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**Analysis of Disclosures, Agency Investigation and Reports,
and Comments of the Special Counsel**

OSC File No. DI-06-1620

Summary

The whistleblower, Frank Terreri, a Federal Air Marshal (FAM), disclosed that he was required to wear dress clothing inconsistent with most passenger attire on many flights, that he was required to pre-board flights in plain view of passengers, and that he must identify himself as a FAM at hotels. He also alleged that officials of the Federal Air Marshals Service (FAMS) released to the media highly sensitive tactical information about training and in-flight procedures used by FAMS, which jeopardized the safety of both FAMS and the flying public. Mr. Terreri alleged that these practices violated the Intelligence Reform and Terrorism Prevention Act of 2004¹ and thereby constituted a serious breach of established law enforcement practice and procedure, gross mismanagement and a substantial and specific danger to public safety.

The Secretary of the Department of Homeland Security delegated authority to Robert F. Byers, then Acting Director, FAMS, to investigate and report on Mr. Terreri's allegations. OSC received an initial report dated October 11, 2006, signed by Philip J. Perry, General Counsel, DHS. The agency produced a supplemental report, which was undated, but received by OSC on May 16, 2007, signed by Acting Director Byers. The whistleblower provided extensive comments on the reports.

As discussed more fully below, the 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. Under the new policies, FAMS dress at their discretion, provided their ability to execute law enforcement duties is not compromised. The Transportation Security Administration (TSA), which oversees FAMS, 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.

For the reasons set forth below, the Special Counsel (OSC) finds 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.

¹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

The Whistleblower's Disclosures

The whistleblower, who consented to the release of his name, has been a FAM since 2002 and has had a 16-year career as a law enforcement officer. As a FAM, he is required to deploy on a minimum of 10 commercial air carrier flights, working over 50 hours per week. Additionally, he is authorized to carry firearms on the flights on which he is deployed. He is also permitted to apprehend criminal suspects, identify and interview witnesses, interrogate suspects, and conduct searches, seizures, and arrests.

Specifically, Mr. Terreri disclosed that: 1) the check-in and boarding procedures currently employed by FAMS necessitate their public identification as FAMs, compromising their undercover status; 2) the FAMS standards of dress and grooming do not take into account the true nature of dress by the flying public on any given flight, and potentially compromise their anonymity; 3) the requirement that FAMs identify themselves as FAMs upon check-in at prescribed hotels compromises their anonymity; and 4) the release to the media of FAMS tactics, methods, and procedures, many of which should be considered sensitive, have damaged the integrity of aviation security and compromised the mission of the agency.

Boarding

According to Mr. Terreri, FAMs were required to fully display their badges and credentials at the ticket counter in front of travelers. FAMs were also requested to bypass the security screening point by entering the exit lane and waiting for either a TSA supervisor or local police to check their credentials and badge. FAMs were required to present a second form of identification at the checkpoint, all in full view of the public. FAMs then presented their badges and credentials again to the gate agent of the airline, in front of passengers awaiting the flight on which FAMs are flying. Then, at least one FAM was required to pre-board in full view of all passengers, which entails being pre-boarded via the jet way approximately five minutes prior to general boarding. On many occasions, the pilot required a FAM to present credentials in the flight deck area after boarding. As a result, anonymity was compromised over 90% of the time.

Dress Code and Grooming

The FAMS dress code, Mr. Terreri alleged, required business suits on certain flights, and dress slacks and dress shoes regardless of destination. Mr. Terreri disclosed that the standard communicated to FAMs was that they were not permitted to wear serviceable sneakers, jeans, or shorts, which would allow them to blend in on certain flights. As such, they were not granted an allowance for casual attire, and were easily recognizable on certain flights, such as on discount carriers and those to vacation and leisure destinations.

Hotel Policy

Mr. Terreri alleged that FAMS on missions to Washington, D.C. and Baltimore, Maryland, were pre-booked into hotels by TSA/FAMS personnel. Due to the pre-booking, all front-desk hotel employees were aware that FAMS stay at that hotel. According to Mr. Terreri, this policy compromised the safety of the FAMS who were regularly forced to stay at locations known to individuals without any security clearance. Mr. Terreri also alleged that a newly implemented hotel procedure, which established a centralized hotel reservations system, is wasteful and will adversely impact employee morale. He asserted that FAMS should follow the same hotel reservations policy used by all other federal agencies, which was effective for FAMS before implementation of the new policy. Under the previous policy, FAMS booked themselves into hotels at government rates and notified their team leaders where they were staying.

Media Disclosures

Mr. Terreri disclosed that FAMS management repeatedly endorsed the public release of sensitive details of operational procedures and security measures employed by FAMS during missions, including, but not limited to: the type of weapon carried and how it is loaded, the way in which FAMS present credentials to airline gate personnel, the fact that airline personnel know the FAM's identity, the number of FAMS that fly on a given mission, and how the FAM is escorted and boarded on the airplane prior to flight. The continued release of this type of information allows terrorists to more easily identify FAMS and provides a blue print to terrorists on how they respond to certain critical situations during flight. FAMS policy on the protection of Sensitive Security Information states, in part: "Limiting access to, and preventing unauthorized disclosure of, SSI is critical to the FAMS mission of guarding against those who pose a threat to transportation security and limiting their ability to develop techniques to subvert transportation security measures."² As such, the release of these operational procedures and security measures violates federal regulations governing the release of sensitive information³, the Intelligence Reform and Terrorism Prevention Act, and FAMS policy on SSI, and constitutes gross mismanagement and a substantial and specific danger to public safety.

The Report of the Department of Homeland Security

The initial report reflected the agency's decision not to investigate or formally report to OSC pursuant to 5 U.S.C. § 1213, on the grounds that the allegations were unfair, out-of-date, and thus moot. Notwithstanding this position, the agency did report on the current

² Department of Homeland Security, Immigration and Customs Enforcement, Federal Air Marshal Service, OMS 1642, *Protection of Sensitive Security Information*, (2004). See also, Department of Homeland Security, Immigration and Customs Enforcement, Federal Air Marshal Service, OMS 1644, *Safeguarding Sensitive But Unclassified Information*, (2004); Department of Homeland Security, Management Directive System, MD Number 11042.1, *Safeguarding Sensitive But Unclassified (For Official Use Only) Information* (2005).

³ The above cited directives incorporate by reference 49 C.F.R. § 1520 (2005, as amended), which defines sensitive security information and regulating its dissemination.

status of FAMS policies and procedures regarding boarding, dress, hotels, and the handling of sensitive information.

Notably, the initial report advised of a recent change in the standards of dress for FAMS. FAMS are permitted 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. The report stated that FAMS is committed to an ongoing review of its operations, including the Standard of Dress policy, and that the Director, FAMS, has convened more than fifteen working groups of FAMS to discuss operational matters and listen to their concerns.

The initial report also addressed the question of boarding procedures. FAMS has developed flexible policies to adapt to the different airport designs. The objective is to enable the FAM to board the airplane in a manner that preserves his or her anonymity; however, the report states, "...the reality is that some airports, as a function of their blueprint layout, simply cannot accommodate ideal methods of getting on airplanes anonymously."

With regard to hotel reservations, the initial report stated that the Director, FAMS, recently announced a revised policy, permitting FAMS to select and book reservations at hotels of their choice. This policy is contingent upon the FAM forwarding hotel information in advance of reaching his or her destination and remaining within budgetary and related guidelines. The initial report emphasized the 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.

The initial report also addressed the manner in which DHS and TSA protect and safeguard Sensitive Security Information, which is strictly regulated under 49 C.F.R. Part 1520. Any media contact with FAMS must be coordinated through the public affairs offices of both TSA and DHS. With regard to Mr. Terreri's disclosure concerning the release of SSI by FAMS officials, the initial report stated that there are, in certain limited circumstances, "legitimate reasons to justify disclosure of information . . . 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." The report did not discuss Mr. Terreri's specific allegations.

In addition to the substantive response to the OSC referral, the initial report also contained a section entitled "Concerns about the Scope of the Authority for the Office of Special Counsel." This section of the report expressed DHS's significant doubts about whether these issues fall within OSC's authority, because in this case there is no reasonable basis to allege a violation of law, rule, or regulation. Moreover, the allegation of a violation of the Intelligence Reform and Terrorism Prevention Act is invalid, according to DHS, because this statute, and its mandate to the Director, FAMS, to "protect the anonymity of Federal air marshals," states an operational objective rather than imposing a rigid statutory requirement on DHS or TSA officials.

According to the initial report, FAMS operational goals require balancing of operational realities with all other factors, and DHS is continuing to improve its policies and practices to address the concerns raised by Mr. Terreri. Nevertheless, the initial report opines that Congress intentionally and appropriately placed responsibility for such operational initiatives in the discretion of the FAMS Director. OSC personnel are “not perfectly suited to second-guess the policy judgments of the agencies and security personnel with decades of experience who are legally authorized and skilled to make such operational determinations.”

The initial report purported to fulfill any reporting obligations to OSC under 5 U.S.C. § 1213. OSC did not accept the report as having met the statutory requirements for investigation and report under 5 U.S.C. § 1213(d), and notified the agency of the deficiencies.

Briefing by FAMS Director Dana A. Brown

At the request of TSA, the Special Counsel met with FAMS Director, Dana A. Brown, on January 25, 2007, so that Director Brown could explain to OSC personally its programs relating to FAMS. At that meeting, the Director discussed the revisions to the Standards of Dress policy and the Hotel policy. In addition, the Director advised OSC that regulatory changes in the boarding procedures had been proposed. A revised policy on Boarding Procedures was expected to be approved by the Assistant Secretary in early 2007.

Supplemental Report of the Department of Homeland Security

On May 16, 2007, FAMS Acting Director Byers submitted a supplemental report to OSC. The supplemental report addressed the four issues related to FAMS operations.

Standard of Dress

Under the revised FAMS dress policy, as described previously, FAMS 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. FAMS must be able to immediately command the respect of fellow passengers in an emergency, since they are required to respond quickly and forcefully in dangerous circumstances. It is critical, therefore, for them to convey an appropriate appearance to gain passenger trust. The policy strikes a balance between the need for anonymity and the FAMS' law enforcement responsibilities.

Hotel Policy

FAMS also issued a revised policy for hotel reservations, as noted above. The revised policy was issued on September 1, 2006, with a further technical modification on December 7, 2006. FAMS may select and book hotel reservations at any domestic hotel of their choice, provided they remain within budgetary and reporting constraints and report information about the hotel selection in a timely manner. According to the supplemental

report, the policy is intended to combine operational needs and individual choice by permitting FAMS to stay where they want while also preserving FAMS's ability to immediately locate personnel in the event of an emergency. The supplemental report further comments on the long standing recognition of the need to protect the anonymity of FAMS while they are on missions. Travel arrangements have historically been made through a specialized system in which the identity of the agent is not revealed, and there is no need, generally, for a FAM to present credentials during check-in.

Boarding Procedures

As of the date of the supplemental report, TSA was in the final stages of proposing to amend the boarding procedures for FAMS under the Aircraft Operator Standard Security Program (AOSSP) pursuant to 49 C.F.R. Part 1544.105(c). The proposed changes are intended to further protect the anonymity of FAMS at the ticket counter and at the boarding gate. Until this regulatory change is made, FAMS has developed flexible policies to adapt to different airport designs, with the recognition that there is no singular approach that fits every situation for boarding an airplane at every airport. The revisions to the AOSSP are a continuation of FAMS's effort to prevent FAMS' anonymity from being compromised by developing flexible policies for boarding and purchasing tickets.

On November 11, 2007, the agency informed OSC that the proposed boarding regulations are under review by the TSA Director, and are expected to be submitted for publication after review.

Protection of Sensitive Security Information

The supplemental report asserts that FAMS, along with every other office of TSA, has been diligent in preventing the release of Sensitive Security Information (SSI). The report fails to address the specific allegations made in the OSC referral; that sensitive information was shared with various media outlets. The supplemental report does generally address TSA's policies in place for the protection of SSI, including strict regulations governing SSI under 49 C.F.R. Part 1520.

According to the supplemental report, FAMS is vigilant to safeguard SSI from public dissemination, and is especially concerned when SSI containing operational information wrongfully enters the public domain. In these events, FAMS coordinates with TSA's SSI Office regarding the material disclosed and remedial measures. Appropriate disciplinary action will be considered against the employee making the unauthorized disclosure. The SSI Office and FAMS are working together to improve training techniques for identifying SSI and for handling SSI-designated documents correctly.

Finally, the supplemental report states that FAMS aims to provide for a first-rate workforce whose anonymity is preserved and which enhances aviation and transportation security. FAMS pledges to continue to engage with TSA and DHS leadership to ensure that

it 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.

Comments of the Whistleblower

Mr. Terreri submitted extensive comments on the report. He stated that in his view, the responses fail to meet the statutory requirements specified in 5 U.S.C. Section 1213, and do not reasonably address the specific public safety and security concerns he raised in his disclosure to OSC. The point of his disclosure was that those in power at FAMS abused it to such an extent that the safety of the public and individual air marshals was in danger. He believes that the comments of the General Counsel, in the initial report, "reek of the same arrogance within DHS and FAMS that caused these public security problems to arise in the first place."

Mr. Terreri identifies at least five areas in which the reports are statutorily deficient: 1) the summary of information to be investigated is inaccurate and grossly incomplete; 2) there is no evidence that any investigation was conducted, much less a description of the conduct; 3) there is no summary of the evidence resulting from the investigation; 4) there is no accounting for violations of agency SSI laws, rules, and regulations, and there is a general mischaracterization of the FAMS Directors adherence to the requirements of P.L. 108-458; 5) the requirements in 1213(d) are met only in the most limited sense in some areas, and there is an outright failure to meet other requirements. For these reasons, he believes that the Special Counsel should reject the report and require the DHS Secretary to conduct a legitimate investigation.

Mr. Terreri expressed specific concern regarding communications between FAMS and OSC that seemed to provide OSC with reassurance about changes in FAMS policy and procedure that are not reflected in the initial or supplemental reports. He cites public comments made by the Special Counsel, and a meeting held between FAMS Director Brown and the Special Counsel, which he believes was mischaracterized by OSC staff as unrelated to the statutory investigation. He believes that any private communications between OSC and FAMS should in no way exempt FAMS from meeting the statutory reporting requirements. He calls for a full public accounting of the conversations between Director Brown and OSC staff, which led to the Special Counsel's public statement that FAMS had "done a good job."

Mr. Terreri stated that he has also been engaged in discussions with the new FAMS leadership and is hopeful that additional changes will be made to correct all of the specific allegations in his disclosure, and to hold accountable those who created the dangers in the first place. He addressed each of the issues separately.

Agency Release of SSI

It is Mr. Terreri's opinion that neither the initial nor the supplemental reports addressed any of the specific security concerns that he disclosed. Rather, the agency asserts its

intention to discipline individual FAMS for the wrongful disclosure of SSI. He states that OSC should recommend that DHS initiate administrative and/or criminal proceedings to discipline FAMS managers who authorized the SSI disclosures that threatened air safety. In his disclosure to OSC, Mr. Terreri provided specific instances in which FAMS management publicly disclosed SSI. He asserts that these specific instances violate regulations safeguarding SSI. In support of his assertion, he cites a brief of the Justice Department interpreting SSI regulations in a case brought against the Department by a FAM who was terminated. He maintains that the reports provide no evidence that the specific information the FAMS officials disclosed do not constitute SSI or that the Under Secretary authorized its release. Rather, the reports cite strict policies protecting SSI, but ignore the specific allegations.

Ticket Purchase

Mr. Terreri grants that the issue of maintaining anonymity while obtaining a boarding pass has been rectified "to a small degree." Four airlines now allow FAMs to obtain a boarding pass at a kiosk, eliminating the need to present credentials in front of passengers. Until all airlines adopt this policy, Mr. Terreri asserts, FAMs are still easy to discern at ticket counters.

Checkpoint Procedures

Checkpoint bypass procedures are woefully inadequate and easily rectified. FAMs daily traverse the security checkpoint in full view of passengers. FAMs must wait for a TSA supervisor and/or uniformed officer to verify the FAMs' identity, by requiring two forms of ID. Mr. Terreri reports that this is rarely handled discretely. The FAM could easily avoid this compromise to anonymity by traversing the checkpoint at another location with the help of a TSA employee. Mr. Terreri believes that the current checkpoint bypass system is the biggest threat, along with pre-boarding at the gate in front of passengers, to the anonymity and safety of the individual FAM.

Boarding Procedures

According to Mr. Terreri, FAMS response to the boarding procedures issue is factually incorrect and fails to address his disclosure. The layout of the specific area has no bearing whatsoever on the ability of a FAM to maintain anonymity at the gate area. He acknowledges that the situation is slightly better because only one FAM is required to pre-board; the other FAM must pre-board in front of waiting passengers. He points out that FAA granted "trusted agent" status to FAMs, allowing them to enter the aircraft without an escort or crew present. This reasonable accommodation was overridden by FAMS management, according to Mr. Terreri, but this danger to public safety was not specifically addressed in the "investigation."

Hotel Policy

The “hotel policy” in which a third party made hotel reservations, as asserted by FAMS in its report, was not in place for several years as claimed. A short-lived hotel program, instituted by the former Director, was wasteful of taxpayer money and manpower. He also disputes FAMS’ statement that the hotel policy did not generally require that a FAM show identification. The previous hotel policy required that FAMs show identification to receive the special rate and it ensured that dozens of FAMs were in the same hotel. Moreover, he asserts, hotel employees were aware that FAMs were staying in their hotels. He comments that the current FAM Director abolished this policy and FAMs now have a hotel policy that ensures their safety and anonymity.

Mr. Terreri concludes that although FAMS management is taking steps in the right direction, there still remains a significant portion of management that is unconcerned with FAM safety and anonymity, and therefore of public safety. He makes specific recommendations, enumerated in his attached comments, that are intended to help FAMS regain some of the tactical advantage forfeited by the past release of SSI to the media. Corrective action is necessary to attempt to restore a tactical advantage against potential terrorists.

Conclusion and Comments of the Special Counsel

Based on my review of the original disclosures and the agency’s reports, I have determined that although the agency’s reports did not adhere to all of the technical, statutory requirements of Section 1213(d), the findings of the agency head appear reasonable.

The agency’s reports do not reflect that a formal investigation was conducted. Nevertheless, the agency did carefully consider Mr. Terreri’s allegations, and Director Brown met with Mr. Terreri to discuss his concerns personally. In addition, Director Brown sought to understand FAMs concerns and seek solutions by establishing Working Groups on a regular basis. Finally, the agency chose to offer a briefing to OSC, and to provide data evidencing policy changes made before and after the referral of Mr. Terreri’s allegations. All of these steps were helpful and welcome, despite that they did not technically comply with the agency’s statutory obligation to investigate and submit a report.

It is OSC’s mission to present for the President, Congress, and the public, where appropriate, the agency’s investigative findings. These generally reflect that the agency has reasonably and carefully responded to the whistleblower’s disclosures, and that wrongdoing, where substantiated, has been corrected. In this case, the agency’s combined responses, including the briefing, reflect many improvements to ensure the continued anonymity and safety of FAMs and the flying public, and an intention to fully respond to Mr. Terreri’s disclosures. It is true that were I the Director of FAMS, I might manage the agency differently and might provide stronger guidance to airlines with regard to how marshals board flights. But, my duties do not permit me to substitute my management predilections – only to determine the reasonableness of the agency’s response. I cannot conclude that no

reasonable director would have taken the actions the FAMS Director took in response to OSC's referral. For this reason, I conclude that the findings of the agency head appear reasonable.