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To Be Argued By:
DOUGLAS N. LETTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 03-40783(L), 04-1131(CON), 04-1796(CON)

ARSHAD CHOWDHURY,

Petitioner,

—v.—

TRANSPORTATION SECURITY ADMINISTRATION, DEPARTMENT
OF HOMELAND SECURITY, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW FROM THE
TRANSPORTATION SECURITY ADMINISTRATION

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ARSHAD CHOWDHURY,

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- v. -

TRANSPORTATION SECURITY ADMINISTRATION,
DEPARTMENT OF HOMELAND SECURITY,
AND UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR RESPONDENTS

Preliminary Statement

Petitioner Arshad Chowdhury ("Chowdhury") seeks access to numerous documents relating to aviation security policies and procedures in order to help him in litigating his separate private lawsuit against Northwest Airlines pending in federal court in the Northern District of California. In three Final Orders, the Transportation Security Administration ("TSA" or "agency") determined that, because of the overwhelming and obvious public interest in protecting the traveling public, the materials sought by Chowdhury constitute "sensitive security information" ("SSI") that cannot be disclosed to a private civil

plaintiff or his counsel, even pursuant to a protective order.
(JA 41-108, 251-359, 401-612).*

In these consolidated petitions for review, Chowdhury challenges TSA's decisions and asks this Court to order the agency to disclose to him this sensitive aviation security material for use in his lawsuit against Northwest Airlines. But Congress has expressly granted TSA the authority to determine when disclosures of information about aviation security would be detrimental to public safety, and has made clear by statute that such materials are to be protected from disclosure. See 49 U.S.C. § 114(s)(1)(C). Moreover, the district court in Chowdhury's action has examined the disputed material ex parte and in camera, and has made clear that it will not assist Chowdhury in proving his case against the airline.

Thus, in refusing to disclose the information Chowdhury seeks here, TSA acted fully within its authority. Chowdhury's request for this Court to override the determinations made by the expert agency entrusted by Congress with the grave responsibility to protect transportation security should be denied.

* References to "JA ___" are to pages of the Joint Appendix filed by Chowdhury.

Jurisdictional Statement

This Court has jurisdiction over Chowdhury's petitions for review. See 49 U.S.C. § 46110(a) (stating that "a person disclosing a substantial interest in an order issued . . . under . . . [49 U.S.C. § 114(s)] may apply for review of the order by filing a petition for review" in an appropriate court of appeals); Pub. L. No. 108-176, § 228, 117 Stat. 2490, 2532 (2003) (amending Section 46110 to provide explicitly that the exclusive jurisdiction of the court of appeals extends to administrative determinations made pursuant to Section 114(s)). Chowdhury resides and works in New York City, Petitioner's Opening Brief ("Br.") at 1, and thus properly filed his petitions for review in this Court. See 49 U.S.C. § 46110(a) (limiting jurisdiction over a petition for review to "the United States Court of Appeals for the District of Columbia Circuit or . . . the court of appeals of the United States for the circuit in which the person resides or has its principal place of business").

Issues Presented for Review

1. Whether TSA, the agency charged by Congress with protecting transportation security by prohibiting disclosure of SSI, may bar disclosure of SSI to civil litigants and their attorneys, where TSA has determined that such disclosure would present an unacceptable risk to transportation security.

2. Whether TSA's expert judgment that disclosure of SSI in civil litigation would be detrimental to the security of transportation is committed to agency discretion by law, or, in any event, whether TSA's discretionary determination should be upheld because it is amply supported by the record and entitled to deference.

3. Whether the Final Orders barring Chowdhury and his counsel from obtaining SSI in the context of his private civil litigation deprived him of a constitutionally protected property interest without due process of law.

Statement of Facts

A. Sensitive Security Information (SSI)

1. TSA's Statutory Authority to Regulate SSI

Since 1974, Congress has limited disclosure of "any information obtained or developed in the conduct of security or research and development activities, . . . if . . . disclosure . . . would be detrimental to the safety of persons traveling in air transportation.'" Public Citizen, Inc. v. FAA, 988 F.2d 186, 193 (D.C. Cir. 1993) (quoting 49 U.S.C. § 1357(d)(2)(C), now codified at 49 U.S.C. §§ 114(s)(1)(C), 40119(b)(1)(C)) (alterations in original). For many years, the Federal Aviation Administration ("FAA") enforced this statutory directive. See id.

Following the tragic events of September 11, 2001, Congress sought to improve the security of the nation's civil aviation system. The legislature enacted the Aviation and Transportation Security Act ("ATSA"), which created TSA and charged it with oversight of the nation's civil aviation security system. See Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-604 (2001). Congress subsequently transferred TSA to the newly created U.S. Department of Homeland Security, whose primary mission is to "prevent terrorist attacks within the United States; . . . [and] reduce the vulnerability of the United States to terrorism." Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(b)(1), 116 Stat. 2135, 2142 (2002).

Congress directed TSA, as it had previously instructed the FAA, to prohibit disclosure of sensitive information regarding transportation security. Specifically, Congress required the Under Secretary of Transportation for Security, now the Assistant Secretary of Homeland Security for TSA, to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out [civil aviation] security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C).

2. The SSI Regulatory Scheme

In accordance with its statutory mandate, TSA issued regulations prohibiting the "disclosure of information developed

in the conduct of security or research and development activities under 49 U.S.C. § 40119 [now codified at 49 U.S.C. § 114(s)] if, in the opinion of the Under Secretary [now the Assistant Secretary], the disclosure of such information would . . . [b]e detrimental to the safety of persons traveling in transportation." 49 C.F.R. § 1520.3(b)(3) (2003).*

a. Regulations Pertaining to SSI

The TSA regulations pertaining to the disclosure of Sensitive Security Information provide that SSI constitutes security-related material, which, although not classified, cannot be distributed to the public. See 49 C.F.R. § 1520.3(a). This material includes, among other things, (1) selection criteria used in any security screening process, including for persons, baggage, or cargo; (2) information that may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack; and (3) specific details of aviation security measures. Id. § 1520.7(c), (h), (j).

In addition, SSI includes "[a]ny other information, the disclosure of which TSA has prohibited under the criteria of 49 U.S.C. § 40119 [now codified at 49 U.S.C. § 114(s)]." 49 C.F.R. § 1520.7(k). Thus, information that is not specifically

* TSA amended its SSI regulations in May 2004. See 69 Fed. Reg. 28066 (May 18, 2004). Because the prior regulations were in effect when TSA issued the Final Orders, all references in this brief to the regulations are to the prior regulations, unless otherwise noted.

identified in the regulations may nevertheless be considered SSI if, in TSA's opinion, its disclosure would be detrimental to transportation safety or security. 49 C.F.R. §§ 1520.3(b)(3), 1520.7(k).

Accordingly, and of particular significance to this case, the statutory and regulatory scheme provides TSA with the authority to determine whether particular material is SSI and, if so, whether and to what extent it can be disclosed. See 49 U.S.C. § 114(s)(1)(C); 49 C.F.R. § 1520.3(b)(3). Pursuant to this authority, TSA restricts disclosure of SSI to persons "with a need to know." 49 C.F.R. § 1520.5(a). TSA has determined that individuals with a "need to know" include airline personnel who must carry out government-approved security functions. Id. § 1520.5(b)(1). The regulations also allow attorneys who represent air carriers and other regulated entities to obtain access to SSI, when the information is needed for judicial or administrative proceedings regarding security-related requirements. Id. § 1520.5(b)(5).

Individuals and entities with access to SSI are not permitted to disclose the information to persons without an identified "need to know," absent authorization from TSA. 49 C.F.R. § 1520.5(a). Thus, a regulated individual or entity must refer requests for access to SSI to TSA. Id. Violation of these non-disclosure requirements "is grounds for a civil penalty and other enforcement or corrective action." Id. § 1520.5(d).

b. Declaration of Former Deputy Administrator McHale

Stephen J. McHale, former Deputy Administrator of TSA (JA 33-37), submitted a declaration in the Northern District of California litigation explaining why TSA carefully safeguards SSI. McHale stated that "[t]he increased level of terrorism in the United States in recent years has underscored the need for heightened security measures at airports." (JA 35). As part of the effort to enhance civil aviation security, TSA has determined that it must limit the dissemination of SSI, which, if disclosed, can reveal "systemic vulnerabilit[ies]" in transportation systems or facilities that "make it more likely for terrorists to succeed in their attacks[.]" (Id.) Thus, if SSI is "compromised," it can be "more difficult" for the Government to prevent terrorist attacks. (Id.)

In light of these concerns, TSA "has determined that it is in the best interests of the traveling public at this time to restrict, to the greatest extent possible, the dissemination of any SSI that could be used to thwart security countermeasures by those intent upon committing criminal acts against civil transportation." (JA 36). For this reason, TSA generally restricts access to SSI to persons with an "operational need to know, as set forth in TSA regulations." (JA 35).

In accordance with its strict policy against disclosure, TSA has determined that it should not release SSI to civil litigants or their counsel. As McHale observed, prior to the September 11

attacks, the FAA had occasionally "made limited accommodations" for civil litigants, permitting "air carrier counsel to provide SSI to opposing counsel . . . pursuant to strictly controlled protective orders." (JA 36).

However, in the aftermath of September 11, TSA decided that it should "re-evaluat[e] its entire transportation security policy, including its policy regarding SSI." (Id.) The agency learned from intelligence reports that al-Qaeda operatives appear to have used "media sources and other publicly available research" to "obtain[] access to information concerning security vulnerabilities at American airports." (Id.) TSA does not purport to know "what part such information may have played in the decision to use U.S. civil airliners in the September 11th attacks." (Id.) Nevertheless, the agency "cannot discount the possibility at this time that SSI provided to those outside the operational need-to-know category could be exploited to further terrorist objectives and put the traveling public at greater risk." (Id.)

TSA has thus decided that the "present and continuing threat of terrorist attacks against aviation interests requires that the number of persons having access to SSI be significantly decreased, rather than increased." (JA 37). Thus, since September 11, 2001, TSA has not granted access to SSI to any "civil litigant who does not otherwise have an operational need to know . . . this sensitive information." (Id. ("[N]on-

disclosure of SSI must be the presumption in civil litigation.")).

B. TSA's Issuance of the Final Orders in Connection with Chowdhury v. Northwest Airlines

1. Chowdhury's Lawsuit

In June 2002, Chowdhury filed suit against Northwest Airlines, Inc. and Northwest Airlines Corporation (collectively, "Northwest") in the United States District Court for the Northern District of California, alleging unlawful discrimination under 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, as well as various state law claims. (JA 791, 817-31). Chowdhury alleged that he was unlawfully prohibited from boarding a Northwest Airlines flight from San Francisco to Detroit on October 23, 2001, based on a "phonetic similarity" between his name and a name on a list of suspected terrorists, despite allegedly having been cleared to fly by the Federal Bureau of Investigation ("FBI") and local law enforcement. (JA 818, 820-23). Chowdhury alleged that he was subsequently given a ticket for a US Airways flight that left fifteen minutes after the Northwest flight, and he boarded the US Airways flight and returned home without further incident. (JA 823).

Chowdhury further alleged that Northwest placed a "security block" on his name for approximately one month, which assertedly caused his name to be included in a database that included known terrorists. (JA 818-19, 824). According to his amended

complaint, a US Airways representative was able to remove the security block from Chowdhury's name after receiving authorization from the FBI. (JA 824).

2. The TSA Final Orders

During the course of discovery in the suit against Northwest, Chowdhury sought access to information related to the airline's security practices and procedures, principally information concerning name lists or "watch lists." Northwest asserted that much of the requested material was SSI, as defined by statute and regulation, which the airline therefore could not legally disclose absent authorization from TSA. As required by TSA's regulations, 49 C.F.R. § 1520.5(a), Northwest forwarded those documents to TSA for review before producing them to Chowdhury. (JA 109-11, 168-69, 221-22, 360-63, 613-14).

TSA conducted a careful, line-by-line review of the submitted materials, redacting only the information that constituted SSI, and authorized Northwest to release all remaining information to Chowdhury. (JA 170-71, 224-25, 615-16). At the request of Chowdhury's counsel (JA 236-39), TSA also conducted a second review of certain pages, and released limited additional information, where security concerns permitted. (JA 241-50).

In a series of three Final Orders, TSA confirmed that the redacted documents, or portions of documents, constituted SSI within the meaning of TSA's regulations, and explained the basis

for the agency's withholdings. (JA 41-108, 251-359, 401-612). The redacted material included, among other things, information regarding counter-terrorism security measures, specific threat information, and information concerning systemic vulnerabilities of the aviation system. (JA 42-44, 252-55, 402-08).

Chowdhury then filed timely petitions for review of the Final Orders in this Court, pursuant to 49 U.S.C. § 46110. (JA 7, 14, 21).

3. Chowdhury's Motions to Compel Production of SSI and for a Protective Order

Chowdhury also filed two motions in the Northern California district court seeking to compel disclosure of the documents, or portions of documents, redacted by TSA, and urging that the materials be given to his counsel under a protective order. (JA 833-51, 892-930). Pursuant to 28 U.S.C. § 517, the Government filed three statements of interest in that court opposing Chowdhury's request for access to SSI. (JA 852-65, 866-75, 1107-25). We asserted primarily that the district court lacked jurisdiction to review the TSA Final Orders or to order the disclosure of SSI, even pursuant to a protective order. (JA 859-64, 870-71, 1111). In the event the district court reached the merits of Chowdhury's discovery requests, we pointed out that 49 U.S.C. § 114(s)(1)(C) expressly directs TSA to "prohibit[] the disclosure of [information relating to civil aviation security] if the Under Secretary [now the Assistant Secretary] decides that

disclosing the information would . . . be detrimental to the security of transportation." We argued that this clear Congressional mandate creates a lawful statutory privilege barring disclosure of SSI in litigation. (JA 1112-17). In addition, at the district court's request, we filed under seal for ex parte, in camera review the unredacted materials containing SSI. (JA 764-69, 777-87, 866-75).*

4. The District Court's Denial of Chowdhury's Motion for a Protective Order

On April 2, 2004, the district court issued a memorandum and order denying Chowdhury's motion for a protective order. (JA 1161-73). The court concluded that Section 314(s) clearly provided TSA with the authority to prohibit disclosure of SSI in civil litigation. (JA 1164-70). The district court also considered and rejected the constitutional due process arguments made by Chowdhury against TSA's determinations. (JA 1171-73). The district court further noted that, based on its in camera review of the documents withheld in whole or in part by TSA, "nothing in those documents supports plaintiff's claim" against Northwest. (JA 1173).

* The Government submitted these materials for ex parte, in camera review solely for the district court's use in making relevancy determinations and substantive rulings on the merits of Chowdhury's claims, if appropriate, and without prejudice to our position that the district court was without jurisdiction to examine the merits of TSA's SSI determinations or to order disclosure of SSI to any party. (JA 867).

The district court nevertheless certified its order for interlocutory appeal to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). (JA 1174-77). Chowdhury filed both a petition for permission to appeal pursuant to Section 1292(b) and a notice of appeal pursuant to 28 U.S.C. § 1291. (JA 810-16). After moving to intervene in the Ninth Circuit proceedings, we have moved to dismiss Chowdhury's direct appeal, and have also opposed Chowdhury's Section 1292(b) petition on the ground that this Court has exclusive jurisdiction under 49 U.S.C. § 46110 to review TSA's Final Orders prohibiting disclosure of SSI to Chowdhury or his counsel in the district court litigation. (JA 811, 816).

Summary of Argument

As we show in our Argument, Chowdhury's petitions for review should be denied.

First, Chowdhury's contention that Congress did not authorize TSA to control the disclosure of SSI sought for use in private civil litigation is without merit. The plain language of Section 114(s)(1)(C) not only grants TSA the authority to prohibit disclosure where, as in the civil litigation context, TSA determines that disclosure of SSI would be detrimental, it mandates that TSA prohibit such disclosure. Even if there were some ambiguity in the statutory language, the agency's determinations on this point plainly are based on a permissible

construction of Section 114(s)(1)(C), and are therefore entitled to substantial deference from this Court.

Second, to the extent Chowdhury claims that TSA was wrong to conclude that disclosure of SSI in civil litigation would be detrimental to the security of transportation, that determination has been expressly committed by Congress to TSA's expert discretionary judgment, and therefore is not reviewable by this Court. In any event, TSA's expert determination as to the effect of disclosure on transportation security is amply supported by the record and is entitled to the utmost deference.

Third, Chowdhury's due process challenge also fails. Chowdhury has no property interest in obtaining sensitive aviation security information for his use in private civil litigation, as such information is protected by a statutory privilege. Nor has Chowdhury demonstrated that his lack of access to SSI has materially impaired his ability to prosecute his cause of action against Northwest. Even if this case did implicate a constitutionally protected property interest, in light of the compelling national security interests at stake, Chowdhury's comparatively weak interest in obtaining sensitive aviation security information in his private civil litigation, and the minimal value of additional procedures, Chowdhury has received all of the process that was due.

ARGUMENT

POINT I

THIS COURT SHOULD UPHOLD TSA'S PROHIBITION ON THE DISCLOSURE OF SSI TO CIVIL LITIGANTS AND THEIR ATTORNEYS

A. The Regulatory Prohibition on Disclosure of SSI in Civil Litigation Is Mandated By Section 114(s)(1)(C)

Section 114(s)(1)(C) plainly authorizes TSA to prohibit disclosure of SSI in civil litigation. Congress drafted the statute in broad terms and required the agency to prohibit the disclosure of security-related information whenever the agency determines that such disclosure would be "detrimental to the security of transportation":

Notwithstanding [the Freedom of Information Act], the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.

49 U.S.C. § 114(s)(1)(C) (emphases added). The statute thus not only authorizes but requires TSA to withhold SSI from all persons, which would include civil litigants and their counsel, when the agency determines that disclosing the information would be "detrimental" to transportation security.

Chowdhury's efforts to narrow the expansive reach of the statute are unavailing.

1. Chowdhury contends that, absent a specific textual reference to civil discovery, Section 114(s)(1)(C) should not be construed to bar disclosure to him. See Br. 25-30. This

argument is foreclosed by the reasoning of the Supreme Court's decision in Baldrige v. Shapiro, 455 U.S. 345 (1982).

There, the Supreme Court addressed whether the Census Act created a statutory privilege as to all "raw data reported by or on behalf of individuals." 455 U.S. at 362. Like Section 114(s)(1)(C), at issue here, the relevant statutory provision in Baldrige did not specifically reference civil discovery. The Supreme Court nevertheless held that the statute "embod[ie]d explicit congressional intent to preclude all disclosure" of raw census data, including "[d]isclosure by way of civil discovery." Id. at 361 (emphasis in original).

Chowdhury's attempt to distinguish Baldrige on the ground that the Census Act "allow[s] the Census Bureau no discretion over whether or not to disclose," Br. at 26, is unconvincing. In concluding that the Census Act created a valid evidentiary privilege, the Supreme Court never suggested that its decision depended on the degree of discretion provided to the agency. See Baldrige, 455 U.S. at 360-62.

2. Chowdhury also incorrectly asserts, Br. at 24-27, that Congress' use of the phrase "[n]otwithstanding [the Freedom of Information Act]," indicates that Section 114(s)(1)(C) prohibits only the public disclosure of SSI in response to a Freedom of Information Act ("FOIA") request. The D.C. Circuit correctly rejected a virtually identical argument in Public Citizen, Inc.

v. Federal Aviation Administration, 988 F.2d 186 (D.C. Cir. 1993).

In that case, the D.C. Circuit observed that, when Congress was considering the statutory predecessor to Section 114(s)(1)(C), several courts had narrowly interpreted FAA's authority to withhold information under FOIA Exemption 3, see 5 U.S.C. § 552(b)(3) (stating that FOIA does not apply to "matters that are . . . specifically exempted from disclosure by statute"). See Public Citizen, 988 F.2d at 195. The D.C. Circuit concluded that Congress "added the 'notwithstanding' clause to overrule those lower court cases," and thus plainly intended to "broaden," not circumscribe, "the FAA's power to withhold sensitive information." Id. at 195 (emphasis in original).

Chowdhury cannot reconcile his reading of Section 114(s)(1)(C) with Public Citizen by arguing that the D.C. Circuit's "reasoning and conclusion [we]re based on the understanding that the statute relates only to public disclosure." Br. at 25 n.11. The D.C. Circuit expressly reaffirmed the FAA's ability to withhold security-sensitive information "regardless of the legal basis of the request for the information." Public Citizen, 988 F.2d at 195-96.

3. Chowdhury's further assertion that SSI does not constitute "state secrets," Br. at 28-30, is puzzling and inapposite. As Baldrige makes clear, the Government need not assert the state secrets privilege or any other common-law

privilege in order to bar disclosure of information in civil litigation where, as here, Congress has itself created a statutory privilege. Moreover, we note that, contrary to Chowdhury's assertion, Br. at 28-29, upon a proper assertion of either the state secrets privilege or a statutory privilege, a private party's litigation need for the information is simply irrelevant. See Baldrice, 455 U.S. at 362 ("A finding of 'privilege' . . . shields the requested information from disclosure despite the need demonstrated by the litigant."); United States v. Reynolds, 345 U.S. 1, 11 (1953) ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.").

4. Chowdhury's reliance on the so-called "[l]egislative [h]istory of Section 114(s)," Br. at 30-31, is misplaced. The statements cited by Chowdhury are not legislative history, but rather are statements by FAA and TSA. See Br. at 30 (citing 67 Fed. Reg. 8340 (Feb. 22, 2002) and 62 Fed. Reg. 13736 (Mar. 21, 1997)). In any event, the cited agency statements do not suggest that either TSA or FAA has interpreted the term "disclosure" in Section 114(s)(1)(C) (or its predecessors) to exclude disclosure in civil litigation.

5. Chowdhury also suggests that, if Section 114(s)(1)(C) permits TSA to prohibit disclosure of SSI in civil litigation, the statute runs afoul of the constitutional non-delegation

doctrine. See Br. at 31-32. Given Supreme Court precedent, this argument is far off target. The Supreme Court has recently underscored the limited scope of that doctrine. See Whitman v. American Trucking Assocs., Inc., 531 U.S. 457, 472, 473 (2001) (although "Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act must conform," "[i]n the history of the Court, [the Court has] found the requisite 'intelligible principle' lacking in only two statutes" (citation and quotation marks omitted)). Chowdhury appears to concede that Section 114(s)(1)(C) provides TSA with an "intelligible principle" for the protection of SSI outside the context of civil litigation. See Br. 31-32. He then fails to explain how the same statutory language could not provide the agency with sufficient guidance for determining when SSI must be protected from disclosure in civil discovery.

In sum, Congress has by statute empowered TSA to determine when disclosure of specific material will be detrimental to transportation security, and has made clear that, when TSA makes such a determination, that material should not be disclosed. Chowdhury's request that this Court override that explicit Congressional decision should be firmly rejected.

B. TSA's Prohibition on Disclosure of SSI in Civil Litigation Is Based on a Permissible Construction of Section 114(s)(1)(C) and Is Entitled to Substantial Deference

Even if the Court finds that Section 114(s)(1)(C) is silent or ambiguous with respect to whether disclosure of SSI to civil

litigants and their attorneys may be prohibited, TSA's overall policy against disclosure of SSI in such circumstances should nonetheless be upheld because it is based on a manifestly permissible construction of the statute. See United States v. Mead Corp., 533 U.S. 218, 227-28 (2001) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984))); Schneider v. Feinberg, 345 F.3d 135, 142 (2d Cir. 2003) (per curiam) (if the agency's interpretation is reasonable, "the court must defer to the agency's construction of the statute"). Given the broad and mandatory language of Section 114(s)(1)(C), directing TSA to withhold security-related information whenever TSA decides that "disclosing the information would . . . be detrimental to the security of transportation," the agency's determination that Section 114(s)(1)(C) applies to civil litigation is eminently reasonable.

The rationality of TSA's interpretation of Section 114(s)(1)(C) is established by the explanation given to the Northern California district court by former Deputy Administrator McHale. As explained supra at 8-10, TSA has determined that it is in the best interests of the traveling public at this time to restrict, to the greatest extent possible, the dissemination of any SSI that could be used to thwart security countermeasures by those intent upon committing criminal acts against civil

transportation. (JA 36). As the expert agency designated by Congress to make difficult judgments to protect the traveling public, TSA reached this reasoned determination in significant part because intelligence reports indicate that al-Qaeda operatives have -- through media sources and other publicly available research -- obtained access to information concerning security vulnerabilities at American airports. (Id.) TSA cannot discount the possibility that SSI provided to those outside the regulatory need-to-know category could be exploited to further terrorist objectives and put the traveling public at greater risk. (Id.) Thus, in TSA's expert judgment, the present and continuing threat of terrorist attacks against aviation interests requires that the agency substantially restrict the number of persons with access to SSI. (JA 37).

Under these circumstances, TSA's position that Section 114(s)(1)(C) governs all disclosures of SSI, including disclosures sought for civil litigation purposes, is a manifestly reasonable interpretation of the statute, which should be accepted by this Court.

POINT II

THIS COURT SHOULD UPHOLD TSA'S DISCRETIONARY DETERMINATION THAT DISCLOSURE OF SSI TO CHOWDHURY FOR USE BY HIM IN HIS CIVIL LITIGATION WOULD BE DETRIMENTAL TO THE SECURITY OF TRANSPORTATION

A. TSA's Determination That Disclosure of SSI to Chowdhury in Civil Litigation Would Be Detrimental to Transportation Security Is Committed to Agency Discretion By Law

TSA determined that disclosure of the SSI at issue here, even pursuant to an attorney's-eyes-only protective order, would be "detrimental" to transportation security. (JA 33-37, 41-108, 251-359, 401-612). Chowdhury contests TSA's decision, based on his own view that "no evidence in the record" supports the conclusion that disclosure pursuant to a protective order "would cause any detriment to transportation safety." Br. 39.

However, this argument is foreclosed because this Court cannot exercise jurisdiction over this aspect of Chowdhury's challenge. TSA's determination that disclosure of the SSI sought by Chowdhury would be "detrimental" to aviation security is plainly committed to TSA's discretion by law. See 5 U.S.C. § 701(a)(2) (judicial review precluded where agency action committed to agency discretion by law). An action is committed to agency discretion "if the governing statute or regulations '[are] drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" Schneider, 345 F.3d at 148 (quoting Heckler v. Chaney, 470 U.S.

821, 830 (1985)) (alteration in original); Lunney v. United States, 319 F.3d 550, 558 (2d Cir. 2003).*

Here, Section 114(s)(1)(C) does not limit TSA's discretion in determining whether a particular disclosure would be detrimental to the security of transportation. To the contrary, Section 114(s)(1)(C) expressly empowers TSA to "decide[]" whether disclosure would be detrimental. The agency's implementing regulations likewise provide that TSA "prohibits disclosure of information . . . if, in the opinion of the Under Secretary [now the Assistant Secretary], the disclosure of such information would . . . [b]e detrimental to the safety of persons traveling in transportation." 49 C.F.R. § 1520.3(b)(3). This standard "fairly exudes deference" and "foreclose[s] the application of any meaningful judicial standard of review." Webster v. Doe, 486 U.S. 592, 600 (1988) (finding termination decision committed to agency discretion by law where statute "allow[ed] termination whenever the Director 'shall deem such termination necessary or advisable in the interests of the United States,' . . . not simply when the dismissal is necessary or advisable to those interests" (emphases in original)).

* "The APA's 'arbitrary and capricious' standard does not by itself provide a 'meaningful standard' of review." Schneider, 345 F.3d at 148. Nor does Section 46110 provide a "judicially-manageable standard" by which to review TSA's action. See Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003) (citation and quotation marks omitted).

Because in the underlying statute Congress explicitly entrusted the decision about when a disclosure of SSI would be detrimental to transportation security to the discretion of TSA, "there is no law [for the Court] to apply" in this instance. Schneider, 345 F.3d at 149; cf. Department of the Navy v. Egan, 484 U.S. 518, 527, 528, 529 (1988) ("[p]redictive judgment" regarding whether grant of security clearance is "clearly consistent with the interests of the national security" is "a sensitive and inherently discretionary judgment call" that is "committed by law to the appropriate agency of the Executive Branch"); People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding non-justiciable agency determination regarding whether organization's terrorist activity threatened national security), cert. denied, 529 U.S. 1104 (2000). TSA's determination on this limited point therefore is committed to agency discretion by law and is not reviewable.

B. In Any Event, TSA Properly Exercised Its Discretion In Determining That Disclosure of SSI to Chowdhury in Civil Litigation Would Be Detrimental to Transportation Security

Even if this Court nonetheless decides to review TSA's discretionary determination that disclosure of SSI in this instance would be detrimental to transportation security, that determination should be upheld. See Public Citizen, 988 F.2d at 196 ("to the extent we review the FAA Administrator's

determinations under [the predecessor to 49 U.S.C. § 114(s)(1)(C)] at all, we do so . . . with the utmost deference in view of administrative expertise" (citation and quotation marks omitted)).

As described supra at 21-22, the McHale Declaration filed in the Northern District of California fully explained TSA's rationale for concluding that the disclosure sought by Chowdhury would be detrimental to transportation security. (JA 33-37). This determination by the agency charged with responsibility for the security of the nation's civil aviation system, see 49 U.S.C. § 114(d), was well within TSA's broad discretion and should be accorded the "utmost deference" from this Court. Public Citizen, 988 F.2d at 196; see also Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 898 (2d Cir. 1960) ("It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress. The [FAA] Administrator is an expert in his field; this is the reason he was given the responsibility for the issuance of air safety regulations.").

Chowdhury does not and cannot dispute that there is a present and continuing threat of terrorist attacks against civil aviation interests, nor that SSI provided to those outside the regulatory need-to-know category could be exploited to further terrorist objectives and put the traveling public at greater risk. (JA 36-37). He nonetheless asks this Court to overrule

TSA's discretionary determinations as to whether the disclosures he seeks would be "detrimental" to transportation security. If this Court concludes that it can consider Chowdhury's challenges to TSA's discretionary determinations, it should reject them.

1. TSA's Decision to Disclose SSI Only to Persons With a Regulatory "Need to Know" Is Eminently Reasonable

1. Chowdhury first objects to TSA's decision to permit counsel representing airlines and other regulated entities in litigation to have access to SSI, while denying access to counsel representing civil litigants who do not have a regulatory need to know SSI.* See Br. at 34-35, 39. As the district court recognized, attorneys representing civil litigants who have no responsibility for aviation security are not similarly situated to attorneys representing air carriers. (RA 57-58).**

Carrier counsel are agents of regulated entities, which have an independent interest in ensuring aviation security and demonstrating compliance with applicable TSA regulations. In addition, carrier counsel are themselves subject to an express regulatory duty to protect SSI. 49 C.F.R. § 1520.5(b), (d).

* Chowdhury's bald assertion that SSI is available to support staff employed by defense counsel, Br. at 19 & n.10, is simply wrong. TSA regulations do not include support staff within the need-to-know category, 49 C.F.R. § 1520.5(b), and the agency has not authorized Northwest's attorneys' support staff to have access to SSI in this case.

** References to "RA ___" are to pages of Respondents' Appendix. Respondents filed a motion for leave to file a Respondents' Appendix on September 27, 2004.

Chowdhury's allegation that TSA permits "broad, unprotected dissemination" of SSI outside of the litigation context, Br. at 36; see also Br. at 34, 37, 39, simply ignores the applicable regulatory restrictions.

Furthermore, by allowing counsel for regulated entities (whether in-house or outside litigation counsel) to have access to specific SSI as needed to provide advice or representation in proceedings regarding security-related requirements, TSA helps to ensure that regulated entities have sufficient guidance and assistance to comply with their regulatory obligation to protect SSI.

In Chowdhury's lawsuit, for example, Northwest's counsel played a significant role in protecting SSI, including by lodging objections to discovery requests that potentially called for the disclosure of SSI, identifying responsive documents and information containing SSI, forwarding documents to TSA for review, and seeking clarification of TSA's SSI designations, where necessary. (JA 109-11, 168-69, 221-22, 246-47, 362-97, 613-14, 962-1013). It is certainly reasonable, and consistent with the conceded statutory purpose of protecting SSI from "harmful disclosure," Br. at 33, for TSA to allow regulated entities to obtain the advice and representation of counsel in this critical process so that they can comply with TSA security mandates. This role is clearly different from that envisioned by Chowdhury for his counsel.

Contrary to Chowdhury's assertion, Br. at 39-40, moreover, TSA has not authorized disclosure of SSI to plaintiffs or their counsel in the consolidated tort litigation brought on behalf of the victims of the September 11 attacks. See In re September 11 Litigation, 21 MC 97 (AKH) (S.D.N.Y.). In fact, TSA recently submitted a report to the district court in that case, which confirmed that "[a]t the present time, TSA is not making any exceptions to its policy of non-disclosure of SSI." (RA 91). TSA advised the court that the agency had "carefully considered less restrictive alternatives to its strict non-disclosure policy," but that "[i]t is TSA's expert judgment, . . . based on all the threat factors that are currently affecting transportation security, and civil aviation in particular, that even limited, conditional disclosure of SSI would be detrimental to transportation security." (RA 95).*

* As former Deputy Administrator McHale explained in his declaration submitted with TSA's February 2004 report,

the threat to U.S. civil aviation remains significant, and . . . current intelligence received by the Department of Homeland Security and the TSA indicates that al-Qaeda and other terrorist operatives . . . continue to develop plans for catastrophic attacks against targets in the United States and U.S. interests overseas involving commercial aircraft Within the past year, the United States has been at high alert for terrorist attacks (Code Orange) three separate times for a total of several weeks. The elevation to a Code Orange alert was based, in part, on a high number of threats to civil aviation. The balance of the year has seen the country at an elevated threat advisory level (Code Yellow), which is indicative of a significant risk of terrorist attacks.

(RA 103-04).

2. Similarly meritless is Chowdhury's argument that TSA must authorize disclosure of SSI to attorneys representing civil litigants because the agency has granted conditional disclosure of SSI to attorneys representing alleged September 11 co-conspirator Zacarias Moussaoui, or because its regulations permit (but do not require) TSA to grant disclosure of SSI to subjects of administrative enforcement actions where necessary to allow them to respond to the allegations made against them. Br. at 35, 40-41. As he appears to acknowledge, see Br. at 35, 40, criminal defendants and subjects of administrative enforcement actions are not similarly situated to Chowdhury. As the Northern California district court observed, there is a substantial difference between TSA's authorizing disclosure of SSI in criminal or administrative enforcement proceedings that the government may choose to bring, and the disclosure of SSI in an unlimited number of civil actions to which the government is not a party and over which it has no control. (RA 48); see also Br. at 19 (conceding that SSI issues are likely to arise in "countless other cases").

2. Chowdhury's Challenges to TSA's Specific Withholdings Are Without Basis

Chowdhury makes several claims that disclosure of the particular SSI at issue in his lawsuit, pursuant to an attorney's-eyes-only protective order, presents no risk to transportation security. See Br. at 37-44. Each of Chowdhury's arguments fails.

1. Chowdhury wrongly argues that there is no security justification for withholding names on watch lists that have been publicly released or have been removed. Br. at 42. As explained by Brian R. Reed, the former Director of TSA's Aviation Operations Litigation Support and Special Actions Staff, "[t]he effectiveness of a watch list as a security countermeasure depends in large part on the government's ability to maintain the secrecy of the names on the list." (JA 39). Even if a name has been publicly released or removed from a watch list, disclosure of that information would still be detrimental because it would alert potential terrorists to names that might be used to evade security countermeasures. (Id. ("To confirm or deny that a particular individual is on a TSA or other government watch list would nullify the list's effectiveness as a current security countermeasure.")).

Chowdhury's reliance on the district court's decision in Gordon v. FBI, No. C 03-01779 CRB, 2004 WL 1368858 (N.D. Cal. June 15, 2004), see Br. at 42-43, is misplaced. Gordon did not implicate watch lists, Security Directives, or Emergency Amendments; the plaintiffs in that case had withdrawn their FOIA requests for these critical security documents earlier in the litigation. See Gordon v. FBI, No. C 03-01179 (dkt. no. 55). In any event, the concern expressed by the Gordon court that the affidavits submitted by the Government in that case were insufficiently specific, see 2004 WL 1368858, at *4, is not

present here, as TSA provided ample justification for its SSI withholdings. See infra at 33-34.

2. There is likewise no basis for Chowdhury's speculative claim that the redacted documents include "numerous old documents apparently no longer operative." Br. at 42. As Director Reed explained, "[t]he date of the material is not dispositive of its SSI status." (JA 39). Only if a security countermeasure is determined to be "completely obsolete" will the SSI designation be removed. (Id.); 69 Fed. Reg. at 28072 (describing new provision in amended regulations regarding removal of SSI designation, and explaining that "[n]ormally, the passage of time or the updating of security procedures does not affect the SSI status of superceded security procedures"). TSA has made such a determination on only one occasion, where the agency determined that the particular security measure "would never be used again, and therefore revealed nothing about current security countermeasures." (JA 39). That plainly is not true with regard to the counter-terrorism security measures and related information redacted by TSA in this case, most of which involve watch lists, a security measure that continues in use.

3. Chowdhury's assertion that the redacted documents "appear to contain information that has been publicized or is simply common sense," Br. at 43, in addition to being speculative, is unavailing. Chowdhury provides no support for this contention. And, if this Court has any doubts about it, we

urge the Court to review the cited documents both in their redacted and unredacted form. (If the Court wishes to review the full text of the SSI at issue, we would be pleased to make the necessary arrangements for an ex parte, in camera inspection.)

4. Chowdhury further suggests that TSA did not adequately consider all relevant regulations in deciding not to disclose the SSI at issue. Specifically, he contends that TSA should have made an "individual assessment" as to whether it could authorize "conditional disclosure" of SSI in his litigation against Northwest. See Br. at 38-39, 58-59. This argument lacks foundation. Chowdhury's demand for consideration of "conditional disclosure" relies on a regulation that did not go into effect until May 2004, after the issuance of the Final Orders under review here. See 49 C.F.R. § 1520.15(e) (2004) (miscited as 49 C.F.R. § 1520.11(c)); 69 Fed. Reg. at 28075 (describing new provision).

3. TSA Has Adequately Explained Its SSI Designations

Chowdhury's contention that the Final Orders provide "scant details" regarding the basis for TSA's withholdings, Br. at 41, simply ignores the evidence in the record. For each document reviewed and redacted by TSA, the Final Orders specifically identify the document and explain the basis for the redaction. (JA 42-44, 252-56, 402-08). For example, with regard to the documents identified in the First Final Order, TSA explained that they were redacted because they constitute or reveal counter-

terrorism security measures, specific threat information, and/or aviation security measures implemented by airline personnel. (JA 42-44).

Chowdhury also objects to TSA's decision to withhold the numbers of Security Directives and Emergency Amendments in particular. See Br. at 43. TSA explained that this information constitutes SSI because disclosure of the Government's numbering scheme would "provide insight into how the government collects and disseminates threat information." (JA 44); cf. Center for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 925-37 (D.C. Cir. 2003) (discussing "mosaic" theory under which "bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself" (citation and quotation marks omitted)), cert. denied, 124 U.S. 1041 (2004). Indeed, TSA could not provide Chowdhury with a more detailed description of the redacted content of the documents without revealing the very information that is sensitive.

Viewing the record as a whole, TSA's security rationale for withholding the redacted information "was adequately explained and rational." Public Citizen, 988 F.2d at 197.

POINT III

CHOWDHURY FAILS TO SHOW ANY VIOLATION OF DUE PROCESS

A. Chowdhury Cannot Establish That He Was Deprived of Any Property Interest Protected by the Constitution

Chowdhury's due process claim is plainly without merit.

While he may have a protected property interest in his cause of action against Northwest, Br. at 45, he does not have a cognizable interest in privileged information, including SSI. Chowdhury alleges a legal entitlement to SSI pursuant to the discovery provisions of the Federal Rules of Civil Procedure. Br. at 48. Those rules provide, however, that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1) (emphasis added). As the Supreme Court has instructed, "[i]f a privilege exists, information may be withheld, even if relevant to the lawsuit and essential to the establishment of plaintiff's claim." Baldrige, 455 U.S. at 360.

As discussed supra at 16-17, by enacting Section 114(s)(1)(C), Congress created a statutory privilege for information the disclosure of which TSA decides would be detrimental to transportation security, including the information set forth in the Final Orders. Because Chowdhury has no constitutionally protected property interest in obtaining this privileged information, TSA had no obligation to afford him due process in making its SSI determinations.

In addition, the record does not support Chowdhury's contention that "withholding SSI from [his] counsel has had a substantial and severe impact on Chowdhury's ability to litigate his claims." Br. at 51. Chowdhury's argument that the Final Orders bar access to "relevant and potentially critical information," Br. at 45, is contradicted by the district court's repeated statements that, based on its in camera review, the SSI redacted by TSA is not particularly relevant or helpful to Chowdhury's case. (JA 1173, RA 2, 4-5, 11, 59-60).*

B. Even if Chowdhury Could Show That He Was Deprived of a Protected Property Interest, He Received All the Process That Was Due

"Due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). To determine the amount of process due in a given situation, this Court "must weigh (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures

* Chowdhury's discussion of the deposition of Northwest employee Keolani Stacey, Br. at 50-51 & n.16, is irrelevant, as the Final Orders do not include any deposition testimony. In any event, TSA is committed to working with the parties to develop a workable approach to future depositions in Chowdhury's lawsuit. To that end, in March 2004, TSA offered to make a security expert available by telephone to consult with witnesses regarding SSI. (RA 82). TSA is also prepared to review long-form responses to deposition questions potentially implicating SSI, as it did with Northwest's interrogatory responses. (JA 409-33, 615-16); cf. Fed. R. Civ. P. 31 (authorizing depositions upon written questions).

used, and the probable value of additional or different procedural safeguards; and (3) the government's interest." Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 651 (2d Cir. 1999); see also Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

Chowdhury's asserted interest in obtaining access to the SSI at issue is not compelling. Although he has an interest in obtaining information to litigate his discrimination claims, the district court has concluded based on its in camera review that "nothing in th[e] documents [redacted by TSA] supports plaintiff's claim." (JA 1173; see also RA 2, 4-5, 11, 59-60).

In stark contrast, it cannot be seriously disputed that the Government has a paramount public safety interest in protecting aviation security information. Chowdhury seeks to downplay the importance of safeguarding SSI by arguing that it "does not trigger the same national security concerns as state secrets or National Security Information." Br. at 59; see also Br. at 15-16, 29-30. This effort is mistaken. The tragic events of September 11, 2001 made abundantly clear the need to safeguard information relating to transportation security from unauthorized disclosure. (JA 35 (need to protect SSI stems primarily from extent to which information, if compromised, "would make it more likely for terrorists to succeed in their attacks and, therefore, make such attacks more difficult to prevent")). Indeed, having reviewed in camera the SSI at issue in this case, the Northern

California district court recognized that "any reasonable person would concede" that SSI "involves issues that are akin[] to national security issues." (RA 46). Congress' express mandate that SSI be protected, together with TSA's expert determination that disclosure of SSI in civil litigation poses an unacceptable risk to transportation security, plainly demonstrate a compelling government interest.

The risk of erroneous deprivation here, moreover, is not substantial. Chowdhury incorrectly asserts that he received no notice or opportunity to be heard with regard to TSA's SSI determinations. Br. at 53-54. Chowdhury was on notice that Northwest had forwarded documents to TSA for SSI review, see, e.g., JA 168-69, 360-61, and he had an opportunity to present his views to the agency, see JA 236-39. TSA considered the issues raised by Chowdhury, see JA 241-42, and at the request of his counsel conducted a second review of particular documents, see JA 241-44, 249. This "opportunity for follow-up contact with the decisionmaker" minimizes the risk of an erroneous deprivation. See Neilson, 199 F.3d at 652 (citing cases).

Further, the additional process advocated by Chowdhury, Br. at 56-59, would not be meaningful. See Neilson, 199 F.3d at 652-53 (proposed additional safeguards not required where further notice would not have been "of significant probable value in protecting" litigant's interest and "no worthwhile purpose would

have been served by conducting a formal, evidentiary hearing"). There would be no point in offering Chowdhury a formal opportunity to "present a case against withholding," as Chowdhury's litigation need for the information, and his own assessment of whether disclosure would be detrimental to security, are simply not relevant. See supra at 19, 23-27, 35.

Given the immense governmental interest in protecting transportation security, Chowdhury's comparatively weak interest in obtaining access to SSI in his private litigation, the low risk of erroneous deprivation, and the minimal value of additional procedures, Chowdhury received all the process he was due under the circumstances. Neilson, 199 F.3d at 654.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Respondents hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 8578 words in the brief.

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ADDENDUM

49 U.S.C. § 114

(s) Nondisclosure of security activities.

(1) In general.--Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would--

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the security of transportation.

(2) Availability of information to Congress.--Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) Limitation on transferability of duties.--Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

49 U.S.C. § 46110

§ 46110. Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (1) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures: -When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an

objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

SUBCHAPTER B—SECURITY RULES FOR ALL MODES OF TRANSPORTATION

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

Sec.

- 1520.1 Applicability and definitions.
1520.3 Records and information withheld by the Department of Transportation.
1520.5 Records and information protected by others.
1520.7 Sensitive security information.

AUTHORITY: 49 U.S.C. 114, 5103, 40119, 44801-44807, 44913-44914, 44916-44918, 44935-44936, 44942, 45105.

SOURCE: 67 FR 8351, Feb. 22, 2002, unless otherwise noted.

§ 1520.1 Applicability and definitions.

(a) This part governs the release, by the Transportation Security Administration and by other persons, of records and information that has been obtained or developed during security activities or research and development activities.

(b) For purposes of this part:

Record includes any writing, drawing, map, tape, film, photograph, or other means by which information is preserved, irrespective of format.

Vulnerability assessment means any examination of a transportation system, vehicle, or facility to determine its vulnerability to unlawful interference.

(c) The authority of the Administrator under this part may be further delegated within TSA.

(d) The Administrator's authority under this part to withhold or to disclose sensitive security information is also exercised, in consultation with the Administrator, by the Commandant of the United States Coast Guard, as to matters affecting and information held by the Coast Guard, and the Administrator of each DOT administration, as to matters affecting and information held by that administration, and any individual formally designated to act in their capacity.

§ 1520.3 Records and information withheld by the Department of Transportation.

(a) Except as provided in paragraphs (c) and (d) of this section, and notwith-

standing the Freedom of Information Act (5 U.S.C. 552) or other laws, the records and information described in § 1520.7 and paragraph (b) of this section are not available for public inspection or copying, nor is information contained in those records released to the public.

(b) Section 1520.7 describes the information that TSA prohibits from disclosure. The Administrator prohibits disclosure of information developed in the conduct of security or research and development activities under 49 U.S.C. 40119 if, in the opinion of the Administrator, the disclosure of such information would:

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the safety of persons traveling in transportation.

(c) If a record contains information that the Administrator determines cannot be disclosed under this part, but also contains information that can be disclosed, the latter information, on proper Freedom of Information Act request, will be provided for public inspection and copying. However, if it is impractical to redact the requested information from the document, the entire document will be withheld from public disclosure.

(d) After initiation of legal enforcement action, if the alleged violator or designated representative so requests, the Chief Counsel, or designee, may provide copies of portions of the enforcement investigative report (EIR), including sensitive security information. This information may be released only to the alleged violator or designated representative for the sole purpose of providing the information necessary to prepare a response to the allegations contained in the legal enforcement action document. Such information is not released under the Freedom of Information Act. Whenever

such documents are provided to an alleged violator or designated representative, the Chief Counsel or designee advises the alleged violator or designated representative that—

(1) The documents are provided for the sole purpose of providing the information necessary to respond to the allegations contained in the legal enforcement action document; and

(2) Sensitive security information contained in the documents provided must be maintained in a confidential manner to prevent compromising civil aviation security, as provided in § 1520.5.

§ 1520.5 Records and information protected by others.

(a) *Duty to protect information.* The following persons must restrict disclosure of and access to sensitive security information described in § 1520.7 (a) through (g), (j), (k), and (m) through (r), and, as applicable, § 1520.7 (l) to persons with a need to know and must refer requests by other persons for such information to TSA or the applicable DOT administration:

(1) Each person employed by, contracted to, or acting for a person listed in this paragraph (a).

(2) Each airport operator under part 1542 of this chapter.

(3) Each aircraft operator under part 1544 of this chapter.

(4) Each foreign air carrier under part 1546 of this chapter.

(5) Each indirect air carrier under part 1548 of this chapter.

(6) Each aircraft operator under § 1550.5 of this chapter.

(7) Each person receiving information under § 1520.3 (d).

(8) Each person for which a vulnerability assessment has been authorized, approved, or funded by DOT, irrespective of the mode of transportation.

(b) *Need to know.* For some specific sensitive security information, the Administrator may make a finding that only specific persons or classes of persons have a need to know. Otherwise, a person has a need to know sensitive security information in each of the following circumstances:

(1) When the person needs the information to carry out DOT-approved, accepted, or directed security duties.

(2) When the person is in training to carry out DOT-approved, accepted, or directed security duties.

(3) When the information is necessary for the person to supervise or otherwise manage the individuals carrying to carry out DOT-approved, accepted, or directed security duties.

(4) When the person needs the information to advise the persons listed in paragraph (a) of this section regarding any DOT security-related requirements.

(5) When the person needs the information to represent the persons listed in paragraph (a) of this section in connection with any judicial or administrative proceeding regarding those requirements.

(c) *Release of sensitive security information.* When sensitive security information is released to unauthorized persons, any person listed in paragraph (a) of this section or individual with knowledge of the release, must inform DOT.

(d) *Violation.* Violation of this section is grounds for a civil penalty and other enforcement or corrective action by DOT.

(e) *Applicants.* Wherever this part refers to an aircraft operator, airport operator, foreign air carrier, or indirect air carrier, those terms also include applicants for such authority.

(f) *Trainees.* An individual who is in training for a position is considered to be employed by, contracted to, or acting for persons listed in paragraph (a) of this section, regardless of whether that individual is currently receiving a wage or salary or otherwise is being paid.

§ 1520.7 Sensitive security information.

Except as otherwise provided in writing by the Administrator as necessary in the interest of safety of persons in transportation, the following information and records containing such information constitute sensitive security information:

(a) Any approved, accepted, or standard security program under the rules listed in § 1520.5(a)(1) through (6), and any security program that relates to United States mail to be transported by air (including that of the United

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States Postal Service and of the Department of Defense); and any comments, instructions, or implementing guidance pertaining thereto.

(b) Security Directives and Information Circulars under §1542.303 or §1544.305 of this chapter, and any comments, instructions, or implementing guidance pertaining thereto.

(c) Any selection criteria used in any security screening process, including for persons, baggage, or cargo under the rules listed in §1520.5(a)(1) through (6).

(d) Any security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto under the rules listed in §1520.5(a)(1) through (6).

(e) Technical specifications of any device used for the detection of any deadly or dangerous weapon, explosive, incendiary, or destructive substance under the rules listed in §1520.5(a)(1) through (6).

(f) A description of, or technical specifications of, objects used to test screening equipment and equipment parameters under the rules listed in §1520.5(a)(1) through (6).

(g) Technical specifications of any security communications equipment and procedures under the rules listed in §1520.5(a)(1) through (6).

(h) As to release of information by TSA: Any information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack. This includes, but is not limited to, details of inspections, investigations, and alleged violations and findings of violations of 14 CFR parts 107, 108, or 109 and 14 CFR 129.25, 129.26, or 129.27 in effect prior to November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001); or parts 1540, 1542, 1544, 1546, 1548, or §1550.5 of this chapter, and any information that could lead the disclosure of such details, as follows:

(1) As to events that occurred less than 12 months before the date of the release of the information, the following are not released: the name of an airport where a violation occurred, the regional identifier in the case number, a description of the violation, the regulation allegedly violated, and the iden-

tity of the aircraft operator in connection with specific locations or specific security procedures. TSA may release summaries of an aircraft operator's total security violations in a specified time range without identifying specific violations. Summaries may include total enforcement actions, total proposed civil penalty amounts, total assessed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(2) As to events that occurred 12 months or more before the date of the release of information, the specific gate or other location on an airport where an event occurred is not released.

(3) The identity of TSA or FAA special agent who conducted the investigation or inspection.

(4) Security information or data developed during TSA or FAA evaluations of the aircraft operators and airports and the implementation of the security programs, including aircraft operator and airport inspections and screening point tests or methods for evaluating such tests under the rules listed in §1520.5(a)(1) through (6).

(i) As to release of information by TSA: Information concerning threats against transportation.

(j) Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in §1520.5(a)(1) through (6). This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

(k) Any other information, the disclosure of which TSA has prohibited under the criteria of 49 U.S.C. 40119.

(l) Any draft, proposed, or recommended change to the information and records identified in this section.

(m) The locations at which particular screening methods or equipment are used under the rules listed in §1520.5(a)(1) through (6) if TSA determines that the information meets the criteria of 49 U.S.C. 40119.

(n) Any screener test used under the rules listed in §1520.5(a)(1) through (6).

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(o) Scores of tests administered under the rules listed in § 1520.5(a)(1) through (6).

(p) Performance data from screening systems, and from testing of screening systems under the rules listed in § 1520.5(a)(1) through (6).

(q) Threat images and descriptions of threat images for threat image projection systems under the rules listed in § 1520.5(a)(1) through (6).

(r) Information in a vulnerability assessment that has been authorized, approved, or funded by DOT, irrespective of mode of transportation.