

Memorandum of Understanding Between the U. S. Office of Special Counsel (OSC) and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners¹

The U.S. Office of Special Counsel and the Transportation Security Administration hereby enter into the following Agreement regarding whistleblower protections for TSA security screeners, under the authority of the Aviation and Transportation Security Act.

A. Summary

1. Program Development

During the first six months of this Agreement, OSC will work with TSA to develop a comprehensive program for receiving and processing whistleblower complaints from security screeners employed by the TSA. Program development will include development of policies and procedures for: OSC/TSA coordination, staffing, training, monitoring, data collection, reporting and evaluation.

2. TSA Directive on Whistleblower Protection

OSC will work with TSA staff to develop a TSA Directive that sets forth TSA policy on providing whistleblower reprisal protection to security screeners. This directive will track the provisions of 5 U.S.C. § 2302(b)(8), set forth the policies and procedures for handling allegations of reprisal for protected whistleblowing, and provide for resolution of substantiated allegations through corrective or disciplinary actions to be taken by TSA. TSA will consult with the Department of Transportation Office of the Inspector General concerning the development of the Directive.

3. Outreach Program

OSC will work with TSA to develop a comprehensive outreach program to inform and train TSA staff and security screeners on whistleblower protection law, and OSC's policies and procedures.

4. Case Processing

OSC will receive, investigate and recommend resolution of complaints from security screeners alleging reprisal for protected whistleblowing. The complaints will be

¹ This Memorandum of Understanding, as specified in herein at paragraph B. Scope, relates only to the TSA security screeners identified at 49 U.S.C. §44935(e). OSC will handle whistleblower protection matters of all other TSA employees under the same procedures applicable to employees covered by the provisions of the Whistleblower Protection Act.

processed in accordance with the applicable statutory and case law used by OSC in processing complaints alleging violations of 5 U.S.C. § 2302(b)(8), the policies and procedures set forth in the TSA Directive referenced in paragraph 2, and this Agreement.

B. Scope

The TSA employees covered by this agreement are the TSA security screeners identified at 49 U.S.C. § 44935(e). Also included in coverage are applicants for TSA security screener positions and former TSA security screeners.

C. Policies and Procedures

1. Case Processing

OSC will process complaints alleging reprisal for protected whistleblowing from TSA screeners in the same manner it processes all other complaints of prohibited personnel practices, with the exceptions noted below.

Findings of Violation. If OSC makes a determination that there are reasonable grounds to believe that a violation of the TSA Directive occurred that requires corrective or disciplinary action, the Special Counsel will transmit to the Under Secretary of Transportation for Security a Report on Findings and Recommendations. This report will set forth the facts and legal analysis that support the Special Counsel's determination that a violation of the Directive occurred, and the Special Counsel's recommendations with respect to appropriate corrective or disciplinary action. The Under Secretary, or his designee, will respond to OSC within 30 days, informing OSC what action the TSA will take. The response period may be extended upon agreement of the parties. In any case where a whistleblower complaint by a security screener involves alleged reprisal by a TSA official at the level of a Deputy Associate Under Secretary or above, a decision by the Under Secretary not to follow OSC's Findings of Violations and recommended corrective or disciplinary action in the particular matter shall be referred to the Secretary for consideration.

Settlements. At the Special Counsel's discretion, whenever appropriate, OSC will seek to resolve complaints informally through settlements before transmitting a formal Report on Findings and Recommendations to the TSA. OSC staff will contact the TSA Case Liaison to discuss settlement of any complaint in which it appears that such resolution is warranted. The settlements may be formal or informal agreements between the TSA and the complainant. Settlements may include corrective and disciplinary actions taken by TSA and/or systemic training programs.

Stays. OSC may request the TSA to stay a personnel action if the available evidence shows that there are reasonable grounds to believe that a violation of the TSA Directive occurred. OSC will make informal requests for stays through the TSA Case Liaison. The Case Liaison will inform OSC within 3 days whether or not the informal stay request will be granted. If the Case Liaison denies the informal stay request, OSC may make a

formal written request to the Under Secretary, or his designee. That official will inform OSC within 5 days whether the formal stay request will be granted in full, partially granted (i.e., by temporarily assigning the screener to non-screening duties), or denied. If a stay or partial stay is granted, the investigation will receive priority treatment consistent with OSC policy

An initial request will be for a stay of 45 days. If a stay is granted and the investigation is not complete at the end of the 45-day period, and reasonable grounds continue to exist for believing that a violation occurred, OSC will discuss the progress of the investigation and legal review with the TSA Case Liaison, and request an extension of the stay.

Cooperation with OSC Investigations. Under the provisions of the TSA Directive, the TSA will make its employees available to testify in regard to matters under investigation by OSC, and will provide records pertinent to such matters. The TSA will require its employees to give to OSC all information, testimony, documents and material related to any matter the investigation of which is authorized by the TSA Directive and this Agreement. When requested to do so, TSA employees shall sign testimony under oath or affirmation before an OSC official authorized to administer oaths. Employees are performing official duty 'when testifying or providing evidence pursuant to an OSC investigation. The TSA will enforce its policies related to cooperation with OSC investigations.

2. Disclosure Policies and Procedures

a. General Policy

OSC policies and procedures that govern the disclosure of case-related information from all other OSC investigative files will be, followed with respect to disclosing information from TSA security screener files.

The parties agree to comply with any laws or regulations related to the Freedom of Information Act (FOIA), the Privacy Act (PA) and regulations related to the protection of Sensitive Security Information under 49 C.F.R. Part 1520. Any questions about coverage or disposition of a FOIA or PA request will be resolved by, and after consultation between, the responsible FOIA/PA officials for OSC and TSA.

b. Quarterly Case Report

OSC will prepare a Quarterly Report on TSA complaints filed with OSC. Under no circumstances will the Report contain Sensitive Security Information. The Quarterly Report will include: the number of complaints filed, closed due to lack of jurisdiction, closed in the Complaints Examining Unit (CEU), referred to the Investigation and Prosecution Division (IPD), closed in the Alternative Dispute Resolution Unit (ADR), and closed in IPD; stays requested and TSA responses; settlements; corrective and disciplinary actions; and Reports on Findings and Recommendations issued to TSA. OSC will also discuss individual cases in which OSC has determined that there were

reasonable grounds to believe that a violation occurred. TSA will be given an opportunity to comment on the Quarterly Report before it is issued. OSC reserves the right to make the final determination on the contents of the Quarterly Report.

c. Press Inquiries

In the event of an inquiry from the press regarding a pending investigation, OSC may respond to such inquiries when the subject matter of a pending investigation has become public knowledge, disclosure is necessary to preserve confidence in the integrity of an OSC investigation, or there is a legitimate public interest, consistent with the terms of OSC's published routine use under the Privacy Act (66 F.R. 36611 (Jul. 12, 2001), and 66 F.R. 51095 (Oct. 5, 2001)). OSC agrees to consult with the TSA Project Liaison or other designated staff before releasing any information to the press other than mere confirmation that the case is under investigation by OSC. Under no circumstances will OSC release any information the TSA designates as Sensitive Security Information.

D. Staffing

1. OSC Staff Commitments

OSC will assign the following staff to perform the duties identified herein. These staff will work on their regularly assigned work in addition to the TSA program and TSA cases.

Program Coordinator. The program coordinator will serve as the liaison with TSA on the performance of the Agreement. The program coordinator will:

- Serve as the primary OSC contact with TSA on the development, implementation and ongoing maintenance of the Agreement,
- Work with OSC's Information Systems Branch to develop computerized case management information on TSA cases,
- Maintain statistical and other data on the cases,
- Prepare the Quarterly Report,
- Develop training on relevant TSA law, regulations and procedures and ensure that all OSC staff who handle TSA cases receive training, and
- Perform other duties related to the maintenance of the Agreement.

Case Processing Staff. OSC will train case processing staff and supervisory personnel who work on TSA cases on TSA law, regulations and procedures. This training will include information about security screener jobs duties and lines of supervision, TSA rules and regulations governing employment actions, and the procedures set forth in this Agreement.

2. TSA Staff Commitments

Project Liaison. TSA will designate a Project Liaison who will be the primary contact with OSC on issues related to policy, procedures, training, reports, press releases and any other issues, as necessary. The Project Liaison will interact directly with the OSC Program Coordinator.

Case Liaison. TSA will designate a Case Liaison to coordinate with OSC examiners, investigators and attorneys on case processing issues. The Case Liaison will have sufficient authority to require other agency employees to comply with requests for documents in a timely manner and will have direct access to a TSA official with authority to settle cases. The Case Liaison will be a neutral, and will not represent any individual agency official in connection with OSC investigations. The Case Liaison will receive training by OSC staff on OSC policies and procedures related to initial intake, investigation and case resolution policies and procedures.

When contacted by an OSC examiner, investigator or attorney, the Case Liaison will:

- Receive and provide timely responses to all requests for documents,
- Arrange for a private location for scheduled interviews,
- Schedule subject and witness interviews when requested to do so,
- Ensure that officials who have been identified as subjects understand that they may have personal counsel present during the fact-finding interviews,
- Ensure that witnesses understand that they are required to give full and truthful responses to the investigator's questions, and
- Represent the TSA in discussions concerning stays, corrective or disciplinary actions.

OSC investigators and/or attorneys will contact the Case Liaison when a TSA investigation becomes active. The investigator or attorney will:

- Explain in general terms the allegations under investigation,
- Provide a general timetable for the investigation,
- Submit requests for documents and other records through the liaison,
- Schedule interviews of all subjects through the liaison,
- Schedule interviews of most witnesses through the liaison (To maintain full independence with respect to investigative activity, OSC reserves the right to contact witnesses directly when appropriate), and
- Contact the liaison about stays, corrective or disciplinary actions.

E. Training and Outreach -Training Security Screeners on Whistleblower Protection and OSC Procedures

OSC will develop and deliver a training module for inclusion in the TSA training program for security screeners. This training will cover:

- The TSA Directive,
- Scope and basis of OSC's jurisdiction to investigate complaints filed by security screeners,
- How to file a whistleblower reprisal complaint with OSC,
- OSC Case Processing Procedures, and
- OSC's secure channel for making disclosures (Disclosure Unit).

F. Effective Date and Duration

This agreement will take effect upon its signing by the Under Secretary of Transportation for Security and the Special Counsel, and will remain in effect unless terminated pursuant to paragraph G.2. below.

G. Modification or Termination

1. Any modification to the agreement must be in writing and must be signed by the heads of both agencies, or by their authorized representatives.
2. If either party decides to terminate all or part of this Agreement, that party shall give written notice to the other party at least 90 days in advance of the termination date. Unless otherwise agreed by the parties, OSC will complete processing of any case open for investigation or review at the time of the termination.

H. Funding

OSC will investigate, analyze, and make recommendations as to resolution of whistleblower complaints, as specified in this Agreement, without seeking reimbursement from TSA. If additional funding is needed by OSC, OSC will seek such funding from Congress through the appropriation process.

I. Summary

This Memorandum of Understanding is an outline of the agreements reached between the TSA and OSC regarding the general policies and procedures that apply to the provision of whistleblower protections to TSA security screeners. Detailed procedures necessary to conduct business between the two agencies, and issues related to implementation, will be resolved at the appropriate staff level.


J. Approvals

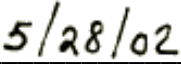
Elaine Kaplan
Special Counsel

John W. Magaw
Under Secretary of Transportation
for Security

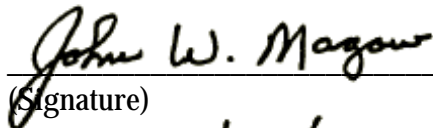
Office of Special Counsel

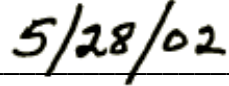
**Transportation Security
Administration
U. S. Dept. of Transportation**



(Signature)


(Date)



(Signature)


(Date)