



U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20036-4505

The Special Counsel

December 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, DC 20528

Re: OSC File Nos. DI-18-5205 and DI-19-0778

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) is failing to adequately protect aviation employees and the public from a serious and growing threat to aviation security and that TSA has failed to address a significant vulnerability in airport security. I have determined that there is a substantial likelihood that the allegations disclose gross mismanagement, as well as a substantial and specific danger to public health and safety. A report of your investigation, including any remedial actions if warranted, is due to the Office of Special Counsel (OSC) by February 18, 2019.

Robert J. MacLean, the whistleblower who consented to the release of his name, a Federal Air Marshal (FAM), alleges that TSA is failing to secure aircraft from terrorist attacks using synthetic opioids, such as fentanyl or carfentanil, to incapacitate flight crews and hijack airplanes. In addition, the whistleblower alleges that TSA's policy of exempting religious food trucks from airport inspections also represents a threat to aviation security, and TSA has failed to adequately address these issues.

Specifically, the allegations by Mr. MacLean, to be investigated include:

- TSA's failure to properly protect flight crews and the public from potential opioid attacks;
- TSA's failure to prevent significant security breaches because of its policy exempting religious food trucks from airport inspections.

The Honorable Kirstjen Nielsen
December 18, 2018
Page 2 of 4

I. Opioids and Security Issues

Opioids are a class of drugs that act in the nervous system to produce feelings of pleasure and pain relief.¹ Some opioids are legally prescribed by healthcare providers to manage severe and chronic pain.² The whistleblower contends that opioid drugs are a growing threat because terrorists may weaponize opioids by using them in a powder or spray form, making the drugs airborne. Opioids, such as fentanyl and other analogs, pose a threat if ingested, inhaled through the nose or mouth, or even absorbed through direct skin contact. Exposure can result in grave health complications and potentially death.³ Anyone who inhales an opioid, such as fentanyl or carfentanil, will likely become incapacitated, unless he or she receives immediate treatment to counter the effects. The U.S. Department of Justice, Drug Enforcement Administration (DEA) has issued a warning regarding the significant threat of fentanyl to law enforcement personnel and others who may be exposed to it and other related substances.⁴

In June 2018, TSA announced that it would screen powder-like substances greater than 12oz/350ml, about the size of a soda can, from carry-on luggage⁵. However, the DEA asserts that 2 - 3 milligrams of the synthetic opioid fentanyl, the equivalent of about 5 - 7 grains of salt, can cause death.⁶ And carfentanil is approximately 100 times more potent than fentanyl.⁷ The whistleblower alleges that, as a result, TSA's screening approach probably will not be effective in preventing opioid threats. He alleges that his colleagues have informed him that neither the screening machines nor trained canines are able to detect opioid substances in such small quantities.

From February through September 2018, the whistleblower reported his concerns to senior TSA officials. However, the whistleblower has not observed any changes in TSA protocol in response to the growing opioid issue. In April 2018, the whistleblower also arranged for a representative from the Virginia Department of Behavioral Health

¹ See <https://ghr.nlm.nih.gov/condition/opioid-addiction>, U.S. Department of Health and Human Services, U.S. National Library of Science.

² Commonly prescribed opioids include oxycodone, fentanyl, buprenorphine, methadone, oxymorphone, hydrocodone, codeine, and morphine. Some other opioids, such as heroin, are illegal drugs of abuse. *Id.*

³ *Id.*

⁴ See Fentanyl, A Briefing Guide for First Responders, U.S. Department of Justice, Drug Enforcement Administration, pp. 2, 16; <https://www.dea.gov/press-releases/2016/09/22/dea-issues-carfentanil-warning-police-and-public>.

⁵ See <https://twitter.com/FoxNews/status/1009540253311471622?s=19>

⁶ See Fentanyl, A Briefing Guide for First Responders, U.S. Department of Justice, Drug Enforcement Administration, pp. 15.

⁷ See <https://www.dea.gov/press-releases/2016/09/22/dea-issues-carfentanil-warning-police-and-public>

The Honorable Kirstjen Nielsen
December 18, 2018
Page 3 of 4

and Developmental Services to provide free training to help certify employees in administering Narcan doses in the event of opioid exposure. However, the training did not take place.

II. Religious Food Trucks and Security Issues

The whistleblower disclosed that TSA's decision to exempt religious food trucks from inspections by local airport and law enforcement officers is a significant threat to aviation safety. This exemption presents a security lapse in secured airport operations areas (AOA). Because it is impossible to screen all cargo entering AOAs, TSA officers conduct surprise "open and look" searches of employees, their vehicles, and their belongings. This practice helps keep airport employees alert to wrongdoing and reinforces the requirement that everyone is required to follow security rules. Additional security checks are conducted through a program called Operation Guardian, a multi-agency law enforcement program, where officers inspect passenger vehicles and cargo trucks that enter AOA security gates and other areas.

According to the whistleblower, religious food trucks are exempted from these "open and look" searches, which means that officers cannot search trucks carrying religious food to make sure narcotics, stowaways, undocumented immigrants, terrorists, firearms, improvised explosives devices, or other security risks do not get on commercial aircraft. The whistleblower states that since September 26, 2017, he has reported these security issues to TSA's National Law Enforcement/Federal Air Marshall Service Advisory Council, the Washington Field Office (WFO) Field Office Focus Group, the WFO Training Division, the WFO Office of Chief Counsel Attorney, WFO senior leadership and agency senior leadership. The whistleblower asserts that he has received no response to his concerns.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses gross mismanagement. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. As previously noted, the Department of Homeland Security must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the Appendix, which can also be accessed online at

The Honorable Kirstjen Nielsen
December 18, 2018
Page 4 of 4

<https://osc.gov/Pages/Resources-PublicFiles.aspx>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact [REDACTED] Chief of the Retaliation and Disclosure Unit, at [REDACTED] for assistance. I am also available for any questions you may have.

As discussed above, your investigative report, including any remedial actions, if warranted, is due to OSC by February 18, 2019.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosure

cc: Mr. John V. Kelly, Senior Official Performing the Duties of the Inspector General

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

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).