BEFORE

THE DEPARTMENT OF TRANSPORTATION

THE DEPARTMENT OF HOMELAND SECURITY

TRANSPORTATION SECURITY ADMINISTRATION

In re: Interim Final Rule Request for Comment on Protection of Sensitive Security Information

Docket No. TSA-2003-15569; Amendment No. 1520-1
RIN 1652-AA08

COMMENTS OF THE SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

Submitted July 16, 2004

The Silha Center for the Study of Media Ethics and Law submits the following comments to the Department of Transportation (DOT), the Department of Homeland Security (DHS), and the Transportation Security Administration (TSA) in response to the notice, published at 69 Fed. Reg. 28,066 (May 18, 2004), seeking comments regarding its interim final rule codified at Protection of Sensitive Security Information, 49 C.F.R. § 1520 (2004) ("interim final rule"). The interim final rule amended and updated procedures for the protection of Sensitive Security Information (SSI) pursuant to 49 U.S.C. § 114(s) (2004) as amended by the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2002).

The Silha Center for the Study of Media Ethics and Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Silha Center also sponsors an annual lecture series; hosts forums, conferences and symposia; produces the *Silha Bulletin*, a quarterly newsletter, and other publications; and provides information about media law and ethics to the public.

INTRODUCTION

The Silha Center recognizes that in the wake of the September 11, 2001 attacks, one of the ways that Congress sought to prevent another such attack was by passing ATSA. Specifically, Congress directed the Department of Homeland Security (DHS) to restrict access to information that would "(A) [b]e an unwarranted invasion of personal privacy; (B) reveal a trade secret . . . ; or (C) be detrimental to the security of transportation." 49 U.S.C. § 114(s). The Department of Transportation (DOT) was given similar directives. *See* 49 U.S.C. §

40119(b)(1) (2004). Although the interim final rule is intended to accomplish the goal of protecting the security of transportation by keeping SSI from the hands of wrongdoers, it also severely restricts public access to information.

The definition of SSI should restrict public access to only the most sensitive information. The foundation of a democratic society requires open access to government and public records to promote public understanding and education. The release of some security information can benefit the public by exposing problems and helping to maintain a transparent and responsive government. Balancing security needs and public access to information is not a zero sum game. In fact, public access to information actually enhances the protection of transportation security by enabling the public to be informed partners in that endeavor.

In order to enhance public safety, increase public awareness, and more clearly define SSI, the Silha Center urges that the interim final rule be modified to:

- Interpret the definition of SSI narrowly.
- Reduce the scope of "covered persons" to ensure that only those actually working with SSI fall within the scope of the rule.
- Exclude most state and local officials from the category of "covered persons."
- Allow greater access to information concerning security screening methods and threats.
- Set specific time limits for the review and declassification of SSI, rather than destroying it.

ANALYSIS

I. OVERLY-BROAD DEFINITIONS GOVERNING SSI VIOLATE THE SPIRIT AND PRINCIPLES EMBODIED IN THE FREEDOM OF INFORMATION ACT.

"The basic purpose of [the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2004),] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The Supreme Court has interpreted FOIA disclosure provisions broadly, finding that they "reflect a general philosophy of full agency disclosure." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotations and citation omitted). The exemptions to FOIA, on the other hand, have been narrowly construed by the Supreme Court. *Id*.

Exemption 3 to FOIA provides that matters specifically exempted by another statute may be withheld from public release under FOIA. 5 U.S.C. § 522(b)(3). Because ATSA creates a statutory exemption to FOIA for all SSI,

it is essential that the definition and designation of SSI be construed in a way that will be as limited as possible in order to avoid denying the public access to information that it needs.

a. An overinclusive construction of SSI allows government agencies to make frivolous exemption claims.

Two air travelers and the American Civil Liberties Union filed suit in federal district court seeking release of "no fly" records and other watch lists used to monitor airline passengers. *Gordon v. Fed. Bureau of Investigation*, 2004 U.S. Dist. LEXIS 10935, at *1 (N.D. Cal., June 15, 2004). TSA initially refused to release the requested records on the grounds that they were exempt as SSI. *Id*. Judge Charles Breyer determined that the claims of SSI exemptions were, in many cases, unnecessarily broad, insufficiently supported, and unreasonably restrictive, finding that "in many instances the government has not come close to meetings its burden [of showing the documents were exempt from disclosure], and, in some instances, has made frivolous claims of exemptions." *Id.* at *12-14. Judge Breyer ordered the government to reevaluate all documents it claimed were exempt to determine whether they actually were SSI. *Id*.; s*ee also* Eric Lichtblau, *Judge Scolds U.S. Officials Over Barring Jet Travelers.* N.Y. TIMES, June 16, 2004, at A19.

Gordon demonstrates that an overly-broad construction of what constitutes SSI will encourage overzealous withholding of records. Under the interim final rule, once it is determined – and it is unclear precisely by whom that determination will be made – that a record fits into one of the litany of categories, it automatically becomes SSI. *See* 49 C.F.R. § 1520.5. Instead, before information is designated as SSI, an affirmative showing that the information would actually pose a clear and present danger to transportation security should be required. Any information not meeting the standard should not become SSI. Moreover, only those portions of records that actually contain SSI should be so designated; the balance of the record, unless otherwise exempt, should be available to the public. Reducing the scope of SSI to the narrowest definition would be in accord with the spirit of FOIA, yet would still protect the transportation security.

b. Only individuals actually working with SSI should be considered "covered persons."

The interim final rule defines a "covered person" as "any individual applying for employment in a position that would be a covered person, or in training for such a position . . . ." 49 C.F.R. § 1520.7. This definition of "covered person" includes applicants who "*may* receive or have access to SSI" prior to being accepted to a permanent position. 69 Fed. Reg. 28,070 (emphasis added). The definition is too broad because, as the government itself concedes, it encompasses "many persons . . . who . . . may not have possession of SSI." *Id.* at 28073.

Some individuals in certain positions will encounter SSI on a routine basis, and perhaps could be identified as "covered persons" based on their titles alone. However, those who do not routinely encounter SSI should be designated "covered persons" only on a case-by-case basis. Before anyone is determined to be a "covered person," an affirmative showing should be required demonstrating that each individual, or each individual holding a certain position, will in fact have access to SSI. This will avoid needlessly gagging individuals and conform to the spirit of FOIA, while still protecting the security of transportation.

II. STATE AND LOCAL OFFICIALS SHOULD BE CONSIDERED "COVERED PERSONS" ONLY IN LIMITED CIRCUMSTANCES.

Although no portion of the rule explicitly applies to state and local emergency response workers or law enforcement officials, they may be considered "covered persons" "where these types of individuals need access to SSI in order to prevent or respond to a transportation security incident." 69 Fed. Reg. 28,073. The *Federal Register* notice states that TSA is considering modifying the rule to include state and local emergency responders or law enforcement officials, and has requested comment on this issue. *Id.* The rule should not be broadened to include most state and local officials who might come into contact with SSI.

a. Including all state and local officials as "covered persons" will create unnecessary confusion and may prevent them from carrying out their duties effectively.

Including state and local law enforcement as "covered persons" will inevitably create confusion. In September 2003, Des Moines Police believed that a contract with TSA barred them from discussing any arrest or incident occurring at the Des Moines International Airport with the public or media. Alex Tom, *Dispute Settled on Airport Pact*, DES MOINES REGISTER, Nov. 13, 2003, at 6B. The contract, which is typical of arrangements between local officials and TSA around the country, provides federal financial assistance for Des Moines law enforcement to help provide security at the Des Moines International Airport. Alex Tom, *Secrecy in Airport Contract Criticized*, DES MOINES REGISTER, Sept. 27, 2003, at 1A. TSA officials cleared up the confusion two months later by explaining that only incidents pertaining to SSI must be cleared with TSA first before informing the public. Tom, *Dispute Settled on Airport Pact*, *supra*.

As the events in Des Moines illustrate, a broad definition of "covered persons" that includes state and local law enforcement will hamper those officials' ability to effectively provide information and assistance to the public. If certain state and local law enforcement officials regularly work with SSI, it may be appropriate to subject them to the requirements of the interim final rule. It will be essential to provide them with appropriate training in handling

SSI. Even then, the rule should be narrowly crafted to ensure that it allows the broadest possible public disclosure of information.

State and local emergency responders, on the other hand, should not be subject to the requirements of the interim final rule. Although emergency response plans and local emergency procedures may constitute SSI by virtue of having been submitted to DHS or DOT, disclosure of these plans does not necessarily constitute a threat to the security of transportation. The public's right to know will typically outweigh the potential danger of releasing these plans. Public knowledge of and access to emergency response plans greatly increases the public's ability to respond the threats, as well as enhancing the public's faith in those security systems.

b. Including all state and local officials as covered persons will cause those officials to tend to err on the side of secrecy.

The possibility of the imposition of sanctions, including civil liability, if SSI is improperly released also weighs against including state and local officials as "covered persons." These penalties, coupled with uncertainty as to whether particular information constitutes SSI, make it likely that state and local officials will tend to err on the side of secrecy, not disclosure. Rather than risk mistakenly releasing SSI, these officials will choose to withhold what should otherwise be publicly-accessible records. This possibility increases for state and local officials who do not regularly work with SSI or for those with inadequate training on handling SSI.

This problem is compounded by the fact that no procedure provides for the release of material erroneously designated as SSI. The only way for incorrectly designated SSI to be released would require either a formal FOIA request or a written order from TSA to release the material. 49 C.F.R. § 1520.15(b), (e). Neither of these options guarantees effective or universal review of SSI designation records. Additionally, because entire records are marked as SSI, publicly-accessible information within these records might be wrongfully exempted from disclosure. *See id*. at § 1520.9. Incorrectly designated SSI restricts access to otherwise public and defeats the general presumption of access to government documents.

c. The interim final rule will undermine state FOI laws which already protect SSI yet allow disclosure of information to the public in appropriate cases.

Several provisions of the interim final rule will make records and information "SSI both in the hands of DHS or DOT and in the hands of the State or local agency that prepared it." 69 Fed. Reg. 28,072. This means that security programs or security contingency plans required by or provided to DOT or DHS, any vulnerability assessment directed or approved by DOT or DHS, security screening procedures, and any critical aviation or

maritime infrastructure asset information submitted to DHS or DOT, become SSI for all purposes. 49 C.F.R. § 1520.5(b). And because nearly all state FOI laws allow specific exemptions to public release of information when mandated by federal or another state statute, *see e.g.*, ALA. CODE § 36-12-40 (1991); CONN. GEN. STAT. § 1-210(b)(19) (2003); MD. STATE GOV'T CODE ANN. § 10-613 (2003); MINN. STAT. § 13.03(1) (2003); MISS. CODE ANN. § 25-61-11 (2004); W. VA. CODE § 29B-1-4 (2003); WASH. REV. CODE § 42.17.260 (2004), 49 U.S.C. §§ 114(s) and 40119(b)(1) effectively amend many state FOI laws.

Some state FOI laws already exempt material that would be classified as SSI under the interim final rule. *See e.g.*, IDAHO CODE § 9-340B (2004); IOWA CODE § 22.7 (2003) (various provisions); MO. REV. STAT. § 610.021(18), (19) (2004); NEB. REV. STAT. § 84-712.05(8) (2003); TENN. CODE ANN. § 10-7-503(e) (2004); WIS. STAT. § 19.36(9) (2003). Many of these laws, however, exempt such information only when it can be affirmatively shown that the release of those records would cause substantial harm to the public. *See e.g.*, MO. REV. STAT. § 610.021. Moreover, at least two of these states provide sunset clauses for the exemptions to lapse unless renewed by the legislature. IOWA CODE § 22.7; MO. REV. STAT. § 610.021.

The interim final rule contains no similar requirements, nor any procedure for removing SSI status from information so designated. As a consequence, the interim final rule will effectively trump state disclosure provisions. Allowing the interim final rule to override state law unnecessarily undermines the democratic process as expressed by state legislatures. At the very least, the rule should be modified, as discussed elsewhere in these comments, to narrowly construe the definition of SSI to encompass only those records whose release would pose a clear and present threat to transportation safety and security, and to require mandatory review, declassification and release of information designated SSI.

III. DESIGNATING ALL INFORMATION ON SECURITY PROGRAMS AS SSI DOES NOT SERVE THE PUBLIC INTEREST AND UNDERMINES PUBLIC TRUST IN THESE PROGRAMS.

Under the interim final rule, any procedure dealing with the security screening of people or baggage is SSI. 49 C.F.R. § 1520.5(b)(9). This includes sources of information used by screening systems, detailed information about screening methods, and performance or testing data from screening systems as SSI. *Id*. This prevents most information relating to security screening systems from being released to the public, presumably out of concern that wrongdoers might use the information to exploit security weaknesses.

Two frequently used screening machines, explosive detection systems (EDS) and explosive trace detection (ETD), which scan checked and carry-on luggage, respectively, often issue false positives by identifying non-threatening objects as explosive material. Bob von Sternberg, *Sometimes, your luggage lies*, MPLS. STAR TRIBUNE, Mar. 28, 2004, at 1A. EDS have issued false alarms scanning chocolate, cheese, golf balls, shoe heels, and books, while ETD have sometimes registered false alarms when scanning hand lotion. *Id.* A United States Government Account Office (GAO) study confirmed the high false alarm rates for EDS and ETD. GAO, CHALLENGES EXIST IN STABILIZING AND ENHANCING PASSENGER AND BAGGAGE SCREENING OPERATIONS, Feb. 12, 2004, at 19, 33-34. The interim final rule, however, withholds specific information on screening systems and tests of those systems from the public.

This is both short-sighted and counterproductive. Withholding information regarding the true effectiveness of screening systems undermines security preparedness by creating a sense of complacency in travelers while also rendering them unable to evaluate the true risks of travel. Releasing at least some of this information will facilitate public oversight, which in turn will encourage improvement of inadequate screening methods and allow the public to participate in shaping effective policies and practices to combat future threats. In addition, if the public knows specifically what triggers false positives, it can take steps to help reduce false alarms, streamline security procedures, and increase security.

IV. SSI MUST BE SUBJECT TO MANDATORY DECLASSIFICATION REVIEW AND RETENTION REQUIREMENTS.

Information that meets the requirements set out in the interim final rule automatically becomes SSI. *See* 49 C.F.R. § 1520.1(a). Except in limited circumstances, SSI generally is restricted from public disclosure, unless TSA determines, in writing, that the information can be released. *Id*. at § 1520.15. When SSI is no longer needed to carry out the functions of the agency holding it, it is to be destroyed. *Id.* at § 1520.19. No provision provides a timeline for review of SSI designation, or for declassification. 69 Fed. Reg. 28,072. This means that SSI is unlikely ever to be released to the public.

Rather than destroying SSI once it no longer constitutes a threat to the security of transportation, SSI should be reviewed, declassified and made accessible to the public. Changing the interim final rule to designate a timeline for declassification, or at least a mandatory review, would not undermine the integrity of SSI. Instead, this small change would further the goals of an open and democratic society by ensuring broader public access to government records.

CONCLUSION

The Silha Center urges DHS and DOT to consider modifying the interim final rule to better serve the public interest by allowing greater access to information. This can be done by narrowly construing the definition of SSI and by limiting the definition of "covered persons" to ensure that only those with actual access to SSI fall within the scope of the rule. The interim final rule should not be broadened to include state and local law enforcement and emergency response workers as "covered persons." Doing so will create confusion about whether or not records are properly designated as SSI, and hinder these officials from carrying out their duties. Existing state FOI disclosure provisions should be honored, not thwarted.

Allowing greater access to information concerning security programs will promote public awareness of transportation security and enhance security screening procedures. Finally, specific procedures for retention, review, declassification, and release of SSI should be developed. These modifications to the interim final rule will promote democratic ideals of an open and accessible government without sacrificing transportation security and safety.

We appreciate the opportunity to share these views with the Department of Transportation, the Department of Homeland Security, and the Transportation Security Administration.

Respectfully submitted,

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