



**U.S. OFFICE OF SPECIAL COUNSEL**  
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Washington, D.C. 20036-4505

The Special Counsel

January 18, 2018

The Honorable Kirstjen Nielsen  
Secretary  
U.S. Department of Homeland Security  
Office of the Secretary  
245 Murray Lane, No. 410  
Mail Stop 0525  
Washington, D.C. 20528

**VIA ELECTRONIC MAIL**

Re: OSC File No. DI-16-2046

Dear Secretary Nielsen:

Pursuant to my responsibilities as Special Counsel, I am referring to you for investigation a whistleblower disclosure alleging that the Transportation Security Administration (TSA) has failed to implement and enforce preventative measures to secure the flight decks of passenger aircraft. Specifically, Robert J. MacLean, the whistleblower and Federal Air Marshal (FAM), alleges that TSA failed to require aircraft operators to strengthen and protect the flight deck area on airplanes. I have determined that there is a substantial likelihood that the allegations disclose a violation of law, rule, or regulation, as well as a substantial and specific danger to public safety. A report of your investigation, including any remedial actions if warranted, is due to the Office of Special Counsel (OSC) by March 19, 2018.

Specifically, the allegations by Mr. MacLean, who consented to the release of his name, to be investigated include:

- TSA failed to require aircraft operators to strengthen and implement flight deck doors that open outward and away from the flight deck; and
- TSA failed to require aircraft operators to install secondary barriers, which function as a second layer of protection between the passenger area and the flight deck.

**I. Flight Deck Doors and Locks**

The Aviation Act charges TSA with developing policies, strategies, and plans for dealing with threats to transportation security. It also instructs TSA to work in conjunction with the Federal Aviation Administration (FAA) concerning any actions or

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activities affecting aviation safety or air carrier operations. *See* Aviation Act, 49 U.S.C. §§ 104(c) and 114(f)(3), (13). TSA is obligated to ensure that aircraft operators have adequate measures to safeguard flight decks (also known as cockpits) and restrict access to the flight deck. *See* 49 C.F.R. §§1544, 1544.237.

According to Mr. MacLean, TSA has failed to work with FAA to accomplish the goals in the Aviation Act. Specifically, Mr. MacLean asserts that all flight decks with inward opening doors remain highly vulnerable to attack. He explained that with an inward opening door, an attacker could knock back a standing pilot into the flight deck. The force from the push could cause the pilot to fall onto the aircraft's steering and thrust instruments, which could result in a catastrophic event. Even if the pilot were to recover from the door striking him, the attacker would likely have already breached the area by entering the flight deck. An inward opening door is ineffective when hit with moderate force. On the other hand, with an outward opening door, the pilot would only need to open the door a few inches to determine whether it was safe to proceed.

In addition, Mr. MacLean alleges that TSA has not required aircraft operators to strengthen flight deck doors and their accompanying locks, creating a potential security threat. In explaining the security threat, Mr. MacLean states that it would be easy for a potential hijacker to break down the one-inch, single latch-locked, inward opening flight deck door, which is common on many passenger aircraft, because only a thin piece of metal is in place to prevent entry.<sup>1</sup> However, it would be more effective to secure the flight deck with a steel jam surrounding the outward-opening door along with a latch and deadbolts.

Mr. MacLean asserts that the flaws highlighted above are the same deficiencies that the hijackers exploited on September 11, 2001. Between November 2015 and February 2016, Mr. MacLean observed, while on duty, that corrective measures had not occurred on airplanes used by several airlines, including American, Delta, Frontier, JetBlue, Northwest, and US Airways. He also observed approximately one aircraft per week with inward opening doors and one-inch single latches. These aircraft were single-aisle Airbus models A319, A320, and A321, and the wide-body Boeing model B767.

Mr. MacLean reported these concerns on December 4, 2015, when he filed a report with TSA's Mission Operations Center through Supervisor [REDACTED]. In that report, Mr. MacLean summarized his observations and concerns.<sup>2</sup> TSA has not rectified these concerns.

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<sup>1</sup> Mr. MacLean states that while some inward opening doors have dual-tandem spring-loaded latches, these types of latches are also easily breached.

<sup>2</sup> [REDACTED] of TSA's Law Enforcement Liaison Section, Air Carrier Unit, briefly responded to Mr. MacLean in an email dated December 7, 2015. In that email, [REDACTED] claims that he addressed Mr. MacLean's concerns with his FAA contact. [REDACTED] asserts that outward opening doors are not used

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## II. Secondary Barriers in Flight Deck Area

Mr. MacLean also asserts TSA has failed to require aircraft operators to implement Installed Physical Secondary Barrier systems—a secondary barrier is a safety measure that provides an additional layer of protection between the passenger area and the flight deck. Currently, in most planes, there is only one (inward opening) door between the two areas, which leaves the flight deck susceptible to a potential attack.

In 2011, the Radio Technical Commission for Aeronautics issued a study entitled, “Aircraft Secondary Barriers and Alternative Flight Deck Security Procedures” (RTCA study).<sup>3</sup> See Enclosure A, which is a redacted version of the RTCA study. The RTCA study explains that since September 11, 2001, Congress, the Department of Transportation, FAA, and the International Civil Aviation Organization have issued a series of new standards to protect flight decks from intrusion and penetration by small-arms fire. See 14 C.F.R. § 25.795. According to the RTCA study, these new standards resulted in the installation of reinforced flight deck doors on some U.S. and international passenger-carrying air carriers.<sup>4</sup> These doors provide protection when they remain closed and locked throughout a flight.

Often, the flight deck door cannot remain closed for the entire duration of a trip. At times, the aircraft staff must open the flight deck door so that crewmembers can access lavatory facilities, transfer meals, and switch crew positions on longer flights (door transitions). For some door transitions, a flight attendant will switch places with one of the pilots so that there are always two people in the flight deck in the event of an emergency. The additional time needed to make this change significantly increases the window of opportunity for an attacker to breach the flight deck. It is during these door transitions that the flight deck becomes vulnerable. The absence of an additional barrier violates 14 C.F.R. § 121.584(a)(1), which states that no one may unlock the flight deck door unless the area outside the flight deck door is secure. The RTCA study states that installing a secondary barrier is a reliable method for ensuring the flight deck remains secure during door transitions. See Enclosure A.<sup>5</sup>

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because it would cause structural and safety issues. Mr. MacLean maintains that [REDACTED] is incorrect and his position is refuted by many commercial passenger aircraft pilots.

<sup>3</sup> RTCA is a not-for-profit corporation formed to advance the art and science of aviation and aviation electronic systems for the benefit of the public. The organization functions as a Federal Advisory Committee and develops consensus-based recommendations on contemporary aviation issues. See Enclosure A, *Foreword*.

<sup>4</sup> Based upon Mr. MacLean’s observations as of February 2016, it is apparent that a number of flight deck doors on passenger aircraft have not been modified in accordance with the standards identified in the RTCA study.

<sup>5</sup> On June 26, 2017, FAA’s Office of Inspector General (OIG) released an audit report entitled “*FAA Has Taken Steps To Identify Flight Deck Vulnerabilities But Needs to Enhance Its Mitigation Efforts.*” In that report, OIG relied upon the RTCA study and concluded that FAA is not effectively mitigating all existing

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On June 9, 2015, Mr. MacLean testified before Congress, and participated in briefings before the Senate Committee on Homeland Security and Governmental Affairs about the benefit of secondary barriers. On November 19, 2015, Mr. MacLean reported his concerns to senior TSA officials. However, Mr. MacLean has not observed any changes in the operations of aircraft, nor has he observed the implementation of secondary barriers as recommended.

I have determined that there is a substantial likelihood that the allegations disclose a violation of law, rule, or regulation, as well as a substantial and specific danger to public safety.

As discussed above, your investigative report, including any remedial actions, is due to OSC by March 19, 2018.

The appendix contains important legal requirements and details for the investigation and report. My staff is available to discuss the questions I am submitting for investigation, clarify the requirements, or consider any request for an extension of the report deadline. The primary point of contact for this case is [REDACTED] Chief, Retaliation and Disclosure Unit. You may reach [REDACTED] or [REDACTED]

Sincerely,



Henry J. Kerner  
Special Counsel

Enclosures

cc: Mr. John V. Kelly  
Acting Inspector General  
U.S. Department of Homeland Security

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flight deck vulnerabilities and may be missing ways to enhance safety and security through closer collaboration with TSA. In particular, it recommended that aircraft operators be required to “conduct a Safety Risk Assessment ... of their current secondary barrier methods using all information from the 2011 RTCA report on secondary barriers ...” See Enclosure B, which is a redacted version of the June 26, 2017 OIG report.

## Appendix

### Investigation Required Under 5 U.S.C. § 1213(c)

#### GENERAL AUTHORITY AND REQUIREMENTS

The U.S. Office of Special Counsel (OSC) receives disclosures of information from federal employees, former employees, and applicants who reasonably believe the information evidences:

- a violation of any 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.

*See* 5 U.S.C. § 1213(a). If the Special Counsel determines by a substantial likelihood that the information evidences conduct within a federal agency in one of these categories, she must transmit the information to the head of the appropriate agency. *See* 5 U.S.C. § 1213(c)(1).

The agency, in turn, is required to investigate the information and any related matters transmitted by the Special Counsel. 5 U.S.C. § 1213(c)(1)(A). Where the whistleblower has consented to OSC's release of their name, OSC requires that the agency interview the whistleblower as part of its investigation. The agency head must submit a written report to the Special Counsel within sixty days, unless the Special Counsel agrees in writing to a longer period of time. 5 U.S.C. §§ 1213(c)(1)(B), (e)(1).

#### AGENCY REPORT

The report must be signed by the head of the agency and include the elements outlined in § 1213(d). The report must also provide findings on the issues submitted for investigation. *See* 5 U.S.C. § 1213(c)(1)(B). The agency head may delegate their authority to review and sign the report, but the delegation must be specifically stated and must also grant the authority to take any necessary action resulting from the investigation.

Please do not include personally identifiable information in the report. OSC does not consider individuals' names or titles to be personally identifiable information for purposes of the report. Please do include information about actual or projected financial savings as a consequence of the investigation, as well as any policy changes related to the financial savings.

#### SUBSEQUENT ACTION BY THE SPECIAL COUNSEL

Upon receipt, the Special Counsel must review the report, determine whether it contains all of the information delineated in § 1213(d), and determine whether the agency head's findings appear reasonable. 5 U.S.C. § 1213(e)(2). In her reasonableness determination, she will consider factors such as the report's exhaustiveness, internal consistency, and credibility. She will then send to the appropriate congressional oversight committees and the President:

- the agency's report;
- the whistleblower's comments, if any, generally after the whistleblower is afforded an opportunity to read the report; and
- her own comments or recommendations, including her determination on whether the findings appear reasonable.

5 U.S.C. §§ 1213(e)(1), (e)(3). In general, OSC will make publicly available the report, the whistleblower's comments, and the Special Counsel's comments or recommendations. *See* 5 U.S.C. § 1219(a). If the agency fails to submit the report in the afforded time period, the Special Counsel must inform the congressional oversight committees and the President that the agency head failed to file the report as required by law. 5 U.S.C. § 1213(e)(4).

#### EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. *See* 5 U.S.C. §§ 1213(f), 1219(a)(1).

#### RETALIATION AGAINST WHISTLEBLOWERS

OSC is authorized to investigate and prosecute federal employees who retaliate against others for whistleblowing or engaging in protected activity. *See* 5 U.S.C. §§ 1214(a)(1)(A), 1215(a)(1), 2302(b)(8), 2302(b)(9). The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.