

*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 As we explain below, the allegations in your letter are in many respects unfair or many months out-of-date, and thus moot.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.

www.dhs.gov

Scott J. Bloch
October 11, 2006
Page 2

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.

Scott J. Bloch
October 11, 2006
Page 3

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

Scott J. Bloch
October 11, 2006
Page 4

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.

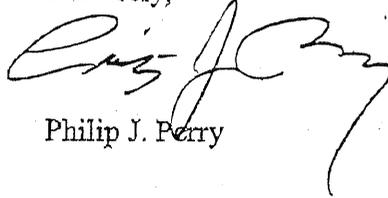
Congress intentionally and appropriately placed the determination and continuation of such "operational initiatives" in the discretion of the Director of the FAMS, a seasoned Government executive and law enforcement official. The Director, as well as officials at TSA and the Department, are well-suited 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

Scott J. Bloch
October 11, 2006
Page 5

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,

A handwritten signature in black ink, appearing to read "Philip J. Perry", with a long, sweeping flourish extending to the right.

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,

A handwritten signature in cursive script, appearing to read "Robert F. Byers".

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

Attachment