



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

July 29, 2022

The Honorable Peter Buttigieg
Secretary
U.S. Department of Transportation
Office of the Secretary
1200 New Jersey Ave, S.E.
Washington, D.C. 20590

Re: OSC File No. DI-18-5205

Dear Secretary Buttigieg:

Pursuant to my responsibilities as Special Counsel, I am referring to you for investigation a whistleblower disclosure alleging that the Federal Aviation Administration (FAA) is failing to adequately protect aviation employees and the public from a serious and growing threat to aviation security.¹ 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 September 27, 2022.

Robert J. MacLean, the whistleblower and a former Federal Air Marshal, who consented to the release of his name, alleges that FAA is failing to secure aircraft from terrorist attacks using synthetic opioids, such as fentanyl or carfentanil, to incapacitate flight crews and hijack airplanes. The allegation to be investigated is as follows:

- FAA has failed to take reasonable steps to protect flight crews and the public from potential opioid attacks and related medical emergencies.

The FAA is responsible for promulgating regulations and setting minimum safety standards for procedures that are deemed necessary for aviation safety or national security.² The U.S. Department of Homeland Security, Transportation Security Administration (TSA), which is responsible for screening passengers prior to boarding, is tasked with working in conjunction with FAA concerning any actions or activities affecting aviation safety or air carrier operations.³

¹ I previously referred the whistleblower's allegations to the U.S. Department of Homeland Security on December 18, 2018. Subsequently, I determined that the U.S. Department of Transportation is the appropriate agency to address aspects of the broader allegation.

² See 49 U.S.C. §§ 106(g) and 44701(a)(5).

³ See Aviation Act, 49 U.S.C. § 114(e), (f)(3), (13).

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The Aviation Act charges “[t]he Administrator of FAA [with] promot[ing] safe flight of civil aircraft in air commerce by prescribing. . . regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.”⁴ Moreover, FAA is responsible for regulations pertaining to equipment required to be carried in medical kits of aircraft operated by air carriers and the training of flight attendants in the use of such equipment.⁵

Opioids are a class of drugs that act in the nervous system.⁶ 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.⁷ 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.⁸

In June 2018, TSA announced that it would screen powder-like substances greater than 12oz/350ml, about the size of a soda can, in carry-on luggage.⁹ But the DEA asserts that even two or three milligrams of the synthetic opioid fentanyl—equivalent to about five grains of salt—can cause death.¹⁰ Notably, carfentanil is approximately 100 times more potent than fentanyl.¹¹ The whistleblower alleges that TSA's screening approach will likely be ineffective at preventing opioid deaths. The whistleblower alleges that neither the screening machines nor trained canines can detect opioid substances in such small quantities. Because TSA screening is inadequate, the whistleblower asserts that FAA should be taking measures to address the public health risks associated with such an attack. For example, FAA could

⁴ See 49 U.S.C. § 44701(a)(5).

⁵ See Aviation Medical Assistance Act of 1998, Act April 24, 1998, P. L. 105-170, 112 Stat. 47; 49 U.S.C. § 44701; 14 C.F.R. § 121.803; 14 C.F.R. Part 121 Appendix A.

⁶ See <https://ghr.nlm.nih.gov/condition/opioid-addiction>, U.S. Department of Health and Human Services, U.S. National Library of Science.

⁷ *Id.*

⁸ 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>.

⁹ See <https://twitter.com/FoxNews/status/1009540253311471622?s=19>.

¹⁰ See Fentanyl, A Briefing Guide for First Responders, U.S. Department of Justice, Drug Enforcement Administration, p. 15.

¹¹ <https://www.dea.gov/press-releases/2016/09/22/dea-issues-carfentanil-warning-police-and-public>.

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mandate the inclusion of opioid antagonists, such as naloxone—which reverse the effects of opioids—in the emergency medical kits that are onboard commercial airplanes.¹²

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, as well as a substantial and specific danger to public health and safety. Please note that the specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency 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 agency 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 <https://osc.gov/Services/Pages/DU-Resources.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 (202) 804-7089 for assistance. I am also available for any questions you may have.

As discussed above, your investigative report, including any remedial actions, is due to OSC by September 27, 2022.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosures

cc: Eric J. Soskin, Inspector General, U.S. Department of Transportation

¹² See, e.g., <https://www.cdc.gov/opioids/overdoseprevention/reverse-od.html>.

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/PublicFiles>. 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).