hours during the month of July). Expectations of privacy are diminished even further for international travel. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (“Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the

¹¹ Both EPIC and MCLU invoke the Privacy Act of 1974, 5 U.S.C. § 552a. EPIC ¶ 6. That Act is irrelevant because it applies to federal agencies, not to private actors. *See* 5 U.S.C. § 552a(b); *Doe v. U.S. Postal Service*, 317 F.3d 339, 340 (D.C. Cir. 2003).

border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.”).

The Supreme Court has further held that citizens forfeit any expectation of privacy when they voluntarily provide information to third parties, or when they engage in actions that the general public could easily observe. For example, there is no reasonable expectation of privacy in the telephone numbers a person dials because anyone familiar with a phone bill knows that such information is revealed to the telephone company. *See Smith v. Maryland*, 442 U.S. 735, 742 (1979) (“[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must ‘convey’ phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.”). Similarly, there is no reasonable expectation of privacy in public travel because such travel can be freely observed by the public. *See United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality) (“One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.”).

Thus, when the rare litigant disregards a quarter century of Fourth Amendment jurisprudence and asserts a claim of privacy in flight information similar to the extravagant assertions of EPIC and MCLU, courts have easily and correctly rejected the

claim. *See, e.g., United States v. Goree*, 2002 WL 31050979, at *5 (6th Cir. 2002) (unpublished) (“All of the information that Goree objects to was provided by him to the airline. Therefore, Goree lacks any reasonable expectation of privacy in his flight information.”) (internal quotation marks omitted).

The common law of privacy is no different. As Professor Prosser, who authored the leading treatise on Torts, has summarized:

On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.

Prosser & Keeton, *THE LAW OF TORTS* § 117, 855-56 (5th ed. 1984). Thus, EPIC’s notion, *see* EPIC ¶¶ 37, 39, that there is somehow a privacy interest in the fact that one is traveling with one’s children on an airplane is absurd. Anyone else on an airplane can observe the children.

Given that the public does not reasonably expect the type of privacy that EPIC and MCLU advocate, there is no “substantial” injury in the disclosure of passenger information, particularly for the type of study by the Ames Research Center as occurred in this case. *See* 15 U.S.C. § 45(n); EPIC ¶ 34; FTC Policy Statement on Unfairness. EPIC and MCLU do not allege that any actual person has suffered any kind of financial or emotional injury because of the research undertaken by Ames, and in the absence of

such an injury, there is no basis for administrative relief.¹²

Finally, as discussed above, if there were total privacy in flight information, such privacy rights would conflict with federal laws requiring disclosure of flight information. No one boarding a commercial airliner even before September 11, 2001, could have reasonably thought that his or her identity on that flight was “private.” After September 11, it is indisputable that whatever minimal expectation of privacy in air travel existed before is diminished further for purposes of public safety.

C. Northwest Airlines Fulfilled All Promises Made In Its Internet Privacy Policy.

Northwest Airlines has not engaged in any type of deceptive practice. EPIC’s and MCLU’s sweeping assertions of total passenger privacy drawn from a few isolated phrases from the Internet privacy policy are unreasonable interpretations of the policy for several reasons. The policy makes assurances only with respect to commercial exploitation of passenger information and protection against hackers; it makes no promise that information will not be shared with the government. Total privacy in passenger information would be an unreasonable expectation in the immediate aftermath of September 11, and it would also be contrary to federal law requiring disclosure. Northwest Airlines fulfilled the promises it made and did not violate its policy.

For those passengers who purchased travel during the relevant period through

¹² In a case that demonstrates the importance of actual injury, the Supreme Court has recently held that complaints under the Privacy Act of 1974 do not qualify for any statutory damages without allegation and proof of “actual damages.” *Doe v. Chao*, ___ U.S. ___, 2004 WL 330043 (Feb. 24, 2004). In so holding, the Court noted that even aside from the plain language of the Privacy Act—which requires “actual damages,” 5 U.S.C. § 522a(g)(4)—provision of statutory damages in the absence of actual damages “is at odds with the traditional understanding that tort recovery requires not only [a] wrongful act plus causation reaching to the plaintiff, but proof of some harm for which damages can reasonably be assessed.”

www.nwa.com—and assuming *arguendo* that those passengers read and relied upon the privacy policy—there is no reason to interpret the policy the way EPIC and MCLU interpret it. The plain meaning and purpose of Northwest Airlines’ privacy policy is to assure online consumers that Northwest Airlines will not exploit their personal information for commercial gain, and to assure consumers that their information is safe from hackers. The policy and the Usage Agreement, of which the policy is a part, make this meaning abundantly clear:

- The policy instructs consumers that they are “in complete control of [their] travel planning needs,” and that “[t]his includes controlling the use of information [they] provide to Northwest Airlines, its airline affiliates, and WorldPerks partners.” Contrary to EPIC’s creative use of ellipses, *see* EPIC ¶ 14, the policy states that customers are in “complete control” of their “travel planning needs”; it does not state that passengers are in “complete control” of “the use of information.”
- The policy emphasizes protection from computer hackers by way of “Secure Sockets Layer (SSL) encryption technology and Private Communication Technology (PCT) security standards supported by Microsoft Internet Explore 3.0 and 4.0 and other popular browsers to protect your online transactions.
- The policy states that Northwest Airlines does not “*sell* individual customer names or other private profile information to third parties” (emphasis in original).
- In listing the third parties with whom Northwest Airlines shares passenger

information, the policy lists only other businesses—“car rental agency, hotel, or other involved third party to ensure the successful fulfillment of your travel arrangements.”

- *There is no representation made in the policy that Northwest Airlines will not provide information to the government.* The Usage Agreement cautions that Northwest Airlines’ performance of this Agreement “is subject to existing laws and legal process, and nothing contained in this Agreement is in derogation of Northwest Airlines’ right to comply with law enforcement requests or requirements relating to the User’s use of this Web site or information provided to or gathered by Northwest Airlines with respect to such use.” Exhibit 1 at 6-7.

The study of passenger information by Ames Research Center that Northwest Airlines permitted was a study of the feasibility of a particular type of computer analysis. It was a pure study of computer methods for security purposes and had no conceivable ulterior motive related to invading passenger privacy or exploiting consumer information for private gain. No reasonable person would or should interpret the privacy policy as forbidding Northwest Airlines from improving its security system by assessing whether computers can perform particular tasks with passenger information.

At bottom, EPIC and MCLU offer an unreasonable construction of Northwest Airlines’ privacy policy. The policy applies only to commercial use of passenger information, and there is no reason to stretch it any farther, particularly after September 11.

II. EPIC And MCLU Should Not Have Standing To Bring A Formal Complaint Because They Allege Purely Hypothetical Harms.

EPIC and MCLU have invoked the formal complaint procedures under the Department's regulations, 14 CFR § 302.404, such that a docketed proceeding has ensued, and Northwest Airlines must respond to this complaint. Neither EPIC nor MCLU purports to be representing any real person asserting under penalty of perjury that he or she [1] in the wake of the worst terrorist attacks in history, actually "clicked" on and read Northwest Airlines' Internet privacy policy, [2] interpreted it the way EPIC and MCLU interpret it, [3] purchased travel on www.nwa.com in reliance on that interpretation, and [4] now feels injured enough to seek relief regarding the research undertaken by the Ames Research Center. Northwest Airlines respectfully submits that complaints such as these, that fail to allege any concrete or particularized injury by a member of either organization, should be treated as informal complaints, 14 CFR § 302.403, subject to further action only upon the initiative of the Secretary.

The statute does not provide EPIC and MCLU standing to file a formal complaint because it states that only "an air carrier, foreign air carrier, or ticket agent" can file a complaint, 49 U.S.C. 41712(a); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976) ("[I]ndividual consumers are not even entitled to initiate proceedings."). The only legal avenue for EPIC and MCLU to file a formal complaint is by a delegation of the Secretary's discretion to open proceedings on his own initiative. Obviously Northwest Airlines is aware that "any person" may file a formal complaint. See 14 CFR § 302.404; *Complaint of the American Society of Travel Agents v. Delta Air Lines, Inc.*, Order 2002-9-2, 2002 WL 2019516 (Sept. 4, 2002). This proceeding, however, demonstrates the propriety of imposing a standing requirement for formal complaints.

EPIC and MCLU are clearly waging a public policy battle by way of the complaint process. They have alleged “unfairness” and sought Department action as if they were participating in notice-and-comment rulemaking. The complaint process is an adjudicatory process regarding particular practices, and it subjects airlines to potential remedies that include civil penalties. Adjudicatory standing requirements are an appropriate check on the abuse of the formal complaint process to prevent it from being yet another forum for abstract policy disputes. The complaints do not satisfy an adjudicatory standing threshold, and for that reason, the complaints in their present form should be treated only as informal in nature.

III. Answer To Specific Allegations.

In accordance with 14 CFR § 302.405, Northwest answers the specific allegations contained in EPIC’s Complaint as follows:

1. Northwest Airlines denies the allegations contained in paragraph 1 of the Complaint.
2. Northwest Airlines denies the allegations contained in paragraph 2 of the Complaint.
3. Northwest Airlines lacks sufficient knowledge to admit or deny the allegations contained in paragraph 3 of the Complaint.
4. Northwest Airlines admits the allegations contained in paragraph 4 of the Complaint.
5. Northwest Airlines states that paragraph 5 of the Complaint asserts legal conclusions to which no response is required, and factual assertions that Northwest Airlines lacks sufficient knowledge to admit or deny
6. Northwest Airlines states that paragraph 6 of the Complaint asserts legal

conclusions to which no response is required.

7. Northwest lacks sufficient knowledge to admit or deny the allegations contained in paragraph 7 of the Complaint.
8. Northwest lacks sufficient knowledge to admit or deny the allegations contained in paragraph 8 of the Complaint.
9. Northwest lacks sufficient knowledge to admit or deny the allegations contained in paragraph 9 of the Complaint.
10. Northwest Airlines admits that the Secretary of Transportation enforces 49 U.S.C. § 41712. Northwest Airlines lacks sufficient knowledge to admit or deny the remaining allegations contained in paragraph 10 of the Complaint.
11. Northwest Airlines admits the allegations contained in paragraph 11 of the Complaint.
12. Northwest Airlines does not have sufficient information from the allegations to admit or deny the allegations contained in paragraph 12.
13. Northwest Airlines admits the allegations contained in the first sentence of paragraph 13 of the Complaint. The quotations from public filings in the second sentence speak for themselves.
14. Northwest Airlines admits that the allegations excerpt portions of Northwest Airlines' Internet privacy policy as it has appeared at www.nwa.com. The quoted portions speak for themselves.
15. Northwest Airlines admits that its Internet privacy policy, as it has appeared at www.nwa.com, has included terms similar or identical to those quoted in paragraph 14 of the Complaint.

16. The quoted representations from Northwest Airlines' "Security Commitment" at www.nwa.com speak for themselves.
17. Northwest Airlines does not have sufficient knowledge to admit or deny the allegations contained in paragraph 17 of the Complaint. The alleged content of the letter speaks for themselves.
18. On information and belief, Northwest Airlines admits the allegations contained in paragraph 18 of the Complaint.
19. Northwest Airlines lacks sufficient knowledge to admit or deny the allegations contained in paragraph 19 of the Complaint.
20. Northwest Airlines lacks sufficient knowledge to admit or deny the allegations contained in paragraph 20 of the Complaint.
21. Northwest lacks sufficient knowledge to admit or deny the allegations contained in paragraph 21 of the Complaint.
22. On information and belief, Northwest Airlines admits the allegations contained in paragraph 22 of the Complaint.
23. Northwest Airlines lacks sufficient knowledge to admit or deny the allegations contained in paragraph 23 of the Complaint.
24. Northwest Airlines lacks sufficient knowledge to admit or deny the allegations contained in paragraph 24 of the Complaint.
25. On information and belief, Northwest Airlines admits the allegations contained in paragraph 25 of the Complaint.
26. The content of the New York Times of September 23, 2003, speaks for itself.
27. The content of the St. Paul Pioneer Press of September 24, 2003, speaks for itself.

28. On information and belief, Northwest Airlines admits the allegations contained in paragraph 28 of the Complaint.
29. The content of the Washington Times of September 27, 2003, speaks for itself.
30. The content of the Washington Post of January 18, 2004, speaks for itself.
31. Northwest Airlines denies the allegations contained in paragraph 31 of the Complaint.
32. Northwest Airlines admits the jurisdiction of the Secretary of Transportation but denied that 49 U.S.C. § 41712 is relevant or otherwise applicable to the allegations in the Complaint.
33. Northwest Airlines lacks sufficient knowledge to admit or deny the allegations contained in paragraph 33.
34. Northwest Airlines states that paragraph 34 of the Complaint asserts legal conclusions to which no response is required. To the extent that a response is required, Northwest denies that 49 U.S.C. § 41712 and 15 U.S.C. § 45(a) are relevant or otherwise applicable to the allegations in the Complaint. Northwest lacks sufficient knowledge to admit or deny the remaining allegations contained in paragraph 34.
35. Northwest Airlines states that paragraph 35 of the Complaint asserts legal conclusions to which no response is required. To the extent that a response is required, Northwest denies that 15 U.S.C. § 45(a) is relevant or otherwise applicable to the allegations in the Complaint. Northwest lacks sufficient knowledge to admit or deny the remaining allegations contained in paragraph 35.
36. Northwest Airlines states that paragraph 36 of the Complaint asserts legal

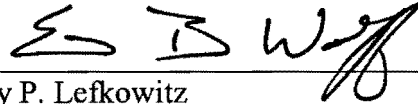
conclusions to which no response is required. To the extent that a response is required, Northwest denies that 15 U.S.C. § 45(a) is relevant or otherwise applicable to the allegations in the Complaint. Northwest lacks sufficient knowledge to admit or deny the remaining allegations contained in paragraph 36.

37. Northwest Airlines states that paragraph 37 of the Complaint asserts legal conclusions to which no response is required. To the extent that a response is required, Northwest Airlines denies that 15 U.S.C. § 45(a) is relevant or otherwise applicable to the allegations in the Complaint. Northwest Airlines lacks sufficient knowledge to admit or deny the remaining allegations contained in paragraph 37.
38. Northwest Airlines states that the quoted material in the second sentence of paragraph 38 of the Complaint speaks for itself. Northwest Airlines denies the remaining allegations contained in paragraph 38.
39. Northwest Airlines denies the allegations contained in paragraph 39 of the Complaint.
40. Northwest Airlines denies the allegations contained in paragraph 40 of the Complaint.
41. Northwest Airlines denies the allegations contained in paragraph 41 of the Complaint.
42. Northwest Airlines denies the allegations contained in paragraph 42 of the Complaint, including subparts A through F, and states that none of the allegations of the Complaint is actionable under 49 U.S.C. § 41712. Furthermore, Northwest asks that the requested relief be denied and that the Complaint be dismissed.

CONCLUSION

For the foregoing reasons, the complaints of EPIC and MCLU should be dismissed.

Respectfully submitted,



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2700 Lone Oak Parkway
Eagan, MN 55420
(612) 727-0750 (phone)

Dated: February 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served a copy of the foregoing Answer of Northwest Airlines, Inc. by Federal Express on the following:

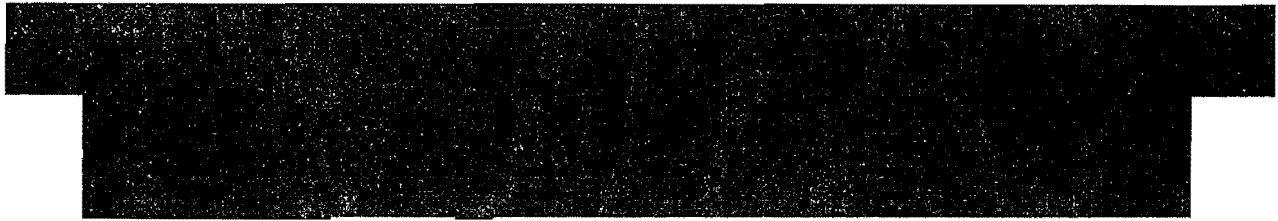
Marcia Hofmann
Staff Counsel
Electronic Privacy Information Center
1718 Connecticut Avenue, N.W.
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Washington, DC 20009

Charles E. Samuelson
Executive Director
Minnesota Civil Liberties Union
1821 University Avenue
Suite N-592
St. Paul, MN 55104

Samuel Podberesky
Assistant General Counsel for Aviation
Enforcement and Proceedings
Department of Transportation
400 7th St., S.W.
Nassif Building, Room PL 401
Washington, DC 20590-0001


Eric B. Wolff

Dated: February 27, 2004



Northwest Airlines nwa.com Reservations, CyberSavers, and WorldPerks Award Travel Reservations Privacy Policy

To view our Usage Agreement [click here](#).

As a User of nwa.com Reservations you are in complete control of your travel planning needs. This includes controlling the use of information you provide to Northwest Airlines, its airline affiliates, and WorldPerks partners.

Below are some commonly asked questions and answers about privacy and the collection of data on nwa.com. If you have additional questions which are not answered here, please [click here](#) to send us an email at TTNWA@nwa.com.

1)What information does Northwest collect and how do we use it?

When making a purchase on nwa.com, Northwest collects the following information:

- Name
- Address
- E-mail address
- Credit card number and expiration date
- Home and work phone numbers
- Fax number
- WorldPerks number

We use your personal information for a variety of purposes, including targeting specific customers for special offers.

In addition, we may retain your flight information and ask you to provide us with your airport of preference and a billing address for your credit card. We use this information to process your online purchase and refer to it if we need to contact you regarding that purchase.

We also collect information about your visits including domains, browsers and pages accessed on nwa.com so we can continue to work to enhance your time spent with us online.

When you send us an email, we will retain the content of the email, your email address, our response and the text of any follow-up questions you may have. We use this information to measure how effectively we address customer concerns online.

2)How is my information protected?

Northwest Airlines uses Secure Sockets Layer (SSL) encryption technology and Private Communication Technology (PCT) security standards supported by Microsoft Internet Explorer 3.0 and 4.0 and other popular browsers to protect your online transactions.

SSL encrypts your credit card number, name, address, and phone number before they travel over the Internet. This makes doing business over the Internet as secure as purchasing by telephone.

SSL safe connection and secure transaction technology has effectively protected hundreds of thousands of nwa.com Reservations customers who have transmitted their credit card numbers online and made a purchase since we launched.

3) With whom do you share my information?

When you reserve or purchase travel services through Northwest Airlines nwa.com Reservations, we provide only the relevant information required by the car rental agency, hotel, or other involved third party to ensure the successful fulfillment of your travel arrangements. We also use information you provide during User registration or as part of the reservation process to customize the content of our site to meet your specific needs and to make product improvements to Northwest Airlines nwa.com.

We do not *sell* individual customer names or other private profile information to third parties and have no intention of doing so in the future. We do share User names and email addresses with our WorldPerks partners only for specific and pertinent promotional use *but only* if our customers have opted to receive promotional emails from Northwest and our

WorldPerks partners.

4) How do I tell Northwest that I don't want to be contacted for promotional purposes?

As a User of Northwest Airlines nwa.com Reservations you have the option to receive updates from Northwest and Northwest WorldPerks Partners about fare sales in your area, special offers, new Northwest Airlines and WorldPerks services and noteworthy news. To receive this information, you must register for our promotional email programs or check the appropriate box in your nwa.com Reservations Member Information profile. If you decide you would rather not receive these emails, you can always unregister or update your Member Information in nwa.com Reservations.

5)How do I correct my personal information on your site?

You may change your personal information at any time on nwa.com. Simply click on the links below to update information in each category as needed.

E-mail address

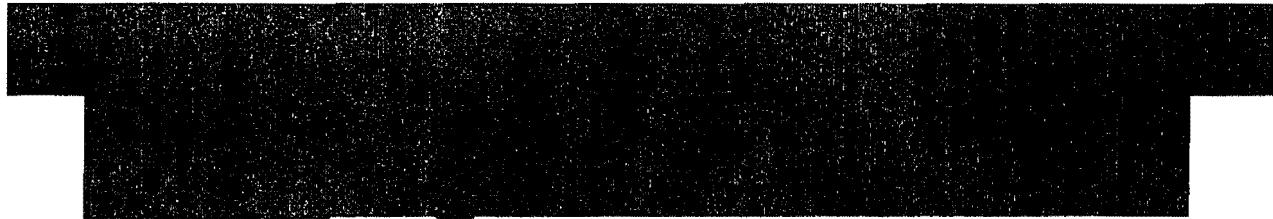
nwa.com Reservations

Award Travel Reservations

6)How can I contact Northwest Airlines?

Click here to contact us via email at TTNWA@nwa.com. If you wish to speak to someone on the phone, please contact:

- 1-800-44PERKS for questions regarding your WorldPerks account
- 1-800-225-2525 for questions about reservations
- 1-800-NWA-NWKL for questions about nwa.com



nwa.com Reservations, CyberSavers and Award Travel Reservations Usage Agreement And Notices

To return to Privacy Policy [click here](#).

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about fare sales in your area, special offers, new Northwest Airlines services and noteworthy news. To receive this information you must register for our [promotional email programs](#) or check the appropriate box in your [nwa.com Reservations Member Information](#) profile. If you decide you would rather not receive these emails, you can always [unregister](#) or update your Member Information in [nwa.com Reservations](#).

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- Upload files that contain software or other material protected by intellectual property laws (or by rights of privacy or publicity) unless the User owns or controls the rights thereto or has received all necessary consents.
- Upload files that contain viruses, corrupted files, or any other similar software or programs that may damage the operation of another's computer.
- Delete any author attributions, legal notices or proprietary designations or labels in any file that is uploaded.
- Falsify the origin or source of software or other material contained in a file that is uploaded.
- Advertise or offer to sell any goods or services, or engage in surveys, contests, or chain letters.
- Download any file that the User knows, or reasonably should know, cannot be legally distributed via this Web site.

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This agreement shall be deemed to have been made in the State of Minnesota, U.S.A. and shall be interpreted, and the rights and liabilities of the parties hereto determined in accordance with the law of the State of Minnesota, U.S.A., without regard to conflicts of law principles. The parties consent to the exclusive jurisdiction of the state and federal courts for the County of Dakota, Minnesota, U.S.A. for the determination of any claim or controversy between the parties and arising out of or relating to this Agreement. Both parties hereby consent to the jurisdiction of the Minnesota courts and waive any objections as to personal jurisdiction or as to the laying of venue in such courts due to inconvenient forum or any other basis.

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Separate terms and conditions will apply to your reservation and purchase of travel-related goods and services that you select. You agree to abide by the terms or conditions of purchase imposed by any supplier with whom you elect to deal including, but not limited to, payment of all amounts when due and compliance with all rules and restrictions regarding availability of fares, products or services. You shall be completely responsible for all charges, fees, duties, taxes and assessments arising out of the use of this Web site.

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National Aeronautics and
Space Administration
Headquarters
Washington, DC 20546-0001



Reply to Attn of: L:KS

JAN 27 2004

The Honorable Gordon Smith
United States Senate
Washington DC, 20510

Dear Senator Smith:

The Administrator has asked me to respond to your letter of January 20, 2004, regarding Northwest Airlines participation in a NASA aviation security research study, a matter that has lately received some attention in the news media.

Following the terrorist attacks of September 11, 2001, NASA, with the best of intentions and in conjunction with the Federal Aviation Administration (FAA), undertook exploratory studies to determine how the agency could contribute to addressing the challenge of aviation security. One of the activities in this effort evaluated how computer techniques developed by NASA to detect anomalies in large volumes of scientific and engineering data could be used to assist in threat detection. The hypothesis was formulated that NASA's techniques could be used to assess large quantities of airline passenger information and possibly find anomalies that could lead to characterizing a subset of the flying public who might include terrorists. Much of the focus of the work was attempting to identify those passengers that clearly were not a threat, so that airline resources would focus on passengers where there was some doubt.

In December of 2001 NASA's Ames Research Center, Moffett Field, Calif., requested passenger data from Northwest Airlines, known throughout the aviation industry as a leader in aviation security, having worked with the Federal Aviation Administration (FAA) to develop the first Computer Assisted Passenger Prescreening System (CAPPS 1). The research was terminated in late 2002 and the data has been returned to Northwest Airlines. No copies of the data were made.

In response to your specific questions:

1. How did NASA protect the privacy of passengers during its recent aviation security research study?

NASA received 180 CDs from Northwest Airlines (NWA) with passenger information covering three months of passenger data. The CDs were kept in a secured lab with limited access. The lab had a cipher lock that required individuals entering the lab to be on the access list and to possess a personal identification number for entry. The lab was also in a secured building that requires card key access on a federal installation that only allows employees and approved visitors onto the secured portion of the installation. When the CD's were not in the lab, they were stored in a locked file cabinet in a locked office. We have determined that 3 preliminary CDs provided by NWA in December 2001 were simply kept in a locked office for the duration of the project. All computers used to store the data, including laptops, were password protected.

2. Did NASA work with Northwest Airlines to protect the privacy of the data used?

No, NASA followed the procedures that it traditionally uses to protect sensitive data.

3. Why did NASA retain the passenger record data for two years?

NASA retained the data for a total of 21 months. For the first 14 months, NASA was working with the data and assessing whether existing algorithms would be useful in passenger threat assessment, performing research using the data. After 14 months, the specific project using the data was terminated since it was determined that the existing algorithms were insufficient for the problem and that research in passenger threat assessment was more appropriately handled by the Transportation Security Administration (TSA) and/or the Department of Homeland Security. NASA retained the data after termination in case the termination of the project was reconsidered.

4. How many passengers' records were shared and what specific passenger record information was provided to NASA for this study.

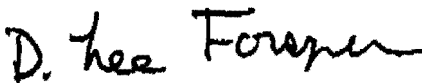
The data contained the records for all of the NWA passengers for a duration of 3 months. Two days worth of data were decompressed and extracted. However, in the process of assessing the data a small number of records may have been decompressed from other days. We do not know the total number of records that were available. The records included flight information and personal information such as phone number, method of payment, and credit card information if the passenger paid with a credit card.

5. In particular, were there any Oregon residents involved in this study?

We do not know.

I hope that you find this information helpful. If you have any further questions please do not hesitate to call upon us.

Cordially,



D. Lee Forsgren
Assistant Administrator
For Legislative Affairs