

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM



**PSEUDO-CLASSIFICATION OF EXECUTIVE BRANCH DOCUMENTS:
PROBLEMS WITH THE TRANSPORTATION SECURITY
ADMINISTRATION'S USE OF THE SENSITIVE SECURITY INFORMATION
(SSI) DESIGNATION**

**JOINT STAFF REPORT
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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
113TH CONGRESS
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I. Executive Summary

Under the Air Transportation Security Act of 1974, the Federal Aviation Administration (FAA) created a category of sensitive but unclassified information, frequently referred to as “Sensitive Security Information” (SSI), and issued regulations that prohibit the disclosure of any information that would be detrimental to transportation security.¹ These regulations restrict disclosure of SSI, exempting information properly marked as SSI from release under the Freedom of Information Act.²

After the 1988 bombing of a commercial airliner that crashed in Lockerbie, Scotland, the FAA made significant changes in aviation security, expanding the definition of SSI to include any information the FAA Administrator determined may reveal systemic vulnerabilities within the aviation system, or vulnerabilities of aviation facilities to attacks.³ Other definitional expansions included details of inspections and investigations, as well as alleged violations and certain agency findings. The SSI regulation was later expanded in order to limit access to protected information to those persons who have a “need-to-know.”⁴

While the SSI designation can protect sensitive information, it is also vulnerable to misuse. Bipartisan concerns about the use of the SSI designation by the Transportation Security Administration (TSA), an agency of the Department of Homeland Security (DHS), have existed since the promulgation of the SSI regulations in 2004.⁵ Through its investigation, the Committee obtained witness testimony and documents that show possible misuse of the SSI designation by TSA. Witnesses detailed instances in which TSA barred the release of SSI documents against the advice of TSA’s SSI Office. TSA also released SSI documents against the advice of career staff in the SSI Office. The Committee’s investigation revealed that coordination challenges exist among the TSA Administrator, TSA’s Office of Public Affairs (OPA), and TSA’s SSI Office.

Witnesses testified that many of the problems related to the SSI designation process emanate from the structure of the SSI regulation itself. TSA’s SSI Office is staffed with career employees tasked with assisting in the SSI designation process. The final authority on SSI designation, however, rests with the TSA Administrator. Pursuant to the regulation, the TSA Administrator must provide certain documentation supporting his SSI designations. Yet, witnesses interviewed by the Committee stated that there were multiple incidents in which the SSI Office was not consulted or where TSA took actions against the advice of SSI Office officials. Further, such actions occurred without the TSA Administrator providing required written documentation supporting the action.

¹ Pub. L. 93-366, 88 Stat. 409 (Aug. 5, 1974); *see also* Transp. Security Admin. (TSA), Statute & Reg. History: Sensitive Security Information (SSI), *available at* <http://www.tsa.gov/stakeholders/statute-and-regulation-history> (last visited May 1, 2014) [hereinafter TSA History].

² 49 C.F.R. § 1520.5; *see also* U.S. Dep’t of Homeland Security (DHS), Management Directive No. 11056.1, SSI (Nov. 3, 2006), https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_110561_sensitive_security_information.pdf.

³ 14 C.F.R. § 191.7.

⁴ 14 C.F.R. § 107.

⁵ *See* 49 C.F.R. § 1520. TSA and the Department of Transportation issued an interim final rule clarify preexisting SSI provisions on May 18, 2004.

Due to this contentious relationship and the failure to follow proper procedures, the SSI Office struggled to carry out its statutory obligations effectively. While the TSA Administrator has the final authority to determine whether information is SSI, he is also required under the regulations to submit written explanations of his decisions to the SSI Office in a timely fashion. Unfortunately, the repeated failure to submit written determinations before taking actions on SSI caused a rift between senior TSA leadership and the SSI Office. This rift resulted in inconsistencies, which could be detrimental to the process for protecting sensitive information.

This report explores issues related to the current TSA SSI designation process and recommends improvements to ensure that sensitive information is properly protected while non-sensitive information is properly released to the public. TSA's use of SSI reveals a broader problem of pseudo-classification of information in federal departments and agencies. Limits on such labeling of information are needed to provide greater transparency and accountability to the public while promoting information security.

II. Findings

- Problems with TSA's application of the SSI designation date back to 2004, including inconsistent application of the designation.
- TSA improperly designated certain information as SSI in order to avoid its public release.
- TSA repeatedly released information to the public against the advice of the SSI office and without having produced suitable documentation to explain the decision.
- The structure and position of the SSI office within TSA has contributed to the difficulties the office has encountered in carrying out its mission. TSA has moved the office within the agency's organizational structure several times. One official stated the office moves have effectively relegated it a "throwaway office."
- TSA made significant improvements to its SSI designation process following the Committee's investigation.

III. Recommendations

- The TSA Administrator should provide documentation and an explanation for his or her decision to override a previous SSI determination in writing to the SSI office *before* the release is made in order to provide the SSI office with an explanation of the Administrator's justification and promote consistent treatment of future SSI designations.
- The Department should undertake an evaluation of the SSI Office's position within TSA's organizational structure, to ensure that the office has the support it requires to carry out its mission.
- Executive Branch departments and agencies must curtail the widespread use of pseudo-classification of information, which hinders transparency. Agencies must track and report the use of such labels on information to ensure consistency and limits on their use.

IV. Brief History of Sensitive Security Information (SSI)

A. Distinctions between Classified/Unclassified Information and SSI

The President sets the federal government's classification standards by executive order.⁶ All information held by the government falls into two categories: (1) classified information, which includes the "Top Secret," "Secret," and "Confidential" designations, and (2) unclassified information.⁷

Unclassified information falls into two categories: Sensitive but Unclassified (SBU), a broad category that includes information protected by federal regulation such as SSI and information protected by agency or government policy such as For Official Use Only (FOUO); and Public Information, which includes all other information not contained in the SBU category.⁸

Generally, classified information is information of which "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security."⁹ Such information must be owned by, produced by, or under the control of the federal government, and must concern one of the following:

- 1) Military plans, weapons systems, or operations;
- 2) Foreign government information;
- 3) Intelligence activities, intelligence sources/methods, cryptology;
- 4) Foreign relations or foreign activities of the United States, including confidential sources;
- 5) Scientific, technological, or economic matters relating to national security;
- 6) Federal programs for safeguarding nuclear materials or facilities;
- 7) Vulnerabilities or capabilities of national security systems; or
- 8) Weapons of mass destruction.¹⁰

Classified information is classified as "Top Secret" if its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security.¹¹ The standard for "Secret" information is downgraded to include information which if released would do "serious damage" to national security, and "Confidential" information is defined as information which if released would pose "damage" to national security.¹² The Counterintelligence and Security Enhancement Act of 1994 established procedures governing the

⁶ JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS 21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK (2013).

⁷ DHS, Transportation Security Administration (TSA) Sensitive Security Information (SSI) Program: SSI Training for Air Cargo Stakeholders, http://www.tsa.gov/sites/default/files/assets/pdf/ssi/ssi_training_air_cargo.pdf (last visited May 1, 2014).

⁸ *Id.*

⁹ Executive Order 13526, Classified National Security Information, at § 1.2 (Dec. 29, 2009), <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

¹⁰ *Id.* § 1.4

¹¹ *Id.* § 1.2

¹² *Id.*

access to classified material so that no person can gain such access without having undergone a background check.¹³ Only personnel with the proper security clearances are permitted access to classified information.

Criminal and civil penalties apply to unauthorized disclosure of classified information, the severity of which depends on the type of information and the manner of disclosure. Federal law allows for a prison sentence of no more than one year and/or a \$1,000 fine for officers and employees of the federal government who knowingly remove classified material without the authority to do so and with the intention of keeping that material at an unauthorized location.¹⁴ Further, fines of up to \$10,000 and imprisonment for up to 10 years can be imposed on a federal employee who transmits classified information to anyone who the employee has reason to believe is an agent of a foreign government.¹⁵

A fine and a 10-year prison term may be imposed on anyone, government employee or not, who publishes, makes available to an unauthorized person, or otherwise uses to the United States' detriment classified information regarding codes, cryptography, and communication intelligence used by the United States or a foreign government.¹⁶ Lastly, the disclosure of confidential information identifying a covert agent, when done intentionally by a person with authorized access to such information, is punishable by imprisonment for up to 15 years.¹⁷ In addition, an agency may employ administrative measures to deter unauthorized disclosures by government personnel.¹⁸ Such measures may include the ability to impose disciplinary action or revoke a person's security clearance.¹⁹

SSI is not classified national security information and therefore not afforded the same protections as classified information. SSI is defined in the Homeland Security Act of 2002 as information obtained or developed during security activities, "if the Under Secretary decides that disclosing the information would (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information, or (C) be detrimental to the security of transportation."²⁰ In order for information to be SSI, it must be related to transportation security, and it must fall under one of the 16 categories of SSI as defined in the SSI regulation.²¹

Although SSI is not subject to the handling requirements governing classified national security information, it is subject to the handling procedures required by TSA's SSI regulation.²² Restrictions on access to SSI and penalties for unauthorized disclosure of SSI are much less

¹³ Counterintelligence and Security Enhancement Act of 1994, Title VII of P.L. 103-359 (codified at 50 U.S.C. § 435 *et seq.*).

¹⁴ ELSEA, *supra* note 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ PUB. L. 107-296.

²¹ 49 C.F.R. § 1520.5(b).

²² *Id.* § 1520.

severe.²³ A security clearance is not required to gain access to SSI, and criminal penalties may not be imposed in the event of unauthorized disclosure of SSI.²⁴ Unauthorized disclosure of SSI may, however, result in civil penalties and/or other enforcement or corrective actions.²⁵

B. The Origins of SSI

FINDING: Problems with TSA’s application of the SSI designation date back to 2004, including inconsistent application of the designation.

The concept behind the SSI designation dates back to the early 1970s.²⁶ A 1970 terrorist hijacking that resulted in the explosions of four airliners “convinced the White House that stronger [security] steps were needed,” including installing federal air marshals and screening passengers and their carry-on luggage.²⁷ Although the air marshal and screening programs provided additional security, continued airliner attacks demonstrated the need for further security directives to prevent the exploitation of airline vulnerabilities.²⁸

On January 4, 1973, after authorities discovered bombs on three airplanes, among other security breaches,²⁹ Senator Howard W. Cannon of Nevada, then-Chairman of the Subcommittee on Aviation of the Senate Commerce Committee, introduced legislation which eventually became the Air Transportation Security Act of 1974 (ATSA).³⁰ ATSA authorized the FAA to issue regulations that, notwithstanding the Freedom of Information Act, prohibited the disclosure of any information, if such disclosure “would be detrimental to the safety of persons traveling in air transportation.”³¹

Pursuant to the authority granted by ATSA, the FAA promulgated regulations that created a “category of sensitive but unclassified information known as Sensitive Security Information (SSI).”³² Originally, SSI included, but was not limited to: hijacker profiles, baggage screening protocols, airport or air carrier security programs, explosive detection devices, security plans, security communications equipment and procedures, and any threats of sabotage, terrorism and air piracy.³³

In 1988, nearly 15 years after ATSA’s passage, the bombing of Pan Am Flight 103 over Lockerbie, Scotland prompted significant reform in aviation security. In 1989, the President’s Commission on Aviation Security and Terrorism recommended improvements to the FAA

²³ *Id.* § 1520.17.

²⁴ *Id.*

²⁵ *Id.*

²⁶ TSA History, *supra* note 1.

²⁷ Judy Rumerman, *Aviation Security*, U.S. Centennial of Flight Comm’n, ¶ 7, (2004), <https://www.hsdl.org/?view&did=447844> (last accessed May 1, 2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Pub. L. 93-366, 88 Stat. 415 (Aug. 5, 1974).

³¹ H.R. Rep. No. 93-1194, at 9 (1974).

³² TSA History, *supra* note 1.

³³ Withholding Security Information from Disclosure under the Air Transportation Security Act of 1974, 41 Fed. Reg. 26579 (June 28, 1976).

security bulletin process.³⁴ As a result, Security Directives and Information Circulars were created, and in 1997, those products became SSI-protected.³⁵

In 1997, the FAA published its final SSI rule, which strengthened the existing regulations.³⁶ The rule states:

Much of the effectiveness of the programs **depends on strictly limiting access to such information to those persons who have a need-to-know.** Unauthorized disclosure of the specific provisions of the air carrier and airport security programs or other aviation security information would allow potential attackers of civil aviation to devise methods to circumvent or otherwise defeat the security provisions. It would also discount the deterrent effect inherently providing in prohibiting disclosure of security measures that may or may not be in place.

There are sophisticated criminal elements who actively seek information on what seemingly are minor security points, with a view to accumulating a larger picture of the entire security program. Therefore, it is imperative that the entire security program be protected.³⁷

Modifications to the regulations also expanded SSI coverage to include, among other things, “[a]ny information that the [FAA] Administrator has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities to attack,” including but not limited to “details of inspections, investigations, and alleged violations and findings of violations”³⁸

Tragically, the September 11, 2001 terrorist attacks drastically altered the landscape concerning the definition of classified and unclassified information. Just two months after the attacks, Congress passed a law that established TSA and delegated it the authority to designate information as SSI.³⁹ TSA regulations implementing the law included new information categories.⁴⁰

Even before TSA issued its final rules, controversies erupted over whether the rules went too far. For example, a Congressional Research Service (CRS) report noted that the SSI regulations “raised a number of concerns,” including whether they were being applied to withhold information.”⁴¹ Before TSA issued its final rules, the *Washington Post* reported that, TSA was “muzzling debate by labeling too many of the agency’s policies and reports as too sensitive for public dissemination, according to pilots, flight attendants and consumer

³⁴ TSA History, *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 14 C.F.R. § 107 (1997).

³⁸ 14 C.F.R. § 191.7 (1997).

³⁹ See Aviation & Transp. Security Act of 2001, 49 U.S.C. § 40101 (2001); TSA History, *supra* note 1.

⁴⁰ See 49 C.F.R. § 1520 (2002).

⁴¹ MITCHEL A. SOLLENBERGER, CONG. RES. SERV., SENSITIVE SECURITY INFO. (SSI) & TRANSP. SECURITY: BACKGROUND & CONTROVERSIES, at 3 (2004).

advocates.”⁴² Notwithstanding the tumult, TSA issued its final SSI rules on May 18, 2004, expanding covered information to include all lists of critical infrastructure developed by state and local governments “because their release to the public would increase the risk of attack on critical transportation assets.”⁴³

In September 2004, two House Appropriations Committee Members asked the Government Accountability Office (GAO) to review how TSA used its SSI authority to withhold transportation security information from the public.⁴⁴ In making their request, Representatives David Obey (D-Wis.) and Martin Olav Sabo (D-Minn.) stated that TSA provided written responses to questions that were designated SSI, “but did not treat the same information as sensitive a month earlier.”⁴⁵ They also noted that TSA claimed information relating to electronic baggage screening was SSI, despite the same information having “already been reported in the public domain.”⁴⁶

In 2005, as a result of its review, GAO found TSA had promulgated no guidance or procedures “for determining what constitutes SSI or who can make the designation,” no policies on accounting for or tracking SSI documents, and no systematic reviews for determining if and when an SSI designation should be removed.⁴⁷ GAO also found TSA “lack[ed] adequate internal controls to provide reasonable assurance that its SSI designation process is being consistently applied across TSA.”⁴⁸

GAO noted that TSA’s Internal Security Policy Board recognized that handling and identifying SSI had become problematic.⁴⁹ A memo from the Board stated that, “[i]dentification of SSI has often appeared to be ad-hoc, marked by confusion and disagreement depending upon the viewpoint, experience, and training of the [particular TSA employee].”⁵⁰ As a result of the complaints concerning TSA’s handling of SSI, the Department of Homeland Security Appropriations Act of 2006 required DHS to include timely reviews of SSI requests, and that all information designated SSI, more than three years old, be released upon request, unless the DHS Secretary makes a written determination that the information must remain SSI.⁵¹

⁴² Sara Kehaulani Goo, *TSA Faulted for Restricting Information*, WASH. POST, Oct. 10, 2003, at A11.

⁴³ 49 C.F.R. § 1520, at 28072.

⁴⁴ Christ Strohm, *Lawmakers Question Policy on Transp. Security Info.*, GOV’T EXEC., Sept. 15, 2004, <http://www.govexec.com/federal-news/2004/09/lawmakers-question-policy-on-transportation-security-information/17599/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ GAO, *TSA: Clear Policies & Oversight Needed for Designation of Sensitive Security Info.*, GAO-05-677 (2005).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 5.

⁵¹ TSA History, *supra* note 32; DHS Approps. Act of 2006, P.L. 109-295, § 525(a)(1)(A), 120 Stat. 1355, 1381-1382 (2006).

V. Origin of Investigation

The Committee's investigation into how TSA identifies and protects SSI began in July 2011. On July 13, 2011, the Subcommittee on National Security, Homeland Defense, and Foreign Operations held a hearing on airport perimeter security.⁵² In preparation for this hearing, Subcommittee Chairman Jason Chaffetz requested information relating to airport incidents involving security breaches. In response, DHS provided a PowerPoint presentation entitled "Information Requested by Chairman Chaffetz," outlining such security breaches.⁵³ Chairman Chaffetz disclosed portions of this presentation publicly both before and during the hearing.

Following the hearing, DHS Deputy General Counsel Joseph Maher sent Chairman Chaffetz a letter accusing him of unlawfully releasing this non-classified information, because it was designated SSI.⁵⁴ Maher stated that "[u]nder applicable regulations, SSI may be disclosed only to covered persons as defined in 49 C.F.R. § 1520.7 who have a 'need to know.'"⁵⁵ In response, Chairman Issa wrote to then-Homeland Security Secretary Janet Napolitano, explaining that Congress is not covered by the regulation governing SSI protection.⁵⁶ Members of Congress are constitutionally protected if they disclose either SSI or classified information.⁵⁷ Additionally, 40 C.F.R. § 1520.15(c) specifically entitles Congress to access to SSI documents.⁵⁸ Based on the plain language of the regulation and relevant case law, Chairman Issa concluded that the Department's position was without merit.⁵⁹

Further, consistent with Title 49 of the U.S. Code, documents designated SSI for the purpose of "conceal[ing] a violation of law, inefficiency, or administrative error" or "prevent[ing] embarrassment" are deemed improperly designated.⁶⁰ Former SSI Office Director Andrew Colsky, an SSI expert, reviewed the PowerPoint presentation in question and concluded

⁵² *TSA Oversight Part 2: Airport Perimeter Security: Hearing before the H. Comm. on Oversight & Gov't Reform, Subcomm. on Nat'l Security, Homeland Defense, & Foreign Ops.* 112th Cong. (July 13, 2011).

⁵³ Inspection & Enforcement Analysis, Info. Requested by Chairman Chaffetz: *U.S. Airport Security Breach & Access Control Incidents November 19, 2001-April 30, 2011*, TSA Office of Security Ops. Compliance Programs (May 12, 2011).

⁵⁴ Letter from Joseph B. Maher, Dep. Gen. Counsel, DHS, to Rep. Jason Chaffetz, Chairman, Subcomm. on Nat. Security, Homeland Defense, & Foreign Ops. (July 13, 2011).

⁵⁵ *Id.*

⁵⁶ Letter from Rep. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Janet Napolitano, Sec'y, DHS (July 22, 2011); 49 C.F.R. § 1520.

⁵⁷ *Gravel v. United States*, 408 U.S. 606, 628-29 (1972).

⁵⁸ 49 C.F.R. § 1520.15(c) (2012) ("*Disclosures to committees of Congress and the General Accounting Office.* Nothing in this part precludes TSA or the Coast Guard from disclosing SSI to a committee of Congress authorized to have the information or to the Comptroller General, or to any authorized representative of the Comptroller General.").

⁵⁹ For clear guidance on this issue, see Frederick M. Kaiser et al., CONG. RES. SERVICE, *Cong. Oversight Manual*, No. RL30240, at 66 (2011) ("[T]he SSI regulations also appear to insulate congressional committees and their staffs from any sanctions or penalty from the receipt and disclosure of SSI. Specifically, the SSI regulations contain a provision defining those persons who are 'covered persons' and, thus, subject to the regulations. A close reading of the definition of 'covered person' indicates that it does not include members of Congress, committees, or congressional staff.").

⁶⁰ 49 U.S.C. § 40119(b).

it may have been improperly designated SSI because it was (1) not sufficiently marked, and (2) comprised of cumulative figures of no value to our enemies and other publicly-available information.⁶¹ Colsky's expert opinion raised questions about TSA's use of the SSI designation.

The dialogue between the Committee and DHS about TSA's application of the SSI designation captured the attention of former SSI Office Director Colsky, who expressed his concerns about DHS's management of the SSI program. Further, as part of its investigation, the Committee conducted a series of transcribed interviews with current and former staff of the TSA office that manages SSI designations.

Witness testimony and documents obtained by the Committee showed significant problems with TSA's application of the SSI designation. Specifically, TSA officials were inconsistent in the application of the designation—sometimes choosing to release information the SSI Office determined to be sensitive security information while in other instances refusing to release potentially embarrassing information the SSI Office did not consider to merit the SSI designation.

VI. Inappropriate Use of the SSI Designation to Prevent FOIA Releases

FINDING: TSA improperly designated certain information as SSI in order to avoid its public release.

Witnesses interviewed by the Committee testified about instances in which TSA inappropriately withheld documents from FOIA requesters because it was deemed SSI. Former SSI Office Director Andrew Colsky testified that TSA used the SSI designation to prevent the release of documents to FOIA requesters related to Whole Body Imagers (WBIs). He stated:

There's certain public interest groups out there that do a lot of FOIA requests over these types of things, and one of them did a FOIA request about information related to those scanners, I guess, and their ability to store images or not store images or whatever. And now this is being—you know, coming secondhand, but from a significant number of highly reliable sources, and -- I don't want to say anything to get anybody in trouble -- and things that I personally overheard where there was information in the responsive documents that was not by any stretch of the imagination at all SSI, but was either embarrassing or was something that they just didn't want the other side to know. And there was **extreme pressure** from again I'll use the term 'front office' to mark it as SSI.⁶²

Colsky also discussed other ways that TSA may be withholding information from disclosure under FOIA. He stated:

⁶¹ Transcribed Interview of Andrew Colsky, at 110-111 (Nov. 9, 2011) (emphasis added) [hereinafter Colsky Tr.]

⁶² Colsky Tr. at 56.

[C]urrently I sit in the Freedom of Information Act office. And one of the first things I was told when I got there from both attorneys and FOIA processors was, oh, yeah, don't worry about it, because **if you come across embarrassing information or whatever, [the Chief Counsel] will just hide it and come up with an exemption**; because if you cover it with a FOIA exemption, it's so hard for the other person to challenge it, and it will be costly and difficult for them to challenge it, and they're probably never going to see it anyway, so you just get away with it. That's the way it's done.⁶³

Pursuant to a FOIA request, the SSI Office was asked to review a video documenting Chairman Chaffetz passing through a TSA screening checkpoint. Multiple news outlets made requests for the video under FOIA. Colsky stated the SSI Office determined the video did not contain any SSI, but other TSA officials intervened to censor the part of the video showing Chairman Chaffetz receiving a "pat down." Colsky stated:

A. Congressman Chaffetz had gone through the screening at—I forget which airport it was . . . But I remember that the video of that screening or that incident had been requested by multiple news sources. And so, again, in good old TSA fashion, I see this commotion down in Office of Public Affairs, because my office at the time was right next to them, and, you know, all this scuffling. You've got general counsel there, you've got all these members of Public Affairs and some people from the front office, I guess. I can't remember who. There was a whole group of people that are all looking at this video. At first we had been asked to review the video for SSI. We reviewed it, and we said there's no SSI in it based on all the guidance that we had at the time. And video was something that we spent a lot of time defining.

But then I believe it was Lee Kair decided that he had concerns about the video being shown. And I don't know—I was not privy to the conversations, so I don't know what the concerns were or whatever.

Q. Who is Lee?

A. Lee Kair was the Assistant Administrator over the Office of Security Operations. Those are the people that deal with the airport security stuff.

Q. Okay.

A. And so someone, I don't know who, I'm going to assume [General Counsel] Francine Kerner and Gale Rossides, I believe, made the

⁶³ *Id.* at 64.

decision that they wanted to block out information as SSI, and they proceeded to, you know, put like the fuzzy image over certain parts of the image. And I was left out of the process. I happened to come over, so I was sort of brought into the discussion. And there's several instances like that.⁶⁴

After the SSI Office determined there was no SSI in the video, Assistant Administrator Lee Kair disagreed with the SSI Office's decision, and TSA General Counsel Francine Kerner intervened to revisit it. By e-mail, TSA Special Counselor Kimberly Walton alerted Kair and Kerner to the fact that TSA had received several FOIA requests for the video, and that the SSI Office had determined the video did not contain SSI.⁶⁵ Kerner wrote: "I think Lee and the SSI office should meet to discuss this particular determination. I am happy to attend having been persuaded by lee's [sic] arguments."⁶⁶

From: Kerner, Francine <[REDACTED]>
To: Walton, Kimberly <[REDACTED]>; Rossides, Gale <[REDACTED]>; Kauffman, Keith <[REDACTED]>; Lee, Kristin <[REDACTED]>; Kair, Lee R <[REDACTED]>; Macias, Art <Chief of Staff> <[REDACTED]>; Berumen, Paul <[REDACTED]>; Heffernan, Claire M. <[REDACTED]>
Sent: Fri Oct 16 13:02:09 2009
Subject: Re: Chaffetz Videos and reports

I think Lee and the SSI office should meet to discuss this particular determination. I am happy to attend, having been persuaded by lee's arguments.

From: Walton, Kimberly
To: 'Rossides, Gale' <[REDACTED]>; 'Kauffman, Keith G' <[REDACTED]>; Lee, Kristin; Kair, Lee R <[REDACTED]>; Kerner, Francine; Macias, Art <Chief of Staff>; Berumen, Paul <[REDACTED]>; Heffernan, Claire M.
Sent: Fri Oct 16 12:54:25 2009
Subject: Chaffetz Videos and reports

All

The FOIA request for the video on Cong. Chaffetz continue to add up. After the discussion this morning, it was brought to my attention that SSI has already reviewed the video and determined that it does not contain SSI.

Generally, a FOIA determination/final response is required within 20 business days from the date of receipt. Our first requests were received in the Office on 10/1. We are currently in receipt of five FOIA requests pertaining to Congressman Chaffetz and the first of these requests were received in the FOIA Office on October 1, 2009. The FOIA Office is in receipt of responsive reports and CCTV recordings. These records are being reviewed for release determinations.

We fully anticipates responding to these requests within the twenty days afforded under the FOIA. However, I understand from Kristen that she is receiving considerable pressure for an earlier release.

⁶⁴ *Id.* at 53-54.

⁶⁵ E-mail to from Kimberly Walton, Ass't Adm'r, Office of Special Counselor, to Lee Kair, Ass't Adm'r, Office of Sec. Operations, & Francine Kerner, Chief Counsel, TSA, et al. (Oct. 16, 2009, 12:54 p.m.).

⁶⁶ E-mail from Francine Kerner, Chief Counsel, TSA, to Kimberly Walton, Ass't Adm'r, Office of Special Counselor, et al. (Oct. 16, 2009, 1:02 p.m.).

Even as TSA General Counsel Francine Kerner was suggesting a meeting with the SSI Office to discuss overruling the SSI Office's determination, Kerner was planning how to "mask the pat down" in the video.⁶⁷

From: Colsky, Andrew E
Sent: Friday, October 16, 2009 2:19 PM
To: Kerner, Francine; [REDACTED]
Subject: RE: Chaffetz Videos and reports -- Washington Post Inquiry

I am just now seeing this and I can be available if needed.

Andrew E. Colsky, Esq.
Director
Sensitive Security Information Office
Transportation Security Administration
601 S. 12 Street
Arlington, VA 20598-6031
[REDACTED]
Records guide 5000 unless otherwise noted

From: Kerner, Francine
Sent: Friday, October 16, 2009 1:18 PM
To: [REDACTED]
[REDACTED] Colsky, Andrew E
Subject: Re: Chaffetz Videos and reports -- Washington Post Inquiry

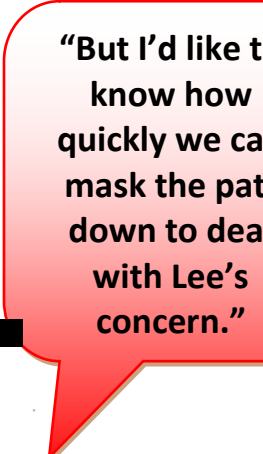
I'm available. But I'd also like to know how quickly we can mask the pat-down to deal with Lee's concern.

From: Lee, Kristin <[REDACTED]>
To: Rossides, Gale <[REDACTED]>; Kerner, Francine <[REDACTED]>; Walton, Kimberly <[REDACTED]>; Kauffman, Keith <[REDACTED]>; Kair, Lee R <[REDACTED]>; Macias, Art <[REDACTED]>; Berumen, Paul <[REDACTED]>; Heffernan, Claire M <[REDACTED]>
Sent: Fri Oct 16 13:12:08 2009
Subject: RE: Chaffetz Videos and reports -- Washington Post Inquiry

Unfortunately, we received a call from the Washington Post Federal Eye, they plan to write on this today. They are asking:

- 1). When do we plan to respond to the FOIA request?
- 2). Do we plan to release it generally or just to those who make a FOIA request? Note: The Post did not file a FOIA request.

They are asking for these answers this afternoon. Are interested parties available to meet at 2pm to discuss SSI and make a recommendation to Gale?



Colsky sent a follow up e-mail to the SSI Office that stated:

Note, I expressed that the SSI regulation and the SSI Office guidance, along with [former Deputy Director of the SSI Office] Rob Metzler's review and my own review did not reveal anything about the blurred portion of the image that would cause me to believe it was SSI. Showing

⁶⁷ E-mail from Andrew Colsky to Francine Kerner, et al. (Oct. 16, 2009, 2:19 p.m.).

the capabilities of all of the cameras for that area, however, was worth considering.⁶⁸

Colsky, the head of the SSI Office, stated he felt he was left out of the SSI determination process.⁶⁹ Ultimately, the video was released with the pat down of Chairman Chaffetz masked.⁷⁰

VII. The Release of Information against the Advice of the SSI Office

FINDING: TSA repeatedly released information to the public against the advice of the SSI Office and without proper documentation to explain the release.

TSA's Office of Public Affairs (OPA) repeatedly released information to the public against the advice of career staff within the SSI Office.

A. SSI Related to Federal Air Marshals

Both the former Director and Deputy Director of the SSI Office provided examples in which agency officials released information related to the presence of Federal Air Marshals (FAMs) on domestic flights. According to both Colsky and former SSI Office Deputy Director Robert Metzler, information about the deployment of air marshals was to be protected as SSI. Metzler stated:

The Federal Air Marshal Service has always expressed to our office a desire to always be very protective of the flights on which their marshals can—the flights on which they have air marshals. And as much as possible we have always attempted to protect it.⁷¹

Metzler described two examples of incidents in which TSA's OPA released specific information about the presence of an air marshal on a flight. In one example, Metzler said an OPA official issued a press release that a plane that had to make an emergency landing had an air marshal on board. According to Metzler, "[i]n our office we saw absolutely no reason why you would release that information."⁷² Metzler also described an incident in which individuals were smuggling weapons into the United States and TSA issued a statement stating "something along the lines that though nobody was in danger, there were Federal Air Marshals on that flight."⁷³

Former Director Andrew Colsky also stated:

⁶⁸ E-mail from Andrew Colsky to Doug Blair & Robert Metzler (Oct. 16, 2009, 4:48 p.m.).

⁶⁹ Colsky Tr. at 62.

⁷⁰ Nicole Gonzales, *TSA Releases Reports Detailing Incident with Utah Congressman*, KSL.COM, Nov. 5, 2009, <http://www.ksl.com/?nid=148&sid=8568676>.

⁷¹ Transcribed Interview of Harry Robert Metzler, Jr., Transcript at 96 (Dec. 15, 2011) [hereinafter Metzler Tr.].

⁷² *Id.* at 97.

⁷³ *Id.* at 98.

Consistently and regularly, whenever there were any events that were newsworthy and dealt with an airline, Public Affairs would be in touch with the news media and couldn't wait to tell them—whether it was true or not, I don't know—there were air marshals aboard you know or this is a regular route that air marshals fly or air marshals you know never travel alone.⁷⁴

In one particular case, the TSA Administrator authorized the public release of information about FAMs without consulting the SSI Office. Colsky said in his interview he was unaware OPA had released the information until he saw it in the news.⁷⁵ Former Administrator Kip Hawley explained his decision in an e-mail. Hawley stated:

I authorized the release of information related to that specific incident. There are real and timely security benefits from public disclosure of the FAM action on that flight for that reason. It is my understanding that I have the authority to make such a decision, and I did so in the best interests of securing passenger air travel. As you know, there is a substantial body of classified information to support this decision.⁷⁶

TSA's release of information related to FAMs is particularly ironic given the agency's treatment of whistleblower and former air marshal Robert MacLean. In 2003, MacLean blew the whistle on TSA's plans to cancel FAM coverage on flights despite the threat of an imminent Al Qaeda hijacking plot.⁷⁷ Numerous Members of Congress raised concerns, and DHS retracted the order to cancel FAM coverage, calling it "a mistake."⁷⁸ Three years later, TSA retroactively labeled the information that MacLean had disclosed as SSI and fired MacLean for his disclosure.⁷⁹

MacLean challenged his dismissal under the Whistleblower Protection Act (WPA). The government argued that MacLean's disclosures were not protected under the WPA because TSA's SSI regulations prohibit disclosure. On March 19, 2012, Representatives Elijah Cummings, Dennis Kucinich, and Carolyn Maloney filed an amicus brief arguing that only Congress, through statutory authority, or the President through Executive Order, can restrict the public free speech rights of government employees to disclose information protected under the WPA.⁸⁰ In April 2013, the U.S. Court of Appeals for the Federal Circuit sided with MacLean, holding that agency regulations, such as TSA's SSI regulations, do not trump a federal employee's protections under the WPA.⁸¹ On May 19, 2014, the U.S. Supreme Court granted

⁷⁴ Colsky Tr. at 36-37.

⁷⁵ *Id.* at 69-70.

⁷⁶ E-mail from Adm'r Kip Hawley to Ellen Howe (June 20, 2008, 5:16 p.m.).

⁷⁷ *What TSA Whistleblower Robert MacLean Tells Us About Post-9/11 Security*, MOTHER JONES, May 9, 2013, <http://www.motherjones.com/politics/2013/05/tsa-whistleblower-maclean-security>.

⁷⁸ *Air Marshals Back to Long Flights*, USA TODAY, July 30, 2003, http://usatoday30.usatoday.com/news/washington/2003-07-30-air-marshal_x.htm.

⁷⁹ Government Accountability Project, *GAP Hails Court Ruling Reaffirming Whistleblower Victory* (Sept. 3, 2013).

⁸⁰ Brief for Representatives Cummings, Kucinich, & Maloney as Amici Curiae Supporting Reversal, *MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301 (2013).

⁸¹ *Robert J. MacLean v. Dep't of Homeland Security*, 714 F.3d 1301 (Fed. Cir. 2013).

DHS's certiorari petition, agreeing to hear the Administration's appeal of the Federal Circuit's decision during the Court's next term.⁸²

The lack of communication between OPA and the SSI Office regarding approved releases of information made it very difficult for the SSI Office to do its job. Colsky explained this in an e-mail to Office of Chief Counsel officials. He wrote: "I also cannot sign my name to court documents confirming SSI decisions because I may find the very same information on the news the same day."⁸³

From:	Colsky, Andrew E
Sent:	Friday, June 20, 2008 10:21 AM
To:	Newhouse, Victoria <TSA OCC>; Johnson, Robert S <TSA OCC>; Walton, Kimberly; Plofker, Howard <TSA OCC>
Cc:	Osler, Bonnie <TSA OCC>; Ruggeri, Amy <TSA OCC>; 'Riggs, Ronald <TSA OCC>'; Bester, Margot <TSA OCC>
Subject:	RE: SSI Breach
Follow Up Flag:	Follow up
Flag Status:	Flagged

I have received confirmation from Ellen that Kip did in fact authorize this release. He has the authority to do so and that is his choice. We do, however, have a process problem here in that OPA does not share this information with the SSI Office despite repeated requests.

I am very uncomfortable in that I have personally given a deposition under oath in a very similar case supporting the fact that this is SSI and a man lost his job over it. I am unable to assist OCC with any testimony in future cases as I don't know what to honestly call SSI anymore. I also cannot sign my name to court documents confirming SSI decisions because I may find the very same information on the news the same day.

I think SSI and OCC need to sit down together and decide how to move forward. Perhaps we need to de-SSI portions of the regulation? I cannot have my staff continue to protect images and FAM information, etc. I am also unclear on how to proceed with marking of GAO reports for Congress especially related to covert testing.

I will send out a meeting invite to those people on this email and allow you to invite any others you feel may need to attend.

Colsky testified that he believed these strategic releases were "security theater" meant to convince the public that the nation's transportation systems were secure. Colsky testified:

TSA is an organization, sadly, that focuses—you know, the term 'security theater' has been used, and unfortunately it's true. Let's do whatever we need to do to change the public perception. Let's not worry about the real issues behind the scenes. And that's all it was. If we needed—if they felt **they needed to do something to get it in the press to change the public**

⁸² U.S. Supreme Court, Dep't of Homeland Security v. MacLean, No. 13-894, Petition for Writ of Certiorari Granted May 19, 2014, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-894.htm> (last visited May 27, 2014).

⁸³ E-mail from Andrew Colsky to Victoria Newhouse, et al. (June 20, 2008, 10:21 a.m.).

perception, that was more important than the security concerns involved. Period.⁸⁴

Colsky said that the release of SSI by the Office of Public Affairs decreased when the personnel changed in 2009 as part of the new Administration⁸⁵

B. SSI Related to Whole Body Imagers

The implementation of the controversial Whole Body Imager (WBI) machines generated significant press attention for TSA. In response, OPA granted media access to TSA's WBIs. Some employees in the SSI Office considered images created by the machines and other related information to be SSI because the release of such materials could adversely affect national security.⁸⁶ SSI Office staff were concerned that terrorists could use the published images to determine the device's vulnerabilities. Colsky informed the Committee that in 2009, after TSA's chief scientist implored him to find a way to stop TSA from releasing WBI images, Colsky approached OPA.⁸⁷ Despite Colsky's warnings, TSA made the images available to the media. Former SSI Office Deputy Director Metzler testified:

[TSA decided to] allow the press to have some level of access to the images, which technically under the [SSI regulation], where it was very specific and said this is SSI, the decision was made that we have to release some level of images because the public has such concern, we have to respond to these public concerns, we need to share this information.⁸⁸

Following a meeting with the SSI Office in which the SSI Office designated the images as SSI—OPA defied the designation and released the images publicly.⁸⁹ Colsky testified: “[The images] were designated SSI, and **it was just ignored by the Public Affairs Office.**”⁹⁰ An attorney from TSA's Office of Chief Counsel expressed surprise about the release after seeing those images posted on TSA's website. In an e-mail to Metzler, Howard Plofker wrote: “Public Affairs is stating that these images are EXACTLY what TSOs see. If correct, wouldn't the images be SSI?”⁹¹

⁸⁴ Colsky Tr. at 21 (emphasis added).

⁸⁵ *Id.* at 86-87.

⁸⁶ *Id.* at 21-23.

⁸⁷ *Id.* at 25-26.

⁸⁸ Metzler Tr. at 62.

⁸⁹ E-mail from Howard Plofker to Robert Metzler & Andrew Colsky (May 12, 2008, 10:02 a.m.).

⁹⁰ Colsky Tr. at 23 (emphasis added).

⁹¹ See E-mail from Plofker, *supra* note 89.

From: Plofker, Howard <TSA OCC>
Sent: Monday, May 12, 2008 10:02 AM
To: Metzler, Robert
Cc: Colsky, Andrew E
Subject: FW: Blog Post on Friday containing frontal images of MMV
Importance: High

Rob,

Would you review this post? Public Affairs is stating that these images are EXACTLY what TSOs see. If correct, wouldn't the images be SSI?

BTW, the checkpoint technologies guide doesn't discuss mm wave.

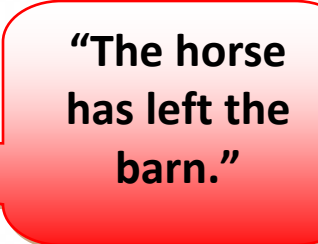
Howard Plofker
Office of Chief Counsel
Transportation Security Administration

In response, Metzler replied, “[t]hanks for bringing this to our attention, we are responding but the images are probably going to be staying up.”⁹² Because OPA had already posted the images on its blog, TSA counsel, Howard Plofker, acknowledged that it would not be helpful to remove the images from the website. He stated in an e-mail to Metzler, “The horse has left the barn.”⁹³

From: Plofker, Howard <TSA OCC>
Sent: Monday, May 12, 2008 10:45 AM
To: Metzler, Robert
Cc: Colsky, Andrew E
Subject: RE: Blog Post on Friday containing frontal images of MMV

The horse has left the barn.

Howard Plofker
Office of Chief Counsel
Transportation Security Administration



Considering the sensitivity of the information and the internal disagreement about its release, Colsky was frustrated. He was especially distressed because a meeting had been held concerning the images. He wrote: “OPA specifically ignored the regulation yet again.”⁹⁴

⁹² E-mail from Robert Metzler to Howard Plofker & Andrew Colsky (May 12, 2008, 10:42 a.m.).

⁹³ E-mail from Howard Plofker to Robert Metzler & Andrew Colsky (May 12, 2008, 10:45 a.m.).

⁹⁴ E-mail from Andrew Colsky to Howard Plofker & Robert Metzler (May 12, 2008, 10:51 a.m.).

From: Colsky, Andrew E
Sent: Monday, May 12, 2008 10:51 AM
To: Plofker, Howard <TSA OCC>; Metzler, Robert
Subject: RE: Blog Post on Friday containing frontal images of MMV

Follow Up Flag: Follow up
Flag Status: Flagged

We had a meeting about images specifically addressing this (Chris White in attendance) and OPA specifically ignored the regulation yet again.

Serious question: Can the SSI Office issue civil penalties against another TSA office?

Andrew E. Colsky, Esq.
 Director, Sensitive Security Information Office
 Office of Special Counselor
 Transportation Security Administration

“OPA specifically ignored the [SSI] regulation yet again.”

Despite the fact OPA made these images available to the public on the TSA blog, similar full body millimeter wave images continued to be withheld from FOIA requesters.⁹⁵ Such actions illustrate the dichotomy in the treatment of such similar information. For example, in July 2009, through a FOIA request, the Electronic Privacy Information Center (EPIC) sought uncensored images from Advanced Imaging Technology (AIT) scanners, contracts relating to the use and manufacture of AIT, and complaints to TSA about the use of AIT. In response, DHS withheld 2,000 images produced by the body scanners and 376 pages of TSA training materials.⁹⁶ Further, the Committee was only allowed limited access to these images through an *in camera* review because the DHS officials considered them to be sensitive.

This is not the first time the Committee explored the inconsistent treatment and release of SSI information. In February 2008, Chairman Henry Waxman and Ranking Member Tom Davis inquired about a TSA Administrator’s CNN interview during which he divulged sensitive information about covert testing. Waxman and Davis noted the paradox – that while TSA imposed strict standards on the Committee to prevent release of SSI during a congressional hearing on a GAO covert testing report, the TSA Administrator revealed related SSI on the same subject to the general public on national television.⁹⁷

⁹⁵ See Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec. (*EPIC I*), 750 F. Supp. 2d 4, 7-8 (D.D.C. 2011), *mot. for relief from judgment denied*, 653 F.3d 1 (D.C. Cir. 2011).

⁹⁶ *EPIC I*, 760 F. Supp. 2d at 8.

⁹⁷ Letter from Rep. Henry A. Waxman, Chairman, & Rep. Tom Davis, Ranking Mem., H. Comm. on Oversight & Gov’t Reform, to Hon. Edmund Hawley, Adm’r, TSA (Feb. 22, 2008).

VIII. Inter-Office Rift Causes Inconsistent Application of the SSI Regulations

Witnesses testified that many problems surrounding the SSI designation process emanate from inconsistent implementation of the SSI regulation. The Administrator is a political appointee, and the regulation is subject to interpretation by the Administrator. Thus, the Administrator has significant latitude in making SSI determinations. This power, combined with the seemingly arbitrary manner in which SSI is labeled, makes it easy for Administrators to play politics with sensitive information. In fact, such inappropriate handling of this information was confirmed by multiple witnesses, who testified that TSA's Office of Chief Counsel, OPA, and the TSA Administrator repeatedly neglected to consult with the SSI Office when making SSI determinations. This rendered the SSI Office powerless and has made the SSI decision-making process appear biased.

Regulations authorize TSA to make a conditional disclosure of specific records or information that constitute SSI, "upon the written determination by TSA that disclosure of such records or information . . . would not be detrimental to transportation security."⁹⁸ The former SSI Office Director and the Deputy Director informed the Committee that documentation of an authorized disclosure is typically completed through the issuance of a memorandum. They stated that a memo explaining a decision to release SSI is important to ensure consistency in future SSI determinations. Yet, the SSI Office received very little guidance regarding the treatment of certain information. Former SSI Office Deputy Director Metzler testified:

Q. The other thing we talked about is sort of the importance of memorializing this information at the beginning of the process . . . early on, so that it is clear . . . what information is being released. So, again, it sounds like there was a significant amount of time that passed between the beginning when these pictures were first released, and later on when the memo was actually written.

Can you talk maybe just for a moment about . . . what importance might have been for the SSI office of having that memo written before the images were actually released or at the beginning of that process?

A. For example, when we were seeing images released, we didn't know what that meant for PowerPoint presentations where we would have individuals that were going to conferences and those conferences might have AIT images present in them. So does that mean that I protect the images when they are trying—I don't know what—you have seen those images. It is hard to tell if it is the

⁹⁸ 49 C.F.R. § 1520.15(e) (stating that TSA may authorize a conditional disclosure of specific records or information that constitute SSI upon the written determination by TSA that disclosure of such records or information, subject to such limitations and restrictions as TSA may prescribe, would not be detrimental to transportation security).

same image that might be a template or not. It is sometimes difficult for the untrained eye to make that decision.

So am I supposed to protect it if it is going to this conference, or am I not? If I have training documents related to AIT screening, do I protect the images in those training documents that might be subject to litigation or might be subject to FOIA? I know decisions were made to release those images. Even though the reg[ulation] specifically says all images, how do I apply the senior leadership team's decision that this is not detrimental; what are the parameters of that; how much do I protect related to other images; how much do I not?

So that would make it difficult for us to decide what to protect. And once you have opened up that door to those types of images, even though the reg[ulation] makes no distinction, am I supposed to alter the way I protect X ray images or EDS images? Did someone make the decision that we no longer need to protect any images?

We didn't know what the decisions were. So the way we treated it at the time was without any additional guidance, we were still very protective of all of the other images until we received some kind of guidance as to what should or should not be protected.⁹⁹

Witnesses reported that in some cases, a determination memo would be submitted to the SSI office **retroactively**. Metzler stated that failure to follow the protocols and such little guidance on designations substantially increased the likelihood of inconsistencies in TSA's SSI designations. Metzler explained:

Q. So that could lead to some inconsistencies, then?

A. Yes.

Q. So is it fair to say . . . if you had been in the room or someone from the SSI had been in the room, a couple of things they would have pointed out might have been . . . the importance of . . . making a clear determination about what is being released and about writing that information down in a memorandum so that it was clear for everyone who is handling SSI material?

A. Yes.

⁹⁹ Metzler Tr. at 73-74.

- Q. And is that, again, to your understanding, to the best of your understanding, is it required the SSI office to be involved in that conversation, or at least under the policies of the Department?
- A. Or have the decision relayed to us with some formality so that we could be confident that the decision actually was made by somebody with the appropriate authority to make that decision. It was I think never our position that that was a decision that they could not make. It was that the decision had not been relayed to us and we didn't know how to respond to the--it was like trying to read tea leaves; you don't know what is intended there. You can read into it any number of different things.¹⁰⁰

Witnesses also described that senior TSA officials repeatedly excluded the SSI Office from discussions about SSI determinations, even though TSA's Management Directive (MD) requires collaboration with the SSI Office. Metzler stated:

- Q. And so under your understanding of the management directive, the current one, not the draft one--could that person, the Assistant Administrator for Public Affairs, make that determination without consulting someone above them in the chain of command?
- A. My understanding of the regulatory requirements is that **if something is specifically identified as SSI, either in the regulation or in our written guidance, that needs some formal discussion with the SSI office before that information is released.** If the head of the Office of Public Affairs were to receive a document from some program office related to their program, they are in a position to know not every word in there is going to be SSI and they can, under their authority and responsibility, make decisions on particular information that should be shared. And if they include information that they then release that TSA has otherwise protected, from my reading of the reg and the MD, is that that would constitute a breach that needs to be addressed formally.¹⁰¹

An e-mail exchange between Office of Chief Counsel officials and Andrew Colsky illustrates an instance in which TSA officials made an SSI determination without the input or agreement of the SSI Office. In the following e-mail, senior TSA officials discussed proposed responses to potential SSI in a GAO report.¹⁰² The e-mail shows that a consensus was reached, but it does not mention whether the SSI Office was included in the consensus.¹⁰³

¹⁰⁰ Metzler Tr. at 74-75.

¹⁰¹ *Id.* at 76.

¹⁰² E-mail from Greg Wellen to Kimberly Walton & Paul Leyh (May 7, 2009, 2:31 p.m.).

¹⁰³ *Id.*

“We met with [Deputy Administrator] Gale [Rossides] this afternoon . . . and discussed the SSI response to GAO.”

From: Wellen, Greg
Sent: Thursday, May 07, 2009 2:31 PM
To: Walton, Kimberly
Cc: Leyh, Paul
Subject: GAO Report

Kim

Just a quick status update. We met with Gale this afternoon on SF and discussed the SSI response to GAO. TTAC took for action tightening up the language for the appendix. I think there was general consensus that the appendix was SSI and that it probably should not be included with the GAO report. TTAC also took for action discussing the revised language with GAO to see if it met their needs as well. We will coordinate with you and the other TSA offices and advise Gale on the results.

Thanks.

Greg

In the next e-mail, Paul Leyh, Director of the “TSA Secure Flight” program, states, “I’m working on the language and will forward a draft when completed.”¹⁰⁴ The director of another program—not the SSI Office—prepared the draft response on the SSI issue. Shortly thereafter, Leyh sent an e-mail with the draft language attached. He wrote:¹⁰⁵

From: Leyh, Paul
Sent: Thursday, May 07, 2009 5:39 PM
To: Leyh, Paul; Thompson, Mardi <TSA OCC>; Smith, Courtney <TSA OCC>; Colsky, Andrew E; Schamberger, Steven
Cc: Wellen, Greg; [REDACTED]
Subject: GAO Report

All,

As a follow up to previous emails and discussion with Gale earlier today attached is the draft of the language that supports the direction requested for the GAO SF report. Please review and let me know if there are any changes, updates, etc.. I'd appreciate any feedback by tomorrow morning so that we can get this issue closed out tomorrow. Current PW applies.

In response, another TSA employee, Steven Schamberger, responded that he would defer to the SSI Office on what was to be considered SSI.¹⁰⁶

¹⁰⁴ E-mail from Paul Leyh to Mardi Thompson, et al. (May 7, 2009, 3:27 p.m.).

¹⁰⁵ E-mail from Paul Leyh to Mardi Thompson, et al. (May 7, 2009, 5:39 p.m.).

¹⁰⁶ E-mail from Steven Schamberger to Paul Leyh, et al. (May 7, 2009 5:48 p.m.).

From: Schamberger, Steven
Sent: Thursday, May 07, 2009 5:48 PM
To: Leyh, Paul; Thompson, Mardi <TSA OCC>; Smith, Courtney <TSA OCC>; Colsky, Andrew E
Cc: Wellen, Greg; [REDACTED]
Subject: RE: GAO Report

Paul,
I defer to the SSI office as to whether the added material is in fact SSI. But if it is GAO will not accept this. They want to produce a public report and only a public report. They are not producing a companion SSI version of the report.

“I defer to the SSI office as to whether the added material is in fact SSI.”

Shortly after Schamberger’s e-mail, Colsky expressed his concern. He wrote, “I am very uncomfortable and somewhat shocked with the way this process has been handled.”¹⁰⁷

From: Colsky, Andrew E
Sent: Thursday, May 07, 2009 5:56 PM
To: Leyh, Paul; Thompson, Mardi <TSA OCC>; Smith, Courtney <TSA OCC>; Schamberger, Steven
Cc: Wellen, Greg; [REDACTED] Metzler, Robert; Blair, Doug E.
Subject: RE: GAO Report

Follow Up Flag: Follow up
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All:

I am very uncomfortable and somewhat shocked with the way this process has been handled. I cannot comment on the product of a process in which my office has not been appropriately involved. I suggest we discuss SSI issues with the SSI office at the table, not as an afterthought.

In the following e-mail, TSA Assistant Administrator Greg Wellen appears to completely disregard Colsky’s documented frustration.¹⁰⁸ Wellen does not address Colsky’s e-mail when he writes that he would set up a teleconference with GAO to discuss the SSI issue with three other TSA employees, none of whom were from the SSI Office.¹⁰⁹

¹⁰⁷ E-mail from Andrew Colsky to Paul Leyh, et al. (May 7, 2009, 5:56 p.m.).

¹⁰⁸ E-mail from Greg Wellen to Paul Leyh, et al. (May 8, 2009, 9:53 a.m.).

¹⁰⁹ *Id.*

From: Wellen, Greg
Sent: Friday, May 08, 2009 9:53 AM
To: Schamberger, Steven; Leyh, Paul; Thompson, Mardi <TSA OCC>; Smith, Courtney <TSA OCC>; Colsky, Andrew E
Cc: ██████████ Williams, Allison; Webb, Matthew <TSA OCC>
Subject: RE: GAO Report

Steve

Appreciate the update. Paul and I will set up a teleconference with Cathy to address the SSI issue. We will make sure Matt and Mardi are also included. Will advise all of the results.

Thanks

Greg

Shortly thereafter, Colsky sent a subsequent e-mail requesting a meeting with Schamberger and the Special Counselor for TSA. The purpose of the meeting was, in Colsky's words, to "get back on track."¹¹⁰ It is unclear whether that meeting took place. What is clear is excluding the SSI Office from decisions to determine whether information qualifies as SSI can lead to inconsistent application of the SSI regulations.

IX. SSI Office Structure and Position within TSA

FINDING: **The structure and position of the SSI office within TSA has contributed to the difficulties the office has encountered in carrying out its mission. TSA has moved the office within the agency's organizational structure several times. One official stated the office moves have effectively relegated it a "throwaway office."**

TSA moved the SSI Office within the agency hierarchy several times. Originally, the SSI Office reported directly to the Chief of Staff to the TSA Administrator. The Office was then moved under the supervision of the Assistant Chief Administrator. It remained there until it was again relocated to the Business Management Office within the Office of Intelligence.¹¹¹ Later, the SSI Office was placed under the authority of the Federal Air Marshal Service. According to Colsky, this move only further marginalized the office. Colsky testified:

- Q. How so does moving it into the Federal Air Marshal Service marginalize it further?
- A. Because they've been moved so far down the organization, they don't have access to anything. They don't have access to decision

¹¹⁰ E-mail from Andrew Colsky to Kimberly Walton (May 8, 2009, 10:30 a.m).

¹¹¹ Colsky Tr. at 99-100.

makers. They don't have access to the budget and stuff that they would normally have. **It's just a throwaway office now.**¹¹²

TSA informed the Committee that the agency moved the SSI Office as part of an Office of Intelligence initiative. A review determined that the functions of the SSI Office were more closely aligned with the mission and responsibilities of the Federal Air Marshal Service's Chief Security Officer, also charged with managing TSA's classified information program. Considering the importance of the SSI designation process, TSA should give the SSI Office a more prominent position in the TSA hierarchy to enable effective communication with OPA and TSA leadership.

X. TSA's Efforts to Address the Problems

FINDING: TSA made significant improvements to its SSI designation process following the Committee's investigation.

On September 15, 2008, TSA issued Management Directive 2810.1, aimed at providing "policy and procedures for the issuance of sensitive security information (SSI) guidance, and the training of personnel on the procedures for recognizing, identifying, safeguarding, and sharing SSI."¹¹³ In April 2012, TSA Administrator John Pistole issued a new SSI handbook applicable to all TSA personnel creating standard operating procedures for SSI. The handbook consolidated numerous stand-alone policies on SSI, streamlining the information to provide clearer guidance. New policies include a template for the revocation of SSI, a system for reporting SSI breaches, and an improved employee training program that is customized to each TSA office.

In late September 2013, the Committee received a briefing from the Division Director for the Office of Security Services and Assessments, who provided an update on the SSI program.¹¹⁴ According to the Division Director, TSA has made improvements to employee training and SSI reporting.

The Committee's investigation found incidents in which OPA released SSI without following the proper procedures. It is not clear whether OPA released this type of information inadvertently or in spite of the regulation. Better knowledge of and respect for the SSI process are necessary. Online SSI training is now provided to all TSA employees, including those in OPA. Requiring OPA to complete SSI training is a step in the right direction. SSI training is tailored to the specific work of each TSA office. Through the training, employees learn how to report a breach and the process for revoking an SSI determination.

Additionally, an online program called "I-Share" is now used for all SSI incident reporting. Use of I-Share allows any TSA employee to report an SSI breach. Once a report is

¹¹² *Id.* at 100 (emphasis added).

¹¹³ TSA, Office of the Special Counselor, Management Directive No. 2810.1, SSI Program (Sept. 15, 2008), http://www.tsa.gov/video/pdfs/mds/TSA_MD_2810_1_FINAL_080915.pdf.

¹¹⁴ Briefing of Div. Dir., Office of Sec. Servs. & Assessments, TSA, to Committee Staff (Sept. 27, 2013).

submitted, it is sent to the SSI Office for resolution. By exposing problems related to the inconsistent labeling of SSI, the Committee's investigation has been successful in engaging TSA to reassess its SSI policies. What these policy changes do not address, however, is the ease with which political appointees can circumvent the process. Thus, changes to the SSI regulation itself are warranted to clarify the procedures that must be followed to designate information as SSI or to remove an SSI designation.

XI. Conclusion

The examples set forth in this report raise valid concerns as to whether TSA consistently uses the SSI designation appropriately. While the agency has made some improvements to the program, additional steps may be necessary in order to insulate the integrity of the SSI process.

TSA must ensure consistent and appropriate application of the SSI designation. TSA officials should always consult the SSI Office when making decisions either to designate information as SSI or to release information that has been or could be designated SSI. Documentation authorizing the release of SSI must be issued prior to the release, rather than after the fact. Further, the TSA Administrator should consider the location of the SSI Office within TSA's organizational structure so that it can perform its work free from political interference.

More broadly, Congress must strongly encourage agencies to curb the use of pseudo-classification of information. The proliferation of the use of unclassified designations in Executive Branch departments and agencies has a profound impact on public access. Strict enforcement of rules governing the use of such designations is necessary to prevent abuse and to maximize public access to government information. Agencies must make greater efforts to track and report the use of such labels on information, as it has become clear that consistency is lacking and better controls are needed. By focusing on the use of SSI at TSA, the Committee hopes to promote transparency and better information security across the Executive Branch.