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Office of Special Counsel Reports & Scott Bloch Issues [18]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	OSC File No. DI-07-1292 - To: Kevin Wilson - From: Robbi Elaine Minden	1	10/13/2007	P6/b6;
002	Email	FW: OSC Letter - To: Fred Fielding, et al. - From: Kenneth Lee	3	09/18/2007	P5;
003	Email	FW: OSC Letter - To: Mary Beth Bakke - From: Kenneth Lee	3	10/01/2007	P5;
004	Letter	OSC File No. DI-06-1731 - To: POTUS - From: Scott Bloch	2	10/18/2007	P6/b6; b7c;
005	Letter	Denial of Request to Add Special Counsel to EO 12993 - To: Clay Johnson - From: Scott Bloch	2	08/07/2007	P5;

COLLECTION TITLE:
Counsel's Office, White House
SERIES:
Fielding, Fred - General Files
FOLDER TITLE:
Office of Special Counsel Reports & Scott Bloch Issues [18]
FRC ID:
11294

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
006	Report	Analysis of Disclosures, Agency Investigation and Report...	3	03/26/2008	P6/b6; b7c;
007	Letter	[Letter] - To: Scott Bloch - From: Lyle Laverty	2	11/07/2007	P6/b6;
008	Letter	OSC File No. DI-07-0955 - To: POTUS - From: Scott Bloch	2	03/26/2008	P6/b6; b7c;
009	Report	Analysis of Disclosures, Agency Investigation and Reports...	10	N.D.	P6/b6; b7c;
010	Letter	OSC File No. DI-06-1620 - To: Karen Gorman - From: Frank Terreri	8	08/15/2007	P6/b6; b7c;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
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U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

November 27, 2007

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-07-1292

Dear Mr. Fielding:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter, report, and comments to the President. If I may provide more information concerning this matter, please do not hesitate to contact me.

Sincerely,

Scott J. Bloch

Enclosures

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

November 27, 2007

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-07-1292

Dear Mr. President:

I received a disclosure from Mrs. Robbi Minden, Administrative Officer, United States Department of Justice, United States Marshals Service (USMS), Northern District of Indiana, South Bend, Indiana. Mrs. Minden, who consented to the release of her name, alleged that the USMS has paid the medical expenses of prisoners within its custody at rates in excess of those permitted by federal law. As a result, Mrs. Minden contended that the USMS needlessly spent thousands of dollars in excess of the amount it should have paid. This conduct, she maintained, constituted a violation of 18 U.S.C. § 4006, which states that the payment for health care costs for detainees in USMS custody generally may not exceed the cost for similar services under the Medicare program.

I required the Attorney General to conduct an investigation into this disclosure pursuant to 5 U.S.C. § 1213(c) and (d). Former Attorney General Alberto Gonzales tasked the Office of the Inspector General (OIG) with conducting the investigation and writing the report.

The agency's July 27, 2007, report confirmed that the health care costs for Northern District of Indiana detainees housed at the Metropolitan Correctional Center Chicago were billed to and paid by the USMS at rates above those under the Medicare program. The rates used in these invoices were consistent with those set forth in Bureau of Prisons (BOP) contracts with the providers. The report also stated that the USMS has paid rates above the Medicare rates in other instances. However, the report concluded that the use of these rates was consistent with USMS policy and did not violate federal law. The basis for this conclusion was an October 25, 2001, memorandum written by USMS Acting General Counsel Gerald Auerbach, which was not included with the report.[1] The memorandum stated that payment of higher rates was proper for two reasons, the detainees were in the primary custody of BOP and the services provided were not similar to Medicare services. The agency acted in accordance with this advice from its

[1] On August 9, 2007, OSC requested a copy of the October 25, 2001, memorandum from the OIG. We received the memorandum on August 13, 2007, and a copy of it is enclosed.

General Counsel, and as such, the evidence did not support a finding of a violation of law, rule, or regulation.

Mrs. Minden provided comments on both the agency's report and the October 25, 2001, memorandum. She questions why the USMS is paying BOP rates for medical expenses when 18 U.S.C. § 4006(b) was specifically enacted to hold down costs. She believes the selective application of § 4006(b) to all medical vendors treating USMS detainees except for those housed in BOP facilities is inequitable, because the USMS must house detainees there by necessity. Regarding the October 25, 2001, memorandum, Mrs. Minden questions its claim that the medical services provided to the USMS detainees differ from those provided to private citizens. She disagrees with the claim that the cost of security is included in the billing rates, because USMS is responsible for the guard service costs. She also questions the accuracy of the claim in the memorandum that some BOP contracts are 15 to 45 percent above Medicare rates, citing some instances where they are 150 percent over Medicare rates. Mrs. Minden concludes her comments by suggesting that Congress should reexamine 18 U.S.C. § 4006(b) or at the very least have the USMS reexamine the October 25, 2001, memorandum.

I have reviewed the original disclosure, the report, and Mrs. Minden's comments. Based on that review, I have determined that the agency's report contains all of the information required by statute and that the findings appear to be reasonable.

As required by law, 5 U.S.C. § 1213(e)(3), I have sent a copy of the report, the October 25, 2001, memorandum, and the whistleblower's comments to the Chairmen of the House and Senate Committees on the Judiciary. I have also filed copies of the agency report and the whistleblower's comments in our public file and closed the matter.

Respectfully,

Scott J. Bloch

Enclosures

U. S. Department of Justice

Office of the Inspector General

July 27, 2007

Scott J. Bloch
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, D.C. 20036

Re: <u>OSC File No. DI-07-1292</u>

Dear Mr. Bloch:

Enclosed is a copy of the Office of the Inspector General (OIG) report entitled, *OIG Report On Allegation of Overpayment for Prisoner Medical Services by United States Marshals Service Employee*. The Office of Special Counsel (OSC) referred this matter to Attorney General Alberto R. Gonzalez on May 9, 2007. In that letter, you requested that the Department of Justice investigate an allegation by the Administrative Officer for the Northern District of Indiana of the United States Marshals Service (USMS), that the USMS had paid the medical expenses of prisoners at rates in excess of those permitted by federal law. Attorney General Gonzales delegated his authority to review and sign this report to the OIG.

The enclosed report summarizes the results of our investigation, which did not substantiate the allegation.

If you have any questions about the enclosed report, please contact Martha Hirschfield, Attorney Advisor, at 202 616-0640.

Sincerely,

Glenn A. Fine

Glenn A. Fine
Inspector General

Enclosure
cc: Catherine McMullen, Chief
Disclosure Unit

U. S. Department of Justice

Office of the Inspector General

OIG REPORT ON ALLEGATION OF OVERPAYMENT FOR PRISONER MEDICAL SERVICES BY UNITED STATES MARSHALS SERVICE EMPLOYEE

July 27, 2007

Introduction

On May 9, 2007, the Office of the Inspector General (OIG) received a whistleblower disclosure from the United States Office of Special Counsel (OSC). The referral forwarded allegations by a United States Marshals Service (USMS) employee that she had been instructed by USMS officials to pay more than Medicare rates for medical services provided to a detainee housed in a Federal Bureau of Prisons (BOP) facility. The complainant alleges that this payment violated 18 U.S.C. § 4006, which limits the amount the USMS may pay for medical services provided to individuals in its custody to the amount that would be paid for similar services under the Medicare program. The OIG conducted a review to determine if the USMS had violated the statute in making this and similar payments.

In conducting our review, we interviewed the complainant, officials from the USMS Office of Interagency Medical Services, and representatives from the BOP and the Office of the Federal Detention Trustee (OFDT).[1] We also obtained and reviewed USMS documents relating to the payment of prisoner medical claims, including internal USMS policies and memoranda between the USMS and the BOP and the OFDT.

We confirmed that in this and other instances, the USMS has paid more than Medicare rates for medical services provided to detainees housed in BOP facilities. However, we concluded that these payments were consistent with USMS policy, that this policy was issued in reliance on a USMS legal opinion that such payments do not violate federal law, and that the legal opinion appears to be reasonable.

Background

The USMS is responsible for housing and transporting individuals who are placed in federal custody until they are either acquitted or sentenced. Such individuals are generally referred to as detainees. Because the USMS does not maintain detention facilities of its own, it places detainees in state or local facilities pursuant to intergovernmental agreements, in private facilities pursuant to contract, or in BOP facilities, where individuals who have been convicted and sentenced of federal crimes are housed. The majority of USMS detainees are housed either in state or local jails or in private facilities.

The USMS is generally responsible for ensuring that detainees receive necessary medical care and for paying for such care.

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[1] The OFDT was created in fiscal year 2001 to manage the Department of Justice's detention resources and coordinate its detention activities.

Medical care for detainees housed in BOP facilities is generally provided in the same manner as medical services to the wider prison population – either through in-facility medical centers or by outside providers pursuant to contracts between the providers and the BOP. According to both USMS and BOP officials, the USMS has historically relied on these BOP contracts to obtain medical care for detainees housed in BOP facilities and has paid the contractual rate for such services.

As noted above, 18 U.S.C. § 4006(b) limits the amount that the USMS may pay for medical services provided to detainees in its custody. Specifically, the statue provides that:

> Payment for costs incurred for the provision of health care items and services for individuals *in the custody* of the United States Marshals Service . . . shall be the amount billed, not to exceed the amount that would be paid for the provision of similar health care items and services under the Medicare program. . . .

(emphasis added).[2] The statute does not limit the amount that may be paid for medical services provided to individuals in BOP custody. According to USMS officials, Section 4006(b) was enacted in 1999 at the behest of the USMS.

The complainant alleged that the USMS violated Section 4006(b) by paying more than the Medicare rate for medical services provided to a detainee housed at the BOP's Metropolitan Correctional Center (MCC) in Chicago, Illinois. BOP has a contract with Medical Development International (MDI) to provide comprehensive medical services to MCC Chicago prisoners, and the medical services at issue were provided pursuant to this contract. MDI billed the USMS $28,374 for the medical services it provided. Although this rate was consistent with the contract rate, the Medicare rate for such services was $13,576.

The complainant also submitted copies of invoices that had been submitted to the USMS between March 2006 and March 2007 for medical services provided to other MCC Chicago detainees. In each of these instances the amount billed was consistent with the BOP contract rate but exceeded the Medicare rate for similar services.

[2] The original statute provided that the USMS should pay no more than the lesser of the Medicare or the Medicaid rate. The statute was amended in 2006 to refer only to the Medicare rate. Pub. Law 109-102, 119 Stat. 3114 (2006).

In 2001, the USMS requested from its OGC an opinion as to whether Section 4006(b) prohibits the USMS from making payments to BOP contractors in excess of Medicare rates for health care items and services provided to detainees housed in BOP facilities. In an opinion issued on October 25, 2001, the USMS OGC opined that the statute does not apply in such circumstances. First, the OGC reasoned that the statute is inapplicable because detainees housed in BOP facilities are in the primary custody of BOP for purposes of receiving medical care. Second, the OGC concluded, that even if such detainees are considered to be in USMS custody, the statute would still not apply because the services at issue are not "similar" to Medicare services. Specifically, the BOP contractors provide such additional services as scheduling hospital and doctor appointments, consolidation of bills, the establishment of a comprehensive network of health care providers, and security procedures that are simply not covered by Medicare rates.

Based on this opinion, the Director of the USMS reported to the Director of the BOP in December 2001 that the USMS was authorized to pay contract rates for medical services provided to detainees housed in BOP facilities. With regard to medical bills for detainees housed in BOP facilities, current USMS procedures instruct employees to pay such bills once they verify that the charges apply to a USMS detainee and that the rate is consistent with the contract rate. In contrast, employees are instructed to pay no more than the Medicare rate for services provided to detainees held in state or local jails or in private facilities.

<u>Analysis</u>

We reviewed the invoices provided by the complainant related to the payment of medical bills for care provided to detainees housed at MCC Chicago. We confirmed that in each instance the billed rate was consistent with the rates provided for in the BOP contract, but in excess of the Medicare rate.

We also reviewed the USMS policy regarding the payment of such medical costs and concluded that it authorized the payment of the BOP contract rates. We further determined that this policy is based on a legal opinion issued by the USMS OGC in October 2001, which concludes that Section 4006(b) does not limit payments for medical services provided to USMS detainees housed in BOP facilities because such detainees are in BOP custody and because the services provided under the contracts are not similar to covered Medicare services. The USMS OGC's opinion appears to us to have a reasonable basis. Accordingly, we concluded that the evidence did not show that the questioned payments were made in violation of law, rule, or regulation.

U.S. Departmer Justice

United States Marshals Service

600 Army Navy Drive
Arlington, VA 22202-4210

OCT 2 5 2001

MEMORANDUM TO: Lydia K. Blakey
Acting Assistant Director
Prisoner Services Division

FROM: Gerald M. Auerbach
Acting General Counsel

SUBJECT: Applicability of the U.S Marshals Service (USMS) Medicare Rate Statute to USMS Prisoners Housed in Bureau of Prison Facilities

You have asked our opinion as to whether 18 U.S.C. § 4006(b) prohibits the U.S. Marshals Service (USMS) from making payments to the Bureau of Prison (BOP) or to BOP contractors for health care items and services provided by the BOP through outside providers for USMS prisoners housed in BOP facilities where those payments exceed the Medicare or Medicaid rates for similar services.

As you know, under 18 U.S.C. § 4006(b), Congress requires the USMS, the Federal Bureau of Investigation (FBI), and the Immigration and Naturalization Service (INS) to pay no more than the "amounts that would be paid for the provision of similar health care items and services" under the Medicare or Medicaid programs for medical items and services for prisoners in its custody. The statute does not apply to prisoners in the custody of BOP. Thus, in determining whether this statute applies, one must determine whether the prisoner is in the "custody" of one of the named agencies, and whether there are "similar health care items and services" covered under Medicare or Medicaid.

I. Custody

The majority of USMS prisoners (those who are pre-trial or sentenced awaiting designation and transportation to a BOP facility to serve sentence) are housed in either state or local jails, or private jail facilities. 18 U.S.C § 4013(a)(2) authorizes the USMS to pay for the medical services of such prisoners in these non-Federal institutions. Thus, there is no doubt that USMS prisoners housed in state or local jails, or private jail facilities are in the "custody" of the

USMS for purposes of 18 U.S.C. § 4006(b).

However, USMS prisoners (pre-trial inmates, sentenced awaiting designation and transportation, or held on a writ) who are housed by the USMS in BOP facilities are, in our opinion, in the primary custody of BOP for purposes of care, including all in-house medical care and outside medical care. That is, 18 U.S.C. § 4042(a)(2) provides that the BOP "shall provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." (emphasis added). BOP is also charged by regulation to house persons awaiting trial. 28 C.F.R. § 551.100. BOP staff may supervise a pre-trial inmate as if held in "custody". 28 C.F.R. § 551.105. BOP staff shall provide the pre-trial inmate with the same level of basic medical care provided convicted inmates. 28 C.F.R. §551.114.

Pursuant to the 1993 Memorandum of Understanding (MOU) between the BOP and the USMS, the BOP is responsible generally for the care of pre-trial inmates and sentenced prisoners awaiting designation held in BOP facilities. While the USMS is financially responsible for payment for all outside medical care for pre-trial prisoners or prisoners awaiting designation under the MOU, the BOP is responsible for arranging all in-house and outside medical care and for assuring that all necessary medical care is provided. Moreover, BOP will transport the pre-trial prisoner or sentenced prisoner awaiting designation to a medical appointment/visit outside the BOP facility when necessary, although the USMS will arrange for necessary guard services.[1]

Thus, while the USMS is financially responsible under its appropriations for outside medical expenses for USMS prisoners held in BOP facilities, we believe that for all practical purposes, while those prisoners are held at BOP facilities, they should be considered in the "custody" of BOP for purposes of outside medical care. The BOP arranges for the outside medical care, and its own doctors maintain liaison with the outside providers in assuring continuity of treatment once the prisoner is returned to the BOP facility. BOP remains responsible for the medical treatment of these prisoners at all times.

18 U.S.C. § 4006(b) does not limit payment for medical items and services for prisoners in the custody of BOP (or for that matter in the joint custody of BOP and USMS). Congress allows BOP to pay more than Medicare or Medicaid rates for medical care of prisoners in BOP custody under BOP care. Had Congress intended to limit BOP to Medicare or Medicaid rates, it could have either listed BOP in the statute (as it did for the USMS, FBI, and INS), or applied the

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Status of this

[1] This arrangement was modified, on a pilot basis, to delegate to BOP all of the financial and operational responsibility for pre-trial prisoners or sentenced prisoners awaiting designation who are housed in BOP facilities in Miami, New York City, and Oklahoma and the BOP Medical Referral Centers in Butner, North Carolina, Carswell, Texas, Devens, Massachusetts, Forth Worth, Texas, Lexington, Kentucky, Rochester, Minnesota, and Springfield, Missouri. Thus, in these BOP facilities, BOP is now responsible for transporting and paying for the outside medical items and services and guard services for these prisoners. BOP and USMS are currently negotiating to extend this arrangement to all BOP facilities.

statute to any prisoner in the custody of the Attorney General. See 18 U.S.C. § 751 (escape statute). Thus, since BOP is ultimately responsible for the medical care of all prisoners in BOP facilities and for arranging outside medical care, we believe that the payment arrangements of BOP are applicable to USMS prisoners housed in BOP facilities not the 18 U.S.C. § 4006(b) rules applicable to the USMS prisoners housed in state, local, or private jails. We believe this to be so even if the USMS is providing incidental guard support at the outside medical provider since this fact alone is indeterminate, e.g., when the doctor visit or hospitalization is brief the USMS may not provide guards, and ultimately the outside medical guards for these prisoners will be provided entirely by the BOP.

By regulation, BOP is charged with providing the same level of medical services to these prisoners that it provides its convicted inmate population. BOP has negotiated requirements type hospital and health care provider contracts for all of its prisoners, those convicted and serving sentences and those who are pre-trial or awaiting to be transported to a facility. While some of these contracts offer rates at or below Medicare rates, some contracts are 15 to 45 per cent above Medicare rates. BOP is not required by 18 U.S.C. § 4006(b) or any other law to limit payments for prisoners in its facilities to the lesser of Medicare or Medicaid rates and this prohibition can not be the governing law for these contracts or any prisoners cared for under these contracts.

II. Similar Health Care Items and Services

Even if these prisoners under these circumstances, were deemed to be in the "custody" of the USMS for purposes of 18 U.S.C. § 4006(b), this statute does not limit payment for "health care items and services"that Medicare or Medicaid would simply not cover. The BOP hospital and health care provider contract bills include services that are not covered by the Medicare or Medicaid programs. The BOP contract vendors provide the additional services of scheduling hospital and doctor appointments for prisoners, consolidation of bills so that the agency will receive one consolidated bill for each prisoner, bill repricing services that evaluate and reprice each bill at the Medicare rate, the establishment of a comprehensive network of health care providers for these prisoners, and the provision of additional internal security procedures in addition to the BOP or USMS guards at the hospital. These are not "similar" services that are normally paid for under Medicare or Medicaid.

The BOP contract vendors' bills, however, do not itemize Medicare covered and non-Medicare covered items and services. For the BOP vendor contracts where total contract payments are below Medicare rates, the BOP is obtaining Medicare items and services well below Medicare rates. However, for those BOP vendor contracts where contract payments exceed Medicare rates, it is likely that the payments above Medicare are attributable to non-Medicare covered items and services provided to these prisoners. Therefore, at the very least, the identifiable portions of each bill that represent these non-covered health care items and services are not limited to Medicare or Medicaid rate.

Conclusion

For the reasons stated above, we believe that 18 U.S.C. § 4006(b), which applies to the USMS, FBI, and INS, does not apply to payments made to BOP or under BOP hospital or health care provider contracts for pre-trial prisoners or sentenced prisoners awaiting designation (or held on a writ) who are housed in BOP facilities. These prisoners are in the primary custody of BOP. The health care of those prisoners is the primary responsibility of BOP and is provided under contractual arrangements entered by the BOP. These BOP contracts are entered under competitive procedures and price is determined to be reasonable, although that price is not required to be the lesser of amounts that would be paid for similar items and services under the Medicare or Medicaid programs. Therefore, the medical care payment law applicable to BOP should govern and the USMS may either reimburse BOP or pay the BOP contractor directly for these payments. Moreover, even if 18 U.S.C. § 4006(b) applies to these prisoners, the services provided under the BOP hospital and health care provider contracts that are not "similar" items and services that are covered under the Medicare and Medicaid programs are not limited to Medicare and Medicaid rates.

If you have any questions, please call me or Gerald L. Elston, Senior Associate General Counsel on 202-307-9054.

2007 OCT 18 PM 1:

(b)(6)

October 13, 2007

Kevin Wilson
U.S. Office of Special Counsel
1730 M Street, N.W. Suite 300
Washington, D.C. 20036-4505

Re: OSC File No. DI-07-1292

Dear Mr. Wilson:

In regards to the findings that were sent on August 28, 2007, If the USMS had Section 406(b) enacted upon its behest to hold down costs for detainees medical bills. Why is the USMS doing an about face and still paying BOP rates? I would think that the USMS OGC should re-review their standing from 2001.

It does not seem equitable to apply 4006(b) to all medical vendors for USMS detainees but not to the ones that we by necessity have to house at BOP facilities. It seems that the USMS is "rolling over and playing dead" when it comes to those charges so that we do not ruffle the feathers of BOP.

In the legal opinion of the USMS OGC dated October, 2001, they sited because the services provided under the contracts are not similar to covered Medicare services. Where does the service diverge and become non-similar to Medicare services? BOP medical vendor contractors do not do anymore than what we do locally or at HQ levels do. Their services are the same for detainees as well as those outside of federal custody as a private citizen. Medical services are medical services. Most vendors can provide consolidated billing for all patients that received services. They do not provide security. BOP provides no security other than what could and is provided under most IGA local facility contracts, including transporting back and forth to medical exams by their employees/guard service. If USMS detainees are in the hospital we are still responsible for paying for the guard service contracted that is incurred whether they are in BOP facility or local contracted jails. They also stated that some contracts are 15 to 45 percent above Medicare rates that may have been true in some instances but my biggest concern is when they are 150 percent over not only Medicare rates but in some instances double original bill rate.

Maybe congress ought to take a look at 18 U.S.C.4006(b) and re-write it to include BOP or at the very least maybe USMS OGC needs to revisit their findings to see if it is still applicable. Because I still feel that there is still gross misappropriation being facilitated.

Sincerely,
Robbi Elaine Minden

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415-1100

OFFICE OF
THE INSPECTOR GENERAL

November 15, 2007

to Emmett
12-10-07
FFF

Honorable Clay Johnson III
Deputy Director for Management
Office of Management and Budget
Washington, DC 20503

Dear Mr. Johnson:

This letter provides you further information regarding my office's investigation of the March 3, 2005 (as amended March 31, 2005) complaint of prohibited personnel practices against Special Counsel Scott Bloch. By letter dated September 28, 2007, we identified actions on the part of Mr. Bloch and certain former U.S. Office of Special Counsel (OSC) officials that have hindered our ability to perform the investigation. Since that time, as we have continued to review material in furtherance of our investigation, we have developed additional information indicating that Mr. Bloch has not respected his recusal obligations. You had previously advised him that his failure to do so would constitute inefficiency, neglect of duty and malfeasance in office.

In a letter to you of March 4, 2005—the day after the original complaint against him was filed—Mr. Bloch informed you that he had recused himself from any participation in this matter and would "fully cooperate with" an investigation. During the period in which jurisdictional issues regarding the case were being considered, you honored Mr. Bloch's recusal commitment by declining to involve him in these matters. Subsequently, in your February 21, 2006 letter to Mr. Bloch, confirming that our office would be conducting an investigation, you advised Mr. Bloch that his recusal decision was correct in light of U.S. Office of Government of Ethics (OGE) rules. You stated that he should act in conformity with his expressed commitment to refrain from any involvement in OSC's handling of the U.S. Office of Personnel Management – Office of the Inspector General (OPM-OIG) investigation, and you identified a broad range of actions that would violate the recusal. These included involvement in preliminary discussions, interim evaluations, review or approval at intermediate levels, supervision of subordinates working on a matter, assigning work, even on an *ad hoc* basis, or taking part in decisions concerning who should work on a matter, how a matter should be handled, and whether a matter should be acted upon.

We have identified instances spanning the entirety of this investigation in which Mr. Bloch became involved, in a personal and substantive manner, with OSC's dealings with our office and its responses to our investigation. The following paragraphs identify a number of these situations. They illustrate that Mr. Bloch repeatedly ignored both his own assurances of his recusal and your confirmation of the necessity for him to do so, and demonstrate that he was continuously involved in OSC's decisionmaking processes regarding this case. On numerous occasions, he used his access to OSC personnel resources as a means of facilitating his opposition to the investigation. Further, it should be noted that Mr. Bloch's violations continued, and to some extent even intensified, after he received your guidance about recusal during 2006.

1. In 2005 and 2006, Mr. Bloch participated in OSC's decision-making process with respect to its negotiations regarding the Economy Act agreement on which the investigation is based. In this connection, he informed the OSC employee who was negotiating the agreement with our office of his views regarding the amount of funding that should be made available through the agreement, and provided guidance to other OSC employees about handling the negotiations with the OPM-OIG.

2. Also in 2005, Mr. Bloch issued to our respective offices his personal response to the complaint against him. He directed the input of all staff of the Immediate Office of the Special Counsel, as well as at least one OSC senior career executive, in researching, editing, and reviewing this extensive (50 page) document.

3. In March 2006, an OSC attorney, with the assistance of senior OSC management officials, prepared a document titled "Conflict of Interest of OPM and the OPM IG in the Complaint Against Scott Bloch," which represented itself as "Mr. Bloch's position" in respect to the OPM-OIG's ability to conduct an impartial investigation. In turn, this was attached to a letter drafted by one of Mr. Bloch's special assistants, proposing that our office and the OPM Director recuse themselves from any participation in the investigation of Mr. Bloch. You will note that this document was prepared notwithstanding the fact that your February 21, 2006 letter stated that your office had concluded that "alleged conflicts of interest relating to OPM" did not raise "an actual conflict or an appearance of conflict that would prevent OPM from conducting this investigation."

4. As summarized in our September 28, 2007 letter to you, when the OPM-OIG began to interview OSC employees in June 2006, Mr. Bloch requested that affidavits be obtained from the interviewees regarding the actions of our investigators and the questions that they asked. The Acting Deputy Special Counsel informed Mr. Bloch that these actions were contrary to the terms of his recusal. The Acting Deputy Special Counsel also instructed the Special Assistant to refrain from further contacts with the employees. However, Mr. Bloch then asked two employees of the Immediate Office of the Special Counsel, in lieu of taking affidavits, to report to him any information about the investigation that they could obtain by speaking with the employees who had been interviewed.

5. As our office's investigation proceeded during 2006, Mr. Bloch repeatedly requested members of his immediate staff to obtain specific items of information

for him regarding the status of the investigation, such as investigative plans, interview schedules, and topics likely to be of interest to the investigators.

6. Our requests for information and documents from OSC have primarily been communicated through written requests to the Deputy Special Counsel. However, in August 2007 we exercised OSC's subpoena authority—which we believe to have been delegated to us through the March 2006 Economy Act agreement—in connection with four requests. Upon being served with a subpoena for records in his possession, Mr. Bloch directed the Deputy Special Counsel to inform us that subpoena authority had not been delegated to our office.

7. In response to requests made both via subpoena and by request to the Deputy Special Counsel, Mr. Bloch directed the Deputy Special Counsel to refuse to turn over various documents that include e-mails and attachments from several OSC employees.

As we informed you in our September 28, 2007 correspondence, the deletion, destruction, and refusal of access to OSC documents have hampered our ability to thoroughly investigate this case, and it has now become evident that Mr. Bloch's recusal violations contributed significantly in this regard. We are working to overcome these obstacles, and may provide you further information about recusal matters if it becomes possible to do so within the context of the pending criminal proceedings of which we have previously notified you.

If you have any questions, please do not hesitate to contact me on (202) 606-1200.

Sincerely,

Patrick E. McFarland

Patrick E. McFarland
Inspector General

✓

Bakke, Mary Beth

From: Johnson III, Clay
Sent: Friday, October 26, 2007 11:21 AM
To: 'Byrne, James'
Cc: Rosen, Jeffrey A.
Subject: RE: Envelope from OMB

I am happy for you and sorry for us that you are moving on. Keep me informed.

JW

From: Byrne, James [mailto:jbyrne@osc.gov]
Sent: Friday, October 26, 2007 11:19 AM
To: Johnson III, Clay
Cc: Rosen, Jeffrey A.
Subject: Envelope from OMB

Clay/Jeff,

Earlier this week we received a mailed envelope from your office delivering the original August 15, **2006** letters from you to Bloch and McGinley. The envelope was post marked last year also. I do not believe it was lost in our mail room for the past year. I am in the last stages of accepting another position outside of OSC.

Sincerely,

Jim

James M. Byrne

Deputy Special Counsel

U.S. Office of Special Counsel

1730 M Street NW, Suite 300

Washington, D.C. 20036-4505

Office: 202.254.3603

Cell: 202.550.8911

Bakke, Mary Beth

From: Johnson III, Clay
Sent: Tuesday, October 02, 2007 9:40 AM
To: Fielding, Fred F.
Cc: Bakke, Mary Beth
Subject: Scott Bloch

I will assume there is nothing for us to do regarding the 9/28 letter from Pat McFarland, unless I hear from you to the contrary.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO: Mary Beth Bakke

Take necessary action	☐
Approval or signature	☐
Comment	☐
Prepare reply	☐
Discuss with me	☐
For your information	☒
See remarks below	☐

FROM: Clay Johnson | Sarah Greer DATE: 10/1/07

REMARKS:

Mary Beth,
Clay asked me to pass on this document to Mr. Fielding.

Thanks. Sg
x. 5. 3844

OMB FORM 4
Rev Aug 70

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
Inspector General

Farren
Flood

September 28, 2007

Honorable Clay Johnson III
Deputy Director for Management
Office of Management and Budget

Dear Clay:

I am writing to you about the status of my office's investigation of the March 3, 2005 (as amended March 31, 2005) complaint of prohibited personnel practices against Special Counsel Scott Bloch. As explained in this letter, we have recently referred to the Office of the United States Attorney for the District of Columbia serious misconduct by Special Counsel Bloch. We believe it is prudent to advise you of these developments in a timely manner, given the seriousness of the recent conduct by Special Counsel Bloch. In order to avoid jeopardizing any potential criminal proceeding, we request that you do not disclose the Department of Justice referral to anyone at the Office of Special Counsel (OSC), including Special Counsel Bloch.

As I have previously indicated, my office has encountered a pattern of systematic delays on the part of OSC officials that began even before we executed the interagency agreement on which our involvement in this matter is based. The OSC caused a delay totaling 233 work days, or approximately 47 percent of the elapsed time since my office undertook this investigation. We have nonetheless continued our investigative activities in good faith, continuing to engage OSC with the expectation that we could ultimately secure its full cooperation and conduct a thorough, impartial, and expedient investigation. Unfortunately, the periodic meetings among you, your counsel, my office, and OSC, generally produced only brief intervals of compliance, followed by repeated but unfulfilled assertions of a desire to cooperate with our inquiry. It has become increasingly evident that actions of both current and former OSC officials continue to thwart our office's efforts to conduct a thorough, impartial investigation that meets professional standards of completeness and integrity.

The knowing destruction of records has occurred throughout the period of our investigation, assertions of unsupported and legally insufficient claims of privilege have been offered in response to investigative inquiries, and the denial of access to relevant documentary material still occurs. A most troubling incident which has recently been brought to our attention is the destruction of documents and withholding of documents by Special Counsel Bloch who is the subject of our investigation. This letter describes each of these situations, and informs you of the actions we have taken and plan to take.

Destruction of Records

Our first formal contact with OSC after receiving your request to conduct an investigation of the complaint against Special Counsel Bloch was through an October 17, 2005 letter that we sent to the then-Deputy Special Counsel, asking that all documents and records relevant to our inquiry be preserved. However, our investigators have determined that Special Counsel Bloch and at least one other senior OSC official have destroyed records subsequent to our preservation notice. One episode in particular, the "wiping" of OSC-furnished computers assigned to Special Counsel Bloch and two of his special assistants by an outside contractor, also raises concerns involving the security of OSC information systems, misuse of government funds and obstruction of justice.

Further details regarding these matters are provided below.

1. On December 18 and 21, 2006 Special Counsel Bloch procured, with OSC appropriated funds, a technician from the company "Geeks on Call" to service his OSC-owned laptop computer. The contractor copied records (including email files) from Special Counsel Bloch's computer to encrypted flash drives and, after providing the flash drives to Special Counsel Bloch, "wiped" the computer's hard drives in a manner that precluded subsequent forensic retrieval of materials that had been stored there. On the same days, the contractor also wiped the OSC-assigned computers of Special Counsel Bloch's principal special assistant and a former special assistant. The total cost of these services and the flash drives was approximately $1,100, which was paid in its entirety with federal funds. Special Counsel Bloch asserts that none of the material copied onto the flash drives from his OSC laptop computer was related to OSC. Special Counsel Bloch, through his attorney, asserts that one file related to his tenure on the PCIE and the remaining material related to previous government positions that Special Counsel Bloch has held. Special Counsel Bloch has refused to provide the flash drives and their contents to our investigators.

   Special Counsel Bloch indicated through his attorney that during his tenure both as Special Counsel and his earlier service at the Department of Justice (November 2001 – December 2003), he routinely deleted email messages as soon as he sent or received them, to avoid "cluttering" his computer. Our review of Special Counsel Bloch's email accounts (as provided by OSC after review by both Special Counsel Bloch and his attorney) disclosed that the "sent messages" folder is missing for the entirety of his tenure as Special Counsel (January 2004 – present). His email "inbox" is missing for the period January 2004 – January 2006, with the exception of one message dated December 15, 2004 and eight messages received at various times in the period January 15 – June 18, 2005. These missing, and presumably deleted, email files cover the period during which the violations alleged by the complaint against Special Counsel Bloch would have occurred and immediately thereafter. Subsequent to January 20, 2006, Special Counsel Bloch's "inbox" reflects several gaps for periods from which data had been removed, but does contain 2,180 messages which were not deleted. Additionally, Special Counsel Bloch's "deleted items" folder contained 14 items; 2 were dated September 1, 2006 and 12 dated between March 27, 2007 – June 29, 2007.

2. All of the 2004 and 2005 email records of the official who served as the Acting Deputy Special Counsel during July 2006 – February 2007 were missing, with the exception of a few messages received in December 2005. This individual stated in an interview with OIG personnel that she deleted her emails on an ongoing basis throughout her service in OSC (March 2004 – present), although this was clearly not accurate, given that her inbox subsequent to December 20, 2005 and sent messages folder subsequent to March 20, 2006 appeared to be largely intact and contained over 11,000 messages. As was the case with Special Counsel Bloch's email account, the emails deleted by this person covered the period that is most directly relevant to our inquiry.

3. For the period covered by our investigation, OSC's information management system was designed to erase materials, including emails and documents that had been deleted from network drives and email servers by individual users after 30 days. No limitations were placed on this process, either by the system itself or by management directive. As a result, the material deleted from email accounts by Special Counsel Bloch and the former Deputy Special Counsel is not believed to be susceptible to recovery through forensic techniques.

4. Special Counsel Bloch directed an OSC management official to obtain affidavits from all OSC employees whom we interviewed. That management official refused to follow Special Counsel Bloch's order.

5. An OSC management employee has informed us that Special Counsel Bloch has directly reviewed files whose release we have requested and initially ordered an OSC staff member to remove "damaging" material from them before they were provided to our office, but later withdrew this request.

6. Given the serious nature of the information described above, we conferred with the Department of Justice. We have recently been informed that this matter has been assigned to an Assistant United States Attorney for development of a criminal investigation under the obstruction of justice statute (18 U.S.C. § 1512).

Unsupported Claims of Privilege

Our investigation has determined that a very small group of individuals within the immediate Office of the Special Counsel, including Special Counsel Bloch, were responsible for the decisions that formed the underlying basis for the March 3, 2005 complaint. Our interviews of the two officials other than Special Counsel Bloch resulted in their blanket refusals, on the basis of attorney-client privilege, to discuss matters regarding the January 2005 OSC reorganization, the event that appears to be central to the allegations that Special Counsel Bloch committed prohibited personnel practices. Upon further questioning by OIG investigators, these persons—both of whom are now career employees for other federal agencies—declined to provide even basic information that would support their assertions of privilege, such as dates, times, subject-matter, and circumstances surrounding the communications they deemed to be privileged. We believe the blanket nature of these claims reflects that they are for the most part unwarranted and are not supportable by reference to the criteria identified by the Merit Systems Protection Board for assessing the applicability of attorney-client privilege in the context of actions for enforcement of subpoenas for documents or testimony. These are generally the same criteria as are applied to assess claims of privilege by the Federal judiciary. *See, for example, Gangi v. United States Postal Service, 97 M.S.P.R 165 (September 1, 2004); Grimes v. Department of the Navy, 99 M.S.P.R. 7 (June 10, 2005); and Willingham v. Ashcroft, 2005 U.S. Dist. LEXIS 22258 (D. DC. October 4, 2005).*

We will continue to explore the full range of means to obtain full and truthful testimony from these employees, and if necessary, to contest unsupported claims of privilege before an appropriate adjudicatory forum.

Denial of Access to Relevant Information

Our office requested that the current Deputy Special Counsel release the emails of various OSC employees. While we ultimately did receive the email accounts we sought in an electronic format, all of them have been subject to some degree of prior scrutiny by OSC officials. The integrity of an investigation and the credibility of the resultant reports are predicated on the investigators' unrestricted access to information. OSC's ongoing insistence upon selectively furnishing materials to us, rather than complying with our requests in full, is inimical to the most fundamental principles of an effective investigation.

Given these concerns, we concluded that full compliance with our requests for information could be secured only through a mandatory process with an enforcement mechanism involving sanctions for noncompliance. The Office of Special Counsel holds an administrative subpoena authority under 5 U.S.C. § 1212 which meets these criteria. Pursuant to the interagency agreement on which our investigation is based and funded, we believe that the power to invoke this authority was delegated to us. Therefore, during the period August 17 – 23, 2007, we issued four subpoenas for documents and information to the Deputy Special Counsel, acting as OSC's point of contact, and one directly to Special Counsel Bloch. The Deputy Special Counsel responded on August 29, 2007, asserting that our subpoenas were "invalid and ultra vires," and claiming that he intended to comply, solely on a voluntary basis, with our investigative requests "as much as reasonably possible."

Special Counsel Bloch responded in a similar vein through a letter from his attorney. Having stated that he believes that "[I]t does not appear that your office has any authority to issue subpoenas in [this] matter," he indicated that he would cooperate "for those requests which are within reason and within your authority." The remainder of that letter in effect documents his refusal to provide any of the items we requested.

Conclusion

It appears that Special Counsel Bloch has successfully thwarted our investigative process. We suspect his lack of cooperation is related to a cover-up, which is an issue we will pursue. It is incredible that such a high level government official subject to an investigation would hire an outside contractor to wipe his computer and the computer of his special assistants, refuse to produce a copy of the deleted material, and demand affidavits, through a management official, of his subordinates who were interviewed. While we can prepare a report that contains factual information regarding the issues identified in the March 2005 complaint against Special Counsel Bloch, the fundamental accuracy of such report is questionable in the absence of complete information from Special Counsel Bloch. We will continue to explore any available options in our investigation and will fully cooperate with the Office of the United States Attorney.

If you have any questions, please do not hesitate to contact me, at (202) 606-1200, or have a member of your staff contact Patti Marshall, my special counsel for this case, at (312) 751-3390.

Sincerely,

Patrick E. McFarland

Patrick E. McFarland
Inspector General

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	FW: OSC Letter - To: Fred Fielding, et al. - From: Kenneth Lee	3	09/18/2007	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Fielding, Fred - General Files
FOLDER TITLE:
Office of Special Counsel Reports & Scott Bloch Issues [18]
FRC ID:
11294
OA Num.:
10821
NARA Num.:
10383

FOIA IDs and Segments:

2014-0210-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051
FACSIMILE (202) 225-4784
MINORITY (202) 225-5074

www.oversight.house.gov

September 17, 2007

The Honorable Scott J. Bloch
U.S. Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W.
Washington, DC 20036

Dear Mr. Bloch:

Your August 31, 2007 response to the Committee's request for information is entirely inadequate and raises additional serious concerns. First of all, I know of no authority for the proposition that consultations between your office and the White House or other agencies may be withheld from Congress as "confidential." As Congress's principal investigative Committee (and the Committee of jurisdiction over your office), the Committee on Oversight and Government Reform has important oversight and legislative interests in such consultations.

Second, as you observed in your letter, you are engaged in pending investigations regarding "political briefings." Investigations of matters on which you had previously given advice would be entirely improper.

Finally, we question the internal review that you claim to have conducted. Sources familiar with contacts between White House staff and your office have told Committee staff that lawyers from the White House Counsel's office conferred with Amber Bell Vail and Ana Galindo-Marrone from your Hatch Act unit regarding the content of PowerPoint slides used by officials from the Office of Political Affairs. Ms. Vail and Ms. Galindo-Marrone, according to our sources, provided advice regarding the content of White House political presentations.

In light of these concerns, please responds to the following questions:

1. Did your internal review include any inquiry of Ms. Vail or Ms. Galindo-Marrone in advance of preparing your August 31, 2007 letter to the Chairman?

2. If so, did Ms. Vail or Ms. Galindo-Marrone deny providing guidance to officials from the White House Counsel's office on political briefings?

3. Did you conduct any review of email between members of the Hatch Act unit and White House staff? If not, why not?

4. Do Ms. Vail or Ms. Galindo-Marrone have any role in OSC's current investigation into whether the political briefings by the White House Office of Political Affairs violated the Hatch Act? If so, what is their role?

5. Does OSC have a policy to wall off staff from matters on which they previously gave advice, even if that advice was communicated orally and not memorialized in writing?

6. On what legal authority do you assert that consultations with the White House or agencies may be withheld from Congress as "confidential?"

Please respond no later than September 24, 2007. If you have any questions regarding this request, please contact Keith Ausbrook at 202-225-5074.

Thank you for your attention to this matter.

Sincerely,

Tom Davis

Tom Davis
Ranking Member

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	FW: OSC Letter - To: Mary Beth Bakke - From: Kenneth Lee	3	10/01/2007	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

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SERIES:
Fielding, Fred - General Files
FOLDER TITLE:
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2014-0210-F

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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 9/1/2016 by erl

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

www.osc.gov

The Special Counsel

Flood
Farren
Burck

October 18, 2007

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-06-1731

Dear Mr. Fielding:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter and report to the President. If I may provide more information concerning this matter, please do not hesitate to contact me.

Sincerely,

Scott J. Bloch

Enclosures

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	OSC File No. DI-06-1731 - To: POTUS - From: Scott Bloch	2	10/18/2007	P6/b6; b7c;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

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U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

FACSIMILE COVER SHEET

TO:

Name: The Honorable Fred Fielding	
Title: Counsel to the President	
Organization: The White House	
Office / Location: Washington, D.C.	
Telephone: (202) 456-2632	**Fax:** (202) 456-6279

FROM:

Name: Scott J. Bloch	
Organization: Office of Special Counsel	
Office / Location: Washington, D.C.	
Telephone: (202) 254-3601	**Fax:** (202) 653-5151

Date: October 18, 2007	**Number of pages, including this cover sheet: 4**

Message: Original and enclosures to follow by Federal Express delivery

If you did not receive the total number of pages shown, please call Denise Toney at (202) 254-3632.

U.S. General Services Administration
Office of Inspector General

VIA FAX

October 17, 2007

The Honorable Fred Fielding
White House Counsel
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. Fielding:

By letter dated March 27, 2007, I submitted to you our Report of Investigation on GSA Administrator Lurita Doan. This office is preparing its upcoming statutorily required Semiannual Report to Congress, which will be completed on October 31, 2007. This report will need to summarize any action taken in this matter. I am writing this letter to provide notice to you of this reporting requirement and to respectfully request an update from your office.

I hope that you or your staff will feel free to contact me with any questions by calling me at 202-501-0450. Thank you.

Sincerely,

Brian D. Miller
Inspector General

U.S. GENERAL SERVICES ADMINISTRATION
OFFICE OF INSPECTOR GENERAL
18TH & F STREETS, NW., SUITE 5340
WASHINGTON, DC 20405

FACSIMILE TRANSMITTAL SHEET

TO: The Honorable Fred Fielding	FROM: Brian D. Miller
ORGANIZATION: White House Counsel	DATE: 10/17/07
FAX NUMBER: (202) 456-6279	FAX NUMBER: (202) 208-7607
PHONE NUMBER:	PHONE NUMBER: (202) 501-0450
RE: GSA	NUMBER OF PAGES INCLUDING COVER SHEET: 2

☐ URGENT ☐ FOR REVIEW ☐ FOR INFORMATION ☐ AS REQUESTED ☐ PLEASE REPLY

COMMENTS:

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5051
FACSIMILE (202) 225–4784
MINORITY (202) 225–5074

www.oversight.house.gov

September 17, 2007

The Honorable Scott J. Bloch
U.S. Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W.
Washington, DC 20036

Dear Mr. Bloch:

Your August 31, 2007 response to the Committee's request for information is entirely inadequate and raises additional serious concerns. First of all, I know of no authority for the proposition that consultations between your office and the White House or other agencies may be withheld from Congress as "confidential." As Congress's principal investigative Committee (and the Committee of jurisdiction over your office), the Committee on Oversight and Government Reform has important oversight and legislative interests in such consultations.

Second, as you observed in your letter, you are engaged in pending investigations regarding "political briefings." Investigations of matters on which you had previously given advice would be entirely improper.

Finally, we question the internal review that you claim to have conducted. Sources familiar with contacts between White House staff and your office have told Committee staff that lawyers from the White House Counsel's office conferred with Amber Bell Vail and Ana Galindo-Marrone from your Hatch Act unit regarding the content of PowerPoint slides used by officials from the Office of Political Affairs. Ms. Vail and Ms. Galindo-Marrone, according to our sources, provided advice regarding the content of White House political presentations.

In light of these concerns, please responds to the following questions:

1. Did your internal review include any inquiry of Ms. Vail or Ms. Galindo-Marrone in advance of preparing your August 31, 2007 letter to the Chairman?

2. If so, did Ms. Vail or Ms. Galindo-Marrone deny providing guidance to officials from the White House Counsel's office on political briefings?

3. Did you conduct any review of email between members of the Hatch Act unit and White House staff? If not, why not?

4. Do Ms. Vail or Ms. Galindo-Marrone have any role in OSC's current investigation into whether the political briefings by the White House Office of Political Affairs violated the Hatch Act? If so, what is their role?

5. Does OSC have a policy to wall off staff from matters on which they previously gave advice, even if that advice was communicated orally and not memorialized in writing?

6. On what legal authority do you assert that consultations with the White House or agencies may be withheld from Congress as "confidential?"

Please respond no later than September 24, 2007. If you have any questions regarding this request, please contact Keith Ausbrook at 202-225-5074.

Thank you for your attention to this matter.

Sincerely,

Tom Davis
Ranking Member

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

cc Fred Fielding

FYI.

FACSIMILE COVER SHEET

TO:

Name: Sarah Greer	
Title: Assistant To Clay Johnston	
Organization: Executive Office of the President	
Telephone: (202) 456-7070	**Fax:** (202) 456-5938

FROM:

Name: Mary Robinson	
Organization: U.S. Office of Special Counsel	
Office / Location: Washington	
Telephone: (202) 254-3611	**Fax:** (202) 653-5161

Date: August 7, 2007	**Number of pages, including this cover sheet:** 11

Message:

Letter to Clay Johnston dated August 7th.

Thank you!

Mary Beth,
Clay asked us to pass on to Mr. Fielding.
Thanks. sg
5-3841

If you did not receive the total number of pages shown, please call (202) 254-3600.

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	Denial of Request to Add Special Counsel to EO 12993 - To: Clay Johnson - From: Scott Bloch	2	08/07/2007	P5;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Fielding, Fred - General Files

FOLDER TITLE:
Office of Special Counsel Reports & Scott Bloch Issues [18]

FRC ID:
11294

OA Num.:
10821

NARA Num.:
10383

FOIA ID and Segment:
2014-0210-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 9/1/2016 by erl

U.S. OFFICE OF SPECIAL COUNSEL

Directive

DATE: July 10, 2007

No. 11

PROCEDURES FOR PROCESSING COMPLAINTS AND DISCLOSURES BY OFFICE OF SPECIAL COUNSEL (OSC) EMPLOYEES

I. **Purpose**. This directive establishes procedures governing: (a) the filing of complaints by OSC employees alleging certain prohibited employment practices, including prohibited personnel practices (PPPs), violations of Hatch Act provisions applicable to federal employees, and violations of Uniformed Services Employment and Reemployment Rights Act (USERRA) provisions applicable to federal agencies; and (b) the filing of whistleblower disclosures by OSC employees.

II. **Authorities**. 5 U.S.C. §§ 1212-1216, 38 U.S.C. § 4301, *et seq.*, 5 C.F.R. Parts 1800 and 1810.

III. **Policy**.

A. OSC will take appropriate measures to ensure that disclosures and complaints are received, investigated, and resolved in such a way as to guard against actual or apparent bias. For example, investigation and legal review of complaints or disclosures will be conducted by investigators and attorneys in a different division or geographical location than that of the subject of the allegation(s) involved, and are not in the same chain of command as the subject. When warranted and practicable, OSC may arrange for the use of investigative or legal resources outside OSC to investigate complaints or disclosures by OSC employees.

B. An OSC official or other employee identified as the subject of a complaint or disclosure by an OSC complainant, whistleblower, or other employee responsible for receiving, reviewing, or investigating a complaint or disclosure pursuant to this directive, shall not participate in the matter for or on behalf of OSC, by way of advice, recommendation, decision, or otherwise.

Distribution: All OSC Employees

Lead Office: Special Counsel

Form OSC-400
Rev. 7/07

IV. Definitions. As used in this directive:

*Disclosure (*or *whistleblower disclosure)* means information filed by an OSC employee that the employee reasonably believes evidences one or more types of official wrongdoing described at 5 U.S.C. § 1213 (*i.e.*, a violation of law, rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety).

Employee means a current or former OSC employee, or applicant for employment with OSC.

Hatch Act complaint means a complaint filed by an OSC employee alleging a violation of Hatch Act provisions applicable to federal employees (at 5 U.S.C. § 7321-25).

PPP complaint means a complaint filed by an OSC employee alleging a prohibited personnel practice, as defined at 5 U.S.C. § 2302(b), and/or other matters under OSC jurisdiction pursuant to 5 U.S.C. § 1216(c)-(e).

Substantial likelihood determination means a determination by OSC, pursuant to 5 U.S.C. § 1213(b), that there is a substantial likelihood that information in a disclosure discloses a violation of any law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

USERRA complaint means a complaint filed by an OSC employee alleging a violation of USERRA provisions applicable to federal agencies.

V. PPP Complaints

A. Filing. All complainants, including OSC employees, must use Form OSC-11 ("Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity") to file a PPP complaint with OSC. Form OSC-11 is available on the OSC web site, at *www.osc.gov/Forms*.

1. Except as provided in paragraph B.1., below, a PPP complaint should be sent or delivered to the Office of Special Counsel, Complaints Examining Unit, 1730 M Street, N.W., Suite 201, Washington, DC 20036-4505.

2. In the alternative, a PPP complaint can be filed electronically. See the OSC web site, at *www.osc.gov*, for instructions.

B. Initial Review. Except as provided in subparagraphs 1.-3., below, a PPP complaint filed by an OSC employee will be reviewed by the Complaints

Examining Unit (CEU) by reference to policies and procedures applied to other PPP complaints. If CEU determines that no further investigation is warranted, it will prepare and send a preliminary determination letter, and closure letter (if appropriate), to the complainant. The unit chief will notify the Deputy Special Counsel of the closure of any PPP complaint filed by an OSC employee.

1. *PPP complaints involving Complaints Examining Unit (CEU) personnel*. If any CEU official or employee is identified as the subject of a PPP complaint filed by an OSC employee, the complaint will be referred by the Document Control Branch, upon mail receipt by OSC, directly to the Deputy Special Counsel or his designee. (If delivered by the complainant in person, the complaint should be delivered to the office of the Deputy Special Counsel or his designee.) The Deputy Special Counsel or designee will conduct the initial review of the complaint in accordance with policies and procedures applied to other PPP complaints.

   a. If the Deputy Special Counsel determines after initial review that no further investigation is warranted, a preliminary determination letter, and closure letter (if appropriate), will be sent to the complainant.

   b. If the Deputy Special Counsel determines that further investigation is warranted, it will be handled in accordance with the procedures described in paragraph B., below.

2. *PPP complaints involving the Deputy Special Counsel*. If the Deputy Special Counsel is identified as the subject of a PPP complaint filed by an OSC employee, the Special Counsel or a designee will carry out the functions assigned to the Deputy Special Counsel in paragraph 1., above.

3. *PPP complaints involving the Special Counsel*. If the Special Counsel is identified as the subject of a PPP complaint filed by an OSC employee, the complaint will processed as described in paragraph C., below.

B. Investigation and resolution. If the CEU determines that further investigation is warranted, the unit chief will refer the complaint to the Deputy Special Counsel, who will assign the matter to an investigator and/or attorney. Upon completion of an investigation and legal analysis, the Deputy Special Counsel or designee will review the investigative and legal findings. The Deputy Special Counsel will make a decision on the disposition of the complaint.

C. <u>PPP complaints involving the Special Counsel</u>

1. *<u>Review</u>*. The CEU will review such complaints only to determine whether the employee has alleged a prohibited personnel practice set forth at 5 U.S.C. § 2302(b), or other matter within OSC's jurisdiction as set forth at 5 U.S.C. § 1216(c)-(e). If the CEU concludes that the complaint should be closed based on lack of jurisdiction, the unit chief shall forward that determination to the Deputy Special Counsel, for review by the Deputy or his designee, and a final decision by the Deputy Special Counsel.

2. *<u>Investigation and resolution</u>*. The Deputy Special Counsel will send a complaint not closed after CEU review to the Office of the White House Counsel for informational purposes, along with an outline of OSC's proposed plan for investigation of the matter, including transmittal of a copy of the report of investigation and any legal analysis to the White House Counsel's office.

3. *<u>Closure</u>*. Notice of the closure by OSC of any PPP complaint involving the Special Counsel shall be sent as soon as possible to the White House Counsel's office, with appropriate protection of the complainant's name if the complainant has not consented to release of that information outside OSC.

VI. <u>Hatch Act Complaints</u>

A. <u>Filing</u>. An OSC employee may use Form OSC-13 ("Complaint of Possible Prohibited Political Activity (Violation of the Hatch Act)") to file a Hatch Act complaint with OSC, or may use any other written format (*e.g.*, a letter). The Hatch Act complaint form is available on the OSC web site, at *www.osc.gov/Forms*. Except as provided in paragraph B.1., below, Hatch Act complaints should be sent or delivered to the Office of Special Counsel, Hatch Act Unit, 1730 M Street, N.W., Suite 201, Washington, DC 20036-4505.

B. <u>Investigation and Resolution</u>. Except as provided in subparagraphs 1.-3., below, a Hatch Act complaint filed by an OSC employee will be evaluated, investigated, and resolved in accordance with policies and procedures applied to other Hatch Act complaints.

1. *<u>Hatch Act complaints involving Hatch Act Unit (HAU) personnel</u>*. If any HAU official or employee is identified as the subject of a Hatch Act complaint filed by an OSC employee, the complaint should be referred by the Document Control Branch, upon mail receipt by OSC, directly to the Deputy Special Counsel or his designee. (If delivered by the complainant in person, the complaint should be delivered to the office of the Deputy Special

Counsel or his designee.) The Deputy Special Counsel or designee will carry out the functions that would otherwise be carried out by HAU personnel in evaluating, investigating, and resolving a complaint, in accordance with policies and procedures applied to other Hatch Act complaints.

2. *Hatch Act complaints involving the Deputy Special Counsel*. If a complaint alleges that the Deputy Special Counsel violated the Hatch Act, Special Counsel or his designee will carry out the functions assigned to the Deputy Special Counsel in paragraph 1., above.

3. *Hatch Act complaints involving the Special Counsel*. If the complaint alleges that the Special Counsel violated the Hatch Act, the complaint will processed as described in paragraph C., below.

C. Hatch Act complaints involving the Special Counsel

1. *Review*. The HAU will review such complaints only to determine whether the facts alleged, if true, would constitute a violation of the Hatch Act. If not, the unit chief shall forward that determination to the Deputy Special Counsel, for review by the Deputy or his designee, and a final decision by the Deputy Special Counsel, who shall have the authority to make such a decision based on the facts and the law.

2. *Investigation and resolution*. The Deputy Special Counsel will send a complaint not closed after HAU review to the Office of the White House Counsel for informational purposes, along with an outline of OSC's proposed plan for investigation of the matter, including transmittal of a copy of the report of investigation and any legal analysis to the White House Counsel's office.

3. *Closure*. Notice of the closure by OSC of any Hatch act complaint involving the Special Counsel shall be sent as soon as possible to the White House Counsel's office.

VII. USERRA Complaints

A. Filing. An OSC employee may use Form OSC-14 ("Complaint of Possible Violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA)") to file a USERRA complaint with OSC, or may use any other written format (*e.g.*, a letter). The USERRA complaint form is available on the OSC web site, at *www.osc.gov/Forms*. Except as provided in paragraph B.1., below, USERRA complaints should be sent or delivered to the Office of Special Counsel, USERRA Unit, 1730 M Street, N.W., Suite 201, Washington, DC 20036-4505.

B. Investigation and Resolution. Except as provided in subparagraphs 1.-3., below, a USERRA complaint filed by an OSC employee will be evaluated, investigated, and resolved in accordance with policies and procedures applied to other USERRA complaints.

1. *USERRA complaints involving USERRA Unit personnel*. If any USERRA Unit official or employee is identified as the subject of a USERRA complaint filed by an OSC employee, the complaint should be referred by the Document Control Branch, upon mail receipt by OSC, directly to the Deputy Special Counsel or his designee. (If delivered by the complainant in person, the complaint should be delivered to the Deputy Special Counsel or his designee.) The Deputy Special Counsel or designee will carry out the functions that would otherwise be carried out by USERRA personnel in evaluating, investigating, and resolving a complaint, in accordance with policies and procedures applied to other USERRA complaints.

2. *USERRA complaints involving the Deputy Special Counsel*. If a complaint alleges that the Deputy Special Counsel violated the USERRA, Special Counsel or his designee will carry out the functions assigned to the Deputy Special Counsel in paragraph 1., above.

3. *USERRA complaints involving the Special Counsel*. If the complaint alleges that the Special Counsel violated the USERRA, the complaint will processed as described in paragraph C., below.

C. USERRA Complaints Involving the Special Counsel

1. *Review*. The USERRA Unit will review such complaints only to determine whether determine whether the employee has alleged a violation of USERRA over which OSC has jurisdiction. If not (*i.e.*, if it appears that the employee has not alleged a violation of USERRA over which OSC has jurisdiction), the unit chief will forward that determination to the Deputy Special Counsel, for review by the Deputy or his designee, and a final decision by the Deputy Special Counsel. If closed by the Deputy Special Counsel, the complainant will, in accordance with policies and procedures applied to other USERRA complaints, be provided with information about his/her right to file a USERRA appeal challenging the underlying action involved in the complaint.

2. *Investigation and resolution*. If it appears that the employee has alleged a violation of USERRA over which OSC has jurisdiction, the USERRA Unit chief will inform the Deputy Special Counsel, who will forward the complaint to the Office of the White House Counsel for informational

purposes, along with an outline of OSC's proposed plan for investigation of the matter, including transmittal of a copy of the report of investigation and any legal analysis to the White House Counsel's office.

3. *Closure*. Notice of the closure by OSC of any USERRA complaint involving the Special Counsel will be sent as soon as possible to the White House Counsel's office.

VIII. Disclosures of Information

A. Filing. An OSC employee may use Form OSC-12 ("Disclosure of Information") to file a whistleblower disclosure with OSC, or may use any other written format (*e.g.*, a letter). The disclosure form is available on the OSC web site, at *www.osc.gov/Forms*.

1. Except as provided in paragraph B.1., below, whistleblower disclosures should be sent or delivered to the Office of Special Counsel, Disclosure Unit, 1730 M Street, N.W., Suite 201, Washington, DC 20036-4505.

2. In the alternative, a disclosure can be filed electronically. See the OSC web site, at *www.osc.gov*, for instructions.

B. Review and Processing. Except as provided in subparagraphs 1.-3., below, a whistleblower disclosure filed by an OSC employee will be reviewed and processed in accordance with policies and procedures applied to other disclosures under 5 U.S.C. § 1213.

1. *Disclosures involving Disclosure Unit (DU) personnel*. If any DU official or employee is identified as the subject of a whistleblower disclosure filed by an OSC employee, the disclosure should be referred by the Document Control Branch, upon mail receipt by OSC, directly to the Deputy Special Counsel or his designee. (If delivered by the disclosure filer in person, the disclosure should be delivered to the office of the Deputy Special Counsel or his designee.) The Deputy Special Counsel (or his designee, as appropriate) will carry out the functions that would otherwise be carried out by DU personnel in reviewing and processing a whistleblower disclosure (including assigning the disclosure for review and making a substantial likelihood determination) in accordance with policies and procedures applied to other disclosures.

2. *Disclosures involving the Deputy Special Counsel*. If the Deputy Special Counsel is identified as the subject of a whistleblower disclosure filed by an OSC employee, the Special Counsel or his designee will carry out the functions assigned to the Deputy Special Counsel in paragraph 1., above.

3. *Disclosures involving the Special Counsel*

   a. If the DU makes a substantial likelihood determination, the unit chief will refer the matter to the Deputy Special Counsel. The Deputy Special Counsel may, as deemed necessary, arrange for the conduct of an investigation by an entity outside OSC in accordance with the requirements of 5 U.S.C. §1213(c). The Deputy Special Counsel (or his designee, as appropriate) will perform the duties otherwise carried out by the Disclosure Unit chief (including reviewing the written report after investigation, providing the whistleblower with an opportunity to comment, and transmitting the report, any comments by the whistleblower,[1] and any OSC comments or recommendations, to the President and Congress).

   b. If a negative substantial likelihood determination is made, the Deputy Special Counsel will prepare a closure letter to the whistleblower in accordance with the requirements of 5 U.S.C. §1213. The Deputy Special Counsel shall forward the closure letter to the White House Counsel's office for informational purposes, with appropriate protection of the whistleblower's confidentiality if the whistleblower does not consent to release of his or her name.

XIV. Records. The Director of the Management and Budget Division, with the heads of the CEU, DU, HAU, IPD, and the USERRA Unit, shall develop and maintain procedures for secure entry and maintenance of, and restricted access to, OSC2000 data and case files on complaints and disclosures by OSC employees. Such procedures shall include effective controls against unauthorized access to and disclosure of information about employee complaints and disclosures to other OSC employees who do not have a need for the information in the performance of their duties.

Issued by:

Scott J. Bloch
Special Counsel

[1] Except as provided under 5 U.S.C. § 1213(f).

Bakke, Mary Beth

From: Johnson III, Clay
Sent: Monday, March 10, 2008 8:42 AM
To: Fielding, Fred F.
Cc: Rosen, Jeffrey A.
Subject: OSC

I am going to check with the OPM IG on the status of the OSC investigation.

Bakke, Mary Beth

From: Johnson III, Clay
Sent: Wednesday, January 23, 2008 11:22 AM
To: Fielding, Fred F.; Rosen, Jeffrey A.
Subject: FW: Office of Special Counsel

Scott Bloch appointed 12/13/03 for a five year term expiring 12/12/08. The law however allows him to hold over until a successor is appointed but not to exceed one year.

Bakke, Mary Beth

From: Johnson III, Clay

Sent: Wednesday, January 23, 2008 11:04 AM

To: Fielding, Fred F.

Cc: Rosen, Jeffrey A.

Subject: HSC

Per a letter to me dated 9/28/07, the OPM IG indicated he had "recently referred to the Office of US Attorney for the District of Columbia serious misconduct by Special Counsel Bloch." I'll send over a copy of that letter and a subsequent letter on the subject.

recd
9-7-08

Coffina
Flood
Farren
Burck

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

February 1, 2008

The Honorable Fred F. Fielding
White House Counsel
Executive Office of the President
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Re: OSC File No. HA-07-1741

Dear Mr. Fielding:

The Special Counsel, pursuant to the authority contained in 5 U.S.C. Secs. 1212, 1216 and 1303 and in Civil Service Rule 5.4 (5 C.F.R § 5.4), requests that you furnish the following information within 30 days of this request.

1. For the period from November 1, 2003, through November 8, 2004, please identify each and every instance where any individual employed or holding office in the White House Office of Political Affairs traveled on Air Force One. Please do not include those instances where the travel was for official purposes only.

2. For each trip identified in response to question one above, please provide the following information:
   (a) the date(s) of the trip;
   (b) the location(s);
   (c) specify whether the purpose of the trip was purely political or a mixed travel trip (i.e., a trip where time was spent attending political events and time was spent performing official duties);
   (d) a cost summary of the trip with supporting invoice from the White House Airlift Operations;
   (e) an accounting of who paid for the use of Air Force One; and
   (f) an explanation as to how the costs of Air Force One were allocated.

The pertinent provisions of the statutes and of Civil Service Rule 5.4 under which this request is made are set forth on the last page of this form. The request is made for law enforcement purposes and in connection with an official investigation being conducted by the Office of Special Counsel.

Thank you for your assistance and cooperation with this matter. Please do not hesitate to contact me at (202) 254-3603 if you have any questions or concerns about this request.

Sincerely,

J.M. Byrne

James M. Byrne
Deputy Special Counsel

Pertinent Provisions of Sections 1212, 1214, 1216 and 1303 of Title 5, United States Code

Sec. 1212(b)(1): "The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence."

Sec. 1214(a)(1)(A): "The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

Sec. 1214(a)(5): "In addition to any authority granted under paragraph (1) of this subsection, the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken."

Sec. 1216(a): "This subsection provides further that the Special Counsel shall investigate any allegation of certain prohibited political activities (Hatch Act), arbitrary or capricious withholding of information requested under the Freedom of Information Act (5 U.S. C. § 552), any activity prohibited by civil service law, rule or regulation, or involvement of any employee in discrimination found by any court or appropriate administrative authority.

Sec. 1303: "The Office of Personnel Management, Merit Systems Protection Board, and the Special Counsel may investigate and report on matters concerning—

> (1) the enforcement and effect of the rules prescribed by the President under this title for the administration of the competitive service and the regulations prescribed by the Office of Personnel Management under section 1302(a) of this title; and
>
> (2) the action of an examiner, a board of examiners, and other employees concerning the execution of the provisions of this title that relate to the administration of the competitive service.

Civil Service Rule 5.4 (5 C.F.R. § 5.4) provides as follows:

> "When required by the Office [of Personnel Management], the Merit Systems Protection Board, or the Special Counsel . . . or by authorized representatives of these bodies, agencies shall make available to them, or their authorized representatives, employees to testify in regard to matters inquired of under the civil service laws, rules, and regulations, and records pertinent to these matters. All such employees, and all applicants and eligibles for positions covered by these rules, shall give to the Office, the Merit Systems Protection Board, the Special Counsel, or to their authorized representatives, all information, testimony, documents, and material in regard to the above matters, the disclosure of which is not otherwise prohibited by law or regulation. These employees, applicants, and eligibles shall sign testimony given under oath or affirmation before an officer authorized by law to administer oaths. Employees are performing official duty when testifying or providing evidence pursuant to this section.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Turner
Flood
Burck

3-31-08

FACSIMILE COVER SHEET

TO:

Name: The Honorable Fred Fielding	
Title: Counsel to the President	
Organization: The White House	
Office / Location: Washington, D.C.	
Telephone: (202) 456-2632	**Fax:** (202) 456-6279

FROM:

Name: Scott J. Bloch	
Organization: Office of Special Counsel	
Office / Location: Washington, D.C.	
Telephone: (202) 254-3601	**Fax:** (202) 653-5151

Date: March 26, 2008	**Number of pages, including this cover sheet: 10**

Message: Original and enclosures to follow by Federal Express delivery

If you did not receive the total number of pages shown, please call Denise Toney at (202) 254-3632.

U.S. OFF CE OF SPECIAL COUNSEL
173) M Street, N.W., Suite 300
Wa: hington, D.C. 20036-4505

The Special Counsel

March 26, 2008

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-07-0499

Dear Mr. Fielding:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter, report and comments to the President. If I may provide more information concerning this matter, please do not hesitate to contact me.

Sincerely,

Scott J. Bloch

Enclosures

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

March 26, 2008

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-07-0499

Dear Mr. President:

Government contract officers are expected to adhere to the highest standards of integrity and ethics in the performance of their duties. I received a disclosure from Rod Losson, a whistleblower who alleged that, contrary to that expectation, Sheila Williams, a contracting officer with the National Park Service (NPS), regularly acquired and retained benefits to which she was not entitled. He alleged further, that her conduct deprived other NPS employees of benefits which otherwise would have accrued to them.

I required the Secretary of the Interior to conduct an investigation into these disclosures pursuant to 5 U.S.C. §§ 1213(c) and (d). The Secretary tasked the National Park Service with conducting the investigation and writing the report. The agency's findings are discussed further in the attached Analysis.

Mr. Losson, an NPS Program Analyst, disclosed to OSC that Ms. Williams, an authorized contracting officer for the U.S. Department of the Interior, NPS, Structural Fire Program in Boise, Idaho, violated agency regulations and engaged in an abuse of authority by providing her personal account number for the business rewards programs offered by hotels when she contracted for NPS conferences and training functions. He alleged that she received substantial personal benefits from these reward programs while depriving NPS employees of benefits which should have accrued to them.

The investigation, conducted by NPS' Office of Professional Responsibility, substantiated the allegations and revealed that Ms. Williams did indeed use her government position to obtain both Marriott and Hilton reward points for her personal use. The investigation also found that she accrued rewards points which did not belong to her. Finally, the investigation found that she used her government purchasing card for purchases through the Marriott rewards site so that she might acquire even more rewards points for her personal use.

In response to these findings, NPS took significant disciplinary action against Ms. Williams. The agency also clarified the guidelines for earning reward points through government contracts and undertaken more frequent and in-depth scrutiny of its contracting officers.

I have reviewed the original disclosures and the agency's report. Based on that review, I have determined that the agency's report contains all of the information required by statute and that its findings appear to be reasonable.

As described in the attached report, the investigation uncovered possible criminal conduct. NPS referred the investigative findings to the Assistant United States Attorney (AUSA) for the District of Idaho for a determination of whether that office would pursue criminal prosecution. The AUSA declined prosecution. Nevertheless, when a case is referred for possible criminal investigation or prosecution, OSC is not permitted to send the report to the whistleblower for comment. 5 U.S.C. § 1213(f). Similarly, the case may not be included in OSC's public file. 5 U.S.C. § 1219(a).

As required by law, 5 U.S.C. § 1213(e)(3), I have sent a copy of the agency report to the Chairman of the Senate Committee on Energy and Natural Resources, and to the Chairman of the House Committee on Natural Resources. OSC's file on this matter has also been closed.

Respectfully,

Scott J. Bloch

Enclosures

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Report	Analysis of Disclosures, Agency Investigation and Report...	3	03/26/2008	P6/b6; b7c;

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COLLECTION:
Counsel's Office, White House
SERIES:
Fielding, Fred - General Files
FOLDER TITLE:
Office of Special Counsel Reports & Scott Bloch Issues [18]
FRC ID:
11294
OA Num.:
10821
NARA Num.:
10383

FOIA IDs and Segments:
2014-0210-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 7 2007

Honorable Scott J. Bloch
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: OSC File No. DI-07-0499

Dear Mr. Bloch:

Thank you for your letter of February 26, 2007, in which you referred for investigation a whistleblower disclosure alleging that an employee of the Department of the Interior's National Park Service engaged in conduct which violated a law, rule, or regulation and constituted an abuse of authority.

I had previously asked acting Assistant Secretary for Fish and Wildlife David M. Verhey to review and respond to the National Park Service's investigatory report relating to this matter. Inasmuch as our new Assistant Secretary for Fish and Wildlife and Parks, Lyle Laverty, recently was confirmed by the Senate and sworn in to his new position, I have redelegated to Mr. Laverty the authority to take the actions prescribed in 5 U.S.C. §1213(d). Mr. Laverty will be responding to you directly. Please contact me or Mr. Laverty at 202-208-5347 if you have any questions or concerns.

Sincerely,

DIRK KEMPTHORNE

cc: Assistant Secretary for Fish and Wildlife and Parks
Associate Solicitor – General Law

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	[Letter] - To: Scott Bloch - From: Lyle Laverty	2	11/07/2007	P6/b6;

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SERIES:
Fielding, Fred - General Files

FOLDER TITLE:
Office of Special Counsel Reports & Scott Bloch Issues [18]

FRC ID:
11294

OA Num.:
10821

NARA Num.:
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FOIA IDs and Segments:

2014-0210-F

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U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Turner
Bloch
Flood
3-31-08

FACSIMILE COVER SHEET

TO:

Name: The Honorable Fred Fielding	
Title: Counsel to the President	
Organization: The White House	
Office / Location: Washington, D.C.	
Telephone: (202) 456-2632	**Fax:** (202) 456-6279

FROM:

Name: Scott J. Bloch	
Organization: Office of Special Counsel	
Office / Location: Washington, D.C.	
Telephone: (202) 254-3601	**Fax:** (202) 653-5151

Date: March 26, 2008	**Number of pages, including this cover sheet: 4**

Message: Original and enclosures to follow by Federal Express delivery

If you did not receive the total number of pages shown, please call Denise Toney at (202) 254-3632.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

March 26, 2008

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-07-0955

Dear Mr. Fielding:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter, report and whistleblower's comments to the President. If I may provide more information concerning this matter, please do not hesitate to contact me.

Sincerely,

Scott J. Bloch

Enclosures

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	OSC File No. DI-07-0955 - To: POTUS - From: Scott Bloch	2	03/26/2008	P6/b6; b7c;

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U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

February 29, 2008

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Re: <u>OSC File No. DI-06-1620</u>

Dear Mr. Fielding:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter, reports and comments to the President. If I may provide more information concerning this matter, please do not hesitate to contact me.

Sincerely,

Scott J. Bloch

Enclosures

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

February 29, 2008

The President
The White House
Washington, DC 20500

Re: OSC File No. DI-06-1620

Dear Mr. President:

I received disclosures from Frank Terreri, a whistleblower at the Department of Homeland Security (DHS), Transportation Security Administration (TSA), Federal Air Marshal Service (FAMS), Washington, D.C. Mr. Terreri, who consented to the release of his name, alleged that officials at FAMS failed to fully protect the anonymity of Federal Air Marshals (FAMs) by actively employing policies which resulted in their public identification as FAMs. He alleged that the failure to protect covert aviation security operations weakens the core FAMS mission and endangers the public.

I required the Honorable Michael Chertoff, Secretary, to conduct an investigation into Mr. Terreri's disclosures pursuant to 5 U.S.C. § 1213(c) and (d). On October 11, 2006, Philip J. Perry, General Counsel, DHS, submitted a report to this office. On May 16, 2007, Robert F. Byers, Acting Director, FAMS, submitted a supplemental report to this office. Mr. Terreri provided comments on the agency reports to this office pursuant to 5 U.S.C. § 1213(e)(1); his comments are attached. As required by law, 5 U.S.C. § 1213(e)(3), I am now transmitting the report to you.

As discussed in the attached Analysis, the agency reports do not claim to have substantiated Mr. Terreri's allegations, nor do they state that his claims were unfounded. The agency did revise several of the policies about which Mr. Terreri expressed concern, to better support FAMs in their missions. These revisions all followed within weeks (in some cases) and months (in other cases) after I substantiated Mr. Terreri's disclosures and ordered Secretary Chertoff to look into FAMs' security. Under the new policies, FAMs dress at their discretion provided their ability to execute law enforcement duties is not compromised. TSA has taken steps to amend boarding procedures for FAMs, to further protect their anonymity during check-in and boarding. In addition to the proposed regulatory changes, FAMS developed flexible policies to adapt to different airport designs and to ensure anonymity. The TSA Sensitive Security Information (SSI) Office and FAMS are working to improve training techniques for identifying SSI and handling documents correctly.

Based on the representations made in the agency reports and Mr. Terreri's comments, I find that although the agency's reports did not adhere to all of the technical, statutory requirements of Section 1213(d), and that more could be done to strengthen the anonymity of Federal Air Marshals, the findings of the agency head appear reasonable.

As required by § 1213(e)(3), I have sent copies of the reports and Mr. Terreri's comments to the Chairman of the Senate Committee on Commerce, Science & Transportation, and the Chairman of the House Committee on Homeland Security. We have also filed copies of the reports and Mr. Terreri's comments in our public file and closed the matter.

Respectfully,

Scott J. Bloch

Enclosures

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Report	Analysis of Disclosures, Agency Investigation and Reports...	10	N.D.	P6/b6; b7c;

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General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

October 11, 2006

Mr. Scott J. Bloch
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Dear Mr. Bloch:

I write for two reasons. First, on behalf of the entire Department of Homeland Security, I would like to express our sincere appreciation for the award of the recent Certificate of Compliance from the Office of Special Counsel. As you know, the Department aims to maintain unquestioned integrity, and we have worked hard to establish an open atmosphere where employees feel comfortable to raise concerns regarding personnel practices. In addition, we treat any alleged wrongdoing in a serious manner; we investigate thoroughly and take remedial actions where appropriate. We appreciate you taking time out of your busy schedule to recognize this achievement by the Department.

Second, I write in response to your letter dated August 10, 2006 regarding allegations regarding the Federal Air Marshal Service (FAMS) (OSC File Nos. DI-06-1620).

As you know, the mission of the Federal Air Marshals (FAMs) is to detect, deter, and defeat hostile acts targeting U.S. air carriers, airports, airplanes, passengers, and crews. FAMs rely upon their extensive training to protect the flying public, and they are held to the highest standards for handgun accuracy among Federal law enforcement agencies. FAMs have an important and expanding role in homeland security and work closely with other law enforcement agencies to accomplish their mission.

Your letter suggests that certain practices of FAMS compromise FAMs' safety, and are therefore violative of law. As we explain below, the allegations in your letter are in many respects unfair or many months out-of-date, and thus moot. FAMS' practices have been refined over the life of the agency and are based, collectively, on hundreds of years of law enforcement experience. These practices are also completely consistent with applicable law.

I. *The Department of Homeland Security/Transportation Security Administration Protects the Anonymity of the Federal Air Marshals.*

DHS considers the anonymity of Federal Air Marshals to be among the highest priorities for transportation security. DHS has already undertaken extensive measures to not only continue operational initiatives designed to protect the FAMs' identities but also to accelerate such programs. Further, the Department is constantly reviewing such measures, and we strive to improve the procedures and operations of the FAMS. Individual allegations are addressed below:

Standard of Dress. Recently, the Director of the FAMS announced a revised policy which permits FAMs to dress at their discretion, so long as they do not attract undue attention to themselves and the attire enables them to execute the full range of their law enforcement duties. Therefore, casual and informal attire is permitted, and a variety of clothing is allowed in order to account for seasons and destinations.

However, unlike other law enforcement officers, FAMs operate in a unique and dangerous environment: in planes at altitudes in excess of 30,000 feet, frequently without any backup or support. If an emergency arises on an aircraft, the FAM oftentimes must respond in a quick and forceful manner. To do so effectively, the FAM must be able to immediately command the respect of fellow passengers. Therefore, it is critical that the FAM conveys an appropriate appearance to gain the trust from law-abiding passengers; if this is not done, the mission might be compromised.

The FAMS are committed to continuing an ongoing review of its operations, including the Standard of Dress policy. To that end, the Director of the FAMS has convened more than fifteen working groups of FAMs this year in order to discuss operational matters and listen to their concerns.

Boarding Procedures. The FAMS policy on boarding procedures at airports similarly protects the identity of FAMs. Because each airport has a distinct construction and layout, there is no simple "cookie-cutter" approach that fits every situation. Therefore, the FAMS have developed flexible policies to adapt to the different airport designs. The objective in every instance is to enable the FAM to board the airplane in a manner that preserves the FAM's anonymity; however, the reality is that some airports, as a function of their blueprint layout, simply cannot accommodate ideal methods of getting on airplanes anonymously. In addition, the FAMS has established a program to allow individual FAMs to obtain tickets for a flight while preserving their anonymity.

A FAM's anonymity depends not only upon policy direction from headquarters, but also upon arrangements reached or tactics utilized for specific airports or circumstances by individual FAMs.

Hotel Reservations. The FAMS has long recognized the need to protect FAMs' anonymity while traveling away from home. For several years, travel arrangements for FAMs have been made through a specialized government system in which the identity of the employing agency is not revealed. Under this system, there is generally no reason to show FAMS credentials during check-in procedures, and therefore, they maintain their anonymity.

Indeed, the Director of the FAMS has recently announced a revised policy permitting FAMs to select and book reservations at hotels of their choice, provided that the FAM forwards the hotel information in advance of reaching his/her destination and remains within budgetary and related guidelines. This policy is based upon an operational need to consolidate the process in an efficient manner, so that FAMs can be located at a moment's notice and recalled in an emergency, while still preserving their anonymity.

Release of Sensitive Security Information. The Department/TSA certainly appreciates the need to protect and safeguard Sensitive Security Information. Accordingly, we have promulgated a strict regulation governing such SSI information at 49 C.F.R. Part 1520, and we carefully scrutinize any materials that are released to the press or public.

Indeed, the FAMS has established policies to ensure that any media contact with FAMs must be coordinated through the public affairs offices of both TSA and the Department. There are, however, aberrations in which an individual might not have followed proper procedures, and we have taken appropriate remedial action to ensure that such instances are not repeated.

Nevertheless, in certain limited circumstances, there are legitimate reasons to justify disclosure of information in order to protect the nation's air transportation systems, facilities, airplanes, and passengers. Sometimes it is important to advise the American public about the FAMS in order to enhance their confidence in civil aviation systems. In addition, such disclosure bolsters the FAMS security program by deterring nefarious behavior.

As noted previously, the Department and TSA are constantly working to improve operational policies and procedures for the FAMs. In addition, there are other programs that we have initiated. However, due to security considerations, it would not be appropriate to discuss them in this forum. Nevertheless, we welcome constructive suggestions and will give them due consideration in light of operational factors. The Department would be pleased to provide additional informational information on each of these topics in a secure format.

II. Concerns About The Scope of the Authority for the Office of Special Counsel

While the Department deeply respects your concern for the safety and well-being of the Federal Air Marshals, we have significant doubts whether this issue falls within the authority of the Office of Special Counsel, as articulated in statute (5 U.S.C. § 1213). Pursuant to § 1213(a)(1), the Office of Special Counsel may review a referral from a Federal employee alleging a "violation of any law, rule, or regulation." Here, however, there is no reasonable basis to allege a violation of law, rule or regulation. Indeed, DHS and TSA have followed the letter and spirit of the relevant statutory provision, as well as its own internal rules and regulations.

Even assuming that the complainant's factual recitation is accurate, which we dispute, there still cannot be a "violation of law." While neither your letter nor the underlying "Report of Disclosures" (based upon the complainant's allegations) articulate the specific provision of the Intelligence Reform and Terrorism Prevention Act (Pub. L. 108-458) which has been allegedly violated, we can assume that it refers to Section 4016(a), which provides that:

> The Director of the Federal Air Marshal Service of the Department of Homeland Security shall continue operational initiatives to protect the anonymity of Federal air marshals.

This statutory provision states an operational objective for the Director of the FAMS to follow. It does not impose a rigid statutory requirement upon any officials within the DHS or TSA. This provision indicates an important policy goal of anonymity which the Department and TSA are working to maintain (as discussed above).

These operational goals, however, require balancing of operational realities with all other factors. Indeed, the statutory language avoids placing strict statutory requirements on the FAMS Director. Instead, this section provides that the FAMS should "*continue operational initiatives* to protect the anonymity" of the FAMs. [Emphasis added.] This construction suggests that DHS/TSA must "continue" the FAMS ongoing policies. While the statutory language does not require any change in current operational policy, the Department continues to improve its policies and practices to address the concerns in your letter.

Congress intentionally and appropriately placed the determination and continuation of such "operational initiatives" in the discretion of the Director of the FAMS, a seasoned Government executive and law enforcement official. The Director, as well as officials at TSA and the Department, are well-suited to decide how best to implement this legislative direction, as they have the proper background, expertise, and experience in the areas of law enforcement, transportation/aviation security, and operational confidentiality. Further, these individuals can coordinate and orchestrate the FAMS operations with the other transportation security and homeland security programs and functions within the Department. While the Department respects the role of the Office of Special Counsel (as is thoroughly established by our recent award), DHS also recognizes that OSC personnel are not perfectly suited to second-guess the policy judgments of the agencies and security personal with decades of experience who are legally authorized and skilled to make such operational determinations.

This letter thus fulfills any reporting obligations in response to your letter dated August 10, 2006. Agency FAMS would be pleased to brief you further on these topics in a confidential format. Thank you for your interest in this important matter.

Sincerely,

Philip J. Perry

Federal Air Marshal Service

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 22202-4220

Transportation Security Administration

Scott J. Bloch, Esquire
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, D.C. 20036

In Re: OSC File No. DI-06-1620 (Federal Air Marshal Service)

Dear Mr. Bloch:

I have been designated by the Secretary of Homeland Security as the Department of Homeland Security's (DHS) official responsible for providing the Office of the Special Counsel (OSC) with the Department's report in this matter pursuant to 5 U.S.C. 1213.

This is the Department's second response to your August, 10, 2006 letter. The first response, which was submitted by the DHS Office of the General Counsel, is attached. I also note that on January 27, 2007, Director Dana Brown met with representatives from your office to discuss Federal Air Marshals Service (FAMS) policies and procedures related to the allegations in your letter. In addition, and with respect to those allegations, the Department reports as follows:[1]

Standard of Dress. As you are aware, the FAMS issued a revised policy for Federal Air Marshals' dress standard on August 31, 2006. Your office was provided with a copy of that policy on January 27, 2007. Under the new policy, Federal Air Marshals dress at their discretion so long as their attire enables them to execute the full range of their law enforcement duties and does not draw undue attention to them.

An important component of the dress code is for a Federal Air Marshal to be able to immediately command the respect of fellow passengers if an emergency arises on an aircraft. Since Federal Air Marshals are required to respond quickly and forcefully in dangerous circumstances, it is critical for them to convey an appropriate appearance to gain the trust of law-abiding passengers. If they are unable to do so, the mission could be compromised. Accordingly, this policy strikes an appropriate balance between the need for anonymity in the FAMS mission and the Federal Air Marshals' law enforcement responsibilities.

---

[1] Specifically, OSC's August 10, 2006 letter, and accompanying Report of Disclosures Referred for Investigation (OSC File No. DI-06-1620) brought four issues related to FAMS operations to the Department's attention:
(1) FAMS' Standard of Dress for Federal Air Marshals; (2) FAMS' Boarding Procedures; (3) FAMS' Policy for Hotel Reservations; and, (4) the protection and safeguarding of Sensitive Security Information (SSI).

Hotel Reservations. Contemporaneous with the issuance of a revised Standard of Dress policy, the FAMS issued revised their policy for hotel reservations. The revised policy was issued on September 1, 2006, with a further technical modification dealing with an e-mail address for reservations, made on December 7, 2006. We provided OSC with that policy on January 27, 2007.

The policy permits Federal Air Marshals to select and book hotel reservations at any domestic hotel of their choice, provided that they remain within budgetary and reporting constraints and report information about the hotel selection in a timely manner. The policy is intended to combine operational needs and individual choice by permitting Federal Air Marshals to stay where they want while preserving FAMS's ability to immediately locate personnel in the event of an emergency.

The FAMS has long recognized the need to protect the anonymity of Federal Air Marshals while they are on missions. For several years, travel arrangements for Federal Air Marshals were made through a specialized system in which the identity of the agent is not revealed. Under this system, there is generally no reason to show FAMS credentials during check-in procedures, thereby further preserving their anonymity.

Boarding Procedures. At present, the Transportation Security Administration (TSA) is in the final stages of proposing to amend the boarding procedures for Federal Air Marshals under the Aircraft Operator Standard Security Program (AOSSP) in accordance with 49 C.F.R. Section 1544.105(c). The proposed changes are intended to further protect the anonymity of Federal Air Marshals throughout the boarding process. The amendment describes boarding procedures both at the ticket counter and at the boarding gate.

To date, the FAMS has developed flexible policies to adapt to the different airport designs, with the recognition that there is no singular approach that fits every situation for boarding an airplane at every airport. In every instance, the objective is to enable the Federal Air Marshals to board the airplane in a manner that preserves their anonymity, as well as to establish a plan to allow individuals to preserve their anonymity when purchasing tickets for a flight. The FAMS has endeavored to prevent Federal Air Marshal anonymity from being compromised by developing flexible policies to adapt to the different airport designs, both for purposes of boarding airplanes and purchasing tickets. The revisions to the AOSSP are a continuation of that effort.

Protection of Sensitive Security Information (SSI). The FAMS, along with every other office of TSA, has been diligent in preventing the release of SSI. TSA has promulgated a strict regulation governing SSI information under 49 C.F.R. Part 1520. Pursuant to the requirements of the DHS/TSA SSI regulation, the FAMS works diligently to protect SSI from unauthorized disclosure.

The FAMS is vigilant to safeguard SSI from public dissemination, and is especially concerned when SSI containing operational information wrongfully enters the public domain. In the event of a potentially unauthorized disclosure, the FAMS coordinates with TSA's SSI Office regarding the sensitivity of the material disclosed and any remedial measures available to prevent further disclosure. If the disclosed material is SSI, the FAMS, like other TSA components will consider appropriate disciplinary action against the employee making the unauthorized disclosure, including forwarding the matter to TSA's Office of Inspections. Depending upon the nature of the SSI released and other relevant factors, disciplinary action can range from suspension to termination. On a proactive note, the SSI Office and FAMS are working together to improve training techniques for identifying SSI and for handling SSI-designated documents correctly.

Conclusion. With these revised policies and procedures, the FAMS aims to provide for a first-rate workforce whose anonymity is preserved and which enhances security in the aviation domain and across the transportation sector. FAMS will continue to engage with TSA and Department leadership to ensure that the component further scrutinizes its practices and continues to develop best practices that support the overall DHS mission and ensure the safety and security of the FAMS workforce.

Please do not hesitate to contact my office or the DHS OSC liaison, Bruce D. Burkley at (202) 447-3525, should you require further information regarding these matters.

Sincerely,

Robert F. Byers
Acting Assistant Administrator/Office of Law Enforcement
Acting Director, Federal Air Marshals Service

Attachment

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-75112

ROBERT J. MACLEAN,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE TRANSPORTATION SECURITY ADMINISTRATION

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

The Transportation Security Administration issued its final order on Sensitive Security Information under 49 U.S.C. § 114(s) on August 31, 2006. Excerpts of Record ("ER") 1-2. Petitioner Robert MacLean filed a timely petition for review in this Court on October 27, 2006. This Court has jurisdiction pursuant to 49 U.S.C. § 46110(a).

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Transportation Security Administration's order that a text message sent to Las Vegas Federal Air Marshals, stating that all "remain overnight" missions would be cancelled from late July to early August 2003, constituted Sensitive Security Information when that information was disclosed on July 29, 2003.

STATEMENT OF THE CASE

In proceedings before the Merit Systems Protection Board, Robert MacLean, a former Federal Air Marshal, alleged that information he had received about certain Air Marshal missions did not constitute "Sensitive Security Information" as that term was defined in pertinent regulations. ER 1 (citing MacLean v. DHS, No. SF-0752-06-0611-I-1 (M.S.P.B.)). Specifically, MacLean claimed that a text message sent to Las Vegas Air Marshals' government-issued mobile phones in July 2003, stating that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled," did not qualify as Sensitive Security Information under the agency's regulations in effect at that time. Id.

The Transportation Security Administration addressed the issue in a final order of August 31, 2006. The order determined that the information in question "concerned specific [Air Marshal] deployments or missions on long-distance flights," and therefore qualified as Sensitive Security Information under the regulations in effect when the message was disseminated. ER 1.

MacLean now petitions for review of that decision.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Background

Since 1974, Congress has required the federal agency responsible for civil aviation security to issue regulations prohibiting the disclosure of certain information in the interest of protecting air transportation. See Pub. L. No. 93-366, sec. 202, § 316(d), 88 Stat. 409, 417 (1974) (formerly codified at 49 U.S.C. App. § 1357(d)). For many years, the Federal Aviation Administration enforced this statutory directive; following the events of September 11, 2001, Congress extended this authority to the newly created Transportation Security Administration ("TSA"). See Pub. L. No. 107-71, § 101(e), 115 Stat. 597, 603 (2001); see also Pub. L. No. 107-296, § 1601, 116 Stat. 2135, 2312 (2002).

As part of this obligation, the Under Secretary of TSA is required to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C); see also 49 U.S.C. § 40119(b)(1)(C) (according similar authority to Secretary of Transportation).[1]

[1]The Under Secretary--along with TSA itself--was originally a part of the Department of Transportation. 49 U.S.C. § 114(a), (b)(1). TSA's functions, as well as the Under Secretary's, were transferred to the Department of Homeland Security pursuant to (continued...)

Pursuant to this mandate, the Under Secretary has defined certain types of information to be "Sensitive Security Information,"--or "SSI"--and has limited the disclosure of that information to a narrow set of circumstances. See generally 49 C.F.R. Pt. 1520.[2]

The definition of "Sensitive Security Information" is set forth in TSA's regulations. Among the covered categories of information are "[a]ny approved, accepted, or standard security program . . . and any comments, instructions, or implementing guidance pertaining thereto"; "[a]ny selection criteria used in any security screening process, including for persons, baggage, or cargo"; and "[a]ny security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto." 49 C.F.R. § 1520.7(a), (c), (d). As relevant here, the regulations also define as SSI

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[1](...continued)
section 403(2) of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. at 2178 (codified at 6 U.S.C. § 203(2)). The Under Secretary is now known as the Administrator of TSA. See 49 C.F.R. § 1500.3. Because federal statutes continue to refer to the head of TSA as the "Under Secretary," this brief follows that convention.

[2]MacLean's challenge before the Merit Systems Protection Board concerned the status of information when it was disclosed on July 29, 2003. ER 1. TSA accordingly based its final order on the SSI regulations in effect at that time, and this brief cites to those same regulations. Except as noted, the current regulations are identical to the 2003 regulations in all respects relevant to this petition--although they have been renumbered within Part 1500. See 69 Fed. Reg. 28066-86 (May 18, 2004).

> [s]pecific details of aviation security measures . . . includ[ing], but [] not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

49 C.F.R. § 1520.7(j). Such information--and any records containing such information--qualify as SSI unless the Under Secretary provides in writing to the contrary. 49 C.F.R. § 1520.7.

In addition to defining Sensitive Security Information, the regulations also prescribe the instances in which SSI may be permissibly disclosed. In particular, the regulations create a duty upon certain individuals to protect SSI; those individuals are prohibited from disseminating SSI except to "persons with a need to know," and are required to report any unauthorized release. 49 C.F.R. § 1520.5(a)-(c). Disclosure by covered persons in violation of the regulations is punishable by civil penalties or enforcement proceedings. 49 C.F.R. § 1520.5(d).

When the Under Secretary determines by final order whether particular material qualifies as SSI--or, if so, to what extent it can be disclosed--that determination constitutes final agency action subject to judicial review. See 49 U.S.C. §§ 114(s); 46110(a). The statute vests exclusive review of such orders in the D.C. Circuit or the court of appeals for the circuit in which a complaining party resides or has its principal place of business. 49 U.S.C. § 46110(a), (c); see also Gilmore v.

Gonzales, 435 F.3d 1125, 1132-34 (9th Cir. 2006), cert. denied, 127 S. Ct. 929 (2007). Those courts may review objections to a final order under section 46110 only if the petitioner has raised the objections previously in the agency proceeding or "if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d).

II. Factual Background and Prior Proceedings

In 2005, the Department of Homeland Security initiated proceedings to remove Robert MacLean from his position as a Federal Air Marshal. The agency ultimately found that MacLean had engaged in unauthorized disclosure of Sensitive Security Information concerning specific Air Marshal missions in July to August 2003, and MacLean was removed from his position in April 2006.

MacLean appealed the agency's determination to the Merit Systems Protection Board ("MSPB"). See ER 1 (citing MacLean v. DHS, No. SF-0752-06-0611-I-1 (M.S.P.B.)). In the course of his appeal before the MSPB, MacLean alleged that the information he had disclosed did not constitute "Sensitive Security Information" as that term was defined by TSA regulations. Id. Specifically, MacLean claimed that a text message sent to Las Vegas Air Marshals' government-issued mobile phones, stating that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled," did not qualify as Sensitive Security

SUMMARY OF THE ARGUMENT

The only issue properly before this Court is whether the Transportation Security Administration correctly determined that a message ordering the cancellation of particular Federal Air Marshal missions from July to August 2003 qualified as Sensitive Security Information at that time. There cannot be any serious dispute on this point. Under TSA's regulations, SSI includes any information "concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j). A message stating that a particular category of Air Marshal missions in a specific part of the country would be cancelled for a defined period fits precisely within the category of information that the regulation contemplates. That reading is supported not only by the regulation's plain language, but also by its purpose, which is to protect information whose disclosure might pose a threat to civil aviation security. TSA's interpretation of the word "specific" to encompass the type of information at issue here is a reasonable reading--and, as an interpretation of the agency's own regulations, must be sustained unless a contrary conclusion is "compelled by the regulation's plain language." Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001).

No alternative interpretation is compelled here. MacLean's arguments to the contrary are meritless, and in some instances wholly irrelevant.

MacLean erroneously suggests that an alleged failure to mark or distribute the July 2003 message in a manner appropriate to SSI somehow exempts it from valid designation as Sensitive Security Information. The regulations support no such conclusion--indeed, they contain no marking or distribution requirements whatsoever. The agency's interim SSI policy, cited by MacLean, likewise contains no suggestion that a failure to mark or distribute data as SSI provides any license to disclose such information; and TSA's new regulations adopting an SSI marking policy specifically state to the contrary. MacLean is free to argue before the MSPB that he did not realize that the 2003 message was SSI because of how it was marked or distributed. But that issue is relevant, if at all, only to the propriety of MacLean's termination--not to the validity of the SSI order before this Court.

Nor is there any purchase to MacLean's procedural critique of TSA's order. MacLean claims that because a court of appeals may review an objection to a final order "only if the objection was made" in the agency proceeding or "if there was a reasonable ground for not making the objection in the proceeding," 49 U.S.C. § 46110(d), he was entitled to object to the SSI order before it was issued. But this language does not create an independent right to lodge objections with an agency; it merely prohibits challenges in the courts of appeals that could have been raised before the agency in the first instance but were not. Where, as here, agency proceedings afford no opportunity to raise objections, the courts of appeals have held that section 46110's exhaustion requirement is excused, and a petitioner may present his arguments to the court in the first instance. This outcome--which is explicitly contemplated by section 46110--affords ample opportunity for MacLean to be heard on his claims, and is fully in accord with the statute.

Similarly mistaken is MacLean's claim that TSA's order is either "impermissibly retroactive" or "forum shopping." The agency's final order does no more than apply the SSI regulations to a specific piece of information on a specific date, using the law in effect at the time of the act in question. This is a classic instance of informal agency adjudication that is neither impermissible nor retroactive, and which follows the exclusive method for review under 49 U.S.C. § 46110 in the courts of appeals. MacLean may be displeased that this is the avenue that Congress has provided for a legal challenge to an SSI order, but the law is clear: review must be in the courts of appeals or not at all.

The remainder of the legal theories on which MacLean relies are not only meritless, but improperly conflate the question before this Court--whether the July 2003 text message was SSI--with the propriety of MacLean's subsequent removal based upon the disclosure of that information. MacLean's arguments under the Whistleblower Protection Act and "Anti-Gag Statute" bear solely on the latter question, and as both a statutory and practical matter can be raised only before the Merit Systems Protection Board. Furthermore, even if such claims were reviewable in this Court, they would fail on their merits. Because both statutes properly address only personnel actions and policies, they have no application to an order such as the one at issue here, which is not a personnel matter at all. In short, MacLean is free to raise a challenge his termination--which is a personnel action--before the MSPB, but such claims have no place in the petition for review before this Court.

ARGUMENT

I. TSA'S READING OF ITS REGULATIONS--A READING ENTITLED TO "EXTREME DEFERENCE"--CORRECTLY DETERMINED THAT THE TEXT MESSAGE QUALIFIED AS SENSITIVE SECURITY INFORMATION UNDER 49 C.F.R. § 1520.7(j) IN JULY 2003.

Where, as here, this Court is asked to review an agency's interpretation of its own regulations, deference to the agency is at its zenith. Such review is "extremely deferential," and the agency's interpretation must control "'unless it is plainly erroneous or inconsistent with the regulation.'" Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). Even without that heavy thumb on the scale, TSA's final order evinces a proper interpretation of section 1520.7(j)'s language and purpose. When viewed in the extremely deferential light that must be afforded to TSA's reading of its own regulations, the validity of the agency's order is unquestionable.

1. As part of its statutory duty to ensure the safety of civil aviation, TSA has issued regulations restricting the disclosure of Sensitive Security Information--i.e., information "developed in carrying out security" whose release would be "detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C); see also 49 C.F.R. § 1520.3(b)(3).[3] Among other items, SSI includes "[s]pecific details of aviation security measures"--which in turn includes any information "concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j). Such data is SSI unless the Under Secretary certifies to the contrary in writing. 49 C.F.R. § 1520.7.

In late July 2003, Federal Air Marshal management sent a text message to the government-issued mobile phones of Las Vegas

[3]SSI also includes certain other information not relevant here. 49 U.S.C. § 114(s)(1)(A)-(B); 49 C.F.R. § 1520.3(b)(1)-(2).

Air Marshals, cancelling future remain overnight missions--i.e., missions for which an Air Marshal would be required to remain at a remote location until the following morning, either because of the length of the protected flight or its hour of departure. Specifically, the text message stated that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled." ER 1. In a final order of August 2006, pursuant to 49 U.S.C. § 114(s), the Transportation Security Administration confirmed that this information constituted Sensitive Security Information under the regulations in effect at the time the message was disclosed. In particular, the Administration held that the information "concerned specific [Air Marshal] deployments or missions on long-distance flights," and therefore qualified as Sensitive Security Information under 49 C.F.R. § 1520.7(j). Id.

2. That determination is plainly correct. The information at issue falls squarely within section 1520.7(j)'s "[s]pecific details of aviation security measures"--and, more narrowly, information "concerning specific . . . deployments or missions" of Federal Air Marshals. The message reveals information about a specific type of assignment (remain overnight); it concerns a specific period (July 29 through August 9, 2003); and it applies to Marshals in a specific location (Las Vegas). The disclosure here is specific three times over--in time, location, and type--

and thus falls well within a reasonable reading of the categories of information covered by section 1520.7(j).

This conclusion is underscored by the required purposes of the SSI statute and regulations. The Under Secretary must prohibit the disclosure of Sensitive Security Information because its release would be "detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). A message to Las Vegas Air Marshals stating that there would be no remain overnight missions between July 29 and August 9, 2003 is precisely such data, susceptible to exploitation and dangerous in the hands of those intending to compromise aviation security. MacLean erroneously claims that this danger is diluted by the obscurity of the phrase "remain overnight missions." Petr's Br. 38-39. But the definition of remain overnight missions is obvious on its face--namely, that an assigned Marshal must remain overnight at a remote location. Even if an individual intending harm to aviation security were unable to deduce that a remain overnight mission means what it says, a modicum of research or common sense would lead a determined individual to conclude that long-distance and evening flights would be more susceptible targets. Intelligence that Federal Air Marshals would not be staffed out of Las Vegas on remain overnight missions for July 29 to August 9, 2003 poses precisely the heightened risk to aviation security that the SSI regulations seek to prevent.[4] That conclusion further bolsters the agency's interpretation of the regulations in this instance.

3. Contrary to MacLean's suggestion (Petr's Br. 37-38), a message need not identify a particular Federal Air Marshal or an individual flight in order to qualify as SSI. While such information would certainly fall within the coverage of section 1520.7(j), the regulation contains no language that compels so narrow a limit to its scope. Indeed, such an interpretation would yield the perverse result that the broader a security measure--and thus the more dangerous its disclosure--the less likely such information would be protected as SSI. The word "specific" does not support such a reading, which would undercut the very purpose of the SSI regulations.

More to the point, even if the scope of section 1520.7(j) could sustain the interpretation MacLean suggests, TSA's reading to the contrary is a reasonable one--and accordingly must prevail.[5] Indeed, MacLean's claim that section 1520.7(j) is an

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[4]Nor is this result altered by the fact that TSA ultimately reinstated remain overnight missions for much of the period in question. See Petr's Br. 39-40. It requires no explanation to understand that releasing an aviation security plan--even if that plan is ultimately implemented in a revised form--still exposes civil air transportation to significant vulnerability.

[5]The language of MacLean's 2006 notice of removal and the deposition testimony of Andrew E. Colsky--neither of which is even part of the administrative record or properly before this Court--do not call the agency's interpretation into question. Contra Petr's Br. 35-38, 40-41. Neither source (unlike the final (continued...)

ambiguous regulation that must be construed against its drafter, Petr's Br. 40-43, displays the flaw of his argument. Whatever purchase that rule might have in contract law, it is wholly inappropriate in the administrative realm, which dictates precisely the opposite outcome. The language of section 1520.7(j) may well be susceptible of both a broad and narrow interpretation--but MacLean bears the heavy burden of demonstrating that the regulation requires a reading contrary to TSA's final order. This Court must defer to TSA's understanding of its own regulation "unless an alternate reading is compelled by the regulation's plain language." Alhambra Hosp., 259 F.3d at 1074 (quotation marks omitted). MacLean's arguments, to the extent they even bear upon the question, support no such radical conclusion.

4. MacLean's contention that the 2003 message may not have been marked or distributed in a manner appropriate for SSI, Petr's Br. 32-35, does not alter this analysis. The regulations in effect at the time of the message's disclosure make no provision for marking or handling SSI--and certainly do not state that a failure to adequately safeguard SSI is license for its disclosure. Nor do TSA's Interim SSI Policies and

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[5](...continued) order in this case) is a formal statement of the agency's reading of the regulation; and in any event neither source contradicts the understanding of the term "specific" as elaborated in the August 2006 order.

Procedures for Safeguarding and Control (Nov. 13, 2002), which elaborate certain marking and distribution protocols for SSI, suggest the contrary. Unlike the SSI regulations, TSA's internal policy manual is not entitled to the force of law, and cannot nullify a legitimate SSI order that reflects the agency's interpretation of its own regulations. See Schweiker v. Hansen, 450 U.S. 785, 789-790 (1981) (per curiam); Anderson v. United States, 44 F.3d 795, 799 (9th Cir. 1995). In any event, the regulations and the policy manual speak with one voice in this instance: the Interim Policies, like the regulations, do not suggest that potentially inappropriate handling of SSI materials can revoke an otherwise valid SSI designation.

To conclude to the contrary would yield the absurd result that an inadvertent error in marking or distributing protected SSI materials would render them freely distributable. Cf. Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 483-85 (D.C. Cir. 1980) (failure to mark classified material in accord with Executive Order does not require the "absurd result" of release under FOIA). In accord with this view, the new regulations--which specifically incorporate provisions for marking SSI--clarify that the agency's regulations have never exempted inadequately marked materials from SSI coverage. See 69 Fed. Reg. 28066, 28074 (May 18, 2004) ("As is the case under the current SSI regulation . . . records containing SSI that are not so marked are nonetheless subject to the requirements of the SSI regulation.").

Furthermore, precisely because markings and distribution methods do not affect an otherwise appropriate SSI designation, neither the administrative record nor TSA's final order contains any mention of the facts alleged by MacLean in pursuing this claim. The absence of any support in the administrative record is itself enough to doom MacLean's argument on this score. See San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 969 (9th Cir. 1989). The alleged failure to mark or distribute the July 2003 message as SSI may bear upon whether MacLean realized that its contents were protected--and thus raise a question before the MSPB as to whether MacLean was appropriately disciplined. But such a failure is of no import to whether the message was properly SSI under section 1520.7(j), which is the only question before this Court.

* * *

In short, TSA correctly determined that the 2003 message constituted Sensitive Security Information under 49 C.F.R. § 1520.7(j). Even assuming that the regulation could be read more narrowly to exclude all but the most particular information about individual Air Marshals or flights, as MacLean argues, that would not be the best reading of the regulation in light of the statutory purpose it is intended to serve. More to the point, that is not the interpretation that the agency has adopted and that this Court must accordingly follow unless a contrary reading is compelled. Whatever the outer bounds of section 1520.7(j) may be, the information at issue here--which concerns a narrow type of Air Marshal mission over a limited time in a particular location--falls well within the scope of information "concerning specific . . . deployments or missions" as the agency has interpreted that phrase. MacLean's arguments to the contrary do not compel an opposite conclusion, and this Court need go no further to deny his petition for review.

II. MACLEAN'S REMAINING ATTACKS ON TSA'S FINAL ORDER, TO THE EXTENT THEY ARE WITHIN THIS COURT'S JURISDICTION, ARE WITHOUT MERIT.

In addition to contesting TSA's interpretation of its own regulations, MacLean mounts a handful of other attacks on the agency's final order. At best, these challenges fail on their merits. At worst, MacLean's claims invoking the Civil Service Reform Act and related federal personnel statutes have no relevance to this petition for review--and must be brought, if at all, before the MSPB.

1. MacLean briefly contends that 49 U.S.C. § 46110(d) guarantees him an opportunity to raise objections to an SSI determination before the agency. Petr's Br. 26-27. But the text of the statute creates no such right. To the contrary, section 46110(d) simply limits the issues that can be raised in

a petition for review: "In reviewing an order under this section, the court may consider an objection to an [agency order] only if the objection was made in the [agency] proceeding . . . or if there was a reasonable ground for not making the objection in the proceeding." The provision creates no independent procedural rights, but is rather a "codification of the administrative exhaustion doctrine." USAir v. Dep't of Transp., 969 F.2d 1256, 1259 (D.C. Cir. 1992). As MacLean notes, Petr's Br. 26 n.7, the statute permits him to present his claims for the first time in the court of appeals where, as here, the agency proceeding did not afford an opportunity for contemporaneous objections. See, e.g., Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 686 (D.C. Cir. 2004); City of New York v. Minetta, 262 F.3d 169, 177 (2nd Cir. 2001). But the statute does not require TSA to allow objections to SSI designations before the agency as well.

2. MacLean's characterization of the agency's final order as "forum shopping" or "impermissibly retroactive," Petr's Br. 27-28, 43-45, is likewise misplaced. As to the former claim, Congress has provided an exclusive avenue by which TSA's designation of Sensitive Security Information may be challenged: a petition for review of a final agency order in the courts of appeals. 49 U.S.C. § 46110(a); see also Gilmore v. Gonzales, 435 F.3d 1125, 1132-34 (9th Cir. 2006), cert denied, 127 S. Ct.

929 (2007). TSA issued a final order in this case, as it does for all challenged SSI designations, to permit review of the agency's reasoned decision before the appropriate tribunal--this Court. That is not "forum shopping": it is the process that Congress has required for challenging SSI determinations.[6]

Nor is the agency's decision retroactive--let alone impermissibly so. As with many agency orders, TSA's decision here simply applies the law at the time of the incident at issue to determine the legal status of a particular act in the past.[7] Far from being impermissibly retroactive, this is the essence of agency adjudication. Perhaps if TSA had rendered its decision under current law--rather than the law at the time of the event at issue--such an order would be "retroactive." See Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). But TSA did no such thing; its SSI determination is no more than an unremarkable example of traditional agency adjudication.[8]

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[6]MacLean is of course correct that deferential standards of review apply under such proceedings; but that, too, was what Congress provided when enacting section 46110.

[7]Needless to say, the inability of an agency official to recall another SSI order that applied to information already disclosed does not suggest that the agency has "violated its own past practice," as MacLean claims. Petr's Br. 28. Certainly, MacLean points to nothing in the statute or regulations that would limit the Under Secretary's authority in such a manner.

[8]MacLean suggests that the 2003 message might not qualify as SSI today because more than three years have elapsed since its issue. Petr's Br. 28. But that contention has no relevance to (continued...)

In sum, MacLean's suggestion that TSA's order "deprives [him] of his right to appeal his removal to the MSPB," Petr's Br. 43, is simply mistaken. With the exception of challenging the final order in this case--which Congress has required to be litigated in the courts of appeals--MacLean remains free to press whatever claims he wishes before the MSPB to contest his termination. Indeed, as discussed below, those of his arguments that rely on federal personnel statutes must be litigated in that forum, or not at all. What MacLean cannot do, however, is litigate an SSI designation before any court other than one provided for in 49 U.S.C. § 46110(a).[9] Compliance with this statutory command is the purpose of TSA's final order, and that result is neither impermissibly retroactive nor an exercise in forum shopping.

3. MacLean's contention that TSA's final order violates either the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), or the "Anti-Gag Statute," Pub. L. No. 109-115, § 820, 119 Stat. 2396, 2500-2501 (2005), is wholly misplaced. It is an open question whether MacLean's removal may contravene either of

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[8](...continued)
the agency's decision here, which concerns only whether the message was SSI when it was disclosed in July 2003.

[9]MacLean is free to argue to the MSPB, as he has to this Court, that TSA's final order is not sufficient to justify his removal. But that question is separate from whether TSA has properly designated the 2003 message as SSI. That issue must be litigated in this Court pursuant to section 46110(a).

those statutes; that is a matter that the MSPB must ultimately decide. But it is abundantly clear that those statutes--which apply only to "personnel actions" and "nondisclosure policies, forms, or agreements" respectively--have no application to a final agency order determining certain information to be SSI. Moreover, even if a cause of action did exist under either statute to challenge TSA's order here, that action would properly lie before the MSPB. That result is compelled not merely by statute, but also by common sense: neither the administrative record in this case nor the courts of appeals in general are suited to adjudicating the fact-intensive inquiries that such personnel claims entail.

First and foremost, neither the Whistleblower Protection Act nor the "Anti-Gag Statute" apply to TSA's final order. The Whistleblower Protection Act is limited in its scope to "personnel actions" taken on account of permissible disclosures. 5 U.S.C. § 2302(b)(8). As defined by the Civil Service Reform Act, the term "personnel action" means

> any appointment, promotion, disciplinary or corrective action, detail, transfer, or reassignment, reinstatement, restoration, reemployment, performance evaluation, decision concerning pay or benefits and the like, decision to order psychiatric examination, and any other significant change in duties, responsibilities, or working conditions.

Orsay v. U.S. Dep't of Justice, 289 F.3d 1125, 1131 (9th Cir. 2002) (citing 5 U.S.C. § 2302(a)(2)(A)). A final order that designates particular information as SSI falls under none of these enumerated categories. As MacLean suggests, TSA's final order may have subsequent legal implications for his action before the MSPB.[10] But this does not alter the conclusion that an SSI order does not itself qualify as a "personnel action" as the Civil Service Reform Act defines the term. MacLean may challenge his removal under that Act, but not TSA's final order on SSI.

MacLean's argument under the annual appropriations bill that he dubs the "Anti-Gag Statute" is equally tenuous.[11] Like the Whistleblower Protection Act, the "Anti-Gag Statute" is aimed at conditions of federal employment: its limitations apply only to a "nondisclosure policy, form, or agreement." 119 Stat. 2500. TSA's final order, which determines a specific piece of information to be SSI, is none of these--it is an agency adjudication, authorized by statute and with attendant force of law. This same conclusion holds for the agency's SSI regulations, which are required by federal statute and bear no resemblance to any common understanding of a "policy, form, or agreement." Indeed, the notion that Congress would require agencies to append the disclosure provisos of section 820 to the

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[10]But see supra note 9.

[11]It should be noted that the Act's appropriations primarily concern the year ending September 30, 2006. 119 Stat. 2396.

end of their regulations or final orders--as opposed to simply their internal forms and agreements with employees--is a strained reading of the statutory text at best. MacLean offers no reason to conclude that the "Anti-Gag Statute" encompasses the agency order or regulations in this case, and both the text of the statute and its purpose suggest the opposite.[12]

Even if TSA's final order did fall under the Whistleblower Protection Act or the "Anti-Gag Statute," such claims would be properly brought before the MSPB. It is beyond question that exclusive jurisdiction over Whistleblower Protection Act claims lies in the MSPB. See, e.g., Richards v. Kiernan, 461 F.3d 880, 885-86 (7th Cir. 2006) (citing cases); Stella v. Mineta, 284 F.3d 135, 142 (D.C. Cir. 2002) ("[u]nder no circumstances does the WPA grant the District Court jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance"). The same is true of the "Anti-Gag Statute," which creates no cause of action but finds expression, if at all, only in the catch-all provision of 5 U.S.C. § 2302(b)(12)

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[12]A contextual reading of the statute's terms makes clear that section 820 is aimed at agreements between the government and its employees--namely, documents akin to "forms" or "agreements" such as the Government Standard Forms 312 and 4414 also enumerated in the same provision. See Massachusetts v. Morash, 490 U.S. 107, 114-15 (1989) (explaining the "familiar principle[] that 'words grouped in a list should be given related meaning'"); see also Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (using noscitur a sociis "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words").

prohibiting personnel actions that "violate[] any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in [5 U.S.C. § 2301]." Thus, even assuming arguendo that the "Anti-Gag Statute" generates any enforceable rights, they would also lie within the exclusive jurisdiction of the MSPB. See generally United States v. Fausto, 484 U.S. 439 (1988). As a precursor to MSPB review, MacLean must also follow a detailed process of administrative exhaustion before pursuing either of his personnel claims. See, e.g., Stella, 284 F.3d at 142 (citing relevant provisions). MacLean cannot avoid this comprehensive system of adjudication by simply pressing his arguments before this Court in a petition for review.

Nor would it make any practical sense for this Court to adjudicate such claims in the first instance--particularly in the case of the Whistleblower Protection Act, where resolution turns upon factual matters such as the reasonable beliefs of an employee and the nexus between an employee's disclosure and an agency's allegedly retaliatory action. The unique institutional capacities of this Court make such an inquiry entirely infeasible. The lack of any germane facts in the administrative record only reinforces this conclusion. See, e.g., San Diego Air Sports Ctr., 887 F.2d at 969 (noting that, even when the administrative record consists of no more than a letter, "[t]he limits of the record limit our jurisdiction").

In sum, MacLean is free to challenge his termination before the MSPB, where his arguments will be appropriately directed at personnel actions and where federal law provides that such challenges must be heard. But MacLean cannot invoke the authority of the Whistleblower Protection Act or the "Anti-Gag Statute" to challenge a non-personnel decision before this Court in the first instance. The record before this Court does not permit the resolution of such claims, nor do the statutes on which those claims rely. The only issue to be resolved by this Court is whether TSA correctly determined that a message disclosing the cancellation of particular Air Marshal missions in July 2003 was SSI. For the reasons discussed above, that decision was correct. This Court should accordingly deny the petition for review in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Respectfully submitted,

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STATEMENT OF RELATED CASES

MacLean appealed his removal from his position as a Federal Air Marshal in <u>MacLean</u> v. <u>DHS</u>, No. SF-0752-06-0611-I-1 (M.S.P.B.). Upon MacLean's request, that action has been dismissed without prejudice pending the resolution of this petition for review.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in monospaced Courier New font of no more than 10.5 characters per inch. The brief from Statement of Jurisdiction to Conclusion contains 6026 words according to the count of this office's word processing system.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2007, I filed and served the foregoing Brief by causing the original and 15 copies to be sent to this Court by Federal Express overnight, and by causing two copies to be sent Federal Express overnight to:

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